

CUSTOMARY LAWS on INHERITANCE in NAMIBIA

**Issues and questions
for consideration in
developing new
legislation**



**Gender Research & Advocacy Project
LEGAL ASSISTANCE CENTRE
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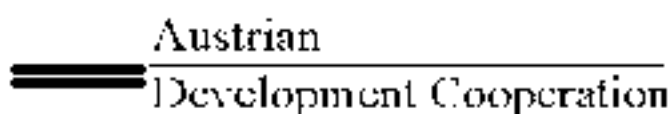
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We trust that our research findings pertaining to customary law and rural women will inform policy-makers, government, service providers and civil society; assist in the lobbying skills and capacity of community-based women's groups active in rural areas, and generate constructive dialogue on the issues addressed in this report.

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SUMMARY OF KEY RECOMMENDATIONS

1. GENERAL APPROACH: We recommend that Namibia's approach to inheritance should be to retain a dual system which incorporates the positive aspects of customary law whilst at the same time ensuring respect for all constitutional rights. As a practical approach, to ensure equitable economic protection of vulnerable women and children, we propose transforming some inheritance issues into issues of maintenance. The following is a summary of the basic approach that we recommend. More detail and additional recommendations are included in Chapter 10 of the report.

2. DISTRIBUTION OF INTESTATE ESTATES: Allow for fragmentation of the estate, to make provision for inheritance by the surviving spouse(s) and children, and also the primary customary law heir or heirs (ie the person or persons who would otherwise have enjoyed preference based on their status within a particular kinship system).

The definition of 'customary law heir(s)' must be worded in a broad and general manner to allow for differential application in different kinship systems. If there is no customary law heir (as in the case of families who do not follow customary law), then this aspect of the scheme would simply fall away.

Other potential beneficiaries to whom the deceased would have owed a duty of support should *not* be included in the distribution scheme, but should claim *maintenance* from the estate if necessary. This wider pool of potential beneficiaries should be eligible to receive portions of the estate as heirs only in the absence of a surviving spouse and/or children.

One advantage of this option is that it provides a uniform approach for all persons in Namibia, whilst still providing an avenue to respect the different customs of different communities. It might, however, be necessary to qualify such an approach by stating in the law that no discriminatory rules of customary law will be enforced by the state.

3. MAINTENANCE FROM THE DECEASED'S ESTATE: Provision should be made for dependants, based on their reasonable maintenance needs, to apply for maintenance within a prescribed period. Maintenance should be available to all dependents of the deceased whose reasonable maintenance needs are not adequately provided for by will or in terms of intestate succession rules. Dependants should be defined broadly to include the surviving spouse and children, as well as any other person who was actually dependant on the deceased at the time of the deceased's death. Providing maintenance for dependents in this way would ensure that the most needy family members are provided for, and would probably avert many disputes about inheritance.

4. DEFINITION OF 'SURVIVING SPOUSE': It is recommended that the term 'surviving spouse' be defined broadly to include surviving partners in long-standing informal relationships and surviving partners in past or future polygamous marriages.

5. PROPERTY GRABBING: The proposed law should make property grabbing a criminal offence with stiff penalties, and provide restitution or compensation for the victim.

6. ADMINISTRATION OF ESTATES: We recommend that the Master's Office be decentralised, and that the Administration of Estates Act 66 of 1965, appropriately amended, be made applicable to all estates.

1. Introduction

1.1 Namibia currently maintains dual laws on succession. Estates of deceased persons other than ‘natives’¹ are regulated by the Intestate Succession Ordinance 12 of 1946 and the Wills Act 7 of 1953, and are administered in terms of the Administration of Estates Act 66 of 1965. The estates of persons classified as ‘Basters’² are administered in terms of Proclamation 36 of 1941. The Native Administration Proclamation 15 of 1928 regulates ‘black’ deceased estates.

1.2 In 2003 the High Court in *Berendt v Stuurman*³ declared unconstitutional sections 18(1), 18(2) and 18(9), and the regulation⁴ made under section 18(9) of the Native Administration Proclamation. The applicants in this matter contended that the relevant sections and the regulation should be set aside as discriminatory, racist and outdated because they subject black estates to a ‘legislative regime which discriminates against them on the ground of race’. The unconstitutional provisions and Regulation GN 70⁵ will apply until such time as new legislation is introduced to remedy the defect. Parliament has been given until 30 June 2005 to review the whole field of inheritance and the administration of deceased estates, although the deadline was recently extended until the end of 2005 at the request of government. In the interim, black persons may report estates either to the Master of the High Court or to magistrates. Parties are also free to ask the Master to administer a deceased’s estate in terms of the Administration of Estates Act 66 of 1965.

1.3 In addition to being discriminatory on the basis of race, the current legislative regime also promotes discrimination on the basis of sex, status and birth by virtue of the application of customary law. Customary law is characterised by notions of patriarchy. Customary law enjoys constitutional recognition on a par with the common law, provided it does not infringe the Constitution or any statutory (civil) law. If Namibia is to give recognition to customary law by maintaining a dual system, it will have to devise a regime which complies with constitutional norms and values.

1.4 In determining who inherits, it is obvious that kinship is important. One may be a member of a patrilineal (Nama and Damara), matrilineal (Ovambo and

¹ Section 25 of Native Administration Proclamation 15 of 1928 defines a ‘native’ as “any person who is a member of any aboriginal race or tribe in Africa”. The terms ‘Africans’ or ‘blacks’ will be used in this report.

² See JS Malan, 1995, *Peoples of Namibia*, 138, for a brief historical background on the Baster community.

³ Unreported Judgement Case No. (P) A 105/2003.

⁴ GN 70 of 1 April 1954 (hereinafter referred to as ‘Regulation GN 70’).

⁵ Ibid.

Kavango), bifurcated (Herero) or ‘cognatic’ kinship system.⁶ The various kinship systems have important political, social and economic implications. For example, membership of a certain kinship system determines who has rights to which categories of property in matters of inheritance. Although these systems differ significantly, they also share many characteristics.

1.5 Differences exist as to how the heirs are defined, but for the majority of Namibians – especially those in matrilineal or double descent systems – the surviving spouse, daughters and sons may have limited or no right at all to inherit. For example, in matrilineal communities, the inheriting group includes the husband’s male relatives, typically his nephew (his sister’s son).⁷ The customary successor (usually the nephew) appointed by the kin group takes control of the property as trustee and manages it for the benefit of the inheriting group. Because spouses are not members of each other’s matrilineage, a surviving spouse does not inherit from her husband if he dies intestate under customary law in matrilineal and double descent systems. In addition, because children in matrilineal communities belong to their mother’s lineage, they also have no right to inherit from their father’s estate. In contrast, in patrilineal systems, children and not the wider kin group have first priority in inheriting the parent’s estate. Here, the surviving spouse acts as trustee of the estate for the benefit of the children, especially the youngest son. In certain communities, the treatment of spouses reflects that they are *part* of the estate itself rather than beneficiaries, as indicated by widow (levirate) and widower (sororate) inheritance practices.⁸

1.6 The differences are significant primarily because they give rise to different sources of conflict over distribution of estates. In patrilineal communities disputes and tensions may give rise to ‘intra-family’ conflict as children compete over resources, whereas in matrilineal and bifurcated kinship systems disputes may arise between the surviving spouse and nephews.

1.7 In South Africa, in sharp contrast to Namibia, inheritance almost exclusively follows a patrilineal model -- which is evident in the legislative regime⁹ which was uncritically applied to Namibia by the South African administrators. This legislative regime and the rule of male primogeniture were recently successfully challenged in South Africa’s Constitutional Court.¹⁰ Inheritance based on primogeniture means that

⁶ D LeBeau et al, 2004, *Women’s Property and Inheritance Rights in Namibia*.

⁷ Ibid, xii.

⁸ These practices are still common amongst Owambo, Herero, Lozi and to a lesser extent Kavango. See *ibid*, x.

⁹ Discussed in more detail below.

¹⁰ *Bhe v Magistrate, Khayelitsha* CCT 49/03. Courts in South Africa have been inundated with cases in which the constitutional validity of existing laws on inheritance in the context of customary law was challenged. The most recent cases, *Charlotte Shibi v Mmantabeni Freddy Sithole & Others* (CCT 69/03) and the *South African Human Rights Commission & Another v The President of the Republic of South Africa & Another* (CCT 50/03), are consolidated in the landmark judgement, *Bhe v Magistrate, Khayelitsha*. In the Shibi case the sister of an unmarried brother sought confirmation of an order of the Pretoria High Court that established that she, and not the brother’s two male cousins, should be the sole heir

the eldest or most senior male in the family inherits the deceased's estate. The South African Constitutional Court stated that the rule prevents: (a) widows inheriting as the intestate heirs of their late husbands; (b) daughters inheriting from their parents; (c) younger sons inheriting from their parents; and (d) extramarital children inheriting from their fathers.¹¹ The rule consequently constitutes unfair discrimination on the basis of gender and birth, and thus "constitutes a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality ...".¹² Although the rule of male primogeniture may not be strictly applied in Namibia, the argument can be advanced that Namibian inheritance practices are similarly incompatible with the constitutional guarantee of equality.

1.8 Ideologies of kinship solidarity and mutual support are flexible and may give way to individualism, depending on the particular mix of socio-economic conditions. Poverty, unemployment and the impact of HIV/AIDS all lead to the impoverishment of the family, and propel family members into a downward spiral of increasing vulnerability. According to the National Strategic Plan on HIV/AIDS,¹³ gender inequality, poverty, the disintegration of traditional family structures and certain cultural practices contribute to the spread of HIV infection in Namibia.¹⁴ To mitigate the impact of the epidemic, government has committed itself to reviewing existing legislation and enacting new laws and policies on the family, with specific reference to inheritance, customary marriage, cohabitation, marital property and divorce.¹⁵ The extent of orphanhood, particularly for young children, reflects dependency at household level and the epidemic's social impact. Approximately 12,2% of children under the age of 15 years are orphaned by one parent and 1,3% by both parents.¹⁶ As surviving spouses are most likely to be the primary caretakers in instances where children are orphaned by one parent, a strong argument can be made that surviving spouses and children should enjoy preference in matters of inheritance.

of his intestate estate. In the South African Human Rights Commission case the relief sought by the Commission, which acted in its own interest and that of the public, was wider than that of the Bhe and Shibi cases. The Shibi and Bhe cases have been criticised for only declaring certain subsections of section 23 of the Black Administration Act 38 of 1927 and the regulations unconstitutional, thereby indirectly pronouncing itself on the constitutionality of the rule of primogeniture. The South African Human Rights Commission case provided the Constitutional Court with an opportunity to devise a remedy with wider application than had it only focused on the facts of the two cases. As a result, the Constitutional Court overturned the Shibi and Bhe High Court judgements. The Constitutional Court however confirmed that the applicants (sister and extra-marital daughters in the respective cases) should be the sole heirs.

¹¹ Ibid, 88.

¹² Ibid, 88, 91.

¹³ Republic of Namibia, *The National Strategic Plan on HIV/AIDS: Third Medium-Term Plan (MTP III), 2004-2009*. Directorate of Special Programmes, Ministry of Health and Social Services.

¹⁴ Ibid, 1.4.1.

¹⁵ Ibid, 1.3.1.

¹⁶ Ibid, Figure 5.

1.9 The literacy level, viewed as an indicator of a country's basic level of socio-economic development, indicates that only 7% of rural women, compared to 25% of urban women, have completed secondary school.¹⁷ Working women who have completed secondary schooling are more likely to earn cash than are less educated women.¹⁸ In communal farming areas, which accommodate 64% of the Namibian population, approximately 41% of the land is used for agricultural purposes.¹⁹ Considering that 51% of women work in agriculture,²⁰ and are therefore less likely to earn cash income,²¹ rural women in particular find it difficult to amass property. The disparity between the status of rural and urban women illustrates that any effort on the part of government to improve the inheritance rights of women in general requires initiatives that are specifically focused on the most vulnerable members of Namibian society. Such a 'bottom-up' approach must transcend law reform initiatives, and requires a commitment on the part of government to provide both political leadership and resources if the status of women is to be improved as demanded by government's domestic and international obligations.

1.10 Since independence the Namibian government has enacted several laws in an attempt to elevate the status of customary law and bring customary law in line with the Constitution. Reform efforts, although commendable, have thus far focused on the area of customary law that can be classified as public law. A 2004 UN Human Rights Committee Report on the International Covenant on Civil and Political Rights reflects the urgent need for law reform in Namibia to address the deficiency in inheritance rights resulting from the non-recognition of customary marriages in Namibia.²² Namibia's judiciary has similarly expressed its dissatisfaction with this state of affairs:

"Seven years have lapsed since Namibia signed the United Nations International Convention on the Elimination of all Forms of Racial Discrimination. *Consequently, to allow Government a period longer than two years to harmoniously and effectively review the fields of inheritance and administration of deceased estates is unacceptable.*"²³ (emphasis added)

Notwithstanding this need for legal change, it must be noted that women's status both in the public and private spheres determines the extent of their inheritance rights under customary law, and therefore cannot be separated from inheritance law reform.

¹⁷ Namibia Demographic and Health Survey 2000, Ministry of Health and Social Services, 28.

¹⁸ Ibid, 38.

¹⁹ LeBeau (op cit n6), 11.

²⁰ Ibid.

²¹ Demographic and Health Survey 2000 (op cit n17), 38.

²² The Committee indicated that it "remained concerned by the high number of customary marriages that continued to be unregistered and about the deprivation of rights that women and children experienced as a consequence, in particular with regard to inheritance and land ownership [and] encouraged the state to take effective measures". (July 2004)

²³ Berendt case (op cit n3).

2. Namibia's constitutional obligations

2.1 Authority for the retention of customary law in Namibia is founded in the Constitution. The Constitution formally recognises customary law by providing that the customary law applicable at the date of independence shall remain valid, provided that it does not conflict with the Constitution or civil law.¹ Customary law and common law are placed on equal footing, with both systems being subordinate to the Constitution and any statutory law. If the Constitution allows, any aspect of customary or common law may be repealed or modified by legislation, which may be confined to particular parts of Namibia or to particular time periods.² In *Myburgh v Commercial Bank of Namibia*³ the court held that to remain valid, any rule under the common law must not have 'fallen foul' of the Constitution or any statutory law.⁴ Though the court in this instance was concerned about the common law only, the same argument can be advanced in respect of customary law in the context of Article 66(1).

2.2 The recognition of customary law is grounded in the constitutional guarantee that every person in Namibia is entitled to enjoy, practise, profess, maintain and promote any culture, subject to the condition that this right shall not intrude on the rights of others or the national interest.⁵ But even though people have an affirmative right to culture, it is not an absolute right in that constitutional norms take precedence. The Constitution in Chapter 3 protects several fundamental human rights which have a bearing on inheritance and impact directly on the right to culture. The most significant of these fundamental human rights are equality before the law⁶ and the prohibition of discrimination on grounds of sex, race, colour, ethnic origin or social or economic status.⁷ These rights are relevant because customary law is still largely influenced

¹ Article 66(1) provides that "[b]oth the customary and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which customary or common law does not conflict with this Constitution or any other statutory law".

² Article 66(2) stipulates that "[s]ubject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by an Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods". Even though the Constitution allows for laws to be confined to particular parts of Namibia, from a political perspective bearing in mind our historical past, it is doubtful that such an option will be exercised in the near future. Sections of the notorious Chapter IV of the Native Administration Proclamation 15 of 1928, regulating succession and marriage, is an example of a law that was made applicable only to certain parts of Namibia (discussed in more detail below).

³ 1999 NR 287.

⁴ *Ibid*, 291H.

⁵ Article 19. For a detailed discussion on Article 19, see TW Bennett, "Customary Law in Constitutional and International Perspective", October 1996.

⁶ Article 10(1).

⁷ Article 10(2).

and characterised by cultural values that reinforce patriarchal attitudes. The obligation to ensure equality before the law goes beyond the mere use of gender-neutral language in legislating to give substance to the rights enshrined in the Constitution.⁸

2.3 Other equally important constitutional rights protect human dignity, the family and property. The Constitution provides that the human dignity of all Namibians is incapable of being violated and no person may be subjected to cruel and inhuman treatment.⁹ Customary law affords differential treatment to family members depending on their status and gender in the family. If women under customary law are subjected to degrading treatment or their self-worth is undermined, their right to human dignity is violated. Our courts recognise that the right to equality is premised on the idea that every person possesses equal human dignity.¹⁰

2.4 The Constitution explicitly recognises that the family is the “fundamental group unit of society and is entitled to protection by society and the State”.¹¹ What constitutes a ‘family’ remains to a certain extent uncertain and decidedly problematic. It is a term too freely used, assuming a self evident natural entity necessary for the survival of the human race. Because humans happen to live in domestic household groups does not mean that the family is a universal concept.¹² The term is derived from the Latin *familia*, which meant all those dependent on a male head, including not just the wife and children but slaves and servants as well. It is the male head who has a family. Single parents with children are not referred to as families, but rather as “female-headed households” indicating the continuing bias of the state and its service providers. Indeed it is now accepted that the historic ‘family’ depended for its

⁸ For example the Communal Land Reform Act 5 of 2002 defines the rights of the surviving spouse. If polygamy is outlawed, the neutral term ‘spouse’ may mask prima facie discriminatory treatment, as spouses in polygamous marriages will not enjoy legal protection. In practice it is mainly men who are allowed to marry more than one spouse, with the effect that women are the ones who will be prejudiced by the outlawing of polygamy.

⁹ Article 8(1) The dignity of all persons shall be inviolable.
(2)(a) In any judicial proceedings or other proceedings before any organ of the State, and during the enforcement of penalty, respect of human dignity shall be guaranteed.
(b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

¹⁰ Myburgh case (op cit n3), 291C.

¹¹ Article 14(3) provides that “[t]he family is natural and fundamental group unit of society and is entitled to protection by society and the State”. Interestingly, South Africa’s ‘final’ Constitution 1998 (Act 108 of 1998) does not expressly provide for the constitutional protection of the family and the courts there have done so by giving constitutional protection within the ambit of Section 10 (Right to Human Dignity). See *Dawood and Another v Minister of Home Affairs and Others*, *Shalabi and Another v Minister of Home Affairs and Others*, *Thomas and Another v Minister of Home Affairs and Others* CCT 35/99; 2000 (3) SA 936 CC; 2000 (8) BCLR 387 (CC).

¹² See Collier, Rosaldo & Yanagisako, 1992, “Is there a family?” in Barrie Thorne and Marilyn Yalom eds, *Rethinking the Family: Some Feminist Questions*, Northwestern University Press, Boston. Collier, Rosaldo and Yanagisako point out that the argument about the family as universal is simply assumed and justified by circular logic. “The logic of the argument is that because people need nurturance, and people get nurtured in The Family, then people need The Family”. Ibid, 41.

existence and character on women's subordination. The notion that the family is a stable and cohesive unit in which the married father serves as economic provider and the mother provides emotional care is an ethnocentric myth. The reality in Namibia, as in most parts of the globe, is a continuing trend towards unwed motherhood, rising divorce rates, smaller households and feminisation of poverty. If our courts favour the narrow interpretation of the concept, then the concept 'family' is closely associated with marriage.¹³ Men and women who have founded a family through marriage¹⁴ enjoy special rights and are entitled to equal rights at its dissolution.¹⁵ One issue in respect of inheritance that may have to be addressed is what degree of protection the wider range of family or kinship¹⁶ should enjoy by society and the state. Should preference be given to the nuclear family or to extended family members who may also be related to the deceased? Inheritance practices under customary law tend to favour the extended family to the exclusion of the nuclear family.

2.5 Inheritance primarily and narrowly deals with the transfer of property or wealth. The Constitution provides that all Namibian citizens have the right to acquire, own and dispose of immovable and movable property and to bequeath property to their heirs and legatees.¹⁷ Thus no limitation is placed on the types of property that may be disposed of. The provision can also be interpreted as favouring the common

¹³ A narrow definition may suggest that a family consists of a relationship of marriage in which there is a father, mother and children. The father is regarded as the provider and the mother the care-giver. In 'black' Namibian families, due to socio-economic factors, there may be multiple care-givers and providers, which complicates the definition of family. See A Iken, 1999, *Women-headed Households in Southern Namibia: Causes Patterns and Consequences*, for an overview of women-headed households as a form of 'family'.

¹⁴ The concept 'marriage' is a complex issue in Africa. In contemporary societies it refers to the relationship between a man and a woman, which is intended to last until one of the parties dies or they mutually agree to divorce. However, in some societies death does not dissolve the marriage, as is the case with levirate and sororate marriages. There are also areas in South Africa and elsewhere where same-sex marriages are accepted both historically and in the contemporary milieu.

¹⁵ Article 14(1) provides as follows: "Men and women of full age, ... shall be entitled to equal rights as to marriage, during marriage and at its dissolution."

¹⁶ The unit and structure from which a kinship system is built consist of the 'elementary' or 'domestic' family (man and his wife and children). In this paper the term nuclear family will be used to denote the elementary family. Within the nuclear family there are three social relationships in the first order, namely that between the parent and child, that between children of the same parents (siblings) and that between husband and wife. Relationships in the second or third order may take into account the common member's connection within two nuclear families such as the father's father, mother's brother, wife's sister or father's brother's son and mother's brother's wife. In a system of wide range a common member may therefore recognise hundreds of relatives with whom he has a relationship. See AR Radcliffe-Brown, 1952, *Structure and Function in Primitive Society*, Cohen and West, London.

¹⁷ Article 16(1) provides that "[a]ll persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens".

law concept of testamentary freedom.¹⁸ A question that arises is whether customary law rules that favour the disposal of property but effectively deny women the right to inherit are subject to constitutional review. A strict interpretation of the property clause that favours all forms of property disposal within the private sphere without regard to the equality clause and the socio-economic impact this may have on vulnerable members of society, especially women and children, would run contrary to the norms the Constitution aims to promote. Children in Namibian society have a right to be cared for by their parents,¹⁹ and the Constitution specifically recognises the plight of women due to past discrimination.²⁰

2.6 The extent to which the property clause and other fundamental rights protected by the Constitution are applicable in private relationships depends largely on whether the Constitution has horizontal application. This is a complicated issue that may have far-reaching consequences not only for the continued existence of customary law but also for the right of women to inherit. Succession is a subdivision of private law and therefore concerns itself only with the relationship between individuals (horizontal relationships). Private law is generally considered to be free from constitutional review, as the general understanding is that fundamental rights are applicable only to vertical relationships (such as between individuals and the state).²¹ The Constitution does not explicitly state that fundamental rights have horizontal application.²² While some say that it could never have been the intention of the drafters of the Constitution to abolish customary law, and that fundamental rights cannot be applicable in private relationships,²³ others assert that there are

¹⁸ Testamentary freedom is encompassed in the maxim *voluntas testatoris servanda est*, and has the effect that very little constraint is imposed on a testator disposing of his estate under statutory or common law. Whether or not any constraint can be placed on the testator's freedom of testation by invoking fundamental rights in the private sphere is an open question.

¹⁹ Article 15(1).

²⁰ See for example Article 23(3) providing that "... women in Namibia have traditionally suffered *special discrimination* ..." (emphasis added).

²¹ See Bennett 1996 (op cit n5), 10; and *Du Plessis v De Klerk and Another*, 1996 5 BCLR 658 (CC).

²² Section 8 of South Africa's 'final' Constitution (Act 108 of 1998) makes it clear that the Bill of Rights applies both vertically and horizontally. In the case of horizontal application, a further distinction is drawn between direct and indirect horizontal application. In *Du Plessis and Another v De Klerk and Another*, which was decided under the 'interim' Constitution (Act 200 of 1993), the court held that the 'interim' Constitution did not have direct horizontal application. Following the promulgation of the 'final' Constitution, the issue of whether the Bill of Rights has direct horizontal application has been reopened and is widely debated amongst academics. Whether indirect horizontal application is applicable to customary law remains uncertain and unresolved. See C Himonga & C Bosch, "The application of African Customary Law under the Constitution of South Africa: Problems solved or Just beginning?" (2000) 117 SALJ 306, 316-318, in which it is argued that to hold that indirect application of the Bill of Rights is applicable only to common law and not customary law, undermines the status of customary law. Such statements are fueled by the fact that section 8(3) of the 'final' Constitution stipulates that only the common law, and not customary law, is subject to development (and therefore indirect application). It has been suggested that Article 5 of the Namibian Constitution does not support direct application of fundamental rights. See Bennett (note 5 above), 11.

²³ See Bennett (op cit n5), 11-12.

provisions in the Constitution that favour horizontal application.²⁴ Proponents of a vertical application of fundamental rights to customary law argue that it would be more harmful to women to declare invalid some customary law institutions that discriminate *prima facie* against women, such as polygamy, than to tolerate them.²⁵ Proponents of a horizontal application of fundamental rights to customary law wish to guard against the ‘privatisation of discrimination’, which creates a situation where people who commit acts of discrimination hide behind the fact that the fundamental rights do not apply in the private sphere.²⁶

2.7 Fundamental rights are not absolute and are subject to limitation,²⁷ and customary law may therefore still escape the full application of fundamental rights. In *Mwellie v Minister of Works, Transport and Communication and Another*,²⁸ the court affirmed that “the constitutional right of equality before the law is not an absolute right but its meaning and content permit the Government to make statutes in which reasonable classifications which are rationally connected to a legitimate object, are permissible”.

²⁴ D Hubbard, “Proposals for Law Reform on the Recognition of Customary Marriages”, Legal Assistance Centre, 1999, note 2.

²⁵ CRM Dlamini, 1997, “Developments in the Law of New South Africa”, Centro di studi e ricerche di diritto comparato straniero. Saggi, Conference e Seminari Rome, 11-12.

²⁶ Ibid.

²⁷ Article 22 provides that fundamental rights may be limited if so authorised, provided any law limiting such rights is of general application, does not negate the essential content thereof and is not aimed at a particular individual. Such a limitation must specify the ascertainable extent of such limitation as well as identify the Article(s) affected.

²⁸ Unreported Sup. Ct. Case No. SA 2/2000 (8 December 2000).

3. International obligations

Introduction

3.1 International and regional instruments ratified by Namibia serve as important interpretive devices for the Namibian Constitution. Irrespective of whether such international instruments are binding, they assist in giving content to constitutional rights and guide the development of domestic legal frameworks.¹ In relation to inheritance the core instruments are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Universal Declaration of Human Rights,² the International Convention on Civil and Political Rights, the International Convention on Economic and Social Rights and the African Charter on Human and People's Rights. The UN Convention on the Rights of the Child and the African Charter on the Rights of the Welfare of the Child further complement these core instruments.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³

3.2 The Convention obligates State Parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women”.⁴ State Parties are further required to take appropriate measures to “modify the social and cultural patterns of conduct of men and women, with the view of achieving the elimination of prejudices and customary and all other practices which are based on the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.⁵ Cultural stereotypes which regard women as perpetual minors and translate into unequal power relations with regard to property are but one example of the attitudes and practices which must be addressed.

¹ The South African Law Reform Commission stated the following in this regard, “Ratification of or accession to international instruments creates obligations on State Parties to take action to bring domestic policy, law and practice into line with the relevant international instrument. But even those instruments which are not yet officially recognized can be very useful in developing a framework for ... legislation.” SALC Issue Paper 13, *Review of the Child Care Act*, Project 110, 1998, 19.

² The Universal Declaration is not a treaty to which states become parties, but has nonetheless had a profound impact on the development of international human rights. It has been argued that the declaration forms part of customary international law. See Dugard, *International Law: A South African Perspective* (2000) 240-241.

³ Acceded by Namibia on 23 November 1992.

⁴ Article 2(g).

⁵ Article 5(a).

3.3 The Convention explicitly condemns cultural practices that deny women the right to inherit property on an equal basis with men, by obligating State Parties in Article 16 to “ensure, on a basis of equality of men and women ... [t]he same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and dispossession of property ...”.⁶ Inheritance practices that do not reflect equal ownership rights to property acquired during marriage contravene the Convention.

3.4 The Committee on the Elimination of all Forms of Discrimination Against Women, in elaborating and interpreting the obligation on State Parties to ensure “the same rights and responsibilities during marriage and at its dissolution”,⁷ stated the following:

“There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband’s or father’s property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased’s property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage”.⁸

International Covenant on Economic, Social and Cultural Rights

3.5 Economic, social and cultural rights are regarded as difficult to implement and enforce because of their economic implications, and consequently they receive less attention than civil and political rights. Nonetheless, these rights are vital in realising the rights of vulnerable groups. Article 11 of the Covenant makes specific provision for the right to housing:⁹

“State Parties ... recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure realization of this right ...”.

⁶ Article 16(1)(h).

⁷ Article 16(1)(c).

⁸ General Recommendation No 21.

⁹ See also Article 14(2)(h) of CEDAW. Article 27(3) of the Convention on the Rights of the Child requires that State Parties, in accordance with national conditions and within their means, take appropriate measures to assist parents and others responsible for the child to implement the right to an adequate standard of living. In case of need, provision should also be made for material assistance and support programmes, particularly with regard to housing (amongst other things).

3.6 Often widows and their children are left destitute once their husbands' relatives or heirs claim ownership of the marital home.¹⁰ Giving content to the right to housing, as with most economic, social and cultural rights, is not an easy task. The Committee on Economic, Social and Cultural Rights (CESCR) has cautioned as follows:

“... the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head, or views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity.”¹¹

African Charter on Human and Peoples' Rights (Banjul Charter), and its Protocol on the Rights of Women in Africa

3.7 The African Charter prohibits discrimination on the grounds of race, ethnic group, colour, sex, religion, birth and social origin, amongst others,¹² and guarantees equality before the law.¹³ The family to a large extent enjoys protection in respect of its role as custodian of the community's morals and traditional values, but only in so far as this does not discriminate against women and children.¹⁴ Article 18 provides that the family is “the natural unit and basis of society” and “the custodian of morals and traditional values recognised by the community”, without detracting from State Parties' responsibility to “ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions”.

3.8 As provided for by the African Charter,¹⁵ the Protocol on the Rights of Women in Africa was adopted on 11 July 2003 in Maputo, Mozambique, to supplement the Charter's provisions. The Protocol seeks to improve the status of women by fostering gender equality and encouraging the elimination of discrimination against women, defined as:

“... any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.”¹⁶

¹⁰ See generally Centre on Housing Rights and Evictions (COHRE), 2004, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*.

¹¹ CESCR, General Recommendation No 4, para 7.

¹² Article 2.

¹³ Article 3 (duty to respect fellow beings without discrimination).

¹⁴ For a detailed discussion see Armstrong et al, 1993, “Uncovering reality: Excavating women's rights in African family law”, in *International Journal of Law and the Family* Vol. 7, 314.

¹⁵ Article 66.

¹⁶ Article 1.

3.9 Article 2 of the Protocol enjoins State Parties to combat all forms of discrimination against women through legislative, regulatory, institutional and other measures. During marriage a woman has the right to acquire property and to administer and manage it freely.¹⁷ The Protocol encourages monogamy as “the preferred form of marriage” while protecting the rights of women in polygamous marriages.¹⁸ Special provision is made for widows: they may not be subjected to inhuman, humiliating or degrading treatment; they have the right to remarry a person of their choice;¹⁹ they have the right to an equitable share in the property of a deceased husband; and they have a right to continue living in the matrimonial home even after remarrying.²⁰ Women and men have the right to inherit equitably from their parents’ properties.

Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child

3.10 Both the Convention on the Rights of the Child (‘the Convention’) and the African Charter on the Rights and Welfare of the Child (‘the Charter’) confer direct rights on children. As a result, the emphasis is no longer only on the protection of the rights of children through their parents, guardians, or other adult members of society. Both the Convention and the Charter prohibit discrimination on the basis of sex, birth and status.²¹ The ‘best interest of the child’ is recognised by both as a primary consideration when considering actions to be taken on behalf of children.²² It can be argued that if a woman is evicted from her home, the best interest of children and their right to survival and development²³ may be compromised. Both documents give special attention to children orphaned by AIDS and to children from AIDS-affected families. The Committee on the Rights of the Child (CRC) stated that the “... trauma HIV/AIDS brings to the lives of orphans ... is frequently compounded by the effects of ... discrimination ... [and] ... State parties ... [have] to ensure that both the law and practice support the inheritance and property rights of orphans.”²⁴

¹⁷ Article 6(j).

¹⁸ Article 6(c).

¹⁹ Articles 20(a) and (c).

²⁰ Article 21(1).

²¹ Convention, Article 2(2); Charter, Article 3.

²² Article 4 of the Charter. The ‘best interest of the child’ has been identified by the Committee on the Rights of the Child as one of four general principles that underpin the values of the Convention.

²³ Article 6.

²⁴ Convention, General Comment No 3, para 33. See also para 31 which emphasises the necessity of providing legal, economic and social protection to affected children to ensure their ability to inherit.

4. Dual laws of inheritance

Legal pluralism, unification and choice of law rules

4.1 Legal pluralism is the recognition within any society that more than one legal system exists to govern the society and to maintain the social order, but without the guarantee that each system will be treated equally.¹ As stated above, Namibia's Constitution formally recognises customary law as a legal system alongside common law. The Constitution seeks to place these two systems on an equal footing,² but historically customary law has always occupied a marginalised position, and appears to enjoy limited recognition in Namibia's common law courts.³ Customary law has been distorted to such an extent that its recognition is sometimes regarded as problematic.⁴ Namibia, like many other African countries that formally recognise customary law, may struggle to give recognition to customary law while simultaneously ensuring equality before the law. The retention of customary law requires the application of choice of law rules, as customary and common law prescribe different solutions to the same problems.

4.2 The Law Reform and Development Commission (LRDC) has indicated that the approach it seeks is one of both harmonisation and integration.⁵ Since the LRDC excludes unification as an option, it is not expected to adopt a uniform system of law that replaces the existing dual system and creates one set of rules for all persons. Thus, the current policy decision is to maintain the existing system of legal pluralism.⁶ However, the current dual system contravenes the Constitution as it retains and endorses gender inequality and racial discrimination. In matters of inheritance our current dual system prescribes that either customary or common law may apply, dependant on where a person is resident, whether the person contracted a civil or customary marriage, the marital property regime applicable, and most importantly,

¹ H Ludson, 2003, "Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law", 21 *Berkeley J. International*, 62, 64.

² For example, customary law and common law are afforded similar treatment not only in Article 66 of the Namibian Constitution, but also in Article 4(3), which equates civil marriage and customary marriage for the purposes of attaining Namibian citizenship by marriage.

³ See for example *S v Jonas Hepute*, unreported judgement of the High Court, 13 June 2001.

⁴ RJ Gordon, "Venacular Law and the Future of Human Rights in Namibia", *Acta Juridica* 1991, 86.

⁵ LRDC 12, Report on Customary Law Marriages, Project 7 (October 2004), 11.

⁶ A similar approach was adopted by South Africa. Its argument in favour of such an approach was that a unified approach "presupposes that a common law system is capable of meeting the needs of people who are used to regulating their lives according to customary law ...". See SA Law Reform Commission, Discussion Paper 93, *Customary Law of Succession*, at 3.1.3 and 3.1.5.

the person's race.⁷ The overriding purpose of these rules was to exclude Africans from the application of common law, unless their lifestyle was considered 'European'. Constitutionally acceptable rules will have to be devised to replace the existing choice of law rules. This requires a repeal of Regulation GN 70 – which by 31 December 2005, in the absence of legislative reform, will in any event no longer be valid.⁸ But bringing choice of law rules in line with the Constitution will not alleviate the social problems associated with inheritance unless the substantive elements of inheritance laws are also addressed. Current legislation in force in Namibia and some of the law reform proposals being considered seem to suggest that affiliation to a traditional community will be a determining factor in whether to apply customary law.⁹ Such an approach does not necessarily reduce conflict in the application of customary law where parties to a dispute are affiliated to different traditional communities. Conflict may also arise where persons who are affiliated to the same traditional community perceive different systems as being more favourable to their interests.

4.3 Different countries employ an array of choice of law rules to resolve the question of whether to apply customary or common law to a given dispute. In South Africa, prior to 1948, there were differing views on whether customary or common law took precedence when a conflict arose.¹⁰ The courts later stated that they were obliged to consider all the circumstances of a case and on the basis of this enquiry, without any prejudice in favour of common or customary law, had to select the appropriate legal system.¹¹ The legislature has since intervened and now requires courts to take judicial notice of customary law insofar as such law can be ascertained readily and with sufficient certainty, provided that customary law does not contravene principles of public policy or natural justice.¹² This approach is not without criticism, as it has been compared with the repugnancy provision applicable under British rule, which stated that customary law shall not apply if it violates "general principles of humanity observed throughout the civilized world".¹³ More recently the South African Law Reform Commission (SALC) has recommended that when deciding whether customary law is applicable, a court may give effect to an express or implied agreement between the parties, unless the court is of the opinion that it is inappropriate to do so.¹⁴ In the absence of agreement, courts may consider such

⁷ GN 70 (op cit s1 n4).

⁸ Berendt (op cit s1 n3).

⁹ See for example Traditional Authorities Act 25 of 2000 and Community Courts Act 10 of 2003.

¹⁰ *Nqanoyi v Njombeni* 1930 NAC (C&O) 13; *Matseng v Dhlamini and Another* 1937 NAC (N& T) 89 at 92.

¹¹ *Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 (1) SA 388 (A) at 396-401.

¹² Section 1(1) of the Law of Evidence Amendment Act 45 of 1988. See also *Hlophe v Mahlalela and Another* 1998 (1) SA 449 (T) in which the court held that where customary law is not readily ascertainable expert evidence may be adduced. The court further held that in trying to establish what customary law is, courts should not adopt an overly positivistic approach. Courts cannot accept that all cultural practices constitute customary law and vice versa.

¹³ SA Law Commission Discussion Paper 76, *Conflicts of Law*, at 1.3.5.

¹⁴ *Ibid*, 110.

factors as the nature, form and purpose of any transaction between the parties; the place where the cause of action arose; the parties' respective ways of life and, in disputes involving land, the place where the land is situated.¹⁵

4.4 Zambia has retained the 'cause of action' approach inherited from colonial rule, in that customary law applies in civil cases between Africans in matters such as marriage, tenure and transfer of property, inheritance and testamentary dispositions.¹⁶ If one party is not subject to customary law, the court may apply customary law provided that no one can claim its benefits if it appears from an express or implied agreement that it was the intention of the parties that some other law be applicable.

¹⁵ Ibid.

¹⁶ Section 16 of the Subordinate Courts Cap 45.

5. Basic differences between succession under customary and common law

5.1 The law of succession is generally defined as the “totality of the legal rules which control the transfer of those assets of the deceased which are subject to distribution among beneficiaries, or those assets of another over which the deceased had power of disposal”.¹ Succession therefore deals primarily with the transfer of wealth and performs an important socio-economic function.²

5.2 Unlike succession under common law³ which is concerned primarily with the transfer of property, succession under customary law is in addition concerned with the transmission of duties and debts. Under customary law the rules of succession are designed to maintain a particular bloodline and to transmit a deceased’s rights and duties to a specified member of his or her kin.⁴ Towards this end, customary systems of succession have been described as follows:

- *Intestate*, in that individuals are generally not free to decide to whom their estate will devolve.
- *Universal*, in that an heir succeeds to the deceased’s rights as well as duties.
- *Onerous*, in that the responsibility to maintain the deceased’s dependants may not be declined or passed on to another.⁵

5.3 Succession under common law confines the circle of beneficiaries to the deceased’s immediate family, does not distinguish between men and women, does not transfer duties and debts and generally does not discriminate on the basis of age. Our common law, however, still discriminates on the basis of birth since extramarital (‘illegitimate’) children may not inherit from their fathers unless clearly provided for in a will.⁶

¹ MJ de Waal et al, 2003, *Introduction to the Law of Succession* (3rd Edition), citing Van der Merwe & Roland, 1990, 1.

² Ibid.

³ The term ‘common law’ is used here to denote Roman-Dutch Law and English Law, which together constitute the dominant legal system in Namibia.

⁴ TW Bennett, 2004, *Customary Law in South Africa*, 334.

⁵ Ibid.

⁶ This unfortunate position of extramarital children under both common and customary law is expected to be addressed by the passage of the Children’s Status Bill (B. 23-2003). The implications of this Bill are discussed in more detail below.

5.4 It is now commonly accepted that customary law of succession draws a distinction between inheritance and succession. ‘Inheritance’ denotes transmission of rights to property only, whereas ‘succession’ denotes transmission of all rights, duties, powers and privileges associates with status.⁷ The term ‘inheritance’ will be used in this report unless the context requires otherwise.

⁷ TW Bennett, 1991, *A Sourcebook of African Customary Law for Southern Africa*, 383.

6. Overview of inheritance laws in Namibia

6.1 As mentioned earlier, estates of deceased persons other than ‘blacks’ are regulated by the Intestate Succession Ordinance 12 of 1946 and the Wills Act 7 of 1953, and are administered in terms of the Administration of Estates Act 66 of 1965. The estates of persons classified as ‘Basters’ are administered in terms of Proclamation 36 of 1941. The Native Administration Proclamation 15 of 1928 regulates ‘black’ deceased estates.

6.2 In terms of the Intestate Succession Ordinance 12 of 1946 as amended, the surviving spouse is the sole intestate heir if no descendants, parents, brothers or sisters survive the deceased spouse.¹ If the spouses are married in community of property and the deceased spouse is survived by descendants, the surviving spouse inherits a child’s share or an amount which together with the surviving spouse’s share in the joint estate does not exceed N\$50 000.² If the spouses are married out of community of property and the deceased spouse is survived by descendants, the surviving spouse inherits a child’s share or an amount not exceeding N\$50 000.³ Irrespective of the marital property regime, if the deceased spouse is not survived by any descendants but leaves parents, brothers or sisters, the surviving spouse inherits a half share provided that the half share does not exceed N\$50 000.⁴ A person regulated by the Intestate Succession Ordinance 12 of 1946 who does not want his estate subjected to the distribution scheme set out in the Ordinance may draft a will in terms of the Wills Act 7 of 1953. Except as may be prohibited by public policy, a testator has absolute freedom to dispose of his movable and immovable property.

Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941

6.3 The Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 applies only to ‘Basters’, persons of the Rehoboth Gebiet, and formally-accepted members of the Rehoboth Bastard Community.⁵ In terms of an agreement entered into between the Kaptein of the Rehoboth Community and the members of the local Raad (Council), it was decided that the Administrator in consultation with the Raad

¹ Section 1(1)(d).

² Section 1(1)(a).

³ Section 1(1)(b).

⁴ Section 1(1)(c).

⁵ Section 29 of the Proclamation 36 of 1941, defines a member of the Rehoboth Bastard Community as “... any person who, by reason of his or her birth or parentage, possesses full burgher rights in the Gebiet under the laws and constitution of the Rehoboth Bastard Community, or any non-European person whose application to be accepted as burgher of the Gebiet has been approved ...”.

may enact legislation which applies specifically to the *Gebiet*. The Kaptein and Raad no longer exist by virtue of statute, as the Constitution repealed the relevant legislation, but the community still elects its own leaders.

6.4 In terms of the Proclamation,⁶ if the deceased is survived by a spouse and children, half of the estate devolves to the surviving spouse and the other half is shared equally between the children and the surviving spouse.⁷ If the deceased is survived only by children, the children inherit the estate in equal shares.⁸ If the deceased is survived only by a spouse, half of the estate devolves to the surviving spouse.⁹ In addition, the surviving spouse is also entitled to one third of the remaining half.¹⁰ The remaining two thirds is shared equally between the parents of the deceased.¹¹ If there are no parents, then the remaining two thirds of the estate is shared equally between the brothers and sisters.¹² The surviving spouse, however, is entitled to full usufruct of the assets in the estate until such time as the surviving spouse dies or remarries.¹³ If the deceased leaves no surviving spouse or children, the entire estate devolves upon the 'family of the deceased'.¹⁴ An extramarital child is barred from inheriting from his deceased father's estate unless provided for in a will.¹⁵

6.5 Any person may dispose of his movable or immovable property by will 'in any manner whatsoever' but subject to the 'existing laws and regulations' of the community.¹⁶

6.6 Estates are lodged with the Magistrate of Rehoboth and administered in a manner similar to that prescribed by the Administration of Estates Act 66 of 1965. The executor appointed has to draw up an inventory of the estate, collect outstanding debts and liquidate the estate in order to meet any lawful claims against the estate.¹⁷

⁶ Second Schedule of Proclamation 36 of 1941.

⁷ Ibid, section 1(a).

⁸ Section 1(b).

⁹ Section 1(c).

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Section 1(d). The family in this instance will be the parents, brothers and sisters of the deceased, and the rules as prescribed in section 1(c) will apply.

¹⁵ Section 2.

¹⁶ Section 18.

¹⁷ See in general sections 2-18.

Native Administration Proclamation 15 of 1928

6.7 The Native Administration Proclamation 15 of 1928 is modelled on South Africa's Black Administration Act 38 of 1927. While the Native Administration Proclamation 15 of 1928 is very much an omnibus, part of its purpose was to deal with what the administration and missionaries saw as growing immorality – the problem of 'conjugal fidelity'. Indeed the (Rhenish) Mission had hoped that the civil marriages introduced after the war would make marriages more permanent. However, according to Mission Inspector Olpp, the number of legally solemnised marriages was diminishing at an alarming rate, while the number of children born out of wedlock had increased phenomenally.¹⁸ Some of the provisions of the Native Administration Proclamation 15 of 1928 were intended precisely to deal with this problem. As the Administrator explained 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."¹⁹

6.8 It is therefore surprising that when the Native Administration Proclamation 15 of 1928 ('the Proclamation') came into force on 1 January 1930,²⁰ Chapter IV of the Proclamation that regulates marriage and inheritance was not made applicable in South West Africa. Its subsequent implementation followed a complicated path.²¹ Certain provisions on marriage²² and inheritance²³ of Chapter IV of the Proclamation only came into force on 1 April 1954.²⁴ Simultaneously, Regulation GN 70²⁵ was brought into force with the view of regulating the manner in which African estates should be administered and distributed. Regulation GN 70 was promulgated in terms of section 18(9) of the Proclamation.²⁶ The relevant provisions, sections 18(3)

¹⁸ UG 31/1928: para 41.

¹⁹ Ibid.

²⁰ GN 165 of 11 December 1929.

²¹ On the implementation of the Proclamation see also Hubbard 1999 (note 24, section 2).

²² Section 17 (6).

²³ Sections 18 (3) and 18 (9).

²⁴ GN 67 of 1 April 1954.

²⁵ GN 70 (op cit s1 n4).

²⁶ Section 18(9) provides that – "The Administrator may make regulations not inconsistent with this Proclamation – prescribing the manner in which estates of a deceased Native shall be administered and distributed; dealing with the disherison [disinheriting] of natives; prescribing the powers and duties of native commissioners or magistrates in carrying out the functions assigned to them by this section;

and 18(9) and Regulation GN 70, were made applicable only to persons north of the Police Zone²⁷ and applied retroactively with effect from 1 August 1950. It was only twenty years later, in 1974, that the entirety of section 18 and Regulation GN 70 were made applicable to the whole of South West Africa, with the exception of Kavango, Owambo and Caprivi.²⁸ To complicate matters further, certain provisions of the Proclamation have since been repealed.²⁹ The sections so repealed are sections 18(3), 18(4), 18(5), 18(7), 18(8) and 18(9)(c).³⁰ The remaining provisions of the Native Administration Proclamation are in clear violation of the Constitution due to their overtly racist application.³¹

6.9 In respect of inheritance, sections 18(3), 18(9) and Regulation GN 70 apply to Africans living in Kavango, Eastern Caprivi and Owambo. Sections 18(1), 18(2), 8(9), 18(10) and Regulation GN 70 apply to the rest of Namibia. In respect of marriage, section 17(6) of the Proclamation applies to Africans living north of the Police Zone. The High Court of Namibia has since declared sections 18(1), 18(2) and 18(9) of the Native Administration Proclamation and Regulation GN 70 in conflict with the Constitution. Parliament has been given until 30 June 2005 (extended to 31 December 2005) to remedy the unconstitutional provisions.³²

6.10 In light of the complicated manner in which Chapter IV of the Proclamation was made applicable in Namibia, the present position creates an intricate legal system similar to the one applied in South Africa, and which can similarly be described as so ‘manifestly discriminatory’ that it needs to be flushed out from the statute books due to its ‘harmful and hurtful’ provisions.³³

prescribing the tables of succession in regard to Natives; and generally for the better carrying out of the provision of this section.

²⁷ The Police Zone (‘Red Line’) is the area south of (‘within’) an imaginary line drawn through Namibia. The area north of (‘outside’) the Police Zone was primarily viewed as labour reserves. The Germans saw no need in directly ruling the area north of the Police Zone, and when South Africa assumed administration of Namibia, it had no clear policy on how to deal with this area. The area was densely populated and the fear of resistance from especially Owambo speakers played a significant role in applying ‘indirect’ rule. The latter did not necessarily mean a hands-off approach, but involved the use of indigenous political institutions and a few white officials and police to ensure that such institutions exercised their power to the advantage of the colonisers. See also Proclamation 67 of 1954 (Application of Certain Provisions of Chapter IV of the Proclamation 15 of 1928 to the Area Outside of the Police Zone). The Police Zone is defined in the First Schedule to Proclamation 26 of 1928.

²⁸ RSA Proclamation R.192 of 15 February 1974.

²⁹ Native Administration Proclamation Amendment Act 27 of 1985.

³⁰ Ibid.

³¹ The only other sections of the Native Administration Proclamation that find application today are sections 23 (penalties for breach of notice, rule, regulation); 24 (exemption from stamp duty); 25 (interpretation of terms); and 27 (repeals and amendments). The Traditional Authorities Act 17 of 1995 (superseded by the Traditional Authorities Act 25 of 2000) repealed the remaining provisions which were not already repealed prior to independence.

³² Berendt (op cit s1 n3).

³³ Bhe (op cit s1 n10), 68.

Impact of Chapter IV of the Native Administration Proclamation on inheritance

6.11 Failure to bring into force Chapter IV of the Proclamation at one point resulted in a suggestion that African estates, except those uncomplicated ‘small’ estates that were dealt with informally, should be brought under the jurisdiction of the Master of the High Court (‘the Master’).³⁴ The bringing into force of this Proclamation settled any ambiguity that may have existed at the time. It confirmed that the Master had no role to play in the administration of intestate African estates. Section 18(6) provided that “... the Master [shall not] have any powers in connection with the administration and distribution of the intestate estate of any deceased Native”. The Master was further not compelled to issue letters of administration³⁵ in respect of African estates, and any letters so issued could be revoked at any time.³⁶ In terms of the Proclamation, any disputes concerning customary law estates are determined by magistrates, with a right of appeal to the High Court.³⁷

6.12 In *Berendt v Stuurman*, the High Court of Namibia declared that the jurisdiction of the Master of the High Court relating to deceased estates shall be concurrent with the jurisdiction exercised by magistrates. It shall be further open to any party to the administration of a deceased estate to request the Master of the High Court to administer the estate in question in terms of the Administration of Estates Act 66 of 1965.³⁸

6.13 In the event that an African dies leaving no valid will, his estate devolves in accordance with customary law. Section 18(1) provides that –

“All movable property of whatsoever kind belonging to a Native and allotted by him or accruing under native law or custom to any women with whom he lived in a customary union, or to any house shall upon his death devolve and be administered under native law and custom.”

Section 18(2) of the Proclamation provides that –

“All other movable property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property *not so devised [by will] shall devolve and be administered according to native law and custom*”. (emphasis added)

³⁴ This suggestion was made to the Master. The argument was made on the basis that section 3(1)(d) of the Administration of Estates Act 24 of 1913, which provided that the Act will not apply to the estates of Africans, was repealed by section 26 of the Native Administration Proclamation 15 of 1928. But once Chapter IV of the Proclamation had been brought into force, the Master’s jurisdiction over the estates of intestate ‘native’ estates was excluded by section 18(9) of the Proclamation.

³⁵ Section 18(6).

³⁶ Section 18(7).

³⁷ Section 18(3).

³⁸ Subject to the jurisdictional limit set by section 4 of the Act. See *Berendt* (op cit s1 n10).

The term 'native law and custom' has become problematic over the years, as increasing numbers of people living under customary law have become dissatisfied with the manner in which African estates are administered and distributed. In many instances the customary law which is applied is regarded as outdated, as it has failed to adapt to changing social conditions or does not conform to the Constitution. Property-grabbing is a growing problem in Namibia.³⁹ Furthermore, estates are administered in an informal manner with the result that any person can be appointed as an executor of an estate without assuming the responsibilities that are normally associated with such a position.⁴⁰

6.14 Interestingly, section 18(1), which uses overtly sexist terminology, is silent as to what happens when a woman dies and her estate has to be distributed. As women under customary law are regarded as perpetual minors and consequently cannot own property, it can be argued that this section sought to give effect to that notion. Inheritance practices under customary law often discriminate against women and children. The only way an African woman can escape the application of customary law is to insist on a monogamous marriage in community of property under an antenuptial contract as provided for by Regulation GN 70. Regulation GN 70 thus promoted oscillation between two legal systems, by stipulating that either customary or civil law may apply, depending on the circumstances.

Section 2 of Regulation GN 70 provides:

"If a native dies leaving no valid will, his property shall be distributed in manner following:–

- (a) If the deceased, at the time of his death, was –
 - (i) a partner in a marriage in community of property or under antenuptial contract; or
 - (ii) a widow, widower or divorcee, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if he had been a European.
- (b) If the deceased does not fall into a class described in paragraph (a) hereof, the property shall be distributed according to native law and custom."

Thus, if the deceased was in a monogamous marriage and married in community of property or under an antenuptial contract, his estate is distributed as if he had

³⁹ LeBeau (op cit s1 n6), 54.

⁴⁰ In customary law most estates are informally distributed by the family. Where the family members need to access funds held in bank accounts or payable in terms of insurance policies, a letter of administration is required. Our research found that more than one family member can acquire letters of administration from various magisterial districts for a single estate, as no formal procedure regulates and controls the appointment of executors. No proper records are kept by the Master's office as to the activities of magistrates. Interview with Administrator of Estates (15 February 2005).

been “a European”, with the effect that the Intestate Succession Ordinance 12 of 1946 applies. As stated earlier, in terms of this Ordinance preference is given to the surviving spouse and children of the deceased. If the deceased does not fall into either of the two classes prescribed by Regulation GN 70, customary law applies.

6.15 The default marital regime for marriages between Africans north of the old Police Zone is out of community of property, unless the parties specifically agree to the contrary. One month prior to the celebration of the marriage the intending spouses have to declare jointly before a magistrate or a marriage officer that it is their intention that the property regime applicable to their marriage should be in community of property. Section 17(6) of the Proclamation provides:

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

6.16 It occurs in practice that such declarations are not properly executed,⁴¹ with the result that even if it was the intention of the parties to contract a marriage in community of property, such marriages are in actual fact out of community of property. As a consequence, the estates of the spouses must be administered in terms of customary law. Couples who failed to properly execute declarations or who are negatively affected by the default property regime prescribed by section 17(6) of the Native Administration Proclamation are not without recourse. Our courts now recognise express and implied antenuptial contracts concluded between spouses to regulate the property consequences of the marriage.⁴² However, such unregistered antenuptial agreements are not enforceable against third parties. The LRDC has made recommendations for the repeal of section 17(6) of the Native Administration Proclamation, but these proposals have not yet been taken forward by government.⁴³

⁴¹ L Agnew & D Hubbard, “Marital Property Regimes and the Native Administration Proclamation”, Legal Assistance Centre, August 2001, 3-4.

⁴² *Mofuka v Mofuka*, unreported judgements, High Court 14 December 2001 and Supreme Court 20 November 2003.

⁴³ The LRDC submitted to the Minister of Justice a Report on the Uniform Default Matrimonial Consequences of Common Law Marriages (Repeal of section 17(6) of the Native Administration Proclamation) in July 2003. The aim of the report was to ‘fast track’ the repeal of the offending provision prior to the finalisation of its Report on Succession of Estates. It appears that the repeal of section 17(6) may take place at some point in the future as part of a more comprehensive reform of marital property regimes in both civil and customary law.

6.17 Section 3 of Regulation GN 70 provides that if the common law applies to the distribution of an estate, the magistrate of the district in which the deceased was ordinarily resident must supervise the distribution, and is further empowered to issue directions as necessary for the distribution of the estate and to ensure compliance with the law.⁴⁴

6.18 Section 18(2) of the Proclamation made it clear that even where an African is capable of devising his estate by will, he does not have absolute freedom to dispose of his estate as he wishes. Firstly, only certain forms of property were capable of being devised by will. “All other movable property” excluded “all movable property belonging to a Native and allotted and accruing under native law and custom to any woman with whom he lived in a customary union or house property” as contemplated by section 18(1) of the Proclamation. Secondly, the manner in which the Proclamation was made applicable in Namibia meant that an African’s testamentary capacity was also limited based on where he was ordinarily resident. Since sections 18(1) and 18(2) of the Proclamation do not apply to Africans residing in Kavango, Eastern Caprivi or Owambo, the effect is that such testators have absolute freedom to dispose of their estates by will. Africans living in any other part of Namibia have limited testamentary capacity in that they may devise by will only the limited forms of property contemplated by section 18(1).

6.19 Conferring on Africans the capacity to draft a will, albeit limited, ushered in the possibility of advocating the use of wills to ameliorate the unfavourable consequences for women and children brought about by the application of customary law. But this strategy presupposes that men will automatically make provision in their wills for their wives and children to inherit, or that all Africans have the capacity to draft wills. Langa DCJ, in referring to section 23 of the Black Administration Act 38 of 1927 and its regulations (which are almost identical to section 18 of Namibia’s Native Administration Proclamation and Regulation GN 70), had the following to say about such an assumption:

“Section 23 and its regulation impose a system on all Africans irrespective of their circumstances and inclinations. What it says to Africans is that if they wish to extricate themselves from the regime [the section] creates, they must make a will. *Only those with sufficient resources, knowledge, education or opportunity to make an informed choice will be able to benefit from that provision.*”⁴⁵ (emphasis added)

6.20 LeBeau⁴⁶ indicates that one of the more recent developments in customary law is an increase in the number of wills drafted by Africans. Our research found that the majority of wills apply customary law rules on inheritance, thereby perpetuating the inequalities brought about by the application of intestate rules under customary

⁴⁴ In practice section 3 was also utilised in estates which devolved under customary law.

⁴⁵ Bhe (op cit s1 n10), 66.

⁴⁶ LeBeau (op cit s1 n6), 54.

law.⁴⁷ As a consequence, spouses and children of the testator may be left destitute. When wills do deviate from customary law by making provision for the surviving spouse, the wishes of the testator are not always followed.⁴⁸ Many of the wills from our sample group indicate that even if the wives and children are the main heirs, provision is still made for extended family members. It is unclear whether this is done merely to mollify extended family members, or as an acknowledgement that the wider kin group has to be included because of need or affiliation.

⁴⁷ Our research sample was obtained from the Master of High Court's office in Windhoek.

⁴⁸ In one instance traditional leaders had besieged the office of an Administrator of Estates, threatening him with weapons and compelling him to disregard the wishes of the testator. (Interview, Administrator of Estates, 15 February 2005). In another instance an executor found the estate to be of nil value as the chief had already proceeded to distribute all the movable property in the estate.

7. Inheritance under customary law

7.1 Introduction and methodology

7.1 In determining who inherits it is obvious that kinship is important. At root kinship is based on the acknowledgement of genealogically derived ties that emerge from bearing and engendering children.¹ Indeed, this fact is epitomised by the use of the term ‘testament’ for the document that directs how the estate should be dealt with. Its Latin root is *testes*, testicle, the source if you will of one’s progeny. How people are related to the progenitor (the biological parent) enables them and the wider community to identify their interest in a family member’s estate, to stake a legitimate claim to portions of it and to have their rights to such claims recognised. Kinship as an organising principle in Namibia has infinitely stronger power than class, yet it is indeed surprising that it has been largely ignored in contemporary Namibia. What class does in advanced capitalist societies – shaping where one will reside, the nature of one’s education, who one’s friends will be and who one will marry – is determined to a large extent in most other societies by kinship. There it is the primary determinant of inheritance and much more; many of one’s rights and duties, where one will live, political solidarity and even educational opportunities are determined by it.

7.2 Descent, the way one is considered to be related to a common ancestor, can be reckoned in two basic ways. In cognatic descent, relatives of *both* the mother’s and father’s lines are considered. This is sometimes referred to as bilateral kinship. The other major class of descent is unilineal, that is, through *either* the father’s or mother’s line. This does not mean that people are ignorant of other lines of descent, simply that they place minimal import on them. More rare, but found in Namibia among Herero-speakers, are systems of double descent whereby some rights and duties (usually religious and political) are inherited patrilineally, while other rights (pre-eminently economic) are inherited matrilineally.

7.3 Namibia is striking in the variety and complexity of its descent systems. People of European origin and many of the San have cognatic systems. Patrilineal descent is found among the Khoekhoegowab and Tswana speakers. Matrilineal descent systems are found in the north, in Owambo and in the Kavango. As noted above, systems of double descent are found among Herero speakers. Even within these systems however, there is much variation and complexity. Matrilineal kinship does not mean that there is a matriarchy, as males are still considered the head of the family. On the contrary, matriliney simply means that people, generally males, inherit through their mothers.

¹ Holy, 1996.

7.4 Descent shapes rules of residence. In Namibia residence is usually virilocal (home of the husband), or increasingly neo-local (a new location), but generally near the husband's natal home. Kinship nomenclature or terminology also provides a guide to etiquette. In oshiNdonga, for example, patrilineal relative terms frequently have the suffix gona which also means 'growl', illustrating the potential antagonism of such relatives in the matrilineal context.² Kinship also moulds inheritance practices, which provide the basis of parental authority. At the same time it is important to emphasise the great degree of flexibility in inheritance rules.³

7.5 Ensuring that simple justice and satisfaction is given to all stakeholders in respect of inheritance is a challenge because it lays bare the liberal dilemma which a modern state like Namibia has to confront: on the one hand we want equal opportunity and equity, especially for vulnerable members of society, while on the other we believe that individuals should dispose of their estates as they please.

How these dilemmas are tackled in Namibia is the subject of this part of the report, which focuses on local attempts to deal with problems arising from inheritance. Given Namibia's extreme cultural diversity, even within groups speaking a common language, this is an intimidating task. Given time and financial constraints, the approach adopted in this study was to focus on three distinct groups, each distinguished on the basis of its kinship system.

In the south a patrilineal system as utilised by the 'Vaalgras People' residing near Keetmanshoop in the Tses communal area was chosen. This community provides an interesting example because they were originally Herero-speakers with a double-descent system but have gradually switched to a patrilineal system along with taking over Khoekhoegowab or Nama/Damara as their dominant language. Controlled comparisons were undertaken with other Khoekhoegowab-speakers residing in Keetmanshoop, Berseba, Tses and Blou Wes, the latter three places all being in communal areas where the activity of note is sheep and goat farming.

7.6 The second area of focus was the double-descent system found among Herero-speakers who dominate in the largely cattle-raising communal areas of central Namibia. Visits and interviews with a variety of people were held in Aminuis, Pos 3 of Epukiro and Okakarara.

7.7 The third field site was in north central Namibia. This is the most densely populated rural area in the country, where people practise agriculture and follow matrilineal kinship systems. Visits and interviews were conducted in Oshikoto, Ohangwena and Omusati Regions, with a range of people, including various traditional authorities.

² Viljoen et al, 1984, *Oshindonga/English Dictionary*, Windhoek.

³ See H Becker's essay in the companion volume to this report, forthcoming from the Legal Assistance Centre in 2005.

7.8 How valid are our observations? Obviously we are acutely aware of our linguistic incompetence. To control for these inadequacies a thorough review of the printed literature and the ‘grey’ literature in the National Archives of Namibia was undertaken to assess the validity of the current findings. Our findings are not going to be completely empirically accurate. No study ever is. Rather the concern is to try to explicate the logic of the kinship systems. Once one can grasp this underlying logic, then the system becomes comprehensible even to a relative outsider. While we were treated with the utmost respect and assistance by people in the field, there are those that may argue that as outsiders one can never understand the intricacies of customary law. This is not a new observation. It is common place in many parts of the world and has basically got to do with turf-wars of identity (the ultimate cultural construct). We are well aware of the difficulties of translation and the accurate sensing of context. But this argument is sloppy and slides easily into racism, because by its logic one has to be Herero in order to understand Herero customary law. If one accepts this position then the rationale for social science is completely negated. More frightening, if one accepts such arguments, social order would be impossible. The prominent historian Eric Hobsbawm once remarked that just as no railway enthusiast had ever written a decent history of railways, no nationalist had ever written a decent history of nationalism. The implication is clear. Good scholarship requires bi-focality, both intimacy and distance at the same time. This report is simply a first step. We hope it will encourage a constructive dialogue.

7.9 Despite the fascination and importance of inheritance in Namibia – and as will be shown, inheritance problems have a long history in the country – very little direct attention has been given to inheritance in the vast body of social research that has been generated. For example, much research has concentrated on households. Information on household types, economics and formation is plentiful but hardly examines household dissolution.

7.10 Determining customary law is not as simple as it sounds and the best indicator of this is that it is also known variously as indigenous law, traditional law, self-stated law, informal law, and vernacular law. This very diversity of terms indicates problems scholars have had in determining the nature of the beast. The problematic nature of that repertoire of norms, politics and behaviour which is labelled customary law has been analysed and critiqued in a variety of places.⁴ The term is usually used in conjunction with legal pluralism. Pluralism is not unique to Namibia or Africa. It is found in advanced industrial countries as well.

7.11 The Traditional Authorities Act 25 of 2000 defines ‘customary law’ as meaning:

“The customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the provisions of the Namibian Constitution or any other statutory law applicable in Namibia.”⁵

⁴ See for example Gordon 1991 (op cit s4 n4).

⁵ Section 1.

7.12 It then proceeds to define ‘traditional community’ as:

“An indigenous, homogenous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, recognises a common traditional authority and inhabits a common communal area; and includes the members of that community residing outside the common communal area.”⁶

7.13 This definition is reminiscent of ‘functionalist’ conceptions that were in vogue in the thirties. Contemporary understandings of ‘tradition’ and ‘community’ stress heterogeneity, adaptability and the permeability of boundaries while globalisation has made the notion of area or space contentious. Locally, Shamena⁷ has pointed out how empirically unworkable this legal definition is. A critique of this definition would require a paper of its own.

7.14 Nevertheless, given this definition, the task of the researcher would obviously be to locate these communities and record their versions of customary law. So it came to pass in Namibia and elsewhere that teams of young law students (or missionaries or administrators in the past) would be dispatched to go and record customary law. Typically they would be armed with questionnaires. There is nothing wrong with a questionnaire when used as an *aide memoire*, but when slavishly followed it not only shapes the way one perceives the information at hand but standardises it as well. The usual pattern after this information has been collected is that someone in the capital or metropole will then undertake a comparative study. Frequently these studies are simply a collection of opinions masquerading as actual practice. Even more problematically, often these opinions are free-floating so that their validity cannot be assessed. It is also an established maxim in the social sciences that there is a world of difference between what people say they will do and what they actually do. Charts and tables will be constructed to show how certain issues are dealt with in different field sites and this is held to be illustrative of cultural diversity or similarity. Such an approach was typical of turn-of-the-century anthropology and more than fifty years ago was derisively dismissed by Edmund Leach as ‘butterfly collecting’. A critique is surely not necessary; suffice to say that disaggregated data in this form is largely useless for understanding what actually happens.

7.15 Reflecting on his six years fieldwork in the former Rhodesia, the famed Dutch legal anthropologist, former magistrate and fluent Shona-speaker Hans Holleman, made the following observations on the practice of asking questions concerning indigenous legal practice:

⁶ Section 1.

⁷ NE Shamena, 1998, “The concept of ‘traditional community’” in FM D’Engelbronner-Kolff et al, eds, *Traditional Authority and Democracy in Southern Africa*, New Namibia Books, Windhoek.

“The answer would usually come without hesitation, sometimes framed in an attractive old legal maxim. Moreover the informants would unanimously agree to this. I would then happily write down this 'rule of law'. The trouble would start when I asked them to tell me about actual cases in which this point had occurred. I then found to my annoyance that, although there were cases in which a 'correct' decision had been given by a tribal court, there were sometimes even more cases in which the court had apparently ignored the law and given quite a different kind of judgement.”⁸

7.16 Analysis based on disaggregated statements often ignores the power dimension and the importance of context in the interpretation of rules and practices. It can easily degenerate into a Humpty-Dumpty situation:

“‘When *I* use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’ ‘The question is,’ said Alice, ‘whether you *can* make words mean different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all’.”⁹

7.17 How then should one record ‘customary law’? Three strategies seem appropriate: (1) Firstly, one should be aware of power. Power relations are deeply embedded in ‘customary law’. Attempts have been made to prevent abuse of power by creating a system of record keeping, but such efforts have not been very successful. Often the power relations are so deeply entrenched that people are not aware of them until they deal with people who are not from the same place. Such ‘outsiders’ (and there are varying degrees and forms of outsiderhood) invariably get the short end of the stick in disputes settled according to ‘customary law’. In Namibia, perhaps the largest single category of outsiders are women who marry, because when they marry they tend to move to an area occupied by their husband’s relatives. (2) Secondly, one needs to appreciate context. The most successful Soviet spy of the fifties, Kim Philby, always claimed that reading and photographing confidential documents was not particularly useful and that the most important part of his job was cruising the cocktail circuit, because it was here that he could see who was trying to sabotage or promote whom. It was only with this knowledge that he could assess the importance of his documents. Context is crucial. It refers not only to spatial context but temporal as well. Statements or documents do not drop ready-made from heaven, despite the earnest wishes and beliefs of aspiring lawyers. They are the products of social interaction and have a history. These have to be assessed in order to gauge the validity of the ‘customary law’ statements. (3) Thirdly, as a variation of context, one has to try to grasp the internal connections, the sense of hanging together. How do the various statements relate to each other? One has to try to understand the cultural logic of what is going on. This cultural logic is based on how one interprets the basic facts of life, or more accurately, reproduction. This

⁸ Hans Holleman, 1958, *African Interlude*, Nasionale Pers, Cape Town, 35.

⁹ Lewis Carroll, *Through the Looking Glass*.

is why kinship forms the obvious point of departure. These three strategies then – an appreciation of the power relationships, a sense of context and a feel for the sense of cohesiveness or how the law ‘hangs together’ – have guided this study.

7.18 The next three sections attempt to present a local perspective on issues around inheritance in three rural communities. This is followed by a section which examines how local administrators have tried to deal with the problems of inheritance, before moving on to a section which deals with national post-independence efforts at dealing with issues and problems of inheritance.

7.2 A patrilineal system of inheritance: Vaalgras

Historical background

7.19 Inheritance problems are not new in Namibia. In 1903 the veteran missionary Wandres complained that: “The most difficult part of the Law of the Nama and Bergdama was without doubt the law of inheritance.”¹⁰ Fifty years on the Chief Bantu Affairs Commissioner, addressing the 1958 Nama Tribal Leaders Conference in Berseba, complained about the large number of estates on all the reserves in the Police Zone which were simply left unsettled and whose assets were stripped. He proposed a system whereby the estate would be settled according to ‘tribal law’ under the auspices of the Welfare Officer/Reserve Superintendent. In future only the Welfare Officer would have the authority to sell estate assets like livestock, and then only in urgent cases.

7.20 The south of Namibia has historically been peopled by Nama-speakers. These were pastoralists who concentrated on small stock with good reason. The south is an arid dry area suitable for little else. According to the 2001 National Census, the Karas region has a growth rate of 1.3, half of that of the national average. 35% of all households are women headed, while males outnumber females 114:100. 69% of those aged 15 or older claim never to have been married. Unemployment hovers at 29%. Its neighbouring region Hardap, which also contains a large number of Khoekhoegowab speakers, claims a growth rate of only 0.3, has 34% women-headed households and an unemployment rate of 34%.

7.21 The Vaalgras community was chosen as a site for more in-depth study for a number of reasons, not least that the written historical record is more comprehensive in the south. Originally known as “Oorlams-Hereros” or “Detribalised Hereros”, the founding ancestors of the community were Hereros captured by Namas in the mid nineteenth century who then escaped to the Cape Colony where they worked

¹⁰ Karl Wandres, nd, “About the Nama and Bergdama Law”, roneo translation from German in the National Archives of Namibia.

on the copper mines in Namaqualand. Towards the end of the nineteenth century they returned to southern Namibia where they used their mining skills to good effect, developing a reputation for well digging. Eventually in 1908 they were settled in Fahlgras.

7.22 In the early twenties the South Africans claimed about a third of the existing area of Berseba, mostly that to the east of the railway line, to cover a large ‘tribal’ debt.¹¹ This became the Tses Native Reserve, and Vaalgras was incorporated into Tses.

7.23 Poly-ethnicity was perhaps the dominant characteristic of the Tses Reserve. In the early fifties the Reserve boasted three headmen, one representing the Nama, one the Herero and the third the “detrribalised” Hereros (or Vaalgras people). In addition there were sizable groups of Damara (known locally as Nami-Daman) and Coloureds resident in the Reserve.

While the government engaged in minimal ‘development work’ the Vaalgras people used their well digging skills to good advantage and developed the water-points in their area. The Vaalgras people rapidly established a reputation for being hard-working. They were known for having strong social kinship cohesion and for typically resisting the authorities. Nowadays this cohesion is being challenged by a small but significant rift between the two leading lineages, that of the Stefanuses and the Appoluses.¹²

7.24 It is this cohesion which makes the community important for this comparative study, as well as the fact while the inhabitants were originally Herero with a complex inheritance system based on double descent (where both matrilineal and patrilineal principles play a role), they do not speak Herero anymore, but Nama and Afrikaans.

The present context

7.25 Only about 500 people still reside at Vaalgras, while most of the estimated 3 000 Vaalgras people live in urban areas like Keetmanshoop, Mariental and Windhoek where they have left their mark as businesspeople and teachers. Others have moved onto farms. Under pressure from the apartheid regime, many Herero inhabitants moved out of Tses and many of their farms were taken over by Vaalgras people. In addition, a few people, including the headman and some councillors, have purchased farms formerly owned by Whites. Nevertheless, Vaalgras is seen as the natal area and this is epitomised by the well-kept cemetery which features some prominent tombstones. Many Vaalgras expatriates maintain ties to Vaalgras most noticeably and economically by having livestock graze there. ‘Naweek Boere’ (weekend farmers)

¹¹ Kossler 2000:449.

¹² “Tribal divisions at Vaalgras deepen” in *The Namibian* 22 June 2005 (online version).

are a common phenomenon. Vaalgras stockowners will typically hire Nama or non-Vaalgras people to shepherd their stock.

7.26 The Vaalgras people are divided into several prominent names, of which the largest are the Appolises because there were five Appolis brothers. Other names which feature are the Stefanuses, the Hindas, the Katzaos and the Biwas. These are known as *!hao-!nati* (patrilineal sibs or lineages) and are exogamous (favouring marriage and cohabitation outside of the group). What is impressive in the larger community is the degree of kinship linkages between everyone. Marriage to complete outsiders appears quite rare, but is apparently increasing. Even the older guard are in favour of this new tendency after a well-known Vaalgras family gave birth to albino twins, which was attributed to cohabitation with people who are too closely related. In Vaalgras most homesteads (*Afrk: werf*) are headed by men known as *//gau-guib tana-khoigu*¹³ although female-headed homestead are becoming increasingly the norm, a situation usually associated with grinding poverty.¹⁴

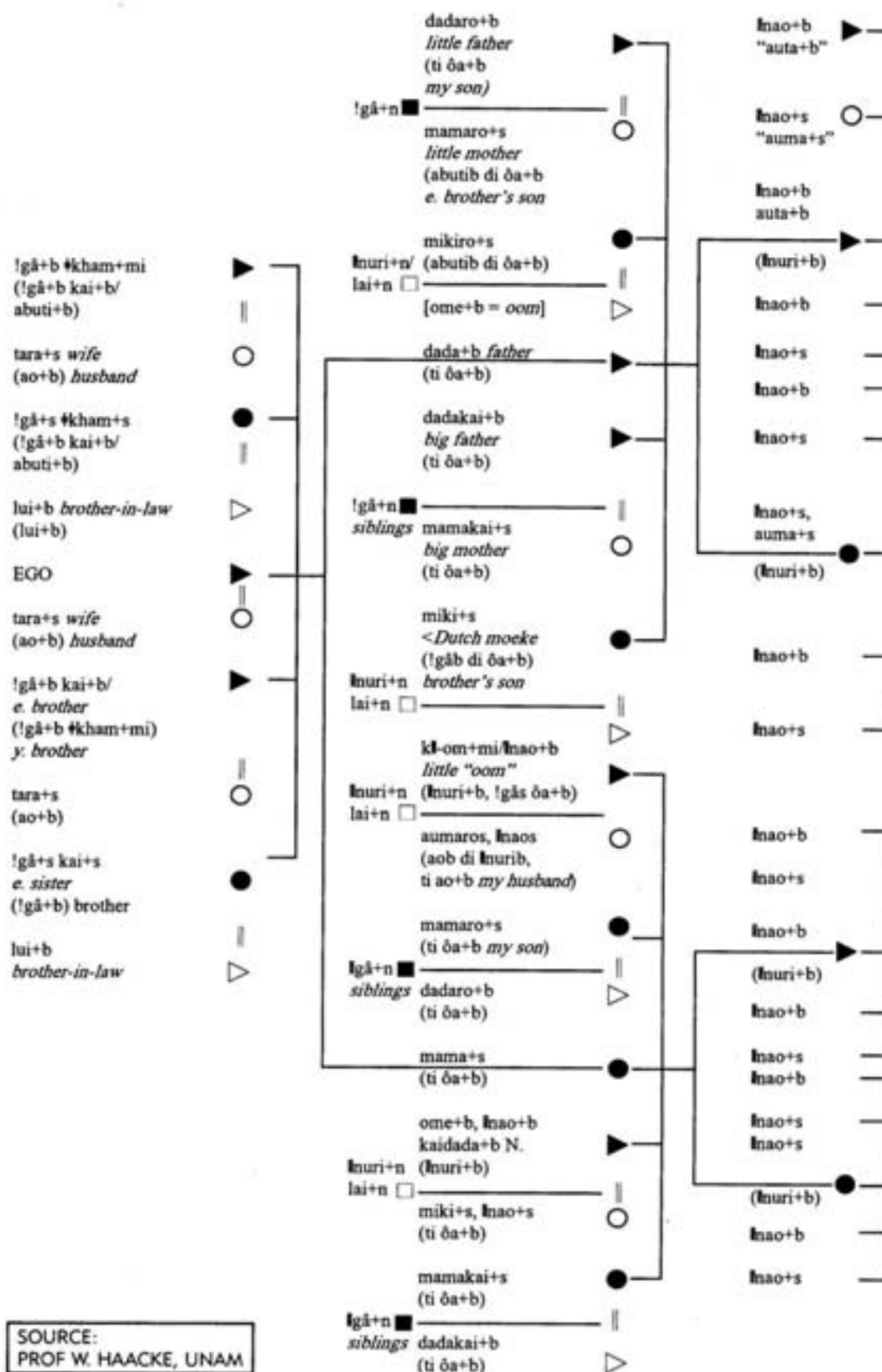
Kinship and gender in historical perspective

7.27 Kinship of course determines how one should behave, where one may live, who one may marry and who one might inherit from. Thus, for example, to call someone 'father' is not simply to label that person that but to imply certain expectations of how people so labelled should behave and how one should behave towards them. Behaviour between those labelled *butib* (brother) and *ousis* (older sister) or *sisiros* (younger sister) are typically respectful and rather distant. Indeed, one of the most powerful oaths a person can make is to invoke not only his mother but his sister's name. Parallel cousins, that is mother's sisters' children or father's brothers' children, are labelled with the same terms as siblings as the chart by Prof Haacke illustrates. However, cross cousins, that is mother's brothers' children or father's sisters' children, are known as *//nuris* (female) and can also be addressed as *taras* (wife), or as *//nurib* (male) and can also be addressed as *aob* (husband). Their relationship is typically informal and they enjoy reasonable sexual freedom. Given this terminology it follows that cross cousins are a source of preferential marriage partners while parallel cousins are not. Indeed this is one distinction between the Vaalgras people and their Nama neighbours. Marriage of cross cousins is still a strong preference for the former while not for the latter. Mother's sisters are referred to as 'mother' (*mamaos* [*little mother*]) while father's brothers are 'father' (*dadarob* [*little father*]). Mother's brothers or father's sisters are known as *//Naob* or *//Naos*. The nephew, *//nurib*, according to Budack can take any healthy animal from the uncle while the uncle can only claim a defective animal or object from the nephew. This has, in some cases, implications for inheritance.

¹³ KFR Budack, 1965, *'n Volkekundige Studie van die Tses Reservaat*, MA thesis, University of Pretoria.

¹⁴ A Iken, 1997, *Women-headed Households in Southern Namibia*. Gamsberg Macmillan, Windhoek.

Diagram 1: KHOEKHOEGOWAB KINSHIP NOMENCLATURE



7.28 The term wife (*taras*), according to Budack,¹⁵ traditionally indicates a comparatively independent status. Wives had authority over the household and the husband had to ask permission before he could remove anything from the hut or if he wanted to drink milk. The wife possessed personal property and could independently sell or slaughter livestock without the husband's permission. She often served as her husband's representative when he was absent.

7.29 When one compares contemporary nomenclature with that used in the past, using as benchmark the so-called *Fragebogen* study¹⁶ completed just over a hundred years ago, some interesting and important changes are apparent. Most notable has been the infiltration and acceptance of Cape Dutch terms like *mamas*, *dadab*, *butib*, *oubutib*, *butirom*, *ousis*,

7.30 The older terms which have been replaced were more gender neutral. The roots for both father and mother (*|gub*) and brother and sister (*|gus*) are basically the same; only the suffix is changed to indicate gender. The change in nomenclature to the more heavily gendered Cape Dutch terms occurred during the era of heavy missionary influence and reflects profound changes in gender relations. In fact, the missionary influence was so thorough and hegemonic that older traditional leaders, who are the sources for 'customary law', will consistently state as an article of faith that divorce did not occur in traditional society, or was extremely rare. Yet a reading of the historical record supported by a structural analysis suggests a situation at variance with these accounts.

7.31 Historical Khoe-Khoen societies must rank as some of the most gender egalitarian on record. In this they are in the company of other peoples who historically subsisted on raising small-stock and foraging (like the Navaho in Northern America). This conclusion is based on the older kinship terminology, as well as practices like cross-naming where boys take their mother's name and daughters their father's name. Such cross-naming militates against strong patriarchal tendencies, as does the fact that the bride gift (*Abbakaros*) goes not to the father of the bride, but to the mother.

7.32 This gender egalitarianism was first specifically spelt out by Jacobowski in 1896¹⁷ when he observed that Khoe Khoen distinguished themselves from the other groups in Africa in the treatment of women. Numerous authors, Jacobowski wrote, had observed that women were not mistreated. The declining status of women in recent years he attributed to the bad example set by the Dutch-speaking Boers. The source of women's power, he argued, rested in their control over the allocation of milk,

¹⁵ Budack (op cit n13), 103.

¹⁶ This was a huge comparative study of customary law in Namibia conducted in the waning years of German colonialism using questionnaires (*Fragebogen*) filled out by numerous missionaries, officials and traders throughout the territory. Copies of the answers are available at the National Library of Namibia.

¹⁷ This section is derived largely from Gordon 1992, "The Venal Hottentot Venus and the Great Claim to Being: Race and Gender in Perceiving the Other" in *African Studies* 51(2):185-202, which contains full bibliographic references.

which was the dietary staple. If a man drank milk without the woman's permission, her family could take the cow or sheep (even if he owned it) and slaughter and eat it. In addition, Jacobowski noted that women had the power to punish their brothers when they disobeyed the rules of etiquette. Powerful shaming devices in this regard were songs of ridicule. Certain social practices served to ensure this egalitarianism. Women could inherit from women and men and moreover could own livestock. Marriage required minimal bride-price and most definitely the bride's consent.¹⁸ A large portion of the bride price went not to the bride's father, but to her mother. Divorce was quite common and typically men would be blamed for it. Cases were even reported of women beating men with sjamboks. A social arrangement which probably contributed to this gender equality was the institution of cross-sexual teknonomy (a naming custom), whereby old men would be named as 'their daughter's father' and old women named as 'their son's mother'. Boys would be named after mothers and girls after fathers.

7.33 Jacobowski's observations were supported by numerous other near contemporary observers as in the *Cape Monthly Magazine* 1871:

"... the hut remains the property of the wife, and Namaqua law protects the rights of married women. She lodges whom she thinks proper, irrespective of the husband's will or convenience. Should anything occur to disturb their connubial harmony, and the husband proves refractory, the offended dame literally 'pulls the house about his ears'. She rolls up the matting, takes down the poles, defies anyone to touch them marches off with her milch goats to her friends Overtures of submission from the repentant husband quickly follow this summary proceeding."¹⁹

Even Theal, an arch apologist for colonialism, was forced to admit that women "were more nearly the equals of the men, and were permitted to exercise much greater freedom of speech in domestic disputes, than among most barbarians [sic!]" Theal observed that women were mistresses within the huts and controlled vital commodities like milk. He attributed the high value placed on women to some historical period when women were scarce.

7.34 While travellers like Thuneberg were proclaiming that the patriarchal form of government had existed among the Khoi since time immemorial, the actual observations of such visitors suggested considerable latitude on the part of women.

¹⁸ Other sources claim that no large dowry is exchanged and that divorces are relatively easy to obtain, the wife simply packing up and going to her family, the mother taking the female children with her while the male children stay with the father. The standard reference is Isaac Schapera, 1933, *The Khoisan Peoples of South Africa*, Routledge, Kegan and Paul, London. See also Peter Carstens, 1983, "The Inheritance of Private Property among the Nama of Southern Africa Reconsidered" in *Africa* 53(2):58-70 for a recent discussion.

¹⁹ Another important reference is Theophilus Hahn (1881) *Tsumi-//goam. The Supreme Being of the Khoi Khoi*, Trubner, London, who notes that Khoi women have absolute control over the house and that the husband has only 'external power'. If a chief dies his energetic wife could succeed him as chief according to Hahn.

Thus Thuneberg followed (plagiarised?) Kolbe in suggesting that under certain circumstances adulterers can be put to death, but also observes that in addition to having a 'real' husband, wives may take substitute husbands especially when their 'proper husbands' go travelling.²⁰ From the perspective of female autonomy, complaints like that of van Riebeeck in 1655 that his interpreter Herry refused to leave his or his fellows' Khoi wives behind when going on an expedition – "that their wives must be with them everywhere, so as to be kept from other men"²¹ – take on a fresh meaning.

7.35 Throughout southern Namibia, in the frontier zone of expanding capitalism with all its connotations of dispossession and exploitation, women played a crucial role as intermediaries, as interpreters – and as concubines. A close reading of missionary and travel accounts of this era suggests that when the writers (usually male) refer to "loose morals" they often have local women in mind who, either with or without the connivance of their families, had set up as concubines or informal wives of traders who had more goods than the local communities.²² The fact that a large number of such women came, not from the lowest rungs of society, but from the elite, indicates that such liaisons were made with the active involvement of kin, and if necessary, kings. Such liaisons were held to facilitate access to goods and services that these traders were believed to be able to supply. Namibians were not unique in engaging in such strategies, as this was a common situation globally. Various forms of generalised exchange based on reciprocity are aimed at reducing risk in hazardous and precarious environments. In a sense, such exchanges were part of a range of foraging strategies with the crucial difference that people give and thus build up a network of obligations. In this context, sex is also a commodity that can be, and was, used in such exchanges.

Already at the turn of the last century missionaries were concerned about the 'loosening of conjugal ties' and the rise of 'informal unions'. Illegitimacy at that stage carried no significant social stigma in local communities. This should not be surprising, as restrictive concepts of family stemmed largely from the Judeo-Christian tradition. Jack Goody²³ has convincingly, albeit controversially, shown how the Churches in Medieval Europe, by changing inheritance laws to exclude concubines and bastards, gained much in direct material ways from this tightening of the web of restrictions on marriage and family formation. The exclusion of the concubine and the bastard

²⁰ Carl Peter Thuneberg, 1986, "Travels at the Cape of Good Hope, 1772-1775", Van Riebeeck Society, Cape Town, 316.

²¹ Ibid.

²² Sir James Alexander, the first traveller to southern Namibia to leave an extensive published journal, likened himself to St Anthony in the Wilderness as he and his fellow travellers had to beat back offers of 'marriage' by lusty wenches for trinkets such as cotton handkerchiefs or even less. Alexander, Sir James E, 1838, *Expedition of Discovery into the Interior of Africa* (2 volumes), Henry Colburn, London, 265, 269, 291. Liaisons between men of his party and local females were so common and accepted that he was led to complain that the "promiscuous intercourse is viewed with the most perfect indifference, where it is not only practised but spoken of without any shame or compunction!" Alexander (op cit), II:23. Galton's account is similarly filled with "black coquettes" and offers of "temporary wives".

²³ Jack Goody, 1983, *The Development of the family and marriage in Europe*, Cambridge University Press, New York.

had a major impact on patterns of inheritance from which the Church derived considerable material benefit – and which indeed propelled the Church into becoming the largest single landholder in the world. By emphasising the importance of marriage rites as practised by the Church, the Church was in effect making an effort to control female bodies as a strategy to increase its power over both males and females. In short, there were sound material reasons for the Churches to define bastardy and its seductive accomplice, prostitution, as “immoral”. This legacy of the early Church was to be a keystone in missionary activities in Namibia. Over time this became the norm for the Judeo-Christian tradition. Given the general poverty of material wealth in Namibia, one could argue that the inheritance of property was not significant and thus female autonomy and bastardy was tolerated. Children born outside of marriage were simply incorporated into the mother's family. High ‘illegitimacy’ rates, an issue that concerned the early missionaries, continue in both in urban and rural areas in contemporary Namibia, reaching up to 90% in some Khoekhoegowab areas and attesting to the continued pervasiveness of this phenomenon. In such cases the progeny are reckoned as part of the female’s family, not that of the male.

While the Administration encouraged provision for accommodation for male African workers, no such provisions were available for females. With few cash-paying jobs available for females, the general economic situation fore-grounded females’ ability and near monopoly in running shebeens,²⁴ which led to an easy and obvious transition into prostitution in some cases.²⁵ At the same time, it is clear that the missionaries and the colonial authorities were aware that they were incapable of directly controlling the situation.²⁶

7.36 The complaints about ‘loose women’ voiced at numerous Nama Tribal Leaders conferences during the fifties and repeated even in the current climate thus have a long *history*. These can be seen as attempts to control women’s bodies, which is always a key mechanism for controlling aspects of inheritance. However, the high degree of female autonomy which remained uncontrolled would appear to have led to a more egalitarian inheritance system, since women frequently contributed as much as men to the family in terms of the necessities of life.

²⁴ One of the most important changes in recent years has been the takeover of shebeens by males and the ‘pushing out’ of females as shebeen owners.

²⁵ Prostitution has a propensity to expand dramatically during situations of rapid socio-cultural change and upheaval. Indeed, in Europe from 1750 to 1850 there was a similar phenomenon associated with the development of industrial capitalism that was attributed to the changes in the division of labour and increasing female sense of self-worth or autonomy. Even as late as the end of the 19th century in the United States of America, prostitution was the second most common female occupation after domestic service. Apartheid-colonialism exacerbated the situation locally, with its attempts to contain urbanisation and tight regulation.

²⁶ For more details on prostitution in Namibia see “Prostitution in Namibia in Colonial Times” in D Hubbard ed, *“Whose Body is It?” Commercial Sex Work and the Law in Namibia*, Legal Assistance Centre, Windhoek, 47-60.

Current inheritance rules and practices

7.37 When asked to describe inheritance (*/omi*) practices, informants, male and female, old and young, invariably took as their initial example the inheritance of the property of an elderly married man – even though females predominate in both Vaalgras and the Karas Region, and the largest death vector is increasingly not the elderly but the middle-aged (due largely to AIDS). When queried about this, informants pointed out that middle-aged or younger people did not possess large estates, meaning that there was little to negotiate or allocate. This report will similarly focus on the estates of elderly married men as key examples.

7.38 When people get married either in the Church (largely Lutheran, AME or Catholic) or civilly, they typically marry in community of property. But perceptions of what ‘in community of property’ entails vary greatly. In Gibeon, for example, some people believe incorrectly that if one is married out of community of property then the children would inherit everything, while the widow would inherit everything if the couple were married in community of property. Settling the estates of unmarried couples does not generate much conflict, but then typically people in such unions do not have large estates. Marriage in this region is very much correlated with wealth and affluence.

7.39 Funerals are important events. People will frequently take out funeral policies to ensure that they are given a decent burial and headstone. Some old-timers contrast the past when much socialising and visiting would take place during the year (“I missed you and thus came to visit”) with the contemporary situation where people now “farm at funerals” with ulterior motives. Nowadays there are also claims that some people commit fraud with funeral policies in that children will take out policies for the elderly and then when they die pocket most of the proceeds, using only a small amount for the funeral.

7.40 As with Nama and Herero, the preferred place of burial is the cemetery closest to the natal homestead. Typically funerals will take place over weekends to allow relatives and friends from distant places to attend. Food will be prepared for mourners and visitors, and some livestock will be slaughtered. “People don’t come if there is no food.” While most of this food is contributed by the immediate family of the deceased, friends, relatives and neighbours will also contribute. At Tses, because of its demographic characteristics (few relatives), community stalwarts will use collection books to collect contributions for the funeral.

7.41 The day after the funeral, typically on the Sunday, the family, or at least those who consider themselves as stakeholders, will gather at the deceased’s house to discuss how the estate should devolve. This is sometimes called “cleaning the house” or “Taking the Fire Out”, and occasionally a goat will be killed and its blood and dung mixed and sprinkled around the yard. This gives “*voorspoed*” (prosperity). Everyone present is marked with the blood. While some women claimed that these activities were directed by the widow, it appears that this task is invariably

undertaken by males. The meeting is typically chaired by the eldest son who is in charge of administering the estate. If he is considered incapable, the job devolves to the next son, and finally to a brother of the deceased. If there are no brothers, the allocation of the estate will be undertaken by the traditional leaders, a headman or the local councillor. Among the Berseba people, daughters will also be considered as potential estate executors. “*Dit hang net af wie het die verstand.*” (“It depends on who has the best knowledge/experience.”) The personal possessions of the deceased will be allocated at this stage, while livestock will typically be parcelled out during the unveiling of the tombstone which occurs about a year after the funeral.

7.42 In some cases, largely urban but also apparently in Gibeon, death can degenerate into a race to collect the death certificate, because the person who then presents this to the local magistrate can be appointed executor and then has the power to withdraw the deceased’s money from the bank. Lawyers interviewed claimed that frequently such people lie to the magistrates, who are rather naïve and too easily assign executorship. Lawyers also bemoaned the fact that there were very few wills, suggesting that much conflict and bitterness would have been avoided had wills been in place. Most estate theft is said to involve livestock, and people will frequently claim that the deceased had given them the animals just prior to death.

7.43 Inheritance is patrilineal, meaning that property, status and rights are transmitted in the ‘father’s line’. Informants talk of inheritance being ‘in the line’ and distinguish between ‘inside’ and ‘outside’ children. All children, legitimate, illegitimate, foster and adopted (formally and informally) are entitled to be considered for a slice of the estate pie. The strength of claims will vary. Children, invariably girls, who have ‘married out’ (*uitgetrou*) for example, will have weak claims on the grounds that they will benefit elsewhere. Most informants felt that illegitimate children of the husband were fully entitled to inherit while illegitimate children born to the mother while married could also inherit from the husband if he had forgiven her. Inheritance is not done according to a catalogue of fixed rules, but is instead flexible. The key structural variable in deciding how to allocate the estate is the stage of development of the household.²⁷ If the household is still in early stages of establishment and the widow is young with no children it might be decided to let her leave (*‘Ons gee jou terug aan jou familie’*), while if the household is more advanced the widow would then feel ‘thrown away’ if she were to leave and would prefer to ‘stay with the children’. In the past, Carstens reports that a young widow or widower with small children might succeed in ‘holding the estate together’ but generally it is divided up.²⁸

7.44 But while patrilineal principles dominate, sometimes matrilineal principles will also come into play, especially in cases involving illegitimacy. On occasion a man’s matrilineal kin will come to commiserate with the bereaved in the hope that they too might gain a remembrance. More commonly a man’s brother will come and try to stake a claim of the widow’s share.

²⁷ Carstens (op cit n18).

²⁸ Ibid.

7.45 Debts are also inherited and must be settled. These come out of the estate, and should that be insufficient then the eldest brother or the oldest son will be held responsible.

7.46 In the Vaalgras and Nama perspective, inheritance is ideally a process that commences prior to death. '*Erf kry 'n aanloop voor die dood van ouers.*' ('Inheritance gets a start before the death of the parents.') An elderly person will ideally make arrangements to prevent conflict about the estate. This will be done by way of verbal wills ("*Jy moet die kinders roep en die erf deel op wit en swart.*"; "You must call the children and divide up the estate clearly."). Items of property are allocated to individuals in the presence of one or more witnesses. While still alive, the deceased would have 'marked' and allocated animals and other items to specific children and even friends. Livestock will sometimes be allocated to children as a stake from which to start their own herd. This does not mean that the legatees to whom such animals were allocated can dispose freely of them. Should they wish to do so, they must request the permission of the owner. In short, they possess but do not own the item. Disposal requires the permission of the living owner. Apparently in the past some people believed that inherited livestock could not be sold but had to be kept until they died (informants believed that this was in accordance with Herero custom). Verbal wills were also apparently used in the past.

Nama inheritance at the turn of the last century

Missionary Wandres reports that at the turn of the last century a testament, *I gus*, could be made to bequeath objects to distant relatives, friends and comrades. However, the headman or chief would always see to it that the nearest relatives were not overlooked. Such testaments, which were rare, had to be made in the presence of witnesses. Wandres, who had extensive experience with the Bondelswarts of Warmbad, described the following inheritance and succession schema:

If the Husband dies then the wife and children get equal shares. While the widow is alive the estate cannot be distributed, except when the wife wants to return to her family at which stage the estate is divided by the chief. The Wife then receives her share and that of the youngest child who always goes with her.

If the Wife dies, then the husband and children inherit as a family. In the event that both parents die, then the chief distributes the estate according to the following formula:

- (a) In the first instance children get equal shares. The eldest son is made administrator of estate but since he is one of the heirs the Deceased's Brother (*gei-dab*) is appointed administrator.

- (b) After the deceased's children, the children of the eldest sister of the father inherit and then the children of the father's brother, father's sister and mother's sister.

Apparently children would receive 1/5 and other heirs 1/10 or 1/20 while the Chief would also take a fee. All the movables except the livestock are taken over by the children without any formalities and a feast is held to celebrate the division of the estate in which the whole community celebrates.²⁹

7.47 Ultimogeniture (whereby the youngest child inherits) is now practised by Nama and Vaalgras people, but this depends largely on the stage of the household in its development cycle. It depends on the relative ages, maturity, marital status, etc of all the stakeholders and especially on whether the older children have received their *intervivos* (inheritance allocated and given while the person is still alive). Ultimogeniture is justified on the grounds that the other children will already have been given a dowry when they got married, while the youngest frequently is expected to care for the elderly parents. The person who looked after the deceased is generally believed to have the strongest case. In Vaalgras this person is responsible for 'keeping the fire alive' in order to bring luck and prosperity to the family, and if there is no male child this task devolves to a daughter's son. Some informants suggested that while Nama preferred their brothers and sisters to inherit after their progeny, the Vaalgras people favoured their nephews and nieces. The child who inherits the house is subject to some restrictions. For example, he or she cannot bar the other children from using the house especially on special occasions like birthdays or New Year's celebrations or weddings. The same applies to other large items like motor vehicles; even if given to individual heirs, other heirs have the right to use them if they are not in use.

7.48 Generally the wife and children are the primary heirs and there is little gender distinction concerning what is inherited. Obviously items of male attire go to males and female attire to females, along with sewing machines. Male clothing usually goes to the deceased's brother, while the wife's clothing would go to a sister of the wife or husband, or to a daughter. One Vaalgras variation concerns the nephew. The deceased is buried in his Sunday best minus his shoes, which go to the nephew. The nephew inherits the riding saddle and the riding horse in addition to the shoes. Where possible, all possible heirs who are present are given a small token, or remembrance. Allocation depends on the relative needs of the heirs and the type of property available. Claims of moral entitlement are also entertained (for example, '*Sy het swaargekry om hom groot te maak*'; 'She struggled to raise him').

Most households in Namaland have one or two adopted or foster children, and with the AIDS pandemic this is clearly a feature showing rapid increase. Known in Afrikaans as *grootmaak kinders*, these children are not usually legally adopted and are typically a

²⁹ Wandres (op cit n10).

daughter's children who are being cared for by the grandmother. People distinguish between *Ai-/go ^an* (voorkinders) and *gai-gai-/go ^an* (grootmaak kinders). The former are children born to the mother or procreated by the father before they got married. In the past 'illegitimate' children could inherit, sometimes at the discretion of the 'legitimate' heirs and then usually obtaining a lesser share. But this is an area of dispute. Some believe that one's obligation towards *grootmaak kinders* (as opposed to first generation 'illegitimate' children) is limited to providing them with schooling until they turn twenty-one. Sometimes a *grootmaak kind* will work as the family shepherd and be given an occasional goat as a reward. As one old lady put it: "*Grootmaak kinders werk vir jou, en is daar vir jou terwyl jou eie kinders nie daar is nie. Hulle moet erf.*" ("Grootmaak children work for you and are there for you while your own children are not there. They must inherit."). Grootmaak kinders are not always the 'illegitimate' grandchildren of their adoptive parent. If not, and if a particular Grootmaak kind is favoured, he or she may be expected to marry a son or daughter of his or her adoptive parents.

7.49 Where the deceased is young or middle-aged, does not have a large estate and has only one or two small children, the children would stay with a grandmother or sister of the deceased – possibly with the approval of the Department of Social Welfare if necessary. Which sibling will care for the deceased's progeny will depend on a variety of socio-economic considerations. A brother of the deceased will administer the estate and see to it that the children are educated at least until they are 'capable' (defined as not drinking, saving money and thus trustworthy not to fritter away the inheritance).

The case of the widow without children

A widow at Blou Wes recounted how her first husband had died after one year of marriage and the family of the husband wanted the property back because she did not have a child with the husband. She went to her pastor, the minister of the local AME Church, who raised the matter with the (white) magistrate. Eventually, through negotiation, it was resolved that the property would be shared between wife and mother-in-law. The mother-in-law justified her claim on the grounds that he was her only son. The estate consisted largely of clothes and furniture. The house was made of corrugated iron, and was dismantled and re-erected by the widow in Blou Wes. (Recorded at Blou-Wes, 25/2/05.)

7.50 Given the polyglot nature of southern Namibia it is not surprising that this is an area where inter-ethnic marriages feature on the social landscape – unlike the matrilineal north where colonial restrictions impeded the movement of women from the south. Informants were unanimous that no problems would arise even if a southern female from a patrilineal system married into a matrilineal system. Prior to marriage, the families would discuss the situation carefully with the couple so that they are aware of the consequences, and then the wife is 'given over to the new

family'. Men do not 'marry out', only women. Several cases of Nama women marrying Ovambo men were cited by informants to illustrate that they were successful unions with no inheritance problems.

Concerning succession to political office, most of our informants insisted that females could not be elected headmen because if they got married they would move away. Yet it is perhaps significant that two Nama Captains, that of the Bondelswarts and more recently the Afrikaners, are female.

7.51 It is noteworthy that, of all the kinship systems investigated, contrary to conventional wisdom, the Khoekhoegowab have both historically and contemporaneously the most gender-neutral inheritance systems.

7.3 Inheritance under a double descent system: Herero

Historical background

7.52 A century ago, the venerable Vedder, missionary documentalist extraordinaire, noted that "the Inheritance law of the Herero is unusually complicated and thus difficult to set out. The main role played in it is by the Eanda and Oruzo".³⁰ Herero kinship and inheritance practices have confounded many scholars and lawyers, as well as some Herero themselves. A frequent complaint of many Native Commissioners working in Herero areas was that they had to spend so much time trying to sort out inheritance disputes that they had no time to undertake other duties. Indeed, some officials believed that Herero sometimes made inheritance even more complex than necessary in order to reduce colonial involvement in their affairs! At the same time one could argue that the same complex system of kinship that so shaped inheritance also contributed to the remarkable cultural continuity and cohesiveness that enabled the Herero to withstand the savage onslaught of the German colonial massacres and attempts to eradicate them.

7.53 Despite this renowned cultural cohesiveness, there were problems confronting Herero culture. On 10 September 1947 Chief Hosea Kutako led a delegation to see the Additional Native Commissioner in Windhoek to discuss issues that had been raised at a meeting in Okahandja. A major concern for them was "loose living". This was explained as the result of the "Europeans having taken away Herero customs and substituted European law". Before marriages were solemnised the families of both parties had to approve, but this social mechanism was absent in cases of informal cohabitation:

³⁰ Heinrich Vedder, nd, "Beantwortung des Fragebogens über die Rechte der Eingeborenen in den deutschen Kolonien", copy in National Library of Namibia.

It was their earnest desire that the Government should stop men and women living together in an unmarried state. This was a bad state of affairs for the parties never married and another man who wanted to marry a woman in that state was prevented from doing so. Another bad aspect of this practice was that fatherless children often became a burden on their mothers, whose earnings were not sufficient to support them. Any man who made an unmarried woman pregnant should be required to marry her or pay two cows. ... In the event of his paying instead of marrying, if he were not irresponsible he should be allowed to take the child and look after it until it could support itself when it should be handed back to the mother. ... If the woman refused to marry the man she should not be allowed to claim any damage and should be required to hand over the child to the man.

7.54 In addition there was the evil of alcoholic liquor. The meeting noted that when Herero had a diet of sour milk and meat, women had begotten children, but alcohol, and especially kari, had led to deterioration. "Women were not producing because they were dinking Kari which was bad for their systems."³¹

Clearly familial issues of reproduction were of major concern, especially how reproduction should be controlled – as well as its unstated implications for inheritance, and how inheritance could be used to control reproductive behaviour.

Herero-speakers occupy the central area of Namibia where they have established a well-deserved reputation as cattle farmers. Even today many will say that cattle form one of their central, if not obsessive, interests in the rural areas. Research was conducted in the communal areas of Omaheke Region in the former Reserves of Aminuis and Epukiro and at Okakarara in the former Reserve of Waterberg-East in the Otjozondjupa Region. In both regions Herero is the dominant language, and women-headed household number about 33%. Farming provides 28% and 15% of main income respectively in these two regions. 73% and 68%, respectively, of all people over 15 have never married or are married consensually, and unemployment is given as 24% and 32% respectively, according to the 2001 Census.³²

Herero kinship is one of the most complex systems known. Every Herero is linked to two separate networks of kin. In this double descent system, certain rights and artefacts, mostly political and religious, are inherited patrilineally, while economic rights and especially cattle are inherited matrilineally. It needs to be stressed of course that there is much internal variation over time and space and that to talk of "the Herero" system is perhaps a simplification. It appears that Herero in Botswana, for example, are more patrilineally-oriented than those in western Namibia.

³¹ National Archives of Namibia File SWAA A50/51).

³² Republic of Namibia, 2003, *2001 Population and Housing Census*, National Planning Commission, Windhoek.

7.55 Patrilineally Herero are connected to one of twenty exogamous *oruzo* groups (although various sources number them between 15 and 30).³³ According to Malan, each *oruzo* has its own set of taboos, usually pertaining to food, and the names of these *oruzo* refer to these taboos. *Oruzo* are again divided into a number of lineages called *ozonganda* (singular: *onganda*),³⁴ which have an average depth of five generations.³⁵ These patrilineages, *ozonganda*, are residentially based and the oldest male (sociologically speaking) acts as ritual link between the living and the dead, being traditionally the guardian of the Holy or Ancestral Fire (*okuruwo*) – although there are frequent exceptions. In Kaokoland residential clustering is not so common, but some chiefly lineages are residentially based in the sense that households which are connected to that ‘line’ cluster in a region and centre on a common ancestral grove where many old graves are located and where ancestral rituals are conducted.³⁶ The *onganda* is a spatially flexible concept expanding to include any cattle posts the *paterfamilias* might set up. He also serves as headman (although sometimes these roles can be split). The *onganda* owner or headman is not appointed by traditional authorities, but rather derives his authority from the fact that he is the social, economic and religious leader of his homestead and is recognised as such. Typically the sons will settle at the place of their father when they marry and keep a presence there, even while working in a distant urban area. Nowadays even affluent Herero who own commercial farms still keep such a presence. In terms of inheritance, one inherits religious and political functions through this line, but perhaps most importantly the immovable property which provides one’s identity of place.

7.56 Malan,³⁷ who wrote his dissertation on Himba double descent in the seventies and then went on to a distinguished career as a Government ethnologist in Namibia, argues that Herero were originally organised according to matrilineal principles and that it was the development of pastoralism that led to patrilocal residence, which in turn created conditions that made possible other patrilineal innovations (with obvious major gender implications).

7.57 Matrilineality determines control and inheritance of Herero wealth, and it is this economic role which propels the matriclan, the *eanda* (pl. *omaanda*). There are six matriclans, namely *Omukwendata*, *Omukweyuva*, *Omukwenambura*, *Omukwatjiti*, *Omukwatjivi* and *Omukwendjandje*, while a seventh is found only in

³³ HP Steyn, 1991, “Huwelikspatrone by die Herero van Omatjette, Namibia” in *South African Journal of Ethnology* 14(3):79-87, 80.

³⁴ Dr Michael Bollig reports that in Kaokoland linages of an *oruzo* are not called *ozonganda* which in Kaoko refers to something approximating the household. Lineages there are associated with the family name. (personal comment)

³⁵ Johan S Malan, 1995, *Peoples of Namibia*, Rhino, Wingate Park, 75. People are typically able to recall names of three living and two deceased generations in their *onganda*.

³⁶ Bollig, personal comment.

³⁷ Malan 1995 (op cit n35).

Kaokoland. These clans are non-totemic and non-localised.³⁸ Each *eanda* is segmented into a number of matrilineages which form the largest exogamous unit. Membership in a matrilineage is obviously assigned on the basis of who one's mother is, and clan members address one another, depending on the generation, as brother, sister, father, mother, grandfather or grandmother. Given such terminology, there is an obvious tendency for such matriclans to be exogamous (favouring marriage outside the group). However such exogamy exists only within smaller lineage units where kinship can be traced to common descent, unlike the larger groupings where blood relations are largely fictional or untraceable. Steyn³⁹ claims that this minimal matriline, consisting of mother-child, is called *ozondjuwo*, which also refers to the hut – although *ondjuwo* can also be used in an extended way in addressing the offspring of an ancestress.⁴⁰ Lineages are generally traceable to five generations of which three are usually living. Matrilineages become important at rites of passage like weddings and funerals.

7.58 In the ideal situation, especially in the communal areas, when a youth is considered marriageable his father will arrange a wife for him and provide him with a small plot, usually near the father's house. Given that patrilocality is the norm, matrilineages are dispersed, with the result that people must move around to attend funerals and marriages. Since inheritance of movable property is matrilineal, there is an added economic inducement to attend such ceremonials, and this creates a non-local network. According to Malan:

“Young men often exploit the economic association that exists between members of the same *eanda*. Whenever they are in need of cattle or money, they approach their maternal uncles, thereby drawing on resources to which they have a hereditary right. A person very seldom makes such requests to his own father, because the father is a member of a different *eanda* and is not allowed to estrange cattle from his own matrilineage except to satisfy the immediate needs of his family. Bearing in mind that a man's wife and children are not members of his *eanda*, it is not difficult to visualise his dilemma in being restricted to make substantial gifts to them.”⁴¹

7.59 Apparently though, according to our Okakarara informants, this right to go to the maternal uncle for assistance applies only if one is unmarried. Once one is married, one should not go to one's uncle for assistance and help.

³⁸ For a discussion of the consequences of clans being non-totemic and non-localised the reader is referred to Malan 1995 (op cit n35).

³⁹ Steyn (op cit n33), 80.

⁴⁰ Bollig, personal comment.

⁴¹ Malan (op cit n35), 73.

In Otjiherero terminology, five, or more accurately six, generations are distinguished.⁴² Moreover Herero differentiate between junior and senior siblings and kinfolk in certain categories, and here relative age can also play a role. Even within one relationship terms can vary. Thus for example a wife never addresses her husband by his name but rather as *(o)murumendu*, and if she wants to be courteous as *hia* ... (followed by the name of their oldest son). A husband on the other hand is allowed to address his wife by her name or as *(o)mukaendu*. A husband can also address his wife more courteously as *ina* (followed by the name of their oldest son).⁴³

7.60 It is useful to elaborate briefly on some of the key kinship terms on a generational basis. For one's parents' generation, father is *tate* and mother is *mama*, while of special import are *ohonini* (father's older brother), *injangu* (father's younger brother), *hongaze* (father's sister)⁴⁴ and most importantly the mother's brother, *ongundue*. With the exception of the mother's brother, all these relatives refer to the offspring of *tate* and *mama* as "my child" (*omuatje uandje*). The maternal uncle (*ongundue*) however refers to his nephew as *omusia*, while the first born child of his sister is *omusia uopeue* (meaning foundation or stone). *Omusia*, the nephew, is the *eanda* heir of his *ongundue* (maternal uncle). Even while living he can ask his uncle for any of his possessions, and if he is refused can simply take them. The mother's brother refers to him as *omurie uandje* (he who eats me, ie my heir), and he works for his uncle as an *omukarere* (serf).⁴⁵ Fights between nephews and mother's brothers are common, and there are tales of *omusia* murdering their *ongundue* to get possession of property quicker. As one councillor put it: "nephews and uncles can kill each other". If a son is naughty, he is sent to the uncle to be disciplined. If the uncle cannot discipline him, then he has the right to kill the nephew. Such a case, according to Budack, is seen as an internal affair for the relevant *eanda*. In Kaokoland one variation noted was that the nephew referred to his uncle as a rhino because if he shot him, he would get rich from the horn!

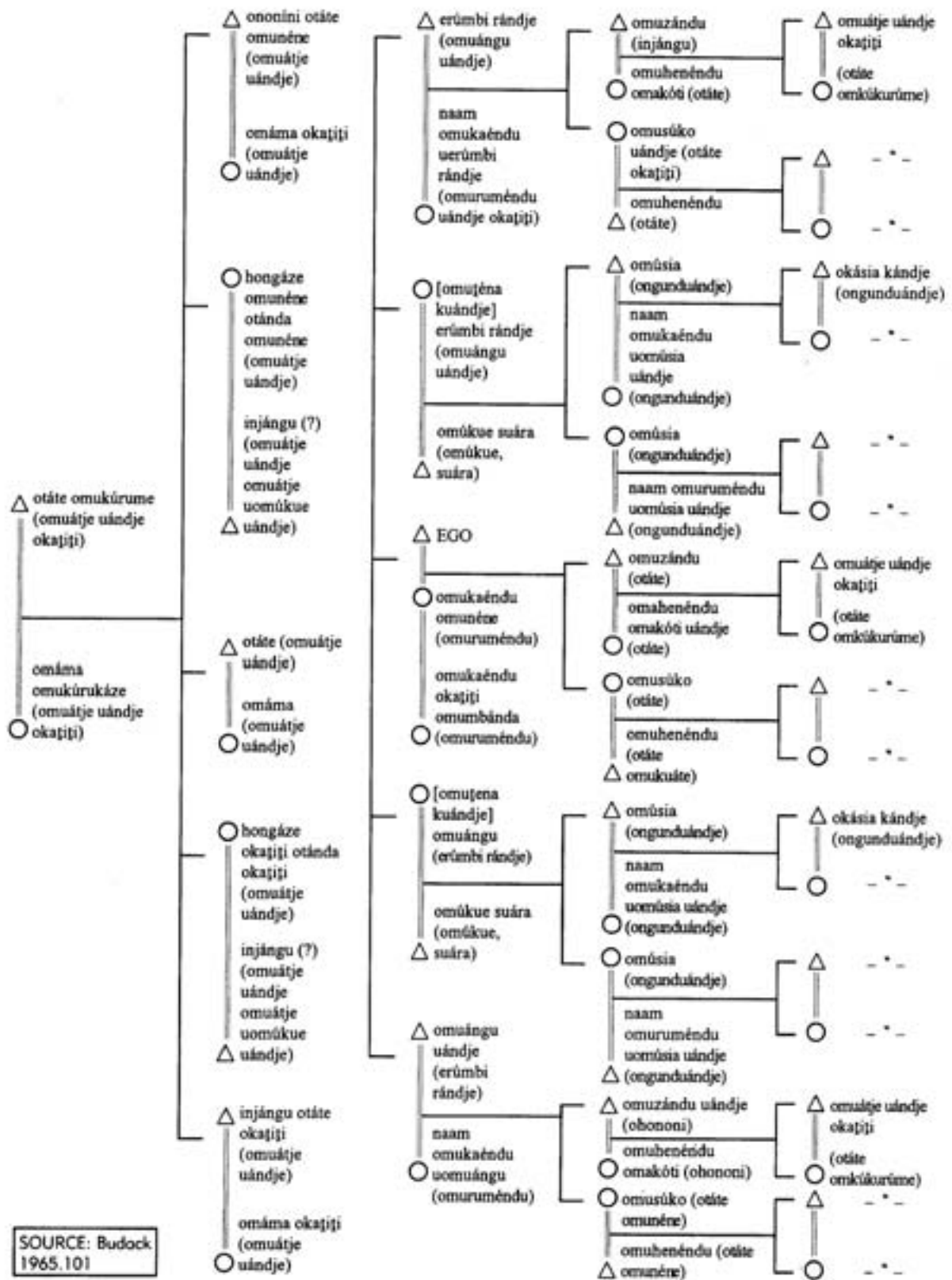
⁴² The sixth is one's sisters' great-grandchildren who are referred to by a distinctive term, *ovasia ovasiona*.

⁴³ Bollig, personal comment. Bollig reports that he rarely heard husbands addressing their wives with their names.

⁴⁴ Interestingly there is now a neologism for the father's sister as well: *otanda* (derived from the Afrikaans *tante*).

⁴⁵ Budack (op cit n13), 107. Bollig (personal comment) however reports that in Kaokoland this is a rather derogatory term and relatives would definitely not use it, probably preferring *omurise uandje* (my herder).

Diagram 2: HERERO KINSHIP NOMENCLATURE



7.61 Within the same generation, the term *ovatena* is used for brothers and sisters without indicating seniority or gender. Behaviour between brothers and sisters is very respectful if somewhat distanced. One of the strongest oaths a Herero can make is to invoke the name of his sister. Weaker versions of this behaviour exist for classificatory siblings (that is other relatives who are addressed by the same term as siblings), in this case parallel cousins (ie one's father's brothers' progeny or one's mother's sisters' progeny). In contrast, one's cross cousins, that is one's mother's brothers' progeny, are called *ovaramue*; the relationship with them is much more informal and they often call each other by nicknames. (Father's sisters do not count as *ovaramue* as they are not matrilineal relatives.⁴⁶) These cross cousins are playmates, there is reasonable sexual freedom between them, and they are strongly preferred as marriage partners for each other. Even today this relationship is subject to debate: what many male cross cousins see as 'playing', their fellow female cousins see as domestic rape. Indeed one of the contemporary pressures against avunculocal residence (living at the uncle's place) comes from wives. As one woman put it: "you are mad to even suggest such a thing – he will have access to all those 'wives'" (ie classificatory relatives with whom he can 'play').

This kinship system is known in academic literature as the Iroquoian or Dakotan or Dravidian system. These matrilineal systems distinguish between parallel cousins and cross cousins. The former are related through a parent who is the same sex as one's own parent (ie your mother's sister's child) while the cross cousin's parent is the opposite sex from one's own parent (ie your mother's brother's child). Parallel cousins are, in contrast, related through a parent who is the opposite sex as one's own parent. Parallel cousins are called by the same terms used for one's siblings (brother and sister), while cross cousins are called by other terms. The same pattern is replicated in the parental generation. The technical term for this phenomenon is bifurcate merging. This system is of particular interest to anthropologists because it appears to foster marriage exchange between 'households of orientation'.⁴⁷

7.62 This kinship system then looks like a charter for marrying one's cross cousins. Since parallel cousins are called by the same term one uses for one's siblings, marriage with them will obviously be taboo, while the term for cross cousin is frequently the same term one uses for spouse. This is so much the case that the term for mother's brother's wife is the same as the term for father's sister (*omama*), while the term for father's brother's wife is the same term for mother's sister (*okatiti* [*omuatje uandje*]). This should become clearer when one considers the geometric representation in the diagram above.

⁴⁶ It is sometimes difficult for persons raised in a cognatic kinship system, in which relatives are reckoned in both the father's and mother's side, to comprehend unilineal descent and kinship systems where relatives are only reckoned through either the mother's line (matrilineal) or father's line (patrilineal). But this is not to say that people in unilineal systems are unaware of relatives on both sides.

⁴⁷ That is the household where most of one's socialisation or growing up occurs, as opposed to the household of procreation where one is conceived and born. Given the high rate of both formal and informal fostering in Namibia, this is obviously a useful distinction to make.

7.63 Thus, one striking characteristic of Herero kinship is the preference for cross cousin marriage, which has important implications for inheritance. It is widely believed that cross cousin marriages are common and popular because they enable the estate to remain within the matrilineage. Such marriages appear to be strongly preferred among the more affluent. However, empirical evidence to back up this assertion is hard to come by. Steyn⁴⁸ in his dissertation on the Kaokoland Himba, claimed that over 90% of all marriages were of this type, but apparently he did not distinguish between real and classificatory cross cousins.⁴⁹ In 1991 Steyn undertook a limited quantitative study in the former Omatjette Reserve in the Erongo Region, and his findings are highly suggestive. On the basis of a small sample of 30 marriages, he found that 4 marriages (13.3%) were between members of the same *oruzo* and 8 marriages (26.6%) between members of the same *eanda*. More importantly some 45% of all the marriages were between cross cousin, divided more or less equally between father's sister's daughter and mother's brother's daughter.⁵⁰ Our own investigations suggest that cross cousin marriage is still frequent.

7.64 Equally important is the late age of marriage. In Steyn's Omatjette sample, men got married at the average age of 38.3 and women at 28.4.⁵¹ Other observers have noted a similar phenomenon in other areas. This trend can probably be attributed to a variety of factors, including rising costs of marriage and the emergence of a Herero middle-class.⁵² Late marriage has important implications. Already during the German colonial era, observers noted that 'illegitimate' children (*omakombezumo*) brought no stigma and could if need be, but apparently rarely were, incorporated into the father's *oruzo* and *eanda* by payment of a compensatory cow called *okatjivereko*.⁵³ 'Illegitimacy' was common not only in urban areas⁵⁴, but in rural areas as well. In some Herero Reserves in the fifties, incidence rose to over 80% of all births.⁵⁵ Once a couple are married, divorce (*okuhapika* or *okuhanika*) is quite rare. Again cross cousin marriage features in this characteristic: "Her father is your uncle. She will simply build a house near you." "Where would you go? You want to hang yourself. People will say if you cannot even live with your cross cousins, how can you live with others and they would refuse you. How could you be trusted?" Another reason is of course that extra-marital liaisons are condoned, which increases the pool of 'illegitimate' offspring while at the same time limiting the number of 'legitimate' offspring. This has an important consequence in that 'illegitimate' progeny complain that at the best they

⁴⁸ HP Steyn, 1978, *Pastoralisme by die Himba van Suidwes-Afrika*, D.Phil. dissertation University of Stellenbosch.

⁴⁹ Michael Bollig, personal comment. The difference between real (or biological) and classificatory kin (biological kin but of varying degrees) should be obvious from para 7.61.

⁵⁰ Steyn 1991 (op cit n33), 81.

⁵¹ Steyn 1991 (op cit n33), 84.

⁵² Bollig, personal comment.

⁵³ Steyn 1991 (op cit n33), 84-5.

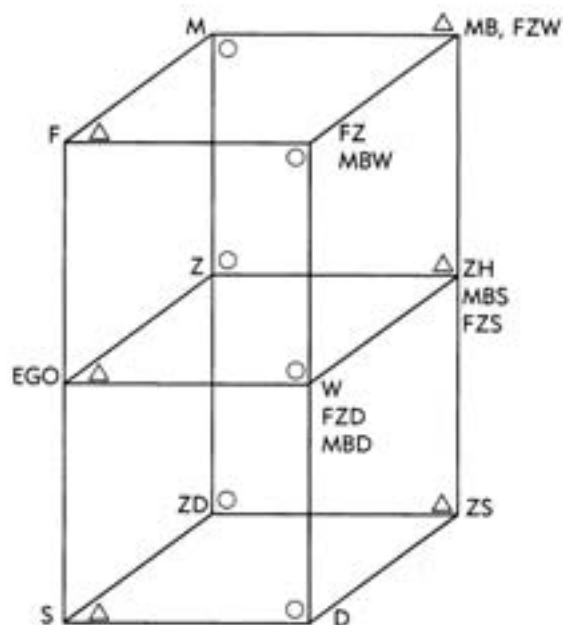
⁵⁴ Wade Pendleton, 1993, *Katutura: A Place where we stay*, Gamsberg Macmillan, Windhoek.

⁵⁵ As indicated by various district ethnological surveys conducted by the government ethnologists.

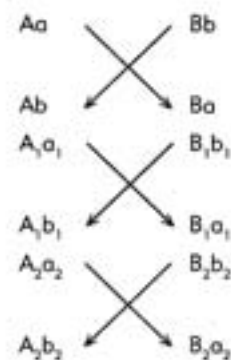
are second-class heirs, who usually do not inherit anything despite what traditional and church leaders might claim. In effect then, late marriage serves to limit the number of ‘legitimate’ heirs and thus channel the wealth into the hands of a few.

7.65 Wealth also remains within the *eanda* for logical reasons. Assuming a cross cousin marriage, if a man’s wife is either his father’s sister’s daughter or his mother’s brother’s daughter, then her father is the person the husband stands to inherit from. As Moore⁵⁶ points out, the nomenclature of this system implies a logical structure of two “lines” (exogamous lineages) exchanging women over several generations which can be expressed geometrically as a cube that can be extended indefinitely. Using a diagram, one can see how this system produces a system of interlocking relationships that contribute to exceptional cultural cohesiveness.

Diagram 3: HERERO CROSS COUSIN MARRIAGE Mathematically expressed



Geometric representation of Herero cross-cousin marriage



Algebraic permutation of Herero cross-cousin marriage

⁵⁶ Alexander Moore, 1978, *Cultural Anthropology*, New York, Harper & Row.

7.66 In algebra, as Moore points out, the system also forms a permutation matrix where A and B represent two males exchanging sisters, *a* and *b*, and have two offspring, a male and a female, in each generation who continue to exchange. This matrix can go on perpetually. After the first generation, the marriage partners are each other's cross cousins, and at precisely this point marriage rules and kinship terminologies coincide. Herero marriage practices articulate linguistic terminology in the conflating of the terms for *cross cousin* and *spouse*; these relationships constitute a linguistic syntax, not only for speech but for action as well. Obviously such perfect coincidences do not occur all the time. Reality does not conform to logical and moral structures. Perfect spouses are not always available at the requisite moment. But all that is needed is enough conformity over time to give a sense of actuality to the nomenclature.

THE CASE OF THE WILFUL WIDOW

Ludwig Katjiroa lived with Adeline, and while there is uncertainty as to whether they were married according to civil law, he had five children with her. When Ludwig died in 1939, his elder brother Simon, whose hut was next Ludwig's, entered the deceased's hut to search for money to pay off a debt of the deceased. He then discovered that Ludwig had written a will. The will was read by the local headman, who informed the local Reserve Superintendent. In his will Ludwig stipulated that his widow and children should continue to reside in and use his house and assets which included 53 mixed large stock, a horse and cash. But he also stipulated that the assets should all be controlled by his elder brother Simon. The widow agreed, but a few years later in 1943 she suddenly decided to leave and took the children and "such of the livestock as were specially donated to the children during the lifetime of their late father and which bore the earmarks of the said children". Simon remonstrated with Adeline, saying that this action was contrary to the wishes of the deceased, and offering to divide the estate with the children if she would return. She refused and laid a complaint against Simon, alleging witchcraft, at the office of the Reserve Superintendent, who then referred the matter to the headman. The headman ordered Simon to return the livestock to Adeline. Dissatisfied, Simon then consulted a lawyer in Gobabis, who argued that the headman had not dealt with the distribution of the deceased's assets or settled the question of guardianship in accordance with the deceased's wishes and in accordance with established Herero custom. Eventually in 1946, the headmen and the Reserve Board settled the dispute to the satisfaction of all except Simon.

Source: SWAA A50/41 Native Affairs. Native Estates General.

THE CASE OF THE WIDOW AND THE WRONGED NIECES

Former policeman Gideon Tjatindi, who died in 1952, lived consensually with Kristina Hangari from 1909 until 1920 and had a son Moritz. The couple then separated, but in 1941 Kristina returned to Gideon, and they continued to live as man and wife until his death. The deceased gave some cattle to Kristina that were then branded in her name. The remaining cattle which bore his brand belonged to Elisabeth, his mother's sister, and Lusia, his sister. The heirs, according to custom, were his brother Gustav Tjatjitua, Elisabeth and Lusia.

After Gideon's death, Kristina and Moritz went to the Magistrate and asked for control over the estate on the grounds that among the Herero, relatives customarily take all the deceased's assets. The Magistrate issued Kristina with an authorisation certificate. The customary heirs challenged the Magistrate on this: "Who gave you the right to dispose of Herero estates?" He referred them to the Chief Bantu Affairs Commissioner in Windhoek, who in turn referred them back to the Reserve Superintendent and Reserve Councillor. A meeting with the Magistrate in Epukiro in May 1955 was unproductive. He refused to consult with the Councillors, who claimed that Gideon and Kristina were not married according to customary law as their parents had not consented. "*Nou toe het een naturellemeid so parmantig en uitdagend met my geword, dat dit 'n skande was. Ek het haar toe gese, as sy haar nie gedra nie, sal ek haar uit die Reservaat smyt*". ("Now one native girl became so stropky and challenging to me that it was a scandal. I then said to her if she did not behave herself I would toss her out of the Reserve.") The opposition to Kristina's claim was led by Magdalena Kandjou (a niece) accompanied by Gustav Tjatjitua, the deceased's brother, who asserted that according to Herero custom he should be the administrator of the estate.

Magdalena and Gustav then consulted a Gobabis lawyer, who wrote to the appropriate authorities. In March 1956 the Magistrate again visited Epukiro and with the help of the Councillors tried to settle the case. He believed that Kristina had been married to Gideon according to Herero custom. The estate consisted of 48 cattle, 4 horses, 8 goats and 109 pounds in cash. The Magistrate allocated the 109 pounds cash and 9 cattle to Kristina and Moritz, and the rest to Gideon's nieces Magdalena and Evelina Kandjou. "According to the traditional leaders it is the custom in Epukiro to divide the estate in two so that the wife and children receive half and the deceased's family the rest. We divided it thus. Evelina is not satisfied with the division and I advised her to put in a court claim" (our translation). Neither was the Chief Bantu Affairs Commissioner satisfied, as he doubted that the estate was settled according to Herero custom. He suggested that the case be re-opened or, if this was not possible, to advise the aggrieved, by way of attorney van Dyk their lawyer, that they could institute a civil claim (30/6/1956).

A few weeks later Elizabeth Tjatindi, Lucia and Magdalena Kandjou applied for passes to press their claims with the Chief Bantu Affairs Commissioner in Windhoek, who informed them that he had no power to administer Native Estates in the Police Zone.

The ultimate resolution of the case is unrecorded.

Source: BAC HN.1/4/2 Native Estates.

Mourning and the process of administering estates

7.67 As usual in our research, when asked to describe how inheritance worked, informants started with an imaginary scenario in which a rich married man died. An Okakarara widow described it thus:

“When someone dies there is a message and you are called into the house. They put you ‘behind clothes’ so no one can see you. Only widows can touch you. Others are scared that if they touch you their husbands will die as well. You are isolated. Not allowed to talk. You only lie on one side and face the wall. This continues until the husband is buried.”

7.68 In the meantime people “come from nowhere to inherit property”. Some widows complained that a lot of their own property was stolen during this period by these claimants and mourners, because “you are relegated to a back room and have to lie facing the wall and cannot speak because you are ‘covered’”. “You don’t even have time to lock your suitcases. They will steal even your nice dresses.” In contrast, were the wife to die, the husband is free to move around.

7.69 There are three stages of mourning: Mourning before the burial, mourning during the burial (*Omutambo*, or lamentation) and finally *Oshipirangi* when the estate is divided up. Women can go into mourning for two to three months. There is no set time period for settling the deceased’s estate. In urban areas like Windhoek, for example, the pattern was that if a man dies, his house is locked up and the estate left untouched until his brothers and sisters can all meet to divide up the property. Depending on logistics, it could take several months for all the relatives to congregate.

7.70 The settling of the estate occurs at the residence of the deceased, when all the relatives from the deceased husband’s side have gathered on the agreed-upon day, usually a weekend. Relatives from the widow’s family, ideally an uncle, will also be there but only as observers. Before the estate is divided up a bull must be driven out and given to the patrilineal relatives, usually those of the grandfather’s clan. Also in the past, in some areas, a cow (*ongunde*) was given by the husband’s family to the widow’s parents as a token of sympathy.⁵⁷ Women are not allowed to

⁵⁷ In Kaoko there was no gift of a cow. Instead, the central pillar of the hut was pulled down if the owner of the household died. Bollig personal comment.

talk during the deliberations. Even men from the widow's side of the family are defined as women during these deliberations and are not allowed to talk. However, if the need arose, women on the husband's side might be allowed to talk as they are defined as being sisters of the deceased. Typically the older brother of the deceased male, especially if he is the lineage senior, will serve as administrator, and the chief heir will be the nephew.⁵⁸ Informants categorically state that this system is used to keep the wealth within the family (in this case the *sub-eanda*).

7.71 The term *orumata* (inherit) means the same as 'bite'. It means just to eat something you didn't work for, explained one headman. A small degree of force is used to grab the items. When one is allocated an inherited item, one is supposed to literally bite it, both as an expression of sorrow for the deceased and also to signal that the property is now yours. If given a cow however, one is supposed to throw a dry piece of dung at it, at least in parts of Okakarara and Epukiro. Another explanation is that when the term *okurumata* is applied to an inheritance, it figuratively means to get *a minor or small inheritance*, to take a bite as opposed to eating the whole thing. As a reader to *The Namibian* noted 'To bite' (*okurumata*) is not stealing and the people who engage in it – "the biters' (*ovarumate*) – are legitimate minor beneficiaries with well-recognised rights, and who always openly receive their equitable share of the estate of the deceased. The 'biters' are minor beneficiaries who 'bite' inherit minor shares, never thieves. They can inherit anywhere from as little as an assegai to as much as a few beasts."⁵⁹

7.72 Inheritance disputes are settled by the family in the first instance. Should they fail, the *eanda* will try to settle the dispute. Failing that, disputants will go to the traditional leaders, and failure there will lead to accessing a lawyer. During the period between death and formal allocation, much of "theft" can occur – although some would deny that this is strictly "theft" insofar as one can in some cases simply "take", and taking from a relative is not defined as theft if one later informs the family that those cattle have been taken. This is a potent source of conflict, especially since a wealthy cattle-owner will disperse his herd among various temporary cattle-posts (*ohambo*) or semi-permanent ones (*otjihambonganda*), where they will be under the care of a relative or other dependent. Inheritance disputes are further exacerbated by *ozondisa*, the rather common practise whereby a rich cattle owner will loan a poorer person some of his cattle on '*bruikleen*' (usufruct, lend-lease, lend – ie use rights but not ownership rights).

7.73 Concerning patrimony – that is, the goods, livestock and rights that are transferred patrilineally – customs are also changing. The customs of keeping the Ancestral Fire and holding traditional funerals are decreasing in practice, although they do still occur. The Ancestral Fire and the holy cattle would ideally go to the oldest

⁵⁸ Again there is variation in Kaokoland where an elder of the matriline who was a bit more removed genealogically would be preferred as the administrator. This person is referred to as *omurumatise* (the person who makes or allows other people to bite). Bollig personal comment.

⁵⁹ Kamanene Mupya, Letter to the Editor, *The Namibian* 3 June 2005.

son of the head wife. If there is no son, or if the son is deemed unfit, then a younger, more junior male might be nominated – a younger (sometimes classificatory) brother or failing that, a nephew. If a younger brother is appointed keeper of the Ancestral Fire, he must still defer to his most senior brother in ritual events. Generally the keeper of the Ancestral Fire has a lot of authority and his word is always taken seriously. Perhaps the most famous case of an Ancestral Fire going to a nephew is that of Chief Hosea Kutako. As in the case of matrilineal inheritance, this inheritance is not automatic. The identity of the person who will inherit the Ancestral Fire is kept secret because of the danger of unleashing potential jealousy. The guardian of the Fire as he grows old will inform only his closest confidantes as to who should take charge of the Fire after his death. “The Day will come when People will not Challenge my words.” “When you are old and sick, this is the time when people come to enquire about your health.” It is strongly believed that a person’s final wishes should be respected, and that failure to do so might result in ill fortune. As in the case of the Fire, male property like guns, horse and saddles will go to the oldest male heirs, while clothing will be divided up among all the male heirs. It is only after these items have been disbursed that the meeting will move on to the more conflictual issue of allocating livestock.

7.74 Oral wills were acceptable in the past. When someone was old and knew he did not have long to live, he would tell his trusted friends how he wanted his property disposed of. But even here oral wills are open to challenge. “How do you trust oral wills?” a young councillor asked. There should be multiple witnesses, he insisted. Written wills are rare and are supposed to be left in the house to be discovered by the executor.

Leviratic marriage and the rights of widows

7.75 In the olden days the house or estate was not divided. “Traditionally you married the whole family. You were inherited, but only if you want. If you are a good woman you might get a portion or part of the inheritance”, explained a young elected Regional Councillor. The very fact that brothers referred to their siblings’ spouses as “our wife” underlines this group emphasis. The heir, usually the next brother, would simply replace the deceased and take all the property and the wife and children and treat them as his own. He does not however own the property. “The property belongs to the wife and children under the protection of the uncle.” It would appear to be more accurate to claim that the heir simply administers the property for the benefit of the *eanda*. “The person who inherits the widow gets all the stock as well. Some of it he may share with other brothers and sisters of deceased, but most of it is kept in trust for the dead man’s children. These have no say in the matter, even if they are adult and have children of their own.”⁶⁰ Wealth is there to keep, in order to sustain the family. Nowadays however, it appears that a lot of the property is taken or simply sold

⁶⁰ Gunther Wagner, nd, “An Ethnological Study of the Windhoek District”, mimeo copy in National Archives of Namibia, 166.

off. It is also said that rather than moving into the house of the deceased, the heir now simply moves closer and circulates between the two houses.

7.76 If no brother is available, the nephew inherits and can even inherit a much older wife. If the children or heirs are too young, a caretaker for the house will be assigned (*Omushere Wanganda, Omushera Wetundu*).⁶¹ What constitutes a ‘child’ varies. Sometimes it is defined as a person who is still at school, or unmarried. The main test seems to be a community feeling that the person is capable of looking after his or her affairs. If there are no brothers or nephews, sisters and nieces will inherit. Generally, if the estate is large, while the bulk will go to the brothers and then to the nephew, all those with a claim will be given a small token or ‘remembrance’.

7.77 Traditionally people believed the widow did not have a choice concerning leviratic marriage, but nowadays it is claimed that an element of choice is present because women have rights and know them. If the widow does not want to be married off in a leviratic marriage, then she can generally take her possessions and move back to her own people – but then she renounces her claim to her children and the use of her husband’s cattle. If the marriage was a long one and she had several children with the deceased, she will be given a few cattle from her husband’s herd and allowed to settle with her children. If she decides to stay, she also has a choice as to which brother of the deceased will ‘marry’ her. Where there is a choice of heirs, it is said she is given different pieces of meat or tobacco, each representing an heir, and she then chooses. Some claim that she would not know which piece of meat represents which presumptive heir, while others claim that while ritually she was not supposed to know, relatives would inform her of the identity of the pieces of meat so that she could exercise an informed choice. The historical record indicates, however, that this element of choice was also present in the past. In the rare cases of the deceased having had multiple wives, it was only the senior wife who was ‘inherited’.

7.78 Another set of variables operative in inheritance concerns the status of the deceased. Where he is simply a junior brother and lives in a single house, then the house is usually left to the wife and children. But where the deceased was an *onganda* (or headed an extended homestead), then a brother will move in and ‘inherit’. “It all depends on how the wife gets on with the family and the wishes of the deceased”, said Headman Hoveka. Christianity also plays a role. If the heir is a Christian and already married, his place may be taken by an unmarried brother or by his father’s sister’s son.

7.79 Where the widow gets married off to a younger brother who is already married, she does not automatically become the first wife. “An inherited wife cannot take over the system.” She must be subservient to the first wife even if this wife is much younger than the widow.

⁶¹ There could be Owambo influence here.

7.80 The degree of intimacy between the widow and her new husband varies considerably, depending on a variety of factors including especially age. If the widow were old, the relationship would simply be a companionate one. If on the other hand, she is a “warm woman”, the heir is allowed to give her children. Any children born of this union are seen as being the offspring of the deceased – not that this mattered since they were of the same *eanda* and *oruzo*.

7.81 When a wife dies, all her property plus one cow is taken to her maternal family, especially to her sisters, who may share some of it with the widower. The widower was traditionally entitled to marry a younger unmarried sister without paying *ovitunja*, but this was a matter of negotiation. This still happens, although considerably less frequently than in the past. All belongings including jewellery go to the maternal kin, who then give them to daughters or sisters. These items are kept in a trunk, and the division made about a month after the death.

7.82 While widow inheritance was one of the first issues raised by Herero themselves, they all acknowledged that this does not happen so frequently nowadays. Many Herero informants stressed that this practice was a form of social welfare designed to safeguard the widow and her family. It is largely a rural phenomenon, they claimed. No informants could point to a single case of widow dispossession, and Steyn in his 1991 Omajette survey found no couples in a leviratic arrangement. Similarly, Steyn⁶² in his 1991 Omajette survey found no couples in a leviratic arrangement.

7.83 There are now frequent disputes about inheritance, with children feeling that they should inherit their father’s property since they must look after their widowed mother. Indeed the children will sometimes refuse to leave the house. It is especially houses in urban areas which are susceptible to such behaviour.

The rights of children born outside of marriage

7.84 ‘Illegitimate’ children form a significant part of the population. In the past, some informants claimed they were stigmatised, but not anymore. The historical record however suggests that ‘illegitimacy’ was much more common than contemporary informants would suggest. Sometimes ‘illegitimate’ children might be adopted informally by the parents of the mother, carrying the name of the woman and belonging to her *eanda* and *oruzo*. Ideally they would be under the care and tutelage of their mother’s brother. If the ‘illegitimate’ child is female and lives with her mother and stepfather, in one case we heard about, the stepfather was allowed to impregnate her. Some of our informants saw this as simply custom while others saw it as an aberration. More rarely will the child take the father’s name, but only when he has paid a compensatory cow (and calf) called *okatjivereko*.⁶³ For formal

⁶² Steyn 1991 (op cit n33), 84.

⁶³ Ibid.

adoption to occur in customary law, the transfer of an animal is required. Even if the father acknowledges his 'illegitimate' progeny, it does not mean that they will automatically inherit. A key factor will be where the child grew up. The children can inherit especially if mentioned in a will, either oral or written, but they must be explicitly mentioned or they will be excluded. Of course this is exceedingly rare. And even then one has to engage in manoeuvring to secure the inheritance. Potential heirs must make themselves known at the funeral, to show "we have a child of his blood". Even if they are going to inherit, 'illegitimate' children are treated as junior to 'legitimate' offspring despite the fact that they might be older than the 'legitimate' progeny. Generally though, as a rule, 'illegitimate' progeny do not inherit from the father because they are also not of the same *eanda*.

Principles for dividing up the estate

7.85 When a person dies he or she has two chief heirs. The *eanda* group inherits all the livestock with the exception of the holy cattle, while the *oruzo* group inherits the homestead, the deceased's positions of authority and the Ancestral Fire. Typically the matrilineal *eanda* property goes to the younger brother of the deceased, and then eventually the eldest sister's eldest son.⁶⁴ The patrilineal *oruzo* property goes to the eldest son of the deceased. The former thus becomes the economic head of the local lineage group, while the latter is the religious and political head.

7.86 Economically the chief beneficiary is the nephew who gets to keep or disburse most of the wealth.⁶⁵

Although the main heir will be allowed to keep most of the inherited cattle for himself, he is under obligation to share the property with his brothers and the sons of his mother's younger sisters, because they all share the same relationship with the deceased, who was their matrilineal uncle. The basis of division will be determined under the supervision of the lineage-head, and will also depend on the size of the estate.⁶⁶

Property is a sign of power, especially cattle. It is quantity rather than quality that counts here. Wealth leads to respect. Chiefs and headmen are said to be amongst the wealthiest. They are also expected to be generous.⁶⁷

⁶⁴ This property comprises non-ancestral cattle, but among the northern Himba includes all cattle, but not money which might have been obtained from cattle sales. Bollig, personal comment.

⁶⁵ In Kaoko it would be the *omurumatise* who disburses the property. Bollig personal comment.

⁶⁶ Malan (op cit n35), 77.

⁶⁷ It is no accident that Chief Riruako has financial problems. *New Era* 8 March 2005.

7.87 Who inherits from the deceased also depends on where one grew up and how far away one is from the deceased. To settle an estate matrilineal relatives will travel from afar, even from Kaokoland and Botswana. In the interim though, sons and patrilineal relatives will try to “take” or “borrow” as many cattle as possible from the deceased’s herd. “This is a man’s world”, it is generally believed, as women would be lost in such acquisitions. Occasionally sons will look after their father’s cattle but generally, at least in the former Hereroland, herders are hired to undertake this task. These herders are typically those who “don’t progress at school”.

7.88 The notion of what constitutes property is complex. A person does not have the “unfettered right to dispose of cattle beyond the limits of his immediate needs”⁶⁸ because he acquired most of his wealth through inheritance and the cattle belong to the lineage. Thus, while cattle are owned by the *eanda*, the patrilineal descendants have an “undisputed right to economic maintenance from his livestock”. Different objects can have different ownership regimes. While everyone claims to know and can name and describe their cattle, and each beast’s mother, it is inheritance disputes about cattle that have the greatest potential for conflict. Individuals have many ways of obtaining cattle. They can be given a cow at naming or circumcision ceremonies, as bonuses for good work and of course through purchase or theft. The father might also gift cattle to sons or patrilineal kin if he believes that the matrilineal heirs might be irresponsible. Rich farmers will allow poor people to use their cattle and locate them in different places.

7.89 There are different types of rights over cattle. Viveló, based on fieldwork in western Botswana, identifies the following types: There are *Ozongombe Za Ka Uriri* (‘general cattle’) which the individual can purchase individually and thus can dispose of as he or she sees fit. There are also *Ozombunda* (‘victory or war cattle’) which are obtained through raiding and to commemorate some feat. The rest of cattle join the ‘general’ herd or, if of the right colour, are assigned to the *oruzo* cattle. These are identified by their colours.⁶⁹ In the old days wealth was measured by the number of these cattle but nowadays it is measured by the total number of cattle. There are also *ozonzere* or *Ongondjuma* (‘sacred cattle’). Sometimes a distinction is made between cattle belonging to the ancestral spirits and cattle of the Ancestral Fire (which are less holy than the former). The milk of these cattle could not be utilised before the homestead head had de-sacralised it by performing the *makera* ritual. Historically one could not eat sacred cattle when they died. Instead the carcasses were placed outside the homestead for dogs and Bushmen to eat. The sale of sacred cattle was also historically forbidden. Nowadays however, Herero do consume and sell holy cattle. It is believed that *ozonzere* are always able to locate water and grazing.⁷⁰

⁶⁸ Malan (op cit n35).

⁶⁹ Herero, like other pastoralists such as Zulu, are literally able to identify thousands of hide patterns on their cattle. See Marguerite Poland, 2003, *The Abundant Herds*, Fernwood, Cape Town.

⁷⁰ Frank Viveló, 1977, *The Herero of Western Botswana*, West, St. Paul, 56. Bollig in a personal comment, however, has never heard of ancestral cattle being eaten and wonders how accurate Viveló’s ethnography is on this point.

7.90 Assuming the deceased is a large cattle owner, then the bulk of *ozonzere* and *oruzo* cattle will pass to the deceased male's eldest son, although Viveló claims that this son will give some to the deceased's sister's son to demonstrate goodwill. The 'general cattle' go primarily to the nephew (ZS in the diagram above), who then might give perhaps 20% to the deceased's son as well as some to the *ovazamumue* (consanguineal relatives) to demonstrate generosity. In Botswana, Viveló predicted a decline in inheritance by the nephews as sons increasingly claimed a larger share and took the matter to Botswana traditional authorities, who operated according to patrilineal principles. All personal property was inherited by the eldest son. Money in bank accounts was also treated as personal property, while money not in the bank went to the *eanda*.

7.91 In Namibia, Malan too reports the emergence of a new principle of inheritance: "namely that the children of the deceased are formally awarded a number of cattle and small stock from their father's estate. This is a very significant trend ... and points to even more functions being transferred to the localized patrilineages."⁷¹

Other livestock, such as goats and sheep, are treated differently. Sheep are seen as valuable and holy and can only be slaughtered near the Ancestral Fire and then only to mark certain ritual events. Goats on the other hand are not seen as valuable and are given to the wife and children. Indeed, in parts of Namibia, if you are hungry and you kill and eat a goat belonging to a relative it is not seen as a crime provided you tell the owner. "If I go to the goat kraal I can take." As Mupya noted:

"It is called *okuramba eria*; literally, it means to 'chase and eat' or 'chase a meal' and it's a maintenance issue where, because of exigency, a relative quickly disposes of the animal of another without permission. 'Chasing a meal' is an emergency maintenance measure. To be 'tolerated,' the 'meal chaser' has to be a relative or a charge of the owner; not be a habitual thief; has to be in dire need; has to be hard-pressed for both time and space so as to be unable to go and ask the owner for permission before disposing of the animal. Also, he has got to get rid of the animal very quickly. He can't keep the animal for a long time, such as farming. The best test is: the 'meal chaser' would have to have such a relationship and be in such a dire situation that had the owner been there himself, he would have given him the animal anyway."⁷²

The gender dimension

7.92 An important aspect of property regimes concerns the gender dimension. On the husband's death domestic property as a rule stays in the wife's family, who will usually give the husband's family a consideration. However some Herero still argue that women should not be allowed to own property and should be treated like children. Thus, while cattle might be given to the wife, who if she goes home

⁷¹ Malan (op cit n35), 77.

⁷² Kamanene Mupya, Letter to the Editor, *The Namibian* 3 June 2005.

(ie after her husband has died or in a divorce) can take it with her. However, while she is still married, the husband can sell the wife's cattle – usually only if he needs to – but must replace it later. Some claimed that this only applies to heifers. Even if children or wives buy cattle, the husband and father can dispose of them at will, although he must eventually replace them. Part of the issue here concerns branding, which is increasingly being done by wives and children. Such actions are often a source of conflict in inheritance cases by relatives, who deny wives and children this right. Women from wealthy families can own significant numbers of livestock, but they are controlled by her husband who can “cheat” on them.

7.93 Even if females can put in a claim for inheritance, especially when a brother dies, they are spatially disadvantaged because typically they will live a distance from the deceased and thus be unable to launch a claim personally. Indeed the fact that women move away to get married was precisely the argument some men used as a reason why women should not inherit. Most must make their claims silently, simply by being present or by getting male relatives to speak on their behalf since they are not allowed to speak at inheritance deliberations. They must be polite, while males can be aggressive in pursuing claims. While widowers are expected to get remarried, widows are not supposed to re-marry, except where it is a leviratic marriage, but can apparently have affairs – though if they are caught, they could be fined six head of cattle.

7.94 While a wife, if she has performed meritorious loyal service, might be given something from her late husband's estate, people were insistent that the husband would never inherit from his wife's estate. Indeed, most were adamant that a man would never move to a house owned by his wife, an increasingly viable scenario nowadays due to the government's gender policy. Informants seemed to fear the power that this could give women: “After mistreating you, they send you away.”

7.95 The complex interlocking kinship system serves to lock people into a powerful and effective series of obligations and rights. It is difficult to opt out, which serves to generate much conflict, but at the same time the system does provide social welfare. As Herero informants in all three locales proudly noted: There are no Herero-speaking street children in Windhoek, and relatively little widow dispossession occurs that is justified by invoking ‘customary law’.

POLITICAL SUCCESSION

Political succession illustrates the flexible and disputatious nature of Herero inheritance and serves as a timely reminder that inheritance is not only about material goods. Such inheritance is patrilineal, meaning that it is reckoned according to oruzo. Historically, like pastoralists elsewhere, Herero had no chiefs.

They were stateless, and a segmentary kinship lineage system structured most of their political behaviour. Malan attributes the fact that the Herero had no senior headmen or chiefs as found amongst the Bantu generally to the fact that they are gradually switching over from a matrilineal to a patrilineal kinship system and have “temporally stabilized precisely between these two poles”. The creation of a Herero Paramount chieftaincy is a late 19th century phenomenon. The consequence is that Herero have two types of family relationships, eanda (matrilineal) and oruzo (patrilineal), and neither set of principles dominates.⁷³ Government ethnologist Budack also investigated this matter and found that a number of qualities were required to be acknowledged as a chief. The first was descent. One had to be heir of an okuruuo (Ancestral Fire). Another was status. One had to be a rich stock farmer with a large number of supporters and a forceful personality. Earlier Herero made a clear distinction between a ‘chief by birth’ and a ‘made chief’ (gemaakte Kaptein). The latter, by reason of courage or exceptional qualities in attracting supporters, could gradually claim the privileges of chieftainship on political, judicial and religious terrain. Drought, robbery and other factors meant that the identity of rich Hereros was constantly changing and made for a relatively unstable chieftainship. This is illustrated by the career of Hosea Kutako, who was appointed headman because he was of Maherero’s ‘oldest brother’s line’ and Maherero’s sons were in Botswana. He was only an omutakamise (caretaker). The Security Police believed that the title of Paramount Chief was bestowed upon him by Michael Scott. Budack claims that the legitimate successor to the now accepted Chief of the Hereros was Frederick Kavikunwa, Tjamuaha’s eldest son’s great-great-grandson.

The Zeraua succession is illustrative of this flexibility: Chief Ngurunjoka ua Zemburuka came to the Erongo area from Kaokoland in the 1850s. He was succeeded by a younger brother (omuangu) Zeraua. Zeraua in turn was succeeded by his sister’s child (omusia) Tjaherani uaMbanderu, who in turn was succeeded by another child of Zeraua’s sister, Manasse Tjiseseta. Manasse was succeeded by his two sons serially, Hiamauru aka Michael Tjiseseta and Haimakuva aka Hugo Tjiseseta. The proper heir should have been his sister’s child Kauatezeua, but Councillors decided on Michael. After Hiamakuva’s death, his sister’s son Hianau should have succeeded him, but was not able to for personal reasons and so the candidate was Hiandopa ua Koungore aka Christian Zeraua. He was Hiamakuva’s only sister’s daughter’s son.⁷⁴

⁷³ Malan memo 6 March 1974, “Politieke Verwikkelinge in Hereroland”, National Archives of Namibia, BAD 7 H.5 Herero Aangeleenthedes.

⁷⁴ Memo by KFR Budack dated 30 March 1972, National Archives of Namibia, BAD 18 N1/12/2 Ethnology.

7.4 Inheritance in a Matrilineal Kinship System: Owambo

Background and social context

7.96 The Owambo people in northern Namibia form part of the western fringe of the so-called matrilineal belt which cuts across the whole of central Africa and is found in association with hoe agriculture. However this belt is frayed, as we shall see, due to the considerable impact of pastoralism, patrilineality and colonial patriarchy. It is here that recent cases of ‘widow dispossession’ have been given much publicity.

7.97 Most of Namibia’s population is located in the sub-tropical fertile and arable far north, beyond the Etosha Park and the so-called Police Zone. Population is concentrated in the northern central regions, especially in the peri-urban hub stretching from Ondangwa to Oshakati. Most of the inhabitants, indeed in a 1996 survey over 53%, claimed they received no cash income, and statistics from the 2001 census show that about 50% of all households in the region claimed to derive their primary support from farming. Farming consists of growing millet (*mahangu*) in small fields, done largely by women, and raising livestock, cattle, goats, donkeys and pigs on communal grazing areas, generally a male occupation.

7.98 The area was also the location for a long and bitter ‘Border War’ which ended with independence. This war, which was largely a low intensity guerrilla conflict, involved many Namibians both as regulars and irregulars, fighting against each other. The war, like all wars, was ‘dirty’, and one of the South African strategies was to strengthen and exploit the role of traditional authorities. The socio-cultural impact of this war has not yet been adequately studied, but it is clear that it had an effect on inheritance practices on at least two fronts. First, robbery as a means of property acquisition became ‘normalised’ to an extent, and secondly, locally recruited troops and policemen (and there were considerable numbers of these in Owambo areas) were encouraged, almost compelled, to draw up wills.

7.99 Historically people used to live in stockaded settlements called *eumbo/ongandjo*,⁷⁵ typically housing an extended family. This settlement formed the basic subsistence and social control unit. A number of *eumbo*, generally at least ten, were grouped together in a ward (*omukunda*) controlled by a sub-headman. Sub-headmen bought wards from the headmen for a number of cattle (and cash nowadays). A person was not allowed to own more than one ward. A number of wards formed part of a district (known variously as *oshkandjo/oshilongo/oshitopolwa/*

⁷⁵ There are several dialects in Owambo. The two major ones are Ndonga and Kuanyama. Where there is significant terminological variation both terms are given.

oshitukulwa) controlled by headmen (*omalenga*) Above the districts in certain tribal areas towered the king or chief (*omukwaniilwa/ohamba*). Land tenure was vested in the chief, who held the land in trust for the people. The chief leased it to councillors or headmen for payment of cattle, or they were appointed as his proxies, with power to lease out the land to commoners on payment of either cattle and or cash. None of these property 'purchases' were transferable, and they expired upon the death of the 'owner'. Some have claimed that this system inhibited the development and proper management of the land.

7.100 Historically these traditional authorities derived their income from 'selling' lifelong usufructs in land, as well as from fines, tributes and cattle raids. Due to the particular nature of capitalist penetration (and counter penetration), the colonial policy of 'indirect rule' and later the policy of apartheid, traditional authorities in the north carry a degree of power and influence which goes beyond their traditional role. While there is much cultural homogeneity in the region, two languages (*oshiNdonga* and *oshiKuanyama*) dominate. The area is divided into a number of 'tribes'. The largest, the Kuanyama, extend well into Angola. They lost their king in 1917 and are administered by a Council of Headmen who meet in Ohangwena. However the kingship has recently been restored. The next largest group are the Ondonga who have a king, Immanuel Elifas. Numerically they are followed by the Kwambi, Ngandjera, Mbalantu, Kualuthi and the Eunda and Nkolonkathi.⁷⁶ Of these the Ngandjera and Kualuthi still have hereditary kings.⁷⁷ There are several smaller groups, Owambo and others including San, also resident in the area.

7.101 This region has the distinction of having the highest number of Lutherans per capita in the world. Almost 150 years of mission endeavour has made Namibia the most Christianised country in Africa and especially in Owambo-speaking regions where the Lutherans, Catholics and Anglicans are prominent.

7.102 Another relevant factor is the efflorescence of small businesses, typically ubiquitous *cuca* shops that sell alcohol and other small necessities. One study found that in the Outapi-Engela region there was about one shop for every 100 people.⁷⁸

⁷⁶ These last two groups are reasonably few in number and are thus usually grouped together for administrative purposes.

⁷⁷ Malan (op cit n35).

⁷⁸ John Mendelsohn et al, 2000, *A Profile of North-Central Namibia*, Gamsberg Macmillan, Windhoek.

Vital Statistics for Northern Central Namibia, 2001

Region	Ohangwena	Omusati	Oshana	Oshikoto
Household Characteristics				
Total no	958	38 202	29 557	28 419
Avg size	6.3	5.9	5.4	5.6
Female-headed	59.7%	62.0%	54.0%	50%
% farming	51.7	45.5	35.8	56.3
Personal Characteristics				
Males per				
100 females	83	81	84	90
15+ never married	59%	60%	63%	59%
15+ unemployed	36%	36%	41%	45%
Orphans	18%	17%	19%	16%

Source: 2001 Census (NPC 2003).

7.103 Demographically one should note the preponderance of females, the large number of female-headed households and the large number of orphans – the highest in Namibia, and a striking reflection of the AIDS pandemic. There is demographic and first hand observational evidence that widows are getting younger, which is exacerbating inheritance disputes. In such cases the likelihood of the young widow being accused of witchcraft and dispossessed is high (“Oh she can get remarried”). An index of change can be seen in the increase in extra-marital births. Based on a study of church registers, this increased from 6.1% in 1936-45 to 13.5% in 1976-85⁷⁹ All indications are that this trajectory is still valid. Household structure, if disaggregated, reveals a bifurcation between a top 20% which are large (typically over 10 members), typically male-headed, have several sources of cash income and ready access to cash, work large fields and own large herds of livestock. Another 60% of households are much smaller, female-headed, have limited access to cash, till much smaller fields and have fewer than one cow and 13 goats. They literally scratch out a living.⁸⁰ In fact, another study estimates that more than half of all households in Owambo areas do not have any cattle, and these are generally female-headed households. There is a vicious downward spiral at work here: “In addition to an inheritance system that directly disadvantages women, and widows in particular, by leaving them without the automatic right to land for cultivation, female-headed households also generally only have access to smaller units of arable land than do male-headed households. Limited access to draught power and smaller plots combine to create higher levels of impoverishment.”⁸¹

⁷⁹ Notkola Veijo & Harri Siiskonen, 2000, *Fertility, mortality and migration in sub-Saharan Africa: the case of Ovamboland in north Namibia, 1925-90*, St Martins, New York, 86.

⁸⁰ Mendelsohn et al (op cit n 78).

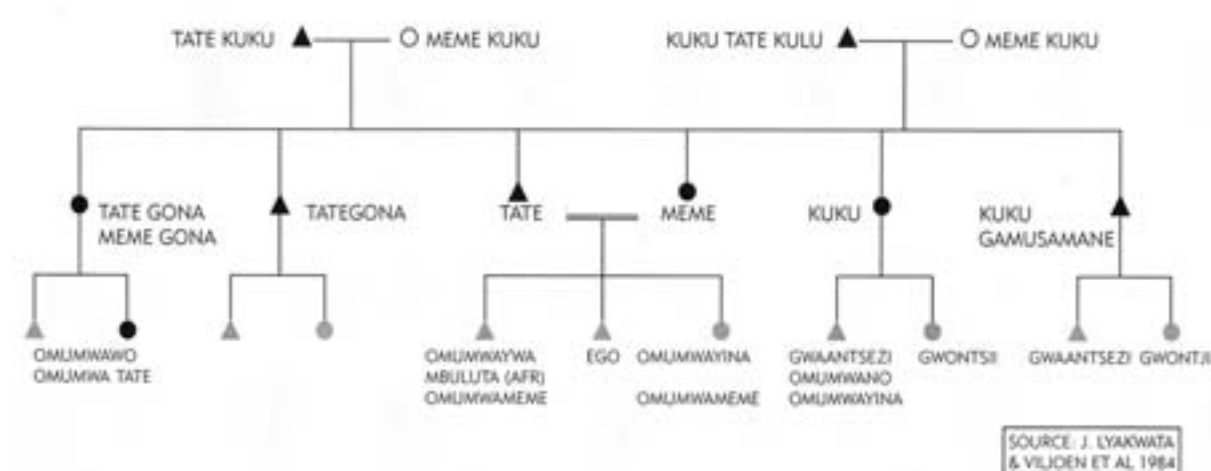
⁸¹ Guy Bruce Frayne, 2001, *Survival of the Poorest: Food Security and Migration in Namibia*, Ph.D., Queens University, 238-9.

Kinship basics

7.104 Kinship, that system of nomenclature which serves to organise and justify so much of social life, is in the areas studied strongly matrilineal with some patrilineal undertones.

7.105 The basic kin unit is the clan or *epata/ezimo* which means ‘hearth’ or ‘cooking place’. Individuals demonstrate their ties with clan members, whether real or fictional, by using classificatory kinship terms. All people of the same generation address each other as brother or sister, or in the ascending generation as father and mother.⁸²

Diagram 4: OSHINDONGA KINSHIP NOMENCLATURE



7.106 There are between twenty and thirty matrilineal clans (*epata*) and while they used to be exogamous, nowadays people are known to cohabit with people of the same *epata* as long as there are no demonstrated kinship ties.⁸³ Matrilineal kinfolk live scattered over a wide area, often beyond the district or even ‘tribal’ borders. Matriclans, in short, are neither corporate nor localised. More important are lineages which are corporate and composed of people who can trace their genealogical relationships. These groups are typically shallow, comprising three living generations and two generations of deceased ancestors. The great grandmother, *okukurwa*, serves as the genealogical reference point. These people refer to themselves as *ovakwetu* (our people) or as *omumwameme* (those from the same mother). Crucially, here exact genealogical relationships are expressed in descriptive kinship terms. The key relationships are between a man and his sister’s son and between mothers and

⁸² Malan 1995 (op cit n35), 18.

⁸³ Peter D Banghart, 1969, *Migrant Labour in South West Africa and its Effects on Ovambo Tribal Life*, MA, University of Stellenbosch, 117.

daughters, according to Bruwer.⁸⁴ There is often a strong emotional relationship between a person and that person's maternal uncle (the mother's brother). The latter will help a nephew with financial support and the nephew is his chief heir. If there are no male heirs then the niece will also be assisted. Malan⁸⁵ claims there is no particular term for the matrilineage other than 'our people' (*aakwetu (Nd) ovakwetu (Kw)*). But Bruwer and his students claimed that the true corporate unit is the local family or *eumbo* which is also glossed as a stockaded homestead or extended household, or perhaps more accurately termed a matri-sib. The husband is known as the 'Owner' (*Omuene uembo*). There are no apparent rules for residence once one is an adult or married, although there is a tendency to locate near close relatives, and sometimes a sister's children will stay with their mother's brother. Becker and Hinz⁸⁶ claim that residence is virilocal (at the husband's domicile). Malan⁸⁷ suggests there is a rise in the number of patrilocal extended families, especially among the wealthy.

7.107 If one asks Owambo speakers which *epata* they belong to, the response will inevitably be: "Which one, my mother or my father's?" The mother's *epata*, the left side one, is the one you inherit from while the father's *epata*, the right-side one, is the one you identify with.⁸⁸ Agnatic relationships (relatives on the male's side of the family) are emphasised to the extent of using the same term as that used for cognates.⁸⁹ Bruwer concluded that the heavy emphasis on the individual family, neo-local residence and the absence of corporate matrilineages (contrary to Malan) have "undoubtedly resulted in a far greater significance of agnatic descent than would otherwise have been expected".⁹⁰ Indeed, he claims that "[Kuanyama] prefer a minimum of structural institutions based on the concept of kinship (since) the prevailing system permits for a free choice of residence and accumulation of property, and, with their own homestead, neither man nor wife is subject to any great degree of authority deriving from either kinship bonds or political power."⁹¹ Certainly in

⁸⁴ Johannes P Bruwer, 1961, *The Kuanyama of South West Africa*, roneo nd Stellenbosch. Bruwer is a decidedly influential figure in Owambo both in terms of scholarship and impact on the lives of Owambo communities. For details about some aspects of his impact, see Robert Gordon i.p., "The Making of Modern Namibia: A case of anthropological ineptitude" in *Kleio*.

⁸⁵ Malan 1995 (op cit n35), 18.

⁸⁶ Heike Becker & Manfred Hinz, 1995, *Marriage and Customary Law in Namibia*, CASS, Windhoek, 69.

⁸⁷ Malan 1995 (op cit n35), 19. Patrilocal refers to the married couple living in a locality associated with the husband's father's relatives. It is quite possible that Malan might have confused patrilocal with virilocal, where the couple move to the husband's locality.

⁸⁸ JC Kotze, 1968, "*Die Kuanyama van Ovamboland, SWA: 'n Studie van Waarde-opvattinge*", MA, University of Stellenbosch, 93.

⁸⁹ Agnates are relatives pertaining to the male, as opposed to uterine (relatives connected through the females). Cognates are all those reckoned to be related on both male and female sides.

⁹⁰ Bruwer 1961 (op cit n84), 42.

⁹¹ Ibid, 60. There is some suggestion though in Walter Louw, 1967, *Die Sosio-Politieke Stelsel van die Ngandjera van Ovamboland*, MA, University of Port Elizabeth, 95, that matrilineages might be important in terms of group liability for acts defined as criminal. The extended family or lineage is also responsible for individual behavior. Especially cases of habitual thieves cause much hardship for the relatives who have to contribute to paying the fines and compensation. On more than one occasion, to avoid such

Windhoek there are indications that the household is becoming the dominant unit, and a gradual shift in authority from the wife's eldest brother to the husband is apparent.⁹² Nevertheless, despite this atomism, Bruwer acknowledges that "avuncular tendencies persist in the system of inheritance and a man will even bring his mother, his sisters and their children into his homestead if necessary".⁹³ In matters of inheritance, especially of cattle, matrilineal lineages are of the utmost importance.

THE CASE OF THE FUGITIVE HEADMAN

King Taapopi of the Kwaludhi tribal area complained to the colonial authorities that Headman Elifas Shiimi was ignoring his instructions. A week later Headman Elifas showed up in the Mbalantu tribal area claiming that he had been chased away and forced to leave his wife and children in Kwaludhi. Taapopi was prepared to accept him back if he followed instructions. A month later the Headman had not returned and had started building a household in Mbalantu, and instructions were given that his headman's allowance be suspended.

Inheritance was at issue here. Headman Elifas was heir to cattle belonging to his deceased brother who had lived in Ngandjera. He had taken nine cattle, of which he kept two at his own kraal, placed two with his brother (Shikongo, a cleaner at the local Magistrate's Office), two with his nephew Omkwayo and two with his nephew Komumba. Finally he had slaughtered one. His brother's widow still had 49 cattle that she "hid from me". He had complained to the appropriate Ngandjera authorities.

Meanwhile the widow had complained to King Taapopi that the Headman had taken the nine cattle and Taapopi had ordered the return of the cattle to Ngandjera. The Headman did not agree, and an argument in the presence of many witnesses ensued at the King's home. The King claimed that "I made trouble and must leave the area and that a Tribal Policeman should guard me." Humiliated thus, the Headman had left the Kwaluthi area.

Taapopi's version was that he told the Headman to return the cattle because, despite being his deceased brother's heir, it was the deceased's wish that the cattle remain with the deceased's wife and children. The Headman had also apparently written letters to the Ngandjera authorities using the official Kwaludhi stamp in order to take possession of the cattle.

Source: NAN. LON 8/3, dated 30/9/1976.

payments, relatives have asked the traditional authorities to amputate an arm or remove an eye or simply let the guilty party be incarcerated by the authorities. (See eg NAN OVJ J6/10/3.)

⁹² Pendleton 1993 (op cit n54).

⁹³ Bruwer 1961 (op cit n84), 61.

7.108 The case described in the case example above graphically illustrates the centrality of inheritance cases in Owambo life and how Owambo have on their own accord tried to deal with the contradictions in their lives. Inheritance affects all levels of society and crosses tribal boundaries.

7.109 As a rule of thumb, the potential for disputes depends on the number of presumptive heirs. If there is a brother, then the likelihood is high that the case will be settled quickly. The most common inheritance disputes according to most Owambo concern the land of the deceased and to whom it should resort. Cattle were also a major source of dispute, but this depended on the size of the herd. The more cattle in the estate, the greater the potential for conflict, as more relatives believe they can put in a claim. Most of this infighting occurs when a husband dies. Widows' estates rarely lead to conflict unless they were rich. Some traditional authorities attribute the increase in inheritance disputes to the fact that "people are too lazy to work", but it appears that the structural factors mentioned earlier (kinship coupled to increasing resource pressure) make an increase in such disputes more likely. Nowadays it is also claimed by some that the main conflict is not about cattle and the extended family per se, but rather about consumer goods acquired after marriage, such as corrugated iron and furniture. Indeed, one participant at a recent workshop suggested that modern and traditional assets should be kept separate.⁹⁴ Cases which we were able to examine bear out this contention.

Land as a source of dispute

7.110 Land is basic to survival and indeed central to most inheritance disputes. It is symbolically vested in the king or chiefs, who then allocate it to headmen, who in turn will upon payment of a small fee allocate lifelong usufruct or use-rights to whoever applies, even as was seen in the one case study to members of a different 'tribe'. While local people talk about "owning" the land, it is clear that this concept of ownership refers more accurately to a lifelong lease. Land is divided into "sowing land" and land for permanent residence. The former is traditionally obtained by a married man⁹⁵ who would then allocate portions of it to his wife or wives, keeping the largest segment for himself. The wives would keep separate granaries. Unmarried children, male and female, will also be allocated garden plots, and they can dispose of the produce thereof as they see fit. Nowadays, with the large number of female-headed households, it is obvious that unmarried women are also obtaining such usufruct. The tenant was not permitted to sub-lease the land and did not have to actually use the land, as non-use was historically not grounds for reallocation. Plots for erecting more permanent buildings are a more recent innovation over the last century. Typically such plots were small, seldom more than 200 square feet⁹⁶, and

⁹⁴ Legal Assistance Centre, 2003, "Workshop on Women and Property Rights under Customary Law", transcript, 39.

⁹⁵ Kotze 1968 (op cit n88), 83.

⁹⁶ Ibid, 84.

had to be bought from the sub-headman but with the headman's approval. Such buildings could not be erected on sowing land. Improvements on the land, like wells and fruit trees planted, also reverted back to the sub-headman on the death of the usufructee. However the Communal Land Reform Act has now changed this. Initial impressions in Owambo are that this part of the Act is working.

7.111 When a landed person died among the Ngandjera, his younger brother traditionally has first option to 'purchase' the plot, and if he does not exercise the option then the next brother can exercise it. If he already had a plot of land, the brother could appoint a claimant to purchase the land. The king will have the final say in such cases.⁹⁷ In effect then these 'purchases' amount to a death tax payable to the local headman by the heir. Louw is adamant that "the King will ensure that a widow does not become homeless". If she does not have enough land to work, he will ensure that her needs are met by allowing her to pay for the usufruct to use her late husband's land, especially if she has adult children. On her death her children are the heirs who then have first option on 'purchasing' the usufruct to her land. This concern, however, only extends to old widows, and apparently not to widows with young children who might remarry. These widows should return to their relatives.

7.112 When sub-headmen or headmen died their land reverted to the next person above them in the hierarchy who could then dispose of it. Typically though, a chief/king would allocate large districts to his proxies, often relatives like brothers, sons and even female relatives.

7.113 Ironically then, the title of the only ethnography on the Owambo, Loeb's *In Feudal Africa*, is a misnomer. Land is not feudal in that one cannot inherit it. Theoretically every male had the chance to obtain a piece of garden land. Control is based on use – if one lets land remain fallow in some parts of Owambo, it could theoretically revert back to the ward head for 'redistribution'. With pressure on resources increasing, this is becoming an option more frequently considered. This system prevented the formation of a rich landowning class and a landless proletariat. Every family was allowed a piece of land which when gardened offered basic subsistence. If land were inheritable, there would probably have been so much subdivision as to make farming unworkable (as in the case in Rehoboth where some farms have 90 or more owners).

Property rights regimes

7.114 Property rights over objects varied quite considerably. Self-made things and items obtained through trade or by find were regarded as being owned by the individual who could dispose of them as they saw fit. Traditional authorities interviewed claimed that if a person bought cattle with money obtained from his own work, he should have the right to dispose of these cattle as he saw fit, and should be

⁹⁷ Louw 1967 (op cit n91), 99.

allowed to give them to his wife or children. It was said that the same would apply to wives who bought cattle.

7.115 This rule also applied to other property of women, who could dispose of their harvest as they saw fit. One exception covered the necklaces made of buttons of whelk-shell called *omba*. In Kuanyama these could only be worn by chiefs and certain female royalty, while in Ondonga they were restricted to aristocrats.⁹⁸ The 1977 Owambo law on wills specifically mentions *omba* and that they are to be inherited patrilineally. Property is gendered in the sense that there are still cases nowadays, even of university graduates, where the wife will purchase a car and have it registered in the husband's name. This kind of practice creates a situation rife with inheritance problems. Another emerging problem concerns situations where people, usually relatives, will pool their resources to purchase a car or truck and then have it registered in one person's name.

7.116 A particular set of restrictions concerned items given as a present by a near relative. Thus wives were not allowed to alienate objects, by gift, destruction, trade or barter without their husband's permission, if he had originally given the items to them as a present. The same applied to children concerning gifts given them by parents or relatives.⁹⁹ Similarly, items obtained through inheritance could not be disposed of without permission from the matrilineal kin involved. Goods received from strangers were classified as being created by one's own energy and could be disposed of without permission.

7.117 As with the Herero, but perhaps not to the same extent, cattle are highly valued by the Owambo. Indeed, according to the Bureau of State Security report on the 1972 Kuanyama "Unrest", while the famous contract worker strikes certainly helped create the conditions of conflict, the major cause was administration restrictions concerning cattle.¹⁰⁰ "Cattle are worth more than anything", a senior headman said, explaining why people had to pay two head of cattle for land. Traditionally a large number of oxen and bulls were kept. Owners of large herds will 'farm out' their livestock to relatives or friends and dependants. Again there is a binary ownership at work. Cattle bought by individuals can be sold or disposed of by them, but cattle inherited cannot be disposed of, and even when such an animal is slaughtered due to old age its meat must be eaten by kinfolk. There is a belief that "cattle are always regarded as men's property" and according to Becker and Hinz this contributes to reinforcing women's poverty. "Cattle are for the generations", they say, although they do not expand on their argument.¹⁰¹ Sometimes a distinction is made between family cattle, which are inherited and cannot be sold without permission, and commercial

⁹⁸ Ulrich F Delius, 1984, *A comparison of the law of things and the law of inheritance and succession of some important tribes of traditional SWA/Namibia*, LLM, U. Bophutatswana, 134.

⁹⁹ Kotze 1968 (op cit n88), 128.

¹⁰⁰ "Owambo Onrus in Kuanyama", National Archives of Namibia, BAD 18 O 13, 24 March 1972.

¹⁰¹ Becker & Hinz 1995 (op cit n86).

cattle which have been bought with money earned by the individual and can be sold easily. Sometimes women will get some of this class of cattle.

7.118 Property which is inherited is seen as ultimately belonging to the clan and thus the individual who possesses it during his or her lifetime cannot alienate it without lineage support. This is the reason why colonial bureaucrats would frequently complain that if Owambo contract labourers died in the Police Zone they could not dispose of their possessions. For example when a bus overturned near Tsumeb and several repatriates were killed, “Several attempts were made to sell off these articles by Public Auction in accordance with circular instruction but no purchases were made. The natives seem to be averse to buying these articles.”¹⁰² A constant complaint by contract workers was that the administration would simply sell off the effects of the deceased contract worker and not repatriate the possessions back to Owambo.

Matrilineal and patrilineal principles

7.119 Inheritance, *osuruwa* (to benefit from the dead), is overwhelmingly, but not solely matrilineal. There are certain objects, like *omba* (a type of jewellery discussed above), religious paraphernalia, sacred amulets, and medical kit which are inherited patrilineally. In the past, sacred cattle, *onangula* (Kuanyama), were also inherited patrilineally. Another item inherited patrilineally is one’s name. Children generally take as their first name the surname of their father. But most of the items defined as economically valuable pass through the matrilineal line. The key is “people of the same mother”. According to Delius,¹⁰³ the first heir is the man’s oldest living brother, and failing brothers the estate devolves to the eldest sister’s living son, and failing that to the sister’s daughter’s eldest son. Failing them, the estate would go to the male descendants of the deceased’s mother’s sisters. One inherits not only wealth but also obligations. In a recent case of suicide, a 63 year-old shot himself, apparently because his younger brother had recently stabbed his girl friend and their child to death and he as heir would have to pay the required compensation.¹⁰⁴

7.120 Historically, as in the case of land, the homestead was not inherited but reverted back to the sub-headman. A new homestead would be erected a short distance away, with the new owner changing the palisade pattern to confuse the former occupant’s ghost. In olden times the homestead and possessions were burnt, but increasing scarcity of wood has resulted in changes, and the deceased’s possessions are now distributed to lineage mates.¹⁰⁵

¹⁰² National Archives of Namibia, SWAA A50/41 Native Affairs, Native Estates General & BAC HN 1/2/3 Estates Main File.

¹⁰³ Delius 1984 (op cit n98).

¹⁰⁴ *The Namibian* 27 May 2005.

¹⁰⁵ Edwin M Loeb, 1962, *In Feudal Africa*, Bloomington, American Folklore Society, 108.

7.121 On the basis of his survey of the extant literature, Delius is adamant that the wife did not inherit anything from her husband, justified by the fact that she was not related to him. A relatively common explanation offered was that “If my wife will inherit she will kill me or cause my death.” There was also a fear that if the property went to the wife she would remarry and ignore the children. Another justification mentioned is that since my father “got nothing, why should I let these people inherit”. At the same time there is a growing realisation that when two people have a home together they amass certain wealth together and that this should be shared.

7.122 In the past the deceased’s relatives could insist that everything he gave the wife while alive as a ‘present’ had to be returned to his relatives. All presents were simply ‘loans’, and she had to return clothing, tools and even jewellery. If the gifts could not be returned, then she was expected to pay compensation, to the extent that one widow had to return a cow because her husband had slaughtered one while she was ill.¹⁰⁶ Some husbands would sell a few cows to their wives at cheap prices while informing relatives so that the cows will remain the property of the woman. One apparent innovation, according to Kotze, was that the husband would give as many gifts to his wife and children as he can, but these gifts must be given in the presence of witnesses, as this new custom had not yet been recognised.¹⁰⁷ A similar scenario played out with a man’s children. Presents given could be called upon for return. The one exception was apparently any weapons a father gave his son.¹⁰⁸ These rules caused so much hardship that from an early period people tried to circumvent these consequences by using a variety of ploys discussed in the following section on the “History of dealing with inheritance”. Bruwer suggests that there was some flexibility, at least by the late fifties: “When the family head dies, it is also general custom that some of the cattle and other livestock are given to the wife and children, but guiding principles in this respect are vague and left to the discretion of the executor of the estate of the deceased.”¹⁰⁹

7.123 When a woman of property dies, her cattle goes to her eldest son, if he is grown. If there are no male descendants then the cattle go to a brother, with the obligation that he distribute them to his nieces. Her personal items would go to her daughters.¹¹⁰ If she has no daughter, her ornaments would go to her sisters or female

¹⁰⁶ Herman Tönjes, (1911) 1996, *Ovamboland*, Namibian Scientific Society, Windhoek, 14. Traditionally divorce was relatively simple. A wife could leave and the only hold a husband had was to insist on the return of all his “gifts”. Loeb (op cit n105), 257, reports that “This is a demand she can rarely meet, since she will have worn or lost her clothing or ornaments.” However traditional authorities have since instituted a new law allowing her to leave without having to recompense her husband.

¹⁰⁷ Kotze 1968 (op cit n88), 133.

¹⁰⁸ Delius 1984 (op cit n98), 160.

¹⁰⁹ Bruwer 1961 (op cit n84), 89.

¹¹⁰ Carlos Estermann, 1976, *The Ethnography of Southwestern Angola* (3 volumes), G Gibson ed, Africana Publishing, New York, 106. Loeb (op cit n105), 109, reports a small variation among the Kuanyama:

cousins. Logically then the lines of inheritance were firstly her children, then her mother and grandmother and finally her siblings. Nowadays with widows, if there are two brothers living with their mother and the eldest is already married, the land and house will go to the one who looked after the mother, usually the younger.

Modes of estate settlement

7.124 Allocation of the estate, symbolically manifested in the past by throwing items on the ground to symbolise loss, usually takes place shortly after the funeral and can easily escalate into a scene of much dissension. As Loeb¹¹¹ described it, during the funereal wailing people would try to get a personal possession of the deceased in order to “take leave” and say how much they were indebted to him. “Heavy fights were usual as all members of the deceased’s clan expected to get something.”¹¹² Wulfhorst described it a century ago: “Often that one gets most who secures his share fast.”¹¹³ Nowadays it is alleged that one of the first things people do when someone dies is to seek and find the relevant documents so that they can be appointed executor by the magistrate, and it happens that sometimes a single estate will have multiple executors appointed by magistrates in different districts. One consequence of the many competing claims is that the estate gets dispersed to a variety of uterine (of the same mother) relatives and claimants as the executor strives for equity. The deceased’s property between the period of death and the formal division of the estate is highly vulnerable. Many described how “people just take” since “it doesn’t belong to anyone”, and men allege that widows will organise their sons to hide the cattle.¹¹⁴

7.125 The executor is generally the principal heir, the deceased’s mother’s brother, or if no brothers are available, his nephew, the eldest son of his eldest sister. The principal heir has an obligation to distribute something to all the nearest uterine relatives but keeps more than what he gives.¹¹⁵ The person with responsibility for dividing the estate varies. Amongst Kuanyama it is apparently a brother or uterine nephew (or even a niece).¹¹⁶ Loeb¹¹⁷ cites Headman Viliho Sr:

Upon the death of a wealthy Kuanyama man his sister’s son divides the estate according to the own wishes. This nephew shares the inheritance with all his relatives, including siblings of the deceased. When there is no nephew or niece to act as executor, a brother or a sister has the right to

A woman’s property goes to her children; her cattle go to her brothers. If she has no son, her cattle go to her brothers. If a woman has no daughter, her ornaments go to her sisters or to her family cousins in the same clan.

¹¹¹ Loeb 1962 (op cit n105), 108.

¹¹² Delius 1984 (op cit n98), 154.

¹¹³ Cited in Delius, *ibid*, 155.

¹¹⁴ Legal Assistance Centre 2003 (op cit n94), 44.

¹¹⁵ Estermann 1976 (op cit n110), 105.

¹¹⁶ *Ibid*, 155.

¹¹⁷ Loeb 1962 (op cit n105), 109.

distribute the property. Every clan mate inherits something from the property of a very rich man.

Among the Ngandjera this task devolves to the mother or, if she is incapable, to one of the brothers or, if no brothers are available, to a maternal aunt or one of her oldest children.¹¹⁸

7.126 One way to deal with this potential conflict is for a person to designate an administrator *Muene wenghali* to execute his estate. This must be done in the presence of a witness and much respect is given to such a development because: *Eendjovo domufi ihadi lundululwa* ("The words of the deceased must be implemented.")¹¹⁹

THE WILFUL NEGLECT OF TIOPLINA ASHIKOTO

A widow, Tiopline, remarried a widower who was considerably older than herself. This was a marriage solemnised both in church (civilly) and by tradition. The couple had a daughter who was now fourteen. Both also had children from their previous marriages. On the death of Tiopline's husband, his sister came and told her to leave. Tiopline, who had been chased away after the death of her first husband, then appealed to the local headman in Ongwediwa. "He refused to hear my case 'You are still young, go and get married elsewhere'."

On the last day of mourning (after a week) the husband's relatives came and took everything, including beds, couches and clothing. Again the widow was asked to leave. The drive was spearheaded, she believed, by a half-brother of her late husband and a nephew, her husband's sister's son. They argued that the son born out of the first marriage should inherit the homestead. This son, now about forty, claimed that his father had promised the land and homestead to him. The son, with his girl friend, had shared the house while the father was alive.

The widow had cared for the old man. His children were ill-treating him, which is why he remarried. He had made an oral will in which he gave the estate to the son of his first marriage, but on the condition that it be shared with the widow. This will was witnessed, but the witness had since died. Again the widow was told to leave, but she responded that she came from two villages away and there was no one, no relatives, she could go and live with. Eventually she went to the Legal Assistance Centre, which gave her a letter to give to the headman to fix a court hearing. This was ignored. She was advised by officials to return to the homestead. Although the homestead property was divided up, she was allocated the land and paid the headman N\$5 for the certificate. "It is my land now, it will go to my daughter."

Source: interview with Tiopline Ashikoto at Ongwediwa, 11 April 2005.

¹¹⁸ Louw 1967 (op cit n91), 100.

¹¹⁹ Kotze 1968 (op cit n88), 134.

Wills

7.127 While there was the possibility of making oral wills in the past, this was rather rare for a number of reasons. There was the belief that in making a will “I am wishing for my own death”, which meant that typically such wills were made when one was old and expecting to die shortly. It is also alleged that fear of being poisoned or the victim of witchcraft plays a role in this reluctance. Many apparently deliberately abstain from will making because they don’t want their brothers to know, and want to hide from the wife the fact that she will not be getting any of the estate. It is also believed that people will sometimes hide the will so effectively that no one will find it, or if it is found some will make the charge that it is a false will.

7.128 In making such a will, one will choose someone who can be trusted. Wills are a well-kept secret. The person who hears the will has no specific title and there are no witnesses. Where there is an oral will, the possibility exists for non-relatives to be allocated a beast or two out of friendship or service. In the past, it is claimed, wives were trusted because marriage was not between two individuals but was rather between two groups. Trust was needed then because people were illiterate and people had better memories because their minds were not besozzled by alcohol. The wife was the bookkeeper and made certain that the assets were not wasted. When a person died, news of the death was kept secret for as long as possible to prevent the squandering of assets. Nowadays though one would make an oral will to one’s wife or one of the older children, a brother or a respected neighbour, or any person thought to be responsible and able to keep secrets.

Debts and liabilities

7.129 The heirs inherit debts as well as assets, but these have to be made public during the lamentation. A particularly large debt could, in the past, be settled by payment of ‘slaves’ (ie a man could give away his sister as payment for murder).¹²⁰ Debts of the deceased are settled out of the estate. If the debt is large, the land of the deceased can be forfeited to settle it, notwithstanding the widow’s claims.¹²¹ Should there still be an outstanding debt, then the deceased’s mother’s brother or his own brother, depending on who can afford it, will settle the debt.¹²² While in the past debts and liabilities fell on the extended families, nowadays they tend to fall increasingly on the married couple alone.

¹²⁰ Delius 1984 (op cit n98), 137.

¹²¹ MO Hinz, 1997, “Law Reform from Within: Improving the Legal Status of Women in Northern Namibia” in *Journal of Legal Pluralism* 39, 69-79. It is unclear how the new Communal Land Act will impact in this regard.

¹²² Kotze 1968 (op cit n88), 134.

Political succession

7.130 The logic and flexibility of inheritance is clearly seen in the rules for inheritance of chiefs. Typically a chief took over his predecessor's cattle herds, royal insignia and sacred things.¹²³ The chieftainship itself was based on inheritance. The ideal pattern for succession was for the eldest brother to succeed and then the eldest son of the eldest sister. When neither of these two lines produced a potential heir, the office went to the deceased's sister's daughter's eldest son. While children did not inherit, while the chief was alive his children were treated as nobles (*omalenge*). Chiefs could also give their sons districts and make them headmen, but when the chief died they reverted back to being ordinary people. Indeed the new chief might – and the historical record indicates, did – assassinate such people for being potential threats.

7.131 The succession of headmen was largely a matter of popular choice by the people over whom they were to govern. However, in a large number of cases it is clear that the headman was chosen in accordance with matrilineal inheritance. Succession could be shaped by the incumbent, as the headman often had a substitute who could act on his behalf and this person usually succeeded him.¹²⁴

7.132 In practice actual succession depended on a number of factors, the key one being whether there were brothers. If so, then the case was settled relatively quickly. Conflicts emerged when there were no brothers but only a number of nephews. These would then start positioning themselves for power and soliciting support at the palace from royal advisors, etc even while the king was still alive. Historically, succession could frequently develop into a naked power grab by the most well-armed and well-positioned nephew.

7.5 The history of inheritance problems in northern Namibia

7.133 It was, and is, in the populous north where most of the population lives that dissatisfaction with inheritance is common. Already at the turn of the last century missionaries recorded complaints about what later was recognised as a matrilineal system of inheritance. In brief, this system of inheritance moved property not to one's children or spouse but to one's brothers and sisters – that is, people who shared the same mother as the deceased. In this system the widow and her children belong not to the husband's family, but to the wife's own matrilineal relatives who are supposed to care for her. The missionaries reported that widows were much devalued. They had no rights to any kind of property left by the husband, and the

¹²³ This in addition to the fact that the chief expected to receive tribute; “whenever a rich man dies, a portion of his property goes to the king”, as Loeb notes (op cit n105), 106.

¹²⁴ Bruwer 1961 (op cit n84), 33.

husband's relatives, those related to him through his mother (usually his brothers), would decide whether the widow could remain on the land or not, and whether she should be stripped of all the gifts given her by the husband. Even gifts given by the father to his children had to be returned. To circumvent this, the Reverends Wulfhorst¹²⁵ and Kraft¹²⁶ reported that fathers would sell such items to their children for a nominal sum, despite strong opposition from matrilineal kin who would try to recover such property. To neutralise this, the father had to inform his kin and disguise the transaction as some form of trade, such as trading cattle for grain or some other commodity. Such transactions had to be done in public so that people knew about them. Variations of these strategies and ploys are recorded by a host of other researchers.¹²⁷ While this was acceptable, it was only so within limits. It should not involve cattle the deceased had inherited, and the bulk of the estate still had to go to matrilineal kin. In effect, such transactions were a sound insurance policy for the matrilineal heirs since the estate would be vulnerable to raiding between the time of death and the settling of the estate, and such close kin living near the deceased would be well placed to engage in such 'raiding'.

7.133 Recognising such problems, the Finnish Missionary Society from an early period, at least from the 1920s, continually encouraged couples getting married in church to do so in community of property. They promoted this choice to improve the position of women, and also because the matrilineal system caused property disputes and thus broke up marriages. It was also argued that matrilineality made a proper Christian upbringing of children impossible, while the missionaries felt that patrilineal inheritance and joint property were "civilised" or "Christian" systems.¹²⁸ In 1920 they asked Ondonga King Martin to allow Christian widows to inherit their husband's property, but he told them that local resistance was too strong to make such an innovation work. Uukwaldhi King Mwaala passed an "Inheritance Law for Christians" in 1926, but nothing came of this. Not only was there popular opposition to patrilineal inheritance, but also administration resistance. The 1931 synod reported that Native Commissioner Hahn was strongly opposed to introducing European-based laws, as this would undermine not only matrilineal kinship but also indirect rule. It would also complicate inheritance and make Africans feel equal to Europeans.¹²⁹ The Lutheran Church also encouraged its adherents to make wills,¹³⁰ initially recommending that at least half the estate be left to the wife. They continually raised the problem with the administration and in 1947 felt that, with Hahn's retirement and the appointment of Eedes as Native Commissioner in Owambo, their proposals would have more

¹²⁵ Rev. Wulfhorst, nd, "Beantwortung des Fragebogens über die Rechte der Eingeborenen in den deutschen Kolonien", copy in National Library of Namibia.

¹²⁶ Cited in Delius 1984 (op cit n98), 155.

¹²⁷ Louw 1967 (op cit n91), 100; Tönjes 1911 (op cit n106); Bruwer 1961 (op cit n84).

¹²⁸ Kari Miettinen, 2005, *On the Way to whiteness*, SKS, Helsinki, 293.

¹²⁹ Ibid, 294. This would probably explain the distinction made in the application of the Native Administration Proclamation 15 of 1928.

¹³⁰ See also Bruwer 1961 (op cit n84), 92.

chance of success. They asked Eedes to make the civil marriage law applicable to Owambo. The problem was apparently that neither missionaries nor pastors were legal marriage officers, although this was formally addressed in 1952. Missionaries and the Church now took it that all marriages they solemnised would be in community of property, unless there was an antenuptial contract, with mutual rights of inheritance. This led to such strong opposition that the law was changed to make out of community of property the default situation in 1954. The Church then decided that it would only sanctify marriages that were in community of property.¹³¹ In the same year the Church also presented the administration with a boiler plate will in Afrikaans and oshiNdonga, which the Administration rejected as being too long and confusing. It was also too radical given the “vested matriarchial system”.¹³² The Chief Native Affairs Commissioner pointed out that wills could not be compulsory but only voluntary, and suggested that the model be shortened, simplified and attested in the presence of an official and two witnesses. Nevertheless the Finns and their successors, the Ovambokavango Church, informally insisted on wills as a condition for marriage. Töttemeyer¹³³ noted that in 1978: “There is still a custom in the Ovambokavango Church whereby a married couple, after celebrating their marriage, have to sign a document (will) stipulating that the survivors, whether the husband, wife or children, are the chief heirs.” Later this practice would fall by the wayside. By the early 1990s, Becker¹³⁴ found that more than three-fourths of all civil law marriages were in community of property, but found that the concept was neither understood nor heeded by the vast majority of the population. This option was usually exercised for religious reasons.

Indigenous efforts to resolve the contradictions

7.134 In 1948, while doing fieldwork among the Kuanyama, Loeb noted that Christians were increasingly opposed to the system of matrilineal inheritance. He reported on a public meeting where switching to a patrilineal system was discussed. This option was reportedly much favoured by younger wage-earning Christians. But the proposal was rejected on the following grounds: First, the cattle did not belong to the individual but to the clan. The brother or nephew was thus ostensibly simply administering them on behalf of the wider group. Second, if a son were an heir he might attempt to kill his father¹³⁵ (patricide and fratricide were rather common among the elite). Third, the traditionalists argued rather tautologically that laws of matrilineal inheritance were always followed, so there was no reason to change them. Finally, it was suggested that to create a patrilineal inheritance sub-system lodged within an overarching matrilineal system would create all sorts of emotional

¹³¹ Miettinen (op cit n128), 295-297.

¹³² National Archives of Namibia, SWAA A50/40 Native Estates.

¹³³ Töttemeyer, 1978, *Namibia Old and New*, C Hurst, London, 16.

¹³⁴ Heike Becker, 1996, “Researching Gender and Customary Law in Namibia”, mimeo presented at a conference on “Researching Gender and the Law” at the University of the Witwatersrand.

¹³⁵ Judging by Vilho Kaulinge, 1997, *“Healing the Land”: Kaulinge’s History of Kwanyama*, edited by Patricia Hayes and Dan Haipinge, Rüdiger Köppe Verlag, Köln.

and social problems given the deep entrenchment of matrilineal ideas in Owambo society. However there were already ways to circumvent the system, in addition to the well-established ploy of selling off items to children for a nominal sum.¹³⁶ Loeb found that “some rich men like headman Nehemiah now bank their excess wealth so that it might be difficult for the matrilineal clan to obtain possession of a clan member’s banked money after his death”.¹³⁷ Another strategy noted by Loeb was that of Senior Headman Viliho, where “a man tries to marry a woman who has wealthy brothers and thus to ensure a rich inheritance for his own children”.¹³⁸

7.135 In the late 1950s Bruwer found that among the Kuanyama:

Most of the [[deceased’s] cattle however go to his nephew, leaving his own household destitute and disintegrated. This system is however being queried more and more. On the one hand wives and children ask for a greater share in the assets of the family head, and on the other hand nephews urge that inheritance should also be applicable to villages and land ownership.¹³⁹

Again evasion strategies are noted:

Although matrilineal inheritance persists. ... [i]t is becoming common practice for a man to give more cattle to his own children than was allowed under traditional law, and women are also taking increasing possession of assets accumulated with the family for her personal use. An interesting modern trend is that some missionaries refuse to solemnize marriages unless they are in community of property, or provision is made for the wife and children if the husband should pass away.¹⁴⁰

7.136 But the situation was already shifting. In Kwambi, for example, it was customary on the death of a man (typically a homestead head) that all his possessions went to his mother except the homestead, lands and *mahango*. His mother would then divide this estate among her children. The deceased’s siblings could then on their own initiative give something to the widow, but were under no obligation to support the widow and children. Indeed, the widow and children could be forcefully driven from the kraal. The widow would, in such cases, be given only one basket of *mahango*. The deceased’s kraal and lands reverted back to the headman who could “sell” them to anyone for a price varying from one basket of *mahango* to two head of cattle. The widow had no claim to the land. The heirs usually bought the kraal and lands as they had first claim to them, but if they were not interested then the headman could sell them to anyone.

¹³⁶ Louw 1967 (op cit n91).

¹³⁷ Loeb 1962 (op cit n105), 110.

¹³⁸ Ibid, 109.

¹³⁹ Bruwer 1961 (op cit n84), 61.

¹⁴⁰ Ibid, 62.

7.137 In 1960 this changed. At the insistence of Headmen Jackie Ashipala, Silas lipumbu Willlipard Sitatra and Herman Shopa, a mass public meeting with all the Kwambi headmen present decided to modify the inheritance law. They unanimously passed a new law which stipulated that widows and children were not to be expelled from the deceased's homestead, but were to inherit the kraal and lands. If the widow was young and married another man then she had to hand over the homestead and lands to the senior headman, who could then sell them.¹⁴¹ At the same time moveable property such as cattle and other livestock would continue to go to the deceased's mother and through her to her children, except that a Kwambi man could, while alive, gift cattle and property to his children with the result that they would remain outside the estate. Where a woman dies, the meeting re-iterated, her children would inherit everything and the husband had no claim. Concerning cash and insurance policies, the meeting resolved that under the new law one half would go to the widow while the other half went to the traditional heirs.

7.138 In the same year a similar mass meeting in Kuanyama also met to modify the community's inheritance law so that the widow would not be dispossessed. Their changes echoed those of Kwambi, with the important difference that the Kuanyama meeting decided that money was not traditional and thus cash, monetary compensation and insurance were not defined as part of the estate and went to the widow.¹⁴²

7.139 In other Owambo areas, inheritance problems and responses were also reported in the early 1960s. Thus both the Tribal Secretary of Onkolonkathi and Chief Taapopi of the Uukwaluthi area reported that "Very often there are troublesome disputes, arguments and assaults between and among heirs about the portions, especially when the first heir is despised by his or her fellow heirs or is female. This is the sort of thing which promotes most complaints."¹⁴³

7.140 Another indicator of the issues is found in Ngandjera, where Chief Oshona Shiimi pioneered an effort to develop a written legal code in the early 1960s (although final interpretation rested with the chief). Of particular interest is Item 16 of the Code:

Neglect of Old People and Children and Infirm. If someone is responsible for supporting these people and refuses or neglects to do so, that person can be fined and the whole fine used to help the suffering party. Repeat fines are possible. If no family then the Captain, headman and sub-headman and all the kraal-owners of the omukunda will help.¹⁴⁴

¹⁴¹ In this new law being married according to Christian rites made no difference, except that a contract of community of property could be made.

¹⁴² National Archives of Namibia, OVJ Ref J17/1 23/10/1979.

¹⁴³ National Archives of Namibia, OVJ Files1 J1/3/1-6 Wetgewing en Regulasies.Tribal Sec Onkolonkathi 24/10/1961 to BAC response to a circular, our translation.

¹⁴⁴ Cited in Louw 1967 (op cit n91), 135, our translation.

7.141 By the early 1970s Tötemeyer¹⁴⁵ found that “With the exception of the traditional leaders, the present system of matriarchal (sic; matrilineal) right of inheritance is rejected with equal vehemence by all the other groups. They are not only opposed to the way in which traditional leaders are succeeded on their decease, but also to the principle whereby, when the head of a family dies, the matrilinear (sic; matrilineal) relatives are the heirs and not the dead person’s own family.” In his in-depth interviews he found that only some 5.2% believed that the old “tradition” should remain or that (matrilineal) blood relatives should inherit.¹⁴⁶ The wisdom of hindsight suggests this was an overly optimistic assessment.

The Efforts of the Owambo Legislative Council

7.142 After the establishment of an ethnic-based Legislative Council in Owambo in which traditional leaders predominated, one of its first activities was to set up a Select Committee to report on jurisprudence. Clearly things were not satisfactory. The Owambo Minister of Justice made a spirited call for traditional courts to modernise so as to make them more acceptable for enlightened local people. In this spirit the Committee recommended that traditional courts keep better records, and that the punishments be made uniform, as frequently there were high fines which bore no relation to the misdeed and punishment. The Committee also urged that fines be paid, not to the presiding officer who frequently used them to his own advantage, but to the Tribal Fund. Misuse of tribal police also had to be controlled.

7.143 In the past there had been much criticism that little, indeed no, documentation existed in which indigenous law was written up as a guide for applying it to cases. As a result, it was claimed, presiding officers were arbitrary and free in their interpretations. To remedy this, the University of Stellenbosch was eventually contracted in 1975 to supply an academic to record Owambo customary law. This academic, Mr J.Pretorius (who had written a Masters thesis on the customary law of the Caprivi), was to be supervised by Prof WJO Jeppe under the aegis of an oversight committee consisting of a Tribal Representative, Prof L de Clerq of the University of Zululand and Prof Francois de Villiers of the University of the Western Cape. By 1980 no report had been received.¹⁴⁷

7.144 On 15 May 1974 Member Toivo Shiyagaya introduced a motion to consider the “advisability of a suitable law of Succession in accordance with the present standard of living in Owambo”. It is worth summarising some of the main points made in this discussion. Many Owambos were annoyed to realise that when they died the property they had accumulated would fall into the hands of relatives they did not like. There was a system of oral wills epitomised in the expression “It is

¹⁴⁵ 1978 (op cit n133), 145.

¹⁴⁶ Ibid, 146.

¹⁴⁷ National Archives of Namibia J6/15/2, “Voorgestelde handleiding in die Optekening van Inheemse Reg”.

the deceased that has said so”.¹⁴⁸ What the proposed legislation would do was simply to legalise this type of oral will. Such legislation was motivated as being necessary to protect businesses – a point Shiyagaya later reiterated, but without explaining how or why this was necessary.¹⁴⁹ Immanuel Hihulifua supported the motion because “In various Court cases we sometimes hear that the widow was asked why she hid some of the property of her husband.” He concluded that widows did this because they needed legal protection in the form of a will.¹⁵⁰ If the property of the deceased was worth less than R600 then it should be kept for the widow and children. However, cattle and other property which had been inherited should go back to the matriline. Minister Cornelius Ndjoba raised the question whether when a woman died, should the widower be entitled to some of the estate? He felt that couples should declare their wealth at marriage and then share what they had jointly accumulated. Peter Kalangula queried this by asking about how this would impact divorces, which were relatively easy in the past but becoming increasingly difficult. While wills could be made he cautioned that “It takes time to determine to whom things must be given when a man dies because it must first be established whether he trusted his family or his wife ... the man may give all his riches to his mother because his wife did not love him.”¹⁵¹ Headman Lisias Aluuma articulated the dilemma well: If a man left everything to his wife he would be rejected by his matriline. Making wills would undermine the matriline system. The problem was so complex he felt the matter should be referred to a select committee. Thomas Shikongo opined that:

“The reason why an Owambo man does not want his wife to inherit is because he is afraid for his life because if she knows that she is going to inherit she will bewitch him ... [but] it must also be taken into consideration that the wife is responsible for the maintenance of the riches of that house. It is the woman that works in the lands and looks after the cattle and ... it is logical that the wife should also get her portion of the riches.”¹⁵²

7.145 Victor Vilho clearly felt uncomfortable about women: “Things can easily go wrong because a woman can, for example, say to the members of her sept [matriline] – no, my husband said when he dies all his possessions must go to his children. My point is therefore there must be a written will. As far as men are concerned there are no problems because they act according to their thoughts.” However, he was unhappy that there were no female members in the Council and asked that if a Select Committee were appointed it be given specific instructions to ascertain the “feelings” of women.¹⁵³

¹⁴⁸ Rautanen nd claims that while oral wills were known they were seldom used. Wulforst nd claims that the Kuanyama did not know wills.

¹⁴⁹ Hansard 1974, *Proceedings of the Owambo Legislative Council*, 14 May-6 June 1974, Oshakati, 39, 46.

¹⁵⁰ Ibid, 40.

¹⁵¹ Ibid, 43.

¹⁵² Ibid, 45.

¹⁵³ Ibid, 47.

7.146 People often gave away their possessions whilst they were still alive, Festus Shiikwa noted, since “we all work for our descendants and in this way we ensure that they inherit something we die It is very difficult for the woman to support the children whilst it was easy whilst both were alive It is my recommendation that we must not strive to let the woman inherit, no it is the child who must inherit because that child belongs to both of us.”¹⁵⁴ Other points made by other members included that while the male matrilineal relatives of the deceased should decide about the cattle and other possessions, the *mahangu* should go to the wife since she planted it. Other points made towards the end of the debate were perhaps most crucial, dealing as they did with questions about the power of law. Cases were cited where half the estate had been given to the deceased’s children but the deceased’s matrilineal relatives simply took everything back. Pastor Hofni Nakamhela made the obvious point that even where the deceased had told the priest or senior headman about how the estate should be apportioned, this did not help because matrilineal relatives simply ignored the dying man’s last wish.

Administrative efforts at “muddling through” wills

7.147 The colonial administration took the matter under advisement. It was felt to be impractical to apply the South African Law on Testaments (1953) because there were no legal practitioners in Owambo who could execute estates to the satisfaction of the Master of the Supreme Court. For example, the South West Africa Bantu Affairs Code instructs: “Intestate estates of deceased Natives married according to European law will also be administered by the Master if assets exceed R600.00, but not if the estates can be satisfactorily dealt with by the heirs even though the assets exceed that amount.” Approached for advice, the Government Ethnologist suggested the following:

- (a) Written affirmation of the wishes of the benefactor. This was simply a development of the traditional oral will.
- (b) The will should be voluntary. The testator should express his desire to draw up a will at an official tribal meeting in the presence of a magistrate.
- (c) The will had to be witnessed by two witnesses and deposited for safekeeping at the Magistrate’s Office.
- (d) The will was to name an executor and after death the estate had to be registered.

7.148 The Ethnologist’s suggestion that the Master be absolved from administering all estates was approved but the suggestion that all conflicts arising from the Estate be mediated by the tribal courts was rejected. Such disputes would be the province of magistrates. In addition, the Minister of Bantu Affairs wanted criminal sanctions

¹⁵⁴ Ibid, 48.

for use against people who took assets from the estate contrary to stipulations in the will. The legal draughtsman in Pretoria was asked to draft the appropriate Bill.¹⁵⁵

7.149 On 25 and 26 April 1977, the Second and Third Readings of the “Owambo Bill on Wills, the Administration of certain Estates and Succession” was formally discussed and approved in the Owambo Legislative Council. It incorporated most of the Ethnologists’ suggestions, viz that it be seen as an extension of the traditional right to make a verbal will, that it was voluntary and that it must be formally declared at a tribal council meeting. In addition, the Bill made provision for wills to be made outside of Owambo, specifically for soldiers, and included penal sanctions for obstruction of the execution of the estate. Disputes were to be handled by the magistrate, who would also appoint an executor if none were named. Certain items, however, were specifically excluded from being included in the will. These included land and certain items like *oonyoka* (beads), *iyyela yokomaako magulu* (bangles) and other ornaments like *oomba* which the testator had received from his family and has only usufruct rights over, and which must go to the person determined by tradition.

7.150 Discussion as usual ranged off the topic but provided important insights into the nature of inheritance generally. Thomas Shikongo, for example, noted that inheritance always causes friction between relatives and pointed out that two types of cattle should be distinguished, namely those that belong to the family and those collected after marriage. He also raised an old bogey: “The is a fear among the Wambo people that when one is in company with your wife, then the family of that man is afraid that that man could be poisoned by his wife, so that his wife may then benefit by it.”¹⁵⁶ The issue of distinguishing between ‘traditional wealth’ (ie that inherited previously) and wealth accumulated during the marriage was of major concern but the Minister claimed that the testator could dispose of traditionally inherited cattle by will if the executor did not discover it. There was a clear potential for misuse, as when people listed cattle in their will which they did not own. Thus the Bill had to be explained carefully to everyone. Ananias Kamanya felt emphatically that children who had helped build up the wealth should inherit it “because we have toiled together to build it up” and while he deplored widow dispossession he insisted that “if my mother is still alive and my wife is still there when I die, then only my mother and my wife must share my estate”.¹⁵⁷ Others felt that only modern property like money and cash should be inherited by will, and that cattle should still be allocated according to tradition. Again doubt was expressed about whether such wills could indeed be enforced because there was a vicious cycle at work:

There are children who are happy because his mother’s brother works for him, and his father also works for him. When I die, that man who is married to my sister, will come and take my goods and then he passes it

¹⁵⁵ National Archives of Namibia, OVJ J1/3/1-7 20/9/76.

¹⁵⁶ Hansard 1977, *Proceedings of the Owambo Legislative Council*, 3rd Session of the 3rd Council, 12 April to 11 May 1977, Oshakati, 191.

¹⁵⁷ Ibid, 201.

on to his children. When he then dies, then my family will say: 'No, that woman was married by our family, so just let the goods remain there with her and the children'. He is now happy, I have now worked for him; he has the children of my sister and he has also inherited the possessions of his father, but my own children here, they are left behind in poverty.¹⁵⁸

7.151 There was a real fear that if people knew who the heirs were, there would be great dissatisfaction and people might become abusive towards the testator. Eliakim David forcefully reiterated his concern: "If I bequest my estate to my children and they realise that I am getting old and they are aware that the money has been bequeathed to them, then I will experience much difficulty."¹⁵⁹

7.152 Finally on 1 October 1977, the Act became operational courtesy of GG 10 of 1977, 22 Dec 1977.¹⁶⁰ Officials described it as aimed at the "younger generation" and designed to facilitate changes in traditional courts, as well to adapt to a "changing world". It was part of the move to give traditional courts original and exclusive jurisdiction in all civil matters except marriage, and was part of a structure with the Appeal Board at the apex. To make these courts more attractive to the many people living in towns who did not accept traditional authority so readily, the magistrate was given some oversight jurisdiction.

7.153 To facilitate the drafting of wills, boiler-plate forms in Afrikaans were roneoed. Implicit in this form are a number of assumptions made concrete. The model will assumes that the testator is married in community of property and assumes that the surviving spouse will be the executor and sole heir to all the property (movable and immovable), but also has space for five individual allocations of cattle and cash printed on the form. Should the wife die first then there the print reads that the property will go to her husband. If both spouses die simultaneously the estate goes to the oldest son, who is instructed to care for the minor children until they are independent. Should the whole family die, then the estate goes solely to the nephew or brother (apparently according to customary law). If the surviving spouse remarries, then the property is to be divided equally among the surviving children.¹⁶¹ The new law also required all magistrates to keep a register of testaments and wills, although the National Archives do not contain any of these registers. One can only conclude that this innovation was still-born.

¹⁵⁸ Minister Daniel Shooya, in Hansard 1977 *ibid*, 203.

¹⁵⁹ *Ibid*, 207.

¹⁶⁰ National Archives of Namibia, OVJ JI/3/1-7 Owambo Wet op Boedels.

¹⁶¹ National Archives of Namibia, LON 17/2. The literature is mute on the implications or the problems entailed in the proposal. It does not answer, for example, the question of what would happen if the widow were to remarry.

Dealing with diversity

7.154 The (white) Owambo Secretary of Justice was concerned about differences in inheritance practices compared to the South African situation (largely patrilineal), and accordingly spoke to all the senior headmen. He discovered that customs differed from tribe to tribe and even from family to family, and offered the following guidelines for magistrates derived from these discussions. The following is a direct parse in translation:

1: Generally: Matrilineal inheritance. Generally the mother is the heir, and if she is deceased then her children.

2: Christian marriage does not affect how goods are inherited. But GN 70 of 1 April 1954 issued in accordance with Proc 15/1928 stipulates that where a marriage is in community of property then inheritance should be as if a White.

3: The general policy is that where a man has insurance policies these get paid out to spouse and are not paid into the Estate.

4: When a male dies then the mother or oldest brother calls all his matrilineal kin to a meeting which decides how the estate should be divided.

5: The common practice is that what belongs to wife stays her property and does not go to the estate. The house and its contents usually go to the wife as well as the garden and a basket or two of *mahango*.

6: If a woman dies, her sisters divide her property if children are still too young. If children adults, then they inherit.

7: Amongst all Owambo tribes, the mother or eldest brother has the power to decide how property should be divided or can even keep it all.

8: When the husband dies, the wife and children are to be cared for by their own relatives. The husband's family or estate has no obligation to look after her.

9: Property of deceased that can be inherited include land-rights, cattle-post, trees, wells, etc.

Article 16(6) of Proc 15/1928 stipulates that if the deceased is married and it is not in community of property and intestate then according to Art 18(2) the estate is to be administered according to Owambo custom.

GN 70 of 1 Apr 1954 provides that if the deceased did not leave a will and is married in community of property or a widow, widower or divorced in a marriage in community of property, then property is administered as if a white. If the deceased

does not fall into one of these categories then the property is treated according to Owambo law and custom.

Ordinance 12/1946 provides that if the deceased is married out of community of property (the default position) then the surviving spouse gets a child's share or R1200.

Article 10 of the Wills Law (6/1977) provides that goods not specifically mentioned in the will are to be administered according to common law. Common law is defined as the laws and customs as defined in Article 9 of Proc. 15/1928.

Article 9 of Proc 15/1928 allows the Bantu Affairs Commissioner to use his discretion and apply Owambo law where it is not contrary to natural justice.

7.155 He then proceeded to highlight some of the regional differences:

Ongandjera: The custom was that the wife and children did not inherit anything. Livestock and possessions went to the mother and her family.

Uukwaluthi: The wife and children do not inherit. The brother of the deceased gets everything but he has the discretion to divide up the estate and to give 1 or 2 cattle to the widow and children.

Uukolonkadhi: The brother of the deceased inherits everything, but he has to give half of the estate including cattle and cash to widow and children. The other half he can either keep or divide among his relatives. The garden and house must go to the wife as this is defined as being her property.

Ombalantu: Here the situation varies practically from family to family. All agree however that the widow may not take anything but must wait until the brother of the deceased gives her a portion. If the deceased was poor, the widow and children get nothing. If rich, then widow and children get half of the property including livestock.

According to custom a man cannot make an oral will before his death. Everything which the wife put together herself remains her property and does not go to the estate. If the deceased and his widow were educated however and were officials or teachers, then the widow inherits everything.

The situation in Ukwambi and Ukuanyama and the innovative changes made in 1960 have been cited *supra*.¹⁶²

¹⁶² National Archives of Namibia, LON 17/1 Erfreg Ombalantu Magistrate 23/10/1979 Ref J17/1, our translation.

The legal consequences of the movement of men and money

7.156 There were, of course, significant changes occurring in the early 1970s, epitomised most spectacularly by the great Owambo Contract Workers Strike of 1971-72 (which probably accounted for the delay in actioning the project of recording customary law). One of the consequences was a policy to strengthen so-called “Traditional Authorities”. Thus after the South African Appeal Court ruled that excessive corporal punishment was illegal, a Council of Appeal was instituted in 1974 to hear appeals from Tribal Courts in an effort to ward off appeals to the Supreme Court.

“There are at present disturbances which very clearly will arise in cases of a quasi political nature and the possibility of applying for further interdicts by the Supreme Court. To counteract this, and to strengthen the Tribal Courts hand against such applications, it is essential to pilot the necessary legislation in the current session. This will take time, and thus as a temporary measure it is suggested that an Appeal Board be established by way of a modification of Proc R348 of 1967.”¹⁶³

7.157 So effective was this boosting of “Traditional Authorities” that the very next year Tarah limbili, the Owambo Minister of Justice, could claim in his budget speech:

“Traditional courts have no faults. They are effective, and indeed in our circumstances in many cases more effective than the magistrates’ courts. The courts will in future focus on prosecuting the traitors to our people. You all know who the traitors to our people and fatherland are – it is them who work with terrorists or simply neglect to report the presence of terrorists to the security forces. For people like this I want today to warn, you are playing with fire and we will not tolerate it any longer”¹⁶⁴

7.158 An indicator of the complexity of the issues is derived from comments made by Government Ethnologist Dr Johan Malan in a memorandum dated 16 August 1977, written just after passage of the Owambo Wills Act. A source of many problems and dissatisfaction was the widespread uncertainty concerning the application of Owambo’s changing principles of inheritance, a situation he attributed to the disintegration of matrilineal kinship groups and the establishment of certain patrilineal rules. In his opinion, this problem should not be interpreted as ineffectiveness on the part of traditional courts and could only be solved by providing more concrete evidence of the will of the deceased. Neither matrilineal nor patrilineal rules could be legislated. A practical approach would thus be to give the new Owambo Law on Wills (6/1977) as much publicity as possible. Extending the jurisdiction of the magistrates’ courts would not work because not only was the distinction between civil and criminal arbitrary in Owambo eyes, but they also preferred compensation or revenge to imprisonment as

¹⁶³ National Archives of Namibia, OVJ M/5/1978, our translation.

¹⁶⁴ National Archives of Namibia, OVJ J1/2 Routine Enquiries, our translation.

modes of redress. “There are also cases where Estates given by the Magistrates’ Court to the wife of the deceased were later under supervision of the tribal court redistributed so that matrilineal relatives of the deceased can also get a share.”¹⁶⁵

7.159 In practice inheritance disputes continued to be important, not only for widows but also symbolically. Thus they featured prominently in the archival record when headmen had to be disciplined, as case studies show.

THE REDEMPTION OF HEADMAN SHOPA

The highest traditional authority in the Kwambi area is the Council of Senior Headmen. When a senior headman dies, the remaining three senior headmen meet with all the residents of the deceased’s district and in consultation with them appoint his successor. A senior headman can suggest his successor, as usually happens, but this choice has to be acceptable to the local residents. The same principles are followed for appointing sub-headmen.

If the senior headman becomes incapacitated, incompetent or disobedient, or the district’s residents complain sufficiently about his behaviour, the other three senior headmen and the magistrate can investigate the complaints, and if they are valid the headman can be given six months to remedy the problems or be permanently suspended.

This happened in October 1979 when the Kwambi senior headmen met in the Kwambi tribal offices with the magistrate and decided to place Senior Headman Herman Shopa on six months probation. Despite the Tribal Secretary’s request in writing and via radio to complainants to attend the meeting, none turned up. Instead it was left to the other senior headmen to lead the evidence.

Senior Headman Ashipala started by saying that he had received constant complaints, usually about estates, and had warned Shopa. His colleague, Senior Headman Sitatara, joined in. He had heard many complaints, usually about a widow being forced out of her home and her land taken. “The usage according to our custom is the after the man dies the kraal and lands should be handed over to the widow.” This had been Kwambi custom since 1950 [1960?] when a meeting was held and this change announced, and Shopa had been personally present at that meeting. When he had arranged to meet to discuss the complaints against Shopa, the latter had simply not turned up. The Tribal Secretary reported that he received about three complaints a week against Shopa and that Shopa would ignore his letters and tell him not to bother notifying him of meetings. Shopa would claim R250 plus a cow from the widow in order for her to retain her rights to use the land, but some widows complained that they had paid but yet Shopa still forced them off the land.

¹⁶⁵ National Archives of Namibia, OVJ J6/4/2 1977, our translation.

Ashipala explained: It was customary for the widow to pay for the right to use the land. If it was a large field then the fee was two cattle, but if it was small and the widow had a son who was working, then the fee was only R20. It was now custom that the widow should have the first option on the land and if she could not pay the fee, the payment period should be extended and she should not be put off the land. We had made the law ourselves and thus could not break it. "It is wrong if widows are pushed around and it makes us ashamed." This new law was accepted by all the tribes in the East, and the (Owambo) Legislative Assembly had also accepted it.

Another complaint was that Shopa had been drunk and insulted the Owambo Chief Minister. Accordingly Shopa was given six months to improve his behaviour. Less than two months later there was a full tribal meeting with all the senior and sub-headmen present. Headman Shopa "had had a big fright" and apologised and regretted his missteps. The meeting then decided unanimously to allow him to stay on.

Source: National Archives of Namibia LON J8/1, 2 October 1979; 22 October 1979

7.6 Developments since independence

7.160 Shortly after independence much coverage was given in the media to a series of cases involving widow dispossession, mostly in the north, but also in Katutura. These cases were given even greater prominence when President Sam Nujoma made a public appeal that widow dispossession should be stopped and on 6 August 1992, Pendukeni Ithana, a SWAPO Cabinet Member, introduced a motion which unanimously passed in the National Assembly demanding fair treatment for widows.

7.161 A few months later, the stalwart pioneer of customary law studies in Namibia, Professor Manfred Hinz, was undertaking research in Ondonga when in conversation with some traditional authorities the topic of inheritance naturally came up. He then modestly suggested that the plight of widows might be eased if widows were allowed to live on the land of their deceased husbands without having to 'buy' the land again from the local headman.

7.162 Then in May 1993 a Customary Law workshop was held and attended by some 79 delegates from six Owambo traditional authorities or communities as they were by now known. (The Uukwaluthi King was not represented but later unanimously endorsed the findings and recommendations of the workshop.) As the Rapporteur put it:

"The workshop discussed the problem of widows being chased out of their homes. All traditional councils were united in their bid to protect the widows. It was also revealed that that the relatives of the deceased are often the ones who suppress the widows. One of the woman participants

stated that women contributed much to the deplorable situation. They inherit from their relatives, but complain when their husbands' relatives inherit property.”¹⁶⁶

7.163 The workshop decided that the situation was so serious that it had to be remedied “by all means, or in any way possible. They shall not be chased out of their homes, or from their lands. They shall not be asked to pay again for the land. The existing laws for the protection of widows should be strengthened.”¹⁶⁷

7.164 Building on the precedent set by the late Oshona Shiimi, and on the many previous efforts to reform the traditional customary law system as we have seen, the Ondonga traditional authorities published a compendium entitled *The Laws of Ondong*” or *Ooveta (Oompango) Dhoshilongo Shondonga*, which were first enacted during the dying days of the South African colonial regime in January 1989. (The term *Ooveta* is derived from the Afrikaans word for law, *Wet*.) This compendium formally allowed widows the first right to “purchase” the land belonging to their late husbands for a price ranging from zero to R600. As we have seen, this was not such a striking innovation. After August 1993, this section was changed to allow widows to remain on the land without payment.

7.165 Of particular interest is Section 10 of this compendium which instructed that widows and household property had to be protected, in the following way. Prior to 1989, after the death of their husbands, widows were required to remain in their huts or kitchens thus giving relatives ample opportunity to search for and carry away anything they liked. The new section now allowed widows to move around and secure their property until after the end of the mourning period, when the property would be formally distributed.

7.166 Seizing the moment, Prof Hinz had the Traditional Authorities come down to Windhoek to repeat their changes in public, and organised a special meeting of the Women and Law Committee to endorse the move. Hinz’s Centre for Applied Social Science (CASS) also ran a series of seminars on wills in Owambo in 1994, which attracted about a thousand participants.

7.167 What effect these measures have had is difficult to say, because the press has continued to report news items about widow dispossession. John Hakaye of the National Council claimed in 1995 that “widows are still suffering” because they are being evicted from their late husbands’ homes, and urged that the matter be addressed in the bill on Communal Lands as soon as possible (as indeed it was).¹⁶⁸ Later, in September that year, a particularly egregious case of widow dispossession in the Oshaandja District led the Ombalantu Council of Headmen to set up a committee to

¹⁶⁶ Ondonga Traditional Authority, 1994, *The Laws of Ondonga or Ooveta (Oompango) Dhoshilongo Shondonga Oweta Oshindonga*, ELCIN Ongwediwa, 89.

¹⁶⁷ Ibid, 89-90.

¹⁶⁸ *The Namibian* 13 April 1995.

study widow abuse. This committee consisted of 14 women.¹⁶⁹ The Acting Ombudsman also got involved in the issue, especially after widow dispossession was heavily criticised by Cabinet, and claimed to be investigating 15 cases.¹⁷⁰

7.168 In 2002, Parliament passed the Communal Land Reform Act, which was brought into force in March 2003. This law and other recent law reform initiatives pertaining to inheritance are discussed in the following section of the report.

7.169 At present, newspaper reports of dispossession continue with varied frequency, but as a news item appear to have declined in newsworthiness. Nevertheless, as an issue widow dispossession continues to fester to such an extent that the Legal Assistance Centre organised a large workshop on *Women and Property Right under Customary Law* in Oshakati in July 2003 and instituted research on inheritance in 2004-5.

7.7 Conclusion

This section shows how people both locally and nationally have been concerned about inheritance practices for a long time and have acted on the issues as they perceive them. The important issue is why all these good intentions have apparently failed, if indeed they have. This raises questions about state-citizen relations, and about state capacity to enforce or implement its reforms. It also raises questions about the much-vaunted power of “Traditional Authorities” who have shown themselves to be aware, sometimes keenly, of inheritance issues, and yet their own “traditional laws” appear to be frequently ignored or side-stepped.

¹⁶⁹ *The Namibian* 22 September 1995.

¹⁷⁰ *The Namibian* 13 February 1996.

8. Reform initiatives and their impact on inheritance in Namibia

Communal Land Reform Act 5 of 2002

8.1 The Communal Land Reform Act 5 of 2002 provides for the allocation of rights in respect of communal land, and for the establishment of Communal Land Boards. It also sets out the powers and functions of traditional authorities and chiefs. Communal land in Namibia is vested in the state¹ and accommodates about 64% of Namibia's population.² Customary land rights have historically been allocated to men, with the result that women's security of land use is gravely compromised by inheritance systems or customs favouring men.³ Historically the authority to allocate land rights is vested only in men. Namibia recognises customary land rights and rights of leasehold, not freehold ownership in communal land.⁴

8.2 The Act establishes Communal Land Boards, whose primary functions are to exercise control over the allocation of and cancellation of customary land rights, and to consider applications for rights of leasehold.⁵ Board members are appointed by the Minister of Lands, Resettlement and Rehabilitation, and the boards can have varying numbers of members as specified.⁶ Persons appointed to boards must be traditional authorities, representatives of organised farming communities, regional officers of regional councils, staff members of the public service or persons nominated by recognised conservancies.⁷ Four women must be appointed to each board, two of whom must be engaged in farming activities and two of whom must have "expertise relevant to the functions of a board".⁸

8.3 The primary authority to allocate or cancel customary land rights is vested in the chief of a particular traditional community or the community's traditional

¹ Article 17 of the Namibian Constitution. See also section 17 of the Act.

² LeBeau et al 2004 (op cit s1 n6), 11.

³ Ibid, 12.

⁴ Article 17 (op cit n1).

⁵ Section 3.

⁶ Section 4.

⁷ Ibid. Persons nominated by conservancies must be included on the board only if conservancies declared in terms of section 24A of the Nature Conservation Ordinance 4 of 1975 exist within a board's area.

⁸ Section 4(d).

authority.⁹ Application for customary land rights must be made in writing in the prescribed form and must be submitted to the chief of the traditional community in which the communal land is situated.¹⁰ Allocations of a customary land right by a chief or a traditional authority have no legal effect unless the decisions are ratified by a board, and a board will ratify such allocations only if it is satisfied that they were made in compliance with the Act.¹¹ Once a board has ratified an allocation, it must issue the applicant with a certificate of registration after registering the right in the name of the applicant in a prescribed register.¹²

8.4 The holder of a customary land right is entitled to that right for life.¹³ In the event that the holder of a customary land right dies, the right reverts to the chief or traditional authority for re-allocation to the surviving spouse, or where there is no surviving spouse, to a child of the deceased identified by the chief or traditional authority as being the rightful heir.¹⁴ The Act defines a ‘spouse’ as a partner in a customary union whether registered or not.¹⁵ Experiences in Namibian communal areas have shown that the position of women in polygamous customary marriages is compromised due to uncertainty about how to apply this definition to multiple wives.¹⁶ A surviving spouse who has been allocated a customary land right and who subsequently remarries is not prejudiced by such remarriage.¹⁷ But a surviving spouse of such a second or subsequent marriage may also be allocated a customary land right, which may prejudice the children from previous marriages.¹⁸ Any reference to a child includes an adopted child,¹⁹ but the Act is silent on the position of extramarital children.

8.5 A person who immediately before the commencement of the Act held a customary land right (‘existing customary land right’) will continue to hold such right, unless this person’s application to a board for the recognition and registration of the right has been rejected,²⁰ or the land has reverted to the State.²¹ If a holder of an existing customary land right dies *before* he could make an application, then the

⁹ Section 20.

¹⁰ Section 22.

¹¹ Section 24(4).

¹² Section 25(1).

¹³ Section 26(1).

¹⁴ Section 26(2).

¹⁵ Section 1.

¹⁶ One such dispute has been referred to the Minister in compliance with section 39(1) of the Act. As of the date of publication of this report (June 2005), we could not establish whether a tribunal had been appointed by the Minister to settle the dispute.

¹⁷ Section 26(3).

¹⁸ Section 26(3)(a) read with section 26(3)(b). See also section 26(4).

¹⁹ Section 26(6).

²⁰ Section 28(1) read with section 28(2).

²¹ Section 28(1) read with section 28(13).

surviving spouse or child of the deceased may make an application as if the right held by the deceased vested in them.²² If the holder of an existing customary land right dies *after* he has made an application but before such application has been approved, the application shall be deemed to have been made by the surviving spouse or child of the deceased.²³

8.6 Rights of leasehold are granted by a Communal Land Board in respect of specified portions of communal land upon application, provided that the traditional authority of the relevant traditional community gives consent.²⁴ Rights of leasehold may not be granted in respect of a portion of land that another person holds under a customary land right.²⁵ A right of leasehold may not be granted for a period exceeding 99 years.²⁶

8.7 With respect to inheritance, it should be noted that the law's precise wording indicates that a widow or widower has a right to remain on communal land which was allocated to a deceased spouse *if she or he wishes*.²⁷ Communal Land Boards must be vigilant to make sure that widows do not come under pressure from their extended families to "decline" their legal right to remain on the land. The Legal Assistance Centre is in the process of assessing the implementation of the Act, which could shed more light on its impact on widows.

Community Courts Act 10 of 2003

8.8 This Act provides primarily for the recognition and establishment of community courts, whose main objective will be to apply customary law. In part the Act formalises unofficial community court structures already in existence. Where a person or body was authorised in the past to adjudicate over civil or criminal matters in a traditional community, and a traditional authority has been recognised for that community in terms of the Traditional Authorities Act, the traditional authority may make a written application to the Minister of Justice for the recognition of a community court.²⁸ A traditional authority may also apply to establish a community court in an area which had no such pre-existing body.²⁹ Only if the Minister is satisfied that a written

²² Section 28(14)(a).

²³ Section 28(14)(b).

²⁴ Section 30.

²⁵ Section 31(2).

²⁶ Section 34(1).

²⁷ Section 26(2)(a): "Upon the death of the holder of a right referred to in subsection (1) such right reverts to the Chief or Traditional Authority for re-allocation forthwith to the surviving spouse of the deceased person, *if such spouse consents to such allocation ...*".

²⁸ Section 2(1). See also section 33.

²⁹ Section 3.

application meets all requirements³⁰ prescribed by the Act will he or she approve the establishment of a community court.³¹

8.9 Historically traditional courts in Namibia have been presided over by chiefs or headmen.³² The Act now provides that community courts will be presided over by justices appointed by the Minister.³³ A person is eligible for appointment as a justice only if he or she is familiar with customary law, can be entrusted with the responsibility associated with such a position and is not a member of Parliament, a regional council or a local authority, or a leader of a registered or unregistered political party.³⁴ A community court is authorised to appoint impartial assessors whose primary function will be “to advise” the community court on matters before it,³⁵ but community courts will not be bound by an assessor’s opinion.³⁶

8.10 As stated above, community courts apply customary law. If the parties to a dispute are connected with different systems of customary law, the court must apply that customary law which it deems “just and fair”.³⁷ If there is doubt as to the existence of a customary rule or the content of a rule, a court may consult decided cases, textbooks and other sources, and may receive opinions either orally or in writing.³⁸ Such evidence, however, will be admissible only if written sources are made available to the parties or oral opinions are given in the same manner as oral evidence.³⁹

8.11 Section 12 of the Act provides:

“A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by customary law, but only if –

- (a) the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court, or
- (b) the person or persons to whom the matter relates are in the opinion of that community court closely connected with the customary law.”

³⁰ See sections 2(2) and 3(2) respectively.

³¹ Section 4. The community courts are established by notice in the Gazette. At the time this report was written, no community courts had yet been recognised or established.

³² For a historical overview see MO Hinz & S Joas, “Customary Law in Namibia: Development and Perspective”, Paper No. 48, Centre of Applied Social Sciences (CASS), Namibia.

³³ Section 7(1).

³⁴ Section 8(2).

³⁵ Section 7(2) read with section 7(8).

³⁶ Section 7(6).

³⁷ Section 13.

³⁸ Section 14.

³⁹ Ibid.

Despite the fact that there is some ambiguity regarding the criminal jurisdiction of community courts,⁴⁰ civil jurisdiction is definitely not excluded and consequently such courts are authorised to hear inheritance disputes.

8.12 The Act provides that a party to a dispute may appear in person,⁴¹ but it is doubtful that many women will do so due to cultural pressures. Generally, women under customary law enjoy no *locus standi* in customary courts and have to be represented by a male relative.⁴² In rare instances women have represented themselves with some success.⁴³

8.13 Persons aggrieved by any decision of a community court may appeal to a magistrate's court, but only after exhausting rights of appeal in the community court.⁴⁴

8.14 The community courts are supposed to be courts of record, with all proceedings recorded by the clerk of the court.⁴⁵ These court records could in future be a rich source of information about inheritance disputes. Until the community courts are up and running, it is otherwise difficult to assess their potential impact on the application of customary law to inheritance issues.

⁴⁰ N Horn, "Criminal or Civil Procedure? The Possibility of a Plea of Autrefois in the Namibian Community Courts Act", paper presented at an International Conference on Traditional Governance and Customary Law, in *Southern African Perspective* July 2004.

⁴¹ Section 16.

⁴² Women's status under customary law may also affect their *locus standi* in common law courts, as illustrated in the South African case *Seemela v Minister of Safety and Security*, 1998 1 ALL SA 408 (W). The appellant, a woman married in terms of customary law, had instituted a claim for damages in the court *a quo* against the respondent for her allegedly unlawful arrest by members of the South African Police. The respondent pleaded that the appellant had no *locus standi* to sue based on section 11(3) of the Black Administration Act 38 of 1927 which provides, among other things, that a black woman who is a partner in a customary union and is living with her husband shall be deemed a minor and her husband shall be deemed her guardian. The court *a quo* upheld the respondent's plea. On appeal the court considered the relevant section "repugnant to the modern views on the status of women".

⁴³ "I went to the community court and represented my husband as his mother, sister and wife. He was caught by his mistress' husband, who then claimed seven cows as compensation. I first discussed with my uncle, who is supposed to represent me, what I intended doing. Once I got there I spoke myself. As an aggrieved party, the mistress' husband also had to pay seven cows as compensation since he was aware of the affair." (Interview with middle-aged rural woman, 5 April 2005.)

⁴⁴ Section 25. An appeal against an order or decision made or given by a magistrate's court may thereafter be made to the High Court.

⁴⁵ Section 18.

Recognition of Customary Law Marriages Bill⁴⁶

8.15 This Bill seeks to give legal recognition to customary marriages and proposes to regulate matters such as the registration, proprietary consequences and divorce in customary marriage. It will repeal rules that limit the legal capacity of spouses and prescribe the requirements for a valid customary marriage.

8.16 In the absence of legislative reform, customary marriage continues to be regulated by unwritten customary laws that differ from one community to another. This has brought about great uncertainty, one consequence of which is that those with vested interests in inheritance disputes can claim that a customary marriage either exists or does not exist, depending on the benefit to be derived from the claim. Marriage under the common law is regulated by the Marriage Act 25 of 1961. The Recognition of Customary Law Marriages Bill proposes to give legal recognition to customary marriage, which historically never enjoyed full legal status due to its polygamous nature, so as to bring it on par with common law marriage.⁴⁷ Both customary marriages entered into before the Bill becomes law ('existing customary marriages') and those entered into after the Bill becomes law ('future customary marriages') will be recognised.⁴⁸

8.17 The Bill prescribes the requirements for a valid customary marriage by stipulating that existing marriages must be concluded "in accordance with the customs applicable to the traditional community" to which the parties belong.⁴⁹ Future customary marriages will have to comply with additional requirements.⁵⁰ Both parties must freely consent to the marriage,⁵¹ must not be related to each other by affinity or blood to such a degree that their marriage would not be valid in terms of applicable customary law and may not be a party to an existing marriage under customary or common law.⁵² A person who is already a party to a customary or common law marriage may not enter into a subsequent marriage to another person, and shall be guilty of the common law offence of bigamy if he or she does so.⁵³ The proposed Bill thus makes clear that existing polygamous marriages will be recognised, but not future polygamous marriages. The Law Reform and Development Commission report on the Bill argues that the prohibition on polygamy will eliminate disputes between women competing over a man's resources.⁵⁴

⁴⁶ Contained in LRDC 12, Report on Customary Law Marriages, Project 7 (October 2004), Annexure B.

⁴⁷ Ibid, section 2, 6.

⁴⁸ Ibid.

⁴⁹ Section 3(1)(a) read with section 3(2).

⁵⁰ Section 3(1)(b) read with section 3(3).

⁵¹ A party who is a minor must obtain consent from the persons and institutions as prescribed by the Marriage Act 25 of 1961.

⁵² Section 3.

⁵³ Section 4.

⁵⁴ LRDC 12, Report on Customary Law Marriages, Project 7 (October 2004), explanatory note on page 4 of the Bill.

8.18 Future customary law marriages will have to be registered in order to facilitate proof of their existence and to be legally recognised as valid marriages. The Permanent Secretary of the ministry responsible for regional government may appoint persons to act as customary law marriage officers in traditional communities whose traditional authorities are recognised in terms of the Traditional Authorities Act 25 of 2000.⁵⁵ Such persons will have limited powers, duties and functions.⁵⁶ The primary duty of the customary law marriage officer will be to ensure that the provisions of the Act have been complied with.⁵⁷ On the question of whether a marriage complies with the customs of the relevant traditional community, the marriage officer must consult with the traditional authority⁵⁸ before registering the marriage and issuing a certificate.⁵⁹

8.19 Specific persons with a vested interest in the recognition of an existing customary marriage may also apply for registration. Persons who allege that they are parties to an existing customary marriage or that they are children born of parents who have concluded a customary marriage, and those who have a ‘substantial interest’ in the existence of the customary law marriage, may apply to the relevant customary law marriage officer to register that marriage.⁶⁰ No fee will be payable for the registration of existing customary law marriages for an initial period of two years.⁶¹ Existing customary marriages which are not registered will be deemed to be valid only under certain circumstances.⁶² In general, the consent of both spouses is required for the registration of marriages, with certain exceptions.⁶³

8.20 As discussed elsewhere in this report, the proprietary consequences of customary marriages for some Namibians are currently regulated by section 17(6) of the Native Administration Proclamation. The Bill proposes that the marital property regime for future customary marriages will be in community of property, unless they have concluded an agreement or made a declaration adopting some other marital property regime.⁶⁴ The default matrimonial property regime will have the effect that all

⁵⁵ Section 5(2)(a)(i).

⁵⁶ Section 5(2)(a)(ii).

⁵⁷ Section 5(3).

⁵⁸ Ibid.

⁵⁹ Section 5(4) read with section 5(5).

⁶⁰ Section 6.

⁶¹ Section 6(6).

⁶² Section 8. The sections that have to be complied with are section 3(1)(a) or section 9(3). According to section 3(1)(a) an existing customary law marriage must be concluded “in accordance with the customs applicable to the traditional community to which the parties belong ...”. Section 9(3) provides that if a party refuses to consent to the registration of the marriage then it will be deemed that such person’s consent has been validly obtained if it is clear that the person has *tacitly given his or her free and voluntary consent to the marriage or voluntarily ratified the marriage*. (emphasis added).

⁶³ Section 9(1). See also section 9(3).

⁶⁴ Section 10(1) read with section 10(2).

the property of the spouses acquired prior to and during the marriage will become part of the joint estate. Upon divorce or death each party will be entitled to half of the joint estate. The Bill further proposes that the proprietary consequences for existing customary marriages will be regulated by 'applicable customary law'.⁶⁵ It is generally assumed that under customary law the husband and wife each retain the separate property they own prior to marriage, and that each owns the separate property acquired as individuals during marriage. For a period of two years, however, parties to existing customary marriages are free to execute and register a notarial contract causing their marriage to be in community of property, provided that the husband has no other wives.⁶⁶

8.21 Spouses in all customary marriages will have full legal status and capacity.⁶⁷ This will have the effect that any person who is a major in terms of common law rules will have the capacity to institute and defend proceedings in any court of law and will also have the capacity to perform juristic acts and own property. Towards this end, the LRDC has proposed to amend the Married Person's Equality Act 1 of 1996 to be applicable in full to customary marriages as well as civil ones.⁶⁸

8.22 The proposed Recognition of Customary Law Marriages Bill does not deal with inheritance directly. However, inheritance and marital property regimes are very closely linked, because the marital property system which applies to the marriage will affect the contents of the "estate" of the deceased which is available to be distributed amongst the heirs. If the marital property regime applicable to a customary marriage provides for a certain division of the couple's assets upon dissolution of the marriage by death, the assets which rightfully belong to the surviving spouse will not form part of the deceased's estate. Inheritance and the division of marital property are in technical terms two separate questions, but the two issues are not always kept separate in public discourse. The average person is understandably more focused on the practical question of what the surviving spouse "gets", regardless of the legal mechanism involved.

8.23 The Bill could also potentially have an impact on inheritance disputes in relation to proof of customary marriage. The registration scheme may remove the question of whether or not a customary marriage had in fact been concluded from inheritance disputes.

⁶⁵ Section 10(3).

⁶⁶ Section 10(4).

⁶⁷ Section 11.

⁶⁸ LRDC 12, Report on Customary Law Marriages, Project 7 (October 2004), Annexure C op cit For a full discussion on the Act, see D Hubbard (op cit s2 n24) at 8.8-8.12.

Children's Status Bill⁶⁹

8.24 This Bill aims to improve the legal position of children under both common and customary law by providing that children must be treated equally irrespective of whether or not they are extramarital ('illegitimate') children.⁷⁰ The common law defines an extramarital child according to the relationship between the parents at the time of the child's conception or birth.⁷¹ Whether or not a child is 'extramarital' is determined primarily by whether the child's parents were validly married at the time of the child's conception or birth or at any time between these two events.

8.25 Currently, extramarital children suffer discrimination under both civil and customary law in respect of inheritance. At common law extramarital children cannot be the intestate heirs of their fathers or paternal blood relations, but can inherit from their mothers or maternal relations.⁷² Recently, the constitutionality of the common law rule which prevents extramarital children from inheriting intestate from their fathers was unsuccessfully challenged in Namibia's High Court.⁷³ The court in this instance, while finding against the applicant on a factual basis, stated that:

It is an affront and painful that the common law rule excluding children born out of wedlock from inheriting intestate from their fathers has survived constitutional scrutiny for a decade and a half since Namibia became a constitutional state on 21 March 1990, for the rule is unbefitting in a democratic society like ours, where the people in their supreme law have pledged to promote human dignity and equality for all.

The court, despite its view that the rule unfairly and without basis discriminates against extramarital children and is an affront to their dignity, fell short of declaring the rule unconstitutional as the court found that the applicants could not prove that

⁶⁹ B.23-2003.

⁷⁰ The Legislature and Judiciary have commonly referred to extramarital children as 'illegitimate', a term now considered offensive. The South African Law Commission (SALC) has suggested that the term 'extramarital' is less offensive. (SALC, *Report on the Investigation into the Legal Position of Illegitimate Children*, Project 38, at 6.26.) South Africa's Constitutional Court recently stated that "the term 'illegitimate children' may be construed as degrading to the status of children to whom it refers ...". See Bhe (op cit s1 n10), fn15. The term has been utilised in this report as a reflection of common discourse and historical discussions of the issue, but placed in quotation marks as a mark of disapproval of the word's negative connotations.

⁷¹ Traditionally three classes of extramarital children are distinguished, namely natural children (*spurri* or *liberi* naturals), adulterine children (*adulterine*) and incestuous children (*incestuosi*). Natural children are children born of parents who were not married to each other at the time of conception or birth or at any time between these events, but who could validly have been married at the time of conception. Adulterine children are conceived at a time when one or both parents were married to someone else. Incestuous children are children of parents who are too closely related to marry. See generally DSP Cronje & J Heaton, 1999, *The South African Law of Persons*, Butterworths, 62.

⁷² *Green v Fitzgerald* 1914 AD 88.

⁷³ Unreported Judgement of the High Court (P) A 148/2004.

they were in fact the children of the deceased.⁷⁴ It appears that the assumption that the inheritance rights of extramarital children are more secure under customary law⁷⁵ is erroneous.⁷⁶ The inheritance rights of extramarital children appear even more precarious if one considers that women under customary law are generally considered incapable of owning property.

8.26 Until recently the South African courts have been of the view that an extramarital child precluded from inheriting in the intestate estate of his or her father, is not prejudiced due to the heir's concomitant duty to support the dependants out of the inherited assets. In *Mathembu v Letsela*⁷⁷ the court found that no valid customary marriage existed between the mother and the deceased, and as a consequence found that the daughter was an extramarital child of the deceased. The daughter was accordingly prevented from inheriting the family home owned by the deceased. However, the Constitutional Court in *Bhe v Magistrate, Khayelitsha* subsequently ruled that differentiating between children based on birth constitutes unfair discrimination.⁷⁸

8.27 The Children's Status Bill proposes that neither testate or intestate inheritance will be allowed to distinguish between children born within marriage and extramarital children.⁷⁹ With respect to intestate inheritance, the Bill explicitly overrules both common law and customary law provisions which fail to treat extramarital children and children born inside marriage equally.⁸⁰ With respect to testate inheritance, the Bill does not affect testamentary freedom, but provides that the terms 'children' or 'issue', if appearing in a testamentary disposition, shall be interpreted as applying equally to extramarital children.⁸¹ This provision is aimed at assisting courts in the interpretation of wills. The Bill also proposes that any child born of parents who marry each other after the child's birth shall be treated as being born within marriage if the parents were in a position to conclude a valid marriage at the time of conception.⁸²

8.28 Concerning guardianship of children, the Bill proposes that if the parents have equal guardianship powers and one parent dies, the other becomes the child's

⁷⁴ Ibid.

⁷⁵ Bhe (op cit s1 n10), 59, citing Jones, "Children on the Move: parenting, mobility, and birth-status among migrants", in Burman & Preston-Whyte (eds), 1992, *Questionable Issue: Illegitimacy in South Africa*, 247, 251-2.

⁷⁶ LeBeau et al (op cit s1 n6), 27; Bennett 1991 (op cit s2 n5).

⁷⁷ *Mathembu v Letsela* cases 2000 (3) SA 867 (SCA) (the decision on appeal to the Supreme Court of Appeal), *Mathembu v Letsela* 1998 (2) SA 675 (T) (the second High Court decision) and *Mathembu v Letsela* 1997 (2) SA 936 (T) (the court of first instance).

⁷⁸ Bhe (op cit s1 n10), 59.

⁷⁹ Section 14(1).

⁸⁰ Section 14(1): Notwithstanding anything to the contrary contained in any statute or common law or customary law, a child born outside marriage shall for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a child born inside marriage.

⁸¹ Section 14(2).

⁸² Section 17.

guardian or custodian unless a court directs otherwise.⁸³ Any person, whether related to the child or not, can apply in writing to the clerk of the children's court for a guardian to be appointed for a child.⁸⁴ If the Commissioner of Child Welfare approves the application, the appointment will take place "separate from any disposition of property belonging to the deceased guardian of the child and will not be dependent on the existence of any inheritance for the child".⁸⁵ Perhaps most important are the provisions which authorise any person with an interest in the welfare of a child to make a complaint to a magistrate's court if they believe that the guardian is not acting in the child's best interests. In such a case, the court must order an investigation by a social worker and then take appropriate action.⁸⁶

8.29 While these provisions, if enacted, should assist in removing discrimination against extramarital children in matters of inheritance, they are unlikely to be fully effective without an overarching reform of the entire system of inheritance under customary law.

⁸³ Section 20(1).

⁸⁴ Section 20(2).

⁸⁵ Section 20(2)(d).

⁸⁶ See section 20(4).

9. Examples from other countries

9.1 This section of the report looks at approaches to inheritance in South Africa, Ghana, Zimbabwe and Zambia. South Africa was chosen as a point of comparison because of its historical connections with Namibia and because of the two countries' similar legal framework and background. Ghana and Zambia are useful examples because they, unlike South Africa, have matrilineal inheritance systems. Both Zambia and Zimbabwe are facing problems with property-grabbing and inheritance disputes similar to those found in Namibia.

SOUTH AFRICA

Constitutional and international obligations

9.2 The South African Constitution¹ recognises “systems of personal and family law under any tradition” and requires courts to “apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”.² Despite the recognition of customary law under the Constitution, some academics fear that customary law characterised by notions of patriarchy will not withstand scrutiny under the equality provision³ or the Promotion of Equality and Prevention of Unfair Discrimination Act⁴ that seeks to give effect to that provision.⁵

9.3 The ostensible conflict between the rights to equality and culture is a contentious issue in South Africa. The equality clause in the South African courts is interpreted as substantive as opposed to formal, with the effect that account is taken of the lived realities of women.⁶ This is significant in that courts faced with similar

¹ The Constitution, Act 108 of 1996.

² Section 15(3)(ii) read with section 211.

³ Section 9.

⁴ The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter ‘the Equality Act’). This Act places an obligation on the state and other institutions to transform and change practices that perpetuate inequality, though the remedies provided do not include striking out offending legislation.

⁵ See R. Loenen, “The Equality Clause in the South African Constitution: Some remarks from a Comparative Perspective”, 1994 *SAJHR*, 122, 123; AJ Kerr, “Inheritance in Customary Law under the Interim Constitution and under the Present Constitution”, 1998 *SALJ*, 263, 267; M Pieterse, “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?”, 2000 *SALJ* (117), 672.

⁶ Bhe (op cit s1 n10), 49; *Minister of Finance & Others v Van Heerden*, CCT 63/03, 26; C. Albertyn & B. Goldblatt, “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality”, 1998 *SAJHR* (14), 248.

facts previously yielded unfavourable interpretations⁷ but today yield favourable interpretations regarding the plight of women and children prejudiced by customary law rules.

9.4 The Constitution imposes a duty on the state to take reasonable steps to ensure that no person is “deprived of property” except if permitted by law, provided that such law does not permit “arbitrary” deprivation.⁸ Whether there has been a deprivation depends on the extent of the limitation of use, enjoyment and exploitation.⁹ A deprivation is arbitrary if the law fails to provide sufficient reasons for the deprivation or is procedurally unfair.¹⁰ The overriding purpose of the property clause is to strike a ‘proportionate balance’¹¹ between the protection of existing property rights and the promotion of public interests.

9.5 It is uncertain whether the property clause applies to deprivations authorised by customary or common law,¹² but it is unimaginable that public policy would favour deprivations which deny women the right to inherit property. Support for this can be found in the Equality Act, which specifically provides that no person may discriminate against women by preventing women from inheriting family property.¹³ The Equality Act binds both the state and private persons. If the property clause were interpreted as applying to private actors, this would empower courts to develop customary law to bring it in line with constitutional principles.

9.6 South Africa has signed and ratified a number of international agreements that require it to take positive measures to prevent discrimination against women and children. These include CEDAW, the United Nations Convention on the Rights of the Child, the International Convention on Civil and Political Rights and the African (Banjul) Charter on Human and Peoples’ Rights. South Africa has signed the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women, but has not ratified it. It is generally accepted in South Africa that consideration must be given to international provisions when interpreting constitutional provisions.¹⁴

⁷ Mathembu cases 1997, 1998 and 2000 (op cit s8 n77).

⁸ Section 25. For a discussion on the interpretation of section 25 see T Roux, “Property”, in Chaskalson et al, *Constitutional Law of South Africa* (2nd Edition), 46-51.

⁹ *Mkotwana v Nelson Mandela Metropolitan Municipality* CCT 57/03 32; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South Africa Revenue Services* 2002 (4) SA 768 61.

¹⁰ Ibid 34; ibid 100.

¹¹ Ibid *FNB v Commissioner, South African Revenue Services* 50.

¹² AJ van der Walt, 1997, “The Constitutional Property Clause”, 106-7, 46-7.

¹³ Section 8(e) of the Equality Act.

¹⁴ Bhe (op cit s1 n10), 55.

Current status of inheritance law reform

9.7 When the South African Law Commission (SALC) commenced its investigation¹⁵ into the customary law of succession in the late 1990s, it faced pressure from women's groups seeking immediate action, from traditional leaders concerned about the 'westernisation' of the customary law of succession, and from parliamentarians who felt that more consultation was required. The two Bills¹⁶ prepared and tabled in Parliament by the Department of Justice proposed that persons regulated by section 23 of the Black Administration Act 38 of 1927 be regulated by the Intestate Succession Act 81 of 1987 and the Wills Act 7 of 1953 through the Administration of Estates Act 66 of 1965. This investigation was subsequently discontinued, due to widespread public dissatisfaction, but has since been revived.¹⁷ In the absence of legislative reform and amidst continual constitutional challenges revolving around inheritance under customary law with divergent outcomes, an 'interim' regime (described in more detail below) is now applicable. This came about as a result of *Bhe v Magistrate Khayelitsha*,¹⁸ and is similar to the initial proposals of the SALC. The interim regime applies only to intestate inheritance under customary law and is only valid until such time as laws of general application can be promulgated.

Intestate inheritance

9.8 Section 23 of the Black Administration Act 38 of 1927 and its accompanying regulations,¹⁹ which were declared unconstitutional,²⁰ provided that all movable property accruing under customary law shall upon an African's death devolve and be administered in terms of "black law and custom".²¹ Land held under quitrent tenure²² devolved upon one male person in accordance with the table prescribed by section 10 of the Black Administration Act.²³ Section 2(e) of the regulations, which governs the administration and distribution of estates, provided that if an African

¹⁵ The investigation was formally launched on 28 April 1998. See SALC discussion paper, *Succession in Customary Law*, Project 90.

¹⁶ B110 (1998) and B109 (1998). Both Bills recommended the repeal of section 23 of the Black Administration Act, the Codes of Zulu Law Act 16 of 1958, Proclamation R151 of 1987 and any customary law obliging an heir to maintain the dependants of a deceased or settle debts incurred by the deceased.

¹⁷ South African Law Commission (SALC) Project 90, *Customary Law of Succession*, 2004.

¹⁸ *Bhe* (op cit s1 n10), 55.

¹⁹ Regulation R200 Published in *Government Gazette 10601* dated 6 February 1987, as amended by GN R1501 in *Government Gazette 24120* dated 3 December 2002 ('the regulations').

²⁰ *Bhe* (op cit s1 n10), 55.

²¹ Section 23(1).

²² Land held under quitrent tenure refers to all land in 'tribal' settlements held upon individual tenure subject to quitrent conditions. See also the Upgrading of Land Rights Tenure Act 112 of 1991 for a definition of 'tribal land' and Regulation 1 of the Black Areas Land Regulation (Proclamation R188 of 1969) for a definition of 'quitrent title'.

²³ Section 23(2).

person dies his intestate estate which does not fall under the purview of sections 23(1) and 23(2) devolves according to 'European law' under certain circumstances. If the intestate at the time of his death has a letter of exemption, is married in community of property or by antenuptial contract, and is not survived by a partner to a customary union entered into subsequent to the dissolution of a marriage in community of property or by antenuptial agreement, then only does the estate devolve according to civil law. If the intestate does not fall into any of the stated categories, his estate devolves according to customary law.²⁴ Section 1(4)(b) of the Intestate Succession Act 81 of 1987 excluded the intestate estates of persons who would otherwise be regulated by section 23 of the Black Administration Act.

9.9 The construction above, which runs parallel to the common law, purported to give effect to customary law. South Africa observes a patrilineal kinship system. Under customary law the rule of primogeniture, which has now been declared unconstitutional,²⁵ favours as heir the eldest male son or the most senior male in the family.²⁶ Where there is more than one heir in a polygamous household, the first-born son of the senior widow is the general heir upon the death of the father. The first-born sons of the second and third widows are heirs of their mothers' houses. The general heir is entitled to inherit property that belongs to his mother's house together with any property that was not allocated upon the death of the father. He was also entitled to inherit from the houses of widows who had no male children. The surviving spouse, female children and male children other than the eldest son or senior male were therefore precluded from inheriting. Extramarital children were similarly precluded.²⁷

9.10 It was for this reason that the SALC initially regarded the Intestate Succession Act as a "convenient solution for most of the problems in customary law".²⁸ The Intestate Succession Act provides that if a person dies intestate, either wholly or in part, and is survived by a spouse and descendants, the children can inherit part of the intestate estate, regardless of gender or birth. The Act provides that if the deceased is survived by a spouse but no descendants, the spouse inherits the entire estate.²⁹ If the deceased is survived by descendants but no spouse, the descendants inherit the entire estate.³⁰ If the deceased is survived by both a spouse and descendants, the spouse inherits a "child's share" of the estate or R125 000,³¹

²⁴ Regulation R200 (op cit n19).

²⁵ Bhe (op cit s1 n10), paras 91-93.

²⁶ In terms of regulation 3, the magistrate in whose jurisdiction the deceased resided is empowered to hold an enquiry to determine the identity of the heir or successor to the deceased's estate.

²⁷ Mathembu cases 1997, 1998 and 2000 (op cit s8 n77).

²⁸ SALC (op cit n17), at 4.6.1.

²⁹ Section 1(1)(a).

³⁰ Section 1(1)(b).

³¹ The Minister of Justice may alter this amount from time to time.

whichever is the greater, and the descendants inherit the residue.³² The SALC further argued that remoter family members could be accommodated as well under the Intestate Succession Act.³³ If the deceased has no surviving spouse or descendants, but does have parents, then the parents inherit in equal shares.³⁴ If the deceased is survived by one parent, the survivor inherits half of the estate and the descendants of the other parent (siblings of the deceased) inherit the remaining half.³⁵ The Intestate Succession Act also provides that extramarital children will not be precluded from inheriting.³⁶ In polygamous marriages the SALC recommended that the Act be amended so that the surviving spouses share equally in the estate.³⁷ A further amendment recommended is that the term ‘surviving spouse’ be redefined to include partners in informal unions.³⁸

9.11 The interim regime similarly provides that section 1 of the Act regulates the devolution of intestate estates.³⁹ The court argued that the advantage of applying section 1 of the Act as a basic mechanism is that it does not discriminate against extramarital children, widows of monogamous customary marriages, unmarried women or any children, irrespective of sex.⁴⁰ In the event that there is more than one surviving spouse, sections 1(1)(c)(1) and 1(4)(f) of the Act will apply, subject to certain qualifications. In the event that there is more than one surviving spouse, sections 1(1)(c)(1) and 1(4)(f) of the Act will apply subject to certain qualifications.⁴¹ These sections are concerned with providing a “child’s share” to a single surviving spouse and calculating this share. In calculating such figures for polygamous marriages, three factors have to be taken into account: (a) a child’s share will be determined by taking into account that there is more than one surviving spouse; (b) provision will be made for each surviving spouse to inherit the minimum if there is not enough in the estate; and (c) in the event that the estate does not provide for the minimum, the surviving spouses will each share in the estate equally.⁴² Even though the interim

³² Section 1(1)(c).

³³ SALC (op cit n17), at 4.6.3.

³⁴ Section 1(1)(d).

³⁵ Section 1(1)(e).

³⁶ Section 1(2).

³⁷ SALC (op cit n17), at 4.9.2.1.

³⁸ Ibid, at 4.9.1.4.

³⁹ Bhe (op cit s1 n10), 115-6.

⁴⁰ Ibid, 113, 125. The inclusion of unmarried women seems to suggest that the term ‘spouse’ be given a wider meaning within the context of the Act to include informal partnerships. In *Volks NO v Robinson* CCT 12/04 the court held that ‘survivor’ within the context of section 2(1) of the Maintenance of Surviving Spouse Act 27 of 1990 means the surviving spouse in a marriage dissolved by death. Marriage in the context of the Act is one recognised by either law or religion. The Act is incapable of being interpreted so as to include permanent life partners, as to do so would be ‘unduly strained’ and ‘manifestly inconsistent’ with the structure of the text.

⁴¹ Ibid, 125.

⁴² Ibid.

regime has the effect that customary law will not apply in the devolution of estates, the Master, who is tasked with administering estates, is directed not to regard the relevant provisions of the Act as fixed rules.⁴³ A special duty rests on the Master, magistrates and other officials involved to ensure that persons are not prejudiced.⁴⁴ Spouses are also free to agree between themselves that one of them will inherit the immovable property upon the dissolution of the marriage, provided that children are not prejudiced.⁴⁵

9.12 The SALC's current recommendations do not depart from the basic principles of its initial approach.⁴⁶ The SALC argues that its approach does not translate into the abolishment of customary law, since customary law will still find application in customary law inheritance matters not amended by legislation.⁴⁷ Persons who entered into a civil marriage or a customary marriage after 15 November 2000 when the Recognition of Customary Marriages Act 120 of 1998 came into force, or who married by customary law before 15 November 2000 but changed the matrimonial property regime by contract in terms of section 7(4) of that Act, or who made a will, are excluded. Form of marriage therefore still dictates whether common or customary law will apply in matters of inheritance. Property acquired or held by traditional leaders in their official capacity and succession to political office are also excluded.

9.13 "House" property is recognised with the aim of protecting the interests of wives and children in customary marriages upon the death of the family head. "House" is defined as "the family and property, rights and status which arise out of the customary marriage of a woman". Female partners to and children born from related and supporting marital unions such as the levirate will be deemed the spouses and children of the deceased who was notionally their "husband" and "father". Children adopted by customary law as opposed to statute⁴⁸ will not be precluded from inheriting. The term 'descendants' is broadly defined to include a customary law dependant, thereby not restricting dependants to biological descendants only.⁴⁹

⁴³ Ibid, 130.

⁴⁴ Ibid.

⁴⁵ Ibid. The judgement does not stipulate whether such an agreement can be expressed or implied. In view of the court's acknowledgment that not all persons are capable of drafting a will (expressed), it is submitted that implied agreements are recognised.

⁴⁶ SALC (op cit n17), at 6.7.6.

⁴⁷ Ibid, at 6.7.

⁴⁸ The Child Care Act 74 of 1983 regulates formal adoptions.

⁴⁹ SALC (op cit n17), 81. In terms of the proposed Bill a descendant includes "a person who was in terms of customary law a dependant of the deceased immediately before the death of the deceased." In contrast, descendants in terms of the common law include only children, grandchildren and great grandchildren.

Testate inheritance

9.14 According to the Wills Act 7 of 1953 all majors have testamentary capacity to dispose of their estates by will. Even though black persons in South Africa are free to make wills, movable house property and land held under quitrent tenure cannot be disposed of by will.⁵⁰ Spouses who were not adequately provided for in a will are entitled to a reasonable portion of the deceased spouse's estate for purposes of maintenance in terms of the Maintenance of Surviving Spouse Act 27 of 1990. This protection is not available to partners in informal relationships⁵¹ or dependants other than spouses or children of the deceased.

Administration of estates

9.15 Until the promulgation of the Recognition of Customary Marriages Act⁵² black women did not have the capacity to be appointed as administrators of estates. Black estates were administered in terms of section 23 of the Black Administration Act and its regulations. This section did not take into consideration the different tribal variations, on the assumption that the universal rule of primogeniture applies across the board to all blacks.⁵³ The regulations gave guidelines for the administration and distribution of black estates in terms of section 23 of the Black Administration Act. The regulations provided for estates which fell under the jurisdiction of either the Master or a magistrate.⁵⁴ The Master had jurisdiction over testate estates. In intestate estates a distinction was made between estates that devolve in terms of the common law and estates that devolve according to customary law. If the common law was applicable, the Magistrate was empowered to supervise the administration of the estate.⁵⁵ If there was a dispute about who should be the customary heir, the Magistrate was empowered to conduct an enquiry.⁵⁶ Section 23 and the regulations have now been declared unconstitutional, with the effect that all intestate estates for the time being are administered by the Master.⁵⁷ The SALC recommended that if South Africa maintains a dual system, estates valued above R100 000 should be administered by the magistrate in whose district the deceased was ordinarily resident before his death.⁵⁸ Any party dissatisfied with a decision of a magistrate could appeal to the Master to review the decision.⁵⁹

⁵⁰ Section 23(1) and 23(2) of the Black Administration Act 38 of 1927.

⁵¹ *Volks NO v Robinson* CCT 12/04 (op cit n40).

⁵² Section 6 confers on women the capacity to administer estates.

⁵³ SA Law Reform Commission, Discussion Paper 96, *Administration of Estates*, Project 90.

⁵⁴ *Ibid*, 5.3.

⁵⁵ *Ibid*, 5.13.

⁵⁶ *Ibid*, 5.36.

⁵⁷ *Bhe* (op cit s1 n10).

⁵⁸ SALC (op cit n17), 7.4.2.

⁵⁹ *Ibid*, 7.4.3.

Marriage

Overview

9.16 South Africa's Recognition of Customary Marriages Act 120 of 1998 which seeks to give legal validity to customary marriages came into effect on 15 November 2000.⁶⁰ It recognises customary marriages, whether polygamous or monogamous, contracted both before and after the commencement date of the Act,⁶¹ as well as setting requirements for the validity of future customary marriages.⁶² A husband who is a spouse in a civil marriage is not allowed to marry another woman by customary rites during the subsistence of the civil marriage.⁶³ A monogamous customary marriage may be converted into a civil marriage as regulated by the Marriage Act 25 of 1961.⁶⁴

Proof of marriage

9.17 Spouses have a duty to register their marriage, but failure to do so does not affect the validity of a customary marriage.⁶⁵ Marriages entered into before the commencement date of the Act must be registered within 12 months of such date, and marriages entered into after the commencement date within a period of three months of the date of the marriage.⁶⁶ Either spouse may apply for registration of the marriage in the prescribed form⁶⁷ at the Ministry of Home Affairs or to designated traditional leaders.⁶⁸ Current procedure requires the spouses and at least one witness for each spouses' family and/or the representative of each family to report for purposes of registration. If more than one of the spouses is a minor, the parents must also be present.⁶⁹

9.18 Registration of the marriage serves as *prima facie* proof of the validity of a customary marriage. One requirement for a customary marriage to be valid is that

⁶⁰ The Act has been discussed in various articles. See A Akinnusi, 2000, "Consequences of customary marriages in South Africa: Would the Recognition of Customary Marriages Act, 1998, make any difference?", in *Journal for Juridical Science* 25(2), 143; JC Bekker, 2001, "Recognition of Customary Marriages Act: An evaluation", in *South African Journal of Ethnology* 24(2), 48; IP Maithufi & JC Bekker, 2002, "The recognition of the Customary Marriages Act of 1998 and its impact on family law in South Africa", in *CILSA* XXXV, 183.

⁶¹ Sections 2(2) and 3.

⁶² Section 3(1)(a) and (b).

⁶³ Section 10(4).

⁶⁴ Section 10(1).

⁶⁵ Section 4(1) read with section 4(9).

⁶⁶ Section 4(3)(a) and (b).

⁶⁷ Section 4(2).

⁶⁸ http://home-affairs.pwv.gov.za/custom_marriage.asp. Site visited 11 May 2005. Application may be made to traditional leaders only in areas where they have been designated to receive such applications.

⁶⁹ Ibid.

“the marriage must be negotiated and entered into or celebrated in accordance with customary law”.⁷⁰ This requirement has been problematic in South Africa, as illustrated in its case law. The custom of *lobolo*, regarded by some as being “inextricably bound up with marriage amongst African societies”,⁷¹ is not expressly provided for as a requirement in the Act, nor is it prohibited.

9.19 The South African courts have not yet formulated an acceptable test to determine the validity of a customary marriage entered into or celebrated in terms of customary law. In all of the cases dealing with the matter to date, the purported wives of the deceased brought applications on behalf of their minor daughters and sought no relief for themselves. The determinative question in each case was whether or not the children were ‘legitimate’.

9.20 In *Mathembu v Letsela*,⁷² Mildred Mathembu alleged that she and the deceased had entered into a customary union on 14 June 1992.⁷³ The deceased’s father averred that no customary marriage existed between his son and Ms Mathembu and that it had never been his son’s intention to marry her according to customary law.⁷⁴ He consequently did not regard her and her daughter as part of his family and refused to assume any responsibility for their maintenance. Ms Mathembu alleged that *lobolo* had been fixed at an amount of R2 000, R900 of which had already been paid at the time of the deceased’s death. To corroborate her statements she attached as proof a document signed by members of the Letsela family and her brother. This document was submitted to the deceased’s employer to claim widow’s benefits.⁷⁵ Oral evidence was requested on the question of the existence of a valid or putative customary marriage.⁷⁶ Ms Mathembu and Mr Letsela both decided, however, not to adduce any evidence, and the matter was eventually resolved around the question of whether the court should develop the rule of male primogeniture in terms of section 35 of the ‘interim’ Constitution.⁷⁷ The court in passing remarked on the validity of customary marriage, stressing the importance of *lobola*:

“According to customary law a woman and her children who are born of a customary union become members of her husband’s family if the husband’s family and the wife’s family have agreed to pay *lobola* which will be paid by the husband, or his family, and the *lobola* has either been paid or has been promised.”⁷⁸

⁷⁰ Section 3(1)(b).

⁷¹ Maihufi & Bekker (op cit n60) 187.

⁷² 2000 (op cit s8 n77); see also JY De Koker, “Proving the existence of an African customary marriage”, 2000 *JBL* 8(3), 257.

⁷³ Mathembu 2000 (op cit s8 n77), 937J.

⁷⁴ Ibid, 938I 940D-E.

⁷⁵ Ibid, 938H-939B.

⁷⁶ Ibid, 947D-F.

⁷⁷ Mathembu 1998 (op cit s8 n77).

⁷⁸ Ibid, 686D.

9.21 In *Bhe v Magistrate, Khayelitsha*⁷⁹ the court was afforded an opportunity to settle the issue, but failed to do so. In the court *a quo* the Cape High Court,⁸⁰ relying on the rule in *Plascon-Evans*,⁸¹ held that a valid marriage existed. The rule provides:

“ ... where there is a dispute as to the facts, a final interdict should only be granted in notice of motion proceedings if the facts stated by the respondents together with the admitted facts in the applicant’s affidavit justify such an order. ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. ... In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. ... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination ... and the Court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof to include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. ... [t]here may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.”

The Constitutional Court stated that reliance on the *Plascon-Evans* rule was inappropriate,⁸² without giving any reasons for this conclusion.

9.22 De Koker⁸³ avers that the essential requirements for a valid customary law marriage are consent from the father of the man and the woman; an agreement that the *lobolo* will be paid (the marriage thus comes into existence before actual delivery of *lobolo*); that the parties to the marriage consent to the marriage; that the women be transferred to the family group of the husband or the husband himself; and that neither party to the marriage is a partner to an existing civil marriage.

Proprietary consequences of customary marriage

9.23 The proprietary consequences of customary marriage differ according to whether the parties concluded a customary marriage before or after the commencement date of the Recognition of Customary Marriages Act. Marriages entered into before the Act’s commencement date continue to be regulated by customary law.⁸⁴ Marriages entered into after the Act’s commencement date are automatically regarded

⁷⁹ Bhe (op cit s1 n10).

⁸⁰ *Bhe & Others v Magistrate Khayelitsha, and Others*, 2004 (2) SA 544.

⁸¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A).

⁸² Bhe (op cit s1 n10), 13.

⁸³ De Koker (op cit n72).

⁸⁴ Section 7(1).

as being in community of property, if monogamous.⁸⁵ Polygamous marriages must be out of community of property.⁸⁶ A wife in a customary marriage now has full status and capacity subject to the matrimonial property system governing the marriage.⁸⁷

9.24 But the gains attained by conferring full status and capacity on women are erased for many women by the Act's provision that customary marriages entered into before the Act's commencement date continue to be regulated by customary law.⁸⁸ In *S v Mehlape*⁸⁹ the court was asked whether women whose marriages are regulated by section 7(1) of the Act had any enforceable interests in marital property. The court concluded that husbands had sole ownership of the property to the exclusion of women.⁹⁰

Customary courts

9.25 South Africa's draft Bill on Customary Courts seeks to provide uniformity in the manner in which customary courts are constituted and regulated in South Africa.⁹¹ The draft Bill concerns itself with the establishment of customary courts, jurisdiction, applicable law and procedures and the hierarchy of courts. The Bill limits the jurisdiction of customary courts to civil cases in which customary law is applicable. Section 8 provides, among other things, that a customary court does not have jurisdiction to determine the validity, effect or interpretation of any will, to dissolve any marriage or to determine the custody and guardianship of minors.

⁸⁵ See sections 7(2), (3) and (5). Chapter III and sections 18, 19, 20, 21 and 24 of the Matrimonial Property Act 88 of 1984 apply to monogamous customary marriages which are in community of property.

⁸⁶ A husband in a customary marriage who wishes to enter into a polygamous marriage with an additional wife after the commencement of the Act must get court approval for a written document which provides for an equitable distribution of the matrimonial property – with the existing spouse or spouses and the prospective new spouse all being joined as parties to the court proceedings. Section 7(6)-(9).

⁸⁷ Section 6 provides: "A wife in a customary marriage has on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any other rights and powers that she might have at customary law."

⁸⁸ See also V Bronstein, "Notes and Comments: Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998", 2000 16 *SAJHR* 559.

⁸⁹ 2002 JOL 10053 (T).

⁹⁰ Such a conclusion fails to take into account section 6 of the Act as it protects equal opportunities of and between spouses in respect of the amassing of property during the subsistence of the marriage.

⁹¹ SALC, *Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90.

GHANA

International and constitutional obligations

9.26 Ghana has signed and ratified a number of international instruments which obligate the country to guarantee women's equal rights under common and customary law. These instruments include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the African Charter on Human and Peoples' Rights. On a domestic level, Ghana's Constitution (1992) addresses property rights of spouses during marriage and at its dissolution. Article 22 provides:

- (1) A spouse shall not be deprived of reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
- (2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
- (3) With a view to achieving the full realization of the rights referred to in clause (2) of this article –
 - (a) Spouses shall have equal access to property jointly acquired during marriage;
 - (b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

Article 22(1) not only entitles the surviving spouse to a reasonable share of the intestate estate of a spouse, but also permits a will to be overridden to ensure that the surviving spouse gets such a share. Articles 22(2) and (3) enjoin Ghana's Parliament to enact laws that will assist in achieving full realisation of property rights of spouses, specifically equal access to property jointly acquired by spouses during marriage and the equitable distribution of such joint assets upon dissolution of the marriage.

9.27 Article 17 protects the right to equality before the law and prohibits discrimination on the grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status. It further ensures that nothing in that Article shall prevent Parliament from enacting laws which regulate matters such as adoption, marriage, divorce, burial, devolution of property on death or any other matter related to personal law.⁹²

9.28 The Constitution recognises five categories of law: the Constitution; laws made by Parliament; existing laws; the common law; and Orders, Rules and Regulations made by any person or authority authorised to do so in terms of the Constitution.⁹³

⁹² Article 17(4).

⁹³ Article 11(1).

The common law comprises the “rules of law generally known as common law”, “doctrines of equity” and customary law.⁹⁴ The common law is based on English common law and the customary law is “the rules of law which by custom are applicable to particular communities in Ghana”.⁹⁵

Inheritance

9.29 When the Ghana Law Reform Commission was established in 1968, one of the first tasks it undertook was to review statutory and customary law with a view to suggesting reforms. It identified inheritance and marriage as key areas requiring reform. This initiative resulted in the enactment of Intestate Succession Law 111.⁹⁶ This law sought to alter succession under customary law by providing a “uniform intestate succession law” that is applicable throughout Ghana “irrespective of the class of the intestate and the type of marriage” contracted.⁹⁷ Two kinship systems exist in Ghana, namely matrilineal and patrilineal.

9.30 The Intestate Succession Law 111 has two important limitations. Firstly, it applies only to property that is not disposed of in a valid will.⁹⁸ If a person dies partially intestate, then the law applies only to that portion of the estate not devolved in terms of the will.⁹⁹ A person wishing to escape the application of the Intestate Succession Law 111 can therefore draft a will.¹⁰⁰ Secondly, the law applies only to self-acquired property of the deceased and not to lineage property.¹⁰¹ The spouse and children are entitled to the household chattels,¹⁰² such as clothes, furniture and furnishings, basic agricultural equipment, hunting equipment, televisions, motor vehicles, household livestock and jewels.¹⁰³ If the marital home is part of the estate, the spouse and children become entitled to it and will hold it as tenants in common. If the estate includes more than one house, the spouse and children are allowed to choose one of them. If the children and spouse are unable to agree on which house to choose, an application can be made to the High Court to determine which of the houses

⁹⁴ Article 11(2).

⁹⁵ Article 11(3).

⁹⁶ Intestate Succession Law, PNDCL 111 (1985).

⁹⁷ Memorandum accompanying Intestate Succession Law 111.

⁹⁸ Section 2(1). Section 1 stipulates that “a person dies intestate if she or he did not have a valid will at the time of his or her death disposing of his or her property”.

⁹⁹ Section 2(2).

¹⁰⁰ The only limitation that is imposed on that testamentary freedom is provided for in Article 22(1) of the Constitution as discussed above.

¹⁰¹ Section 1(2).

¹⁰² Section 3.

¹⁰³ Section 18.

devolves upon the spouse and children.¹⁰⁴ A ‘child’ for purposes of the statute includes children born in and outside of marriage.¹⁰⁵

9.31 The Intestate Succession Law 111 sets out a complicated formula for the division of the residue of the estate.¹⁰⁶ Where the deceased is survived by a spouse and children, the residue is distributed as follows:

- (a) three-sixteenths to the surviving spouse.
- (b) nine-sixteenths to the surviving children.
- (c) one-eighth to the surviving parent.
- (d) one-eighth in accordance with customary law.¹⁰⁷

If there is no surviving parent, one-fourth of the residue is distributed under customary law. If the child is a minor undergoing educational training, “reasonable” provision must be made for the child before any distribution takes place.¹⁰⁸

9.32 Where the deceased is survived by a spouse but no children, the spouse inherits one-half of the residue.¹⁰⁹ The deceased’s parents and the inheriting group under customary law will each receive one-fourth. If there is no surviving parent, one-half of the estate will devolve in accordance with customary law.

9.33 If the intestate is survived by children but no spouse, the children inherit three-fourths of the residue. Of the remaining one-fourth, one-eighth will devolve upon the surviving parent(s) and the remaining one-eighth to the inheriting group under customary law.¹¹⁰ If there is no surviving child or spouse, three-fourths of the estate devolves upon the surviving parent(s) and the remaining one-fourth is distributed to the inheriting group under customary law.¹¹¹ If there is no surviving spouse, children or parent(s), the entire estate devolves according to customary law.¹¹² This complicated scheme has been criticised for being difficult to manage.¹¹³

9.34 In respect of small estates, special provision is made to limit the estate’s fragmentation and to ensure that key beneficiaries receive the bulk of it. If the estate’s

¹⁰⁴ Section 4.

¹⁰⁵ Section 125 of the Children’s Act 560 of 1998; see also section 18 of the Intestate Succession Law 111.

¹⁰⁶ See sections 5-11.

¹⁰⁷ Section 5.

¹⁰⁸ Section 125 of the Children’s Act.

¹⁰⁹ Section 6.

¹¹⁰ Section 7.

¹¹¹ Section 8.

¹¹² Section 11. Only if there is no customary law applicable under these circumstances will the estate devolve upon the state.

¹¹³ COHRE (op cit s3 n10), 61.

value is less than 10 000 000 cedis, the spouse and children of the deceased become entitled to the entire estate. If its value is less than 10 000 000 cedis and the deceased is survived only by a parent or parents, they become entitled to the entire estate.¹¹⁴

9.35 Section 16A prohibits any person from ejecting a spouse or a child from the matrimonial home, irrespective of whether the spouse died intestate or testate, prior to the distribution of the estate.¹¹⁵ Any person who violates this provision, or who unlawfully deprives a person of the use of any property, commits an offence and is liable for a minimum fine of 50 000 cedis or a maximum fine of 500 000 cedis or a term of imprisonment not exceeding one year.¹¹⁶

9.36 Written wills in Ghana are regulated by the Wills Act 360 of 1971. Section 13(1) of the Act enables the High Court to make reasonable provision out of the estate of a spouse for his widow and other relevant persons such as parents and minor children if: (a) the application is made within three years of the date on which probate of the will is granted; (b) the High Court finds the testator has not made reasonable provision for the maintenance of the applicant either in his lifetime or in the will; and (c) hardship will be caused by this neglect of the testator.

9.37 Ghanaian law requires a party seeking to administer an intestate's estate to obtain letters of administration.¹¹⁷ The law establishes a hierarchy among persons with a beneficial interest in the estate who are entitled to such letters. The order of priority is the spouse, children and parents of the intestate and the customary successor.¹¹⁸

¹¹⁴ Section 12. The original amount of 50 000 000 cedis was amended in 1998 by section 125 of the Children's Act 560 of 1998.

¹¹⁵ Section 16A provides:

- (1) No person shall before the distribution of the estate of the deceased person whether testate or intestate eject a surviving spouse or child from the matrimonial home –
 - (a) where the matrimonial home is self-acquired property of the deceased;
 - (b) where the matrimonial home is rented property, unless the ejection is pursuant to a court order;
 - (c) where the matrimonial home is the family house of the deceased, unless a period of six months has expired from the date of the death of the deceased; or
 - (d) where the matrimonial home is public property, unless a period of three months has expired from the date of the death of the deceased.
- (2) For the purposes of this section matrimonial house means –
 - (a) the house or premises occupied by the deceased and the surviving spouse, or the deceased and a surviving child or all as the case may be, at the time of the death of the deceased; or
 - (b) any other self-acquired house of the deceased occupied by the surviving spouse or child or both at the time of the death of the deceased.

¹¹⁶ Section 17.

¹¹⁷ Section 6 of Probate and Administration Rules, LI 1515 (1991), Order 2.

¹¹⁸ ED Kom, *Inheritance Marriage and Divorce*, 1993, 5.

Marriage

9.38 The majority of marriages in Ghana are customary marriages.¹¹⁹ There are two alternatives to customary law marriage: an ‘Ordinance marriage’ governed largely by English law through the Marriage Ordinance;¹²⁰ and a marriage under Islamic law.¹²¹ In contrast to customary and Islamic marriages, ordinance marriages are monogamous. Law 111 dictates the distribution of estates for individuals who die intestate, regardless of the status of the marriage contracted by the individual during his lifetime.

9.39 On the same day that Law 111 came into force, the state promulgated the Customary Marriage and Divorce (Registration) Law of 1985 (Law 112),¹²² meant to complement Law 111 by creating a system of official record-keeping of customary law marriages. Law 112 was therefore meant to facilitate proof of marriage. As originally enacted, Law 112 mandated the registration of customary marriages and divorces within three months of the marriage or divorce, and the registration of all existing customary marriages within three months of the law’s date of commencement. Law 112 set out the application form for registration¹²³ and the procedure for registering the marriages. This law not only mandated registration of all customary marriages, but also limited the application of Law 111 to customary marriages that were validly registered.¹²⁴ This provision may have inspired parties who wished to escape the application of Law 111 to avoid registration. In 1991 Law 112 was amended to provide that “[w]here a marriage has been contracted under customary law, either party to the marriage or both parties may apply in writing” to register their marriage with the Registrar of Marriages in the district where the marriage took place.¹²⁵ There is no longer a fixed time period for the registration of marriages; instead the law allows the Secretary of Justice to prescribe periods of time within which registration must take place.¹²⁶ Most importantly, the amended law now makes it possible for Law 111 to apply in instances where a “court or tribunal is satisfied by oral or documentary evidence before it that a customary law marriage had been validly contracted between a deceased and surviving spouse”.¹²⁷

¹¹⁹ COHRE (op cit s3 n10), 59; see also K Awusabo-Asare, “Matriliney and the New Intestate Succession Law of Ghana”, *CJAS/RCEA* 24:11990.

¹²⁰ Marriage Ordinance (Cap 127) of 1884.

¹²¹ Mohammadans Ordinance (Cap 129) of 1907.

¹²² Customary Marriages and Divorce (Registration) Law, PNCL 112 (1985), hereinafter referred to as ‘Law 112’.

¹²³ Section 2(3) of First Schedule.

¹²⁴ Sections 2(2), 7(1) and 15.

¹²⁵ Section 2(a) of the Customary Marriages and Divorce (Registration) (Amendment) Law, PNCL 263 (1991).

¹²⁶ Ibid, section 2(b).

¹²⁷ Ibid, section 5.

Difficulties in the implementation of Ghana's intestate succession laws

Polygyny and informal partnerships

9.40 Law 111 is drafted in facially gender-neutral terms and does not provide for the practical reality of polygyny or informal partnerships. The law also fails to make provision for multiple spouses and children from multiple mothers¹²⁸

Proof of marriage

9.41 In Ghana, in the absence of registration of a customary marriage, disputes may arise as to whether or not a widow and her deceased spouse had completed the necessary customary rites for their marriage to be regarded as valid. The validity of incompletely formalised customary marriages has been recognised by the Judiciary. In *Essellie v Quarcoo*¹²⁹ the Court of Appeal distinguished between two forms of valid customary marriages. In the first, the necessary customary rites and ceremonies have been fully performed. In the second, the customary marital rites have not been performed but the parties have consented to living in the eyes of the world as man and wife, their families have consented to their doing so, and the parties actually do live as man and wife in practice.¹³⁰ Consent of the two families need not be actual or express, but could be implied from their conduct.¹³¹

Establishing the nature of the property in the estate

9.42 Section 18 of Law 111 defines “estate” to mean “self-acquired property which the intestate was legally competent to dispose of during his lifetime and in respect of which his interest has not been terminated by or on his death”. Law 111 excludes family property from its scope, with the result that disputes often arise as to the nature of the estate.¹³² Ghanaian law makes no provision for joint ownership of property of individuals who are not part of the same lineage, even when those individuals are legally married.¹³³ The law is silent on property that may have been acquired jointly by the spouses or which the wife may have acquired by herself.¹³⁴

¹²⁸ COHRE (op cit s3 n10), 61.

¹²⁹ [1992] 2 Ghana L Rep 180.

¹³⁰ Ibid, at 184 and 188. The court in this instance relied on *Yaotey v Quaye* (1961) 2 Ghana L Rep 573 and *Sackitey's Caveat, Re* (1962) 1 Ghana L Rep 180.

¹³¹ Ibid, 185.

¹³² COHRE (op cit s3 n10), 61.

¹³³ Akua Kuenyehia, “Distribution of Matrimonial Property on Dissolution of Marriage: A Re-Appraisal”, 18 Ghana L. J. 94, 108 (1990-1991) (describing the suggestion of a community property regime in Ghana as “radical”). See also COHRE (op cit s3 n10), 65.

¹³⁴ COHRE (op cit s3 n10), 61.

ZAMBIA

Constitutional and international obligations

9.43 The legal system of Zambia, a former British colony, incorporates both customary law and statutory law, which has been modified and extended since Zambia gained independence in 1964.¹³⁵ Since ratifying CEDAW in 1985, the government of Zambia has engaged in legal reform aimed at removing legal provisions that are overtly discriminatory. Zambia adopted its current Constitution in 1996.¹³⁶

9.44 The Zambian Constitution provides that all Zambians are entitled to fundamental rights and freedoms irrespective of race, colour, sex and marital status, provided that such rights do not prejudice the rights and freedoms of others or public interests.¹³⁷ No person may be deprived of property without any compensation.¹³⁸ The Constitution further provides that “no property of any description shall be compulsorily taken possession of, and no interest or right over property of any description shall be compulsorily acquired” unless a law has been passed that makes provision for compensation.¹³⁹

9.45 Zambia recognises both patrilineal and matrilineal kinship systems. No law in Zambia may make any provision that is indirectly or directly discriminatory.¹⁴⁰ The term ‘discriminatory’ in this context is defined as follows:

“... affording different treatment to different persons attributable, ... by race, tribe, sex, ... [or] marital status, ... whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject ... to ... or are accorded privileges or advantages ...”.¹⁴¹

Article 23(4) of the Constitution, however, excludes from the application of non-discriminatory provision laws dealing with adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law¹⁴² and customary law.¹⁴³ The Committee on the Elimination of Discrimination against Women has recommended

¹³⁵ Ibid, 143.

¹³⁶ Available at <http://www.thezambian.com/Constitution/1996.aspx>.

¹³⁷ Article 11.

¹³⁸ Article 11(d).

¹³⁹ Article 16.

¹⁴⁰ Article 23(1) provides that “no law shall make any provision that is discriminatory either of itself or in its effect”.

¹⁴¹ Article 23(3).

¹⁴² Article 24(c).

¹⁴³ Article 24(d).

repealing Article 23(4) as it permits Zambian laws to discriminate against women.¹⁴⁴ The Zambian Constitution is currently under review by the Constitutional Review Commission and gender discrimination is likely to be on the agenda.¹⁴⁵

Intestate Succession Act 5 of 1989

9.46 The Intestate Succession Act of 1989, which was aimed at eradicating property-grabbing, has been ineffectual.¹⁴⁶ This is due partly to the fact that the mechanism introduced by the Act to ensure a fair distribution of an estate is said to be too far removed from customary norms.¹⁴⁷ The COHRE report,¹⁴⁸ relying on the research findings of Zambia's Women and Law in Southern Africa (WLSA), recently stated that even though the Act was "regarded as a victory for most Zambian women ... now, almost 15 years later ... [it] has proven to be seriously flawed". Himonga¹⁴⁹ 10 years earlier cautioned that the "gloomy picture" should not be regarded as a final judgement on the fate of the law because time is essential in evaluating the social impact of any law.

9.47 The Act applies only to members of a community to whom customary law would have applied,¹⁵⁰ and who died partially intestate or without leaving any will at all.¹⁵¹ It excludes from its application land held under customary law and "institutional property of a chieftainship".¹⁵²

9.48 The Act defines an "estate" as "the assets and liabilities of a deceased, including those accruing to him by virtue of death or after his death and for the purposes of administration of the estate ... includ[ing] personal chattels."¹⁵³ Personal chattels include clothing, articles of personal use or adornment, furniture and furnishing, appliances, utensils, simple agricultural and hunting equipment, books and motor vehicles, but not chattels used for business purposes, money or securities for money.¹⁵⁴ Movable and immovable property belonging collectively to family members ('family property') is also excluded.¹⁵⁵

¹⁴⁴ <http://www.hri.ca/fortherecord2002/vol2/zambiatb.htm>.

¹⁴⁵ See also COHRE (op cit s3 n10), 144.

¹⁴⁶ <http://www.irf.org.zm/Newsletter/june2005/features.html>.

¹⁴⁷ Ibid.

¹⁴⁸ COHRE (op cit s3 n10), 148.

¹⁴⁹ CN Himonga, *Family and Succession Laws in Zambia: Developments since Independence*, 1995, Munster: Lit 177.

¹⁵⁰ Section 2(1).

¹⁵¹ Sections 3 and 4.

¹⁵² Section 2(2). "Institutional property of a chieftainship" presumably refers to property that a chief holds on behalf of members of a community.

¹⁵³ Section 3.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

9.49 The Act allows for fragmentation of the estate. The distribution mechanism prescribes that certain categories of beneficiaries are entitled to a specified percentage of the estate.¹⁵⁶ Twenty percent of the estate devolves upon the surviving spouse.¹⁵⁷ Where there is more than one spouse, this twenty percent is divided among them proportional to the duration of their respective marriages.¹⁵⁸ “Other factors” such as the widow’s contribution to the estate may be taken into account when justice so requires.¹⁵⁹

9.50 Fifty percent of the estate devolves upon the children in such proportions as are commensurate with the children’s ages and educational needs.¹⁶⁰ If a child is still a minor, his or her portion of the estate will be held in trust by the mother, father or guardian.¹⁶¹ Twenty percent of the estate devolves upon the deceased’s parents,¹⁶² and ten percent goes to dependants, in equal shares.¹⁶³ If a priority dependant is of the opinion that his portion of the estate is unreasonably small based on his dependence on the deceased, the dependant may apply to a court for an adjustment of the portions inherited.

9.51 If there is no surviving spouse, the portion of the estate that would have been inherited by the spouse will devolve upon the children in such proportions as are commensurate with the children’s ages and educational needs.¹⁶⁴ For purposes of the Act, ‘child’ includes an extramarital child, a legitimate child, an adopted child and a child conceived but not yet born.¹⁶⁵

9.52 If the deceased is survived by neither a spouse nor children, the aggregate portion of the estate to which they would have become entitled will devolve upon the deceased’s parents in equal shares.¹⁶⁶ If there are also no surviving parents, the estate will devolve upon dependants in equal shares.¹⁶⁷ If there are also no dependants, the estate will devolve upon near relatives in equal shares.¹⁶⁸ The Act defines ‘near relative’ as a brother, sister, grandparent or other remoter descendant of the deceased.¹⁶⁹ If the deceased is not survived by even a near relative, the estate will go to the state.¹⁷⁰

¹⁵⁶ Section 5.

¹⁵⁷ Section 5(1)(a).

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Section 5(1)(b).

¹⁶¹ Section 5(2).

¹⁶² Section 5(1)(c).

¹⁶³ Section 5(1)(d).

¹⁶⁴ Section 6(a).

¹⁶⁵ Section 3.

¹⁶⁶ Section 6(b).

¹⁶⁷ Section 6(c).

¹⁶⁸ Section 6(d).

¹⁶⁹ Section 3. An issue includes children, grandchildren and other remoter descendants.

¹⁷⁰ Section 6(e).

9.53 The property distribution scheme is not applied in respect of small estates. If an estate is valued at less than K30 000 then the estate devolves upon the surviving spouse or children, or in their absence upon the deceased's parents.¹⁷¹

9.54 If a deceased in a monogamous marriage is survived by a spouse, a child or both, the spouse and/or child are entitled to the deceased's personal chattels in equal shares.¹⁷² If the estate includes a house, the surviving spouse and/or children become entitled thereto.¹⁷³ If there is more than one surviving spouse or child, they will hold the house as tenants in common.¹⁷⁴ The surviving spouse has a life interest in that house which terminates upon remarriage.¹⁷⁵ If there is more than one house, the surviving spouse and children shall determine which of the houses they should hold as tenants in common, and the remainder of the houses shall form part of the estate.¹⁷⁶ If the deceased was a partner to a polygamous marriage, then each child and widow shall be entitled to the applicable homestead property, and will share the common property equally.¹⁷⁷

9.55 Property-grabbing is a punishable offence. Section 14 provides:

“Any person who –

- (a) unlawfully deprives any person of the use of –
 - (i) any part of the property of the deceased to which that person is entitled under this Act; or
 - (ii) any property shared with the deceased to which this Act applies; or
- (b) otherwise unlawfully interferes with the use by any person of any property referred to in paragraph (a);

shall be guilty of an offence and liable on conviction to a fine not exceeding seven hundred and fifty penalty units or imprisonment not exceeding two years, or both.”

9.56 Other sections of the Act regulate the administration of estates, guardianship of minor children of deceased persons, the loss of inheritance by beneficiaries who have caused the death of the intestate, the appointment of receivers pending

¹⁷¹ Section 11.

¹⁷² Section 8.

¹⁷³ Section 9.

¹⁷⁴ Section 9(1)(a).

¹⁷⁵ Section 9(1)(b).

¹⁷⁶ Section 9(2).

¹⁷⁷ Section 10. Homestead property in relation to a polygamous marriage refers to the deceased's personal chattels which were utilised by him and the wife and children of a particular household. It excludes common property (property used in common by the deceased, his wife and children). See Section 3.

the grant of letters of administration, and the preservation of rights and obligations of administrators and beneficiaries existing before the commencement of the Act.¹⁷⁸ Local courts, the lowest in the judicial hierarchy, hear the majority of disputes involving the appointment of administrators, the distribution of estates and property-grabbing offences.¹⁷⁹ These courts up until 1998 mainly applied customary law, but are now empowered to apply the Intestate Succession Act. However, decisions in these courts are still influenced largely by customary law.¹⁸⁰

Wills and Administration of Testate Estates Act 6 of 1998

9.57 The Wills and Administration of Testate Act was promulgated simultaneously with the Intestate Succession Act, and similarly does not apply to land which was acquired and held under customary law and which the testator could not dispose of by will, or to institutionalised property of a chieftainship.¹⁸¹ Except for these limitations, any Zambian who is a major and of sound mind may dispose of property by means of a will.¹⁸² The Act prescribes the formalities that have to be complied with in order for a will to be valid, and also affords special protection to families through provisions for maintenance.

9.58 If a testator has not made provision for a dependant in a will, a dependant may apply to a court for maintenance.¹⁸³ The court will award maintenance for the dependant if in its opinion a testator has not made “reasonable provision”, either during his lifetime or in his will, for the maintenance of the dependant, and “hardship” will be the consequence.¹⁸⁴ An order for maintenance may include payment of a lump sum and a grant of interest in an immovable property for life or a lesser period.¹⁸⁵ If an order for periodical payment is made, payment will be provided to a spouse only until his or her remarriage, and in the case of a child only until she or he attains the age of 18 years or completes secondary or tertiary education.¹⁸⁶ In the case of a disabled child periodical payments will be awarded only until the “cesser of the disability”.¹⁸⁷ Generally an award for periodical payments will cease upon death of the dependant.¹⁸⁸ A ‘dependant’ is defined as a wife, husband, child or parent.¹⁸⁹ Appli-

¹⁷⁸ Sections 15-48.

¹⁷⁹ C Himonga, 2001, “Protecting the Minor Child’s Inheritance Rights”, citing *Zulu v Zulu* 1995/HP/2901, in A Bainham (ed), *The International Survey of Family Law*, 466.

¹⁸⁰ Ibid.

¹⁸¹ Section 2.

¹⁸² Section 4.

¹⁸³ Section 20(1).

¹⁸⁴ Ibid.

¹⁸⁵ Section 20(2)(a) and (b).

¹⁸⁶ Section 20(2)(b)(i) and (ii).

¹⁸⁷ Section 20(2)(b)(iii).

¹⁸⁸ Section 20(2)(b)(iv).

cations for maintenance must be made within six months of the date on which representation in regard to the testator's estate is first taken out.¹⁹⁰ As is the case under the Intestate Succession Act, the 'intermeddling' of property is a punishable offence.¹⁹¹

Shortcomings of the Zambian approach to succession

9.59 Zambia is ravaged by poverty since the collapse of the mining industry following unsuccessful attempts to privatise this industry.¹⁹² Against this backdrop, one major criticism of the Intestate Succession Act is that, in spite of the mechanisms it introduced in an effort to provide for the fair distribution of a deceased's property, property-grabbing continues unabated.¹⁹³ One indirect effect of property-grabbing is that women and children are exposed to HIV/AIDS since many of those left destitute resort to prostitution to survive.¹⁹⁴ Fines prescribed for property-grabbing by the Intestate Succession Act are widely considered to be "extraordinarily low".¹⁹⁵ In *Gabula v Mwanza*,¹⁹⁶ the High Court explicitly stated that the law does not provide sufficient protection against property-grabbing and suggested that the Intestate Succession Act be amended to provide for stiffer punishment for people convicted of this offence. The Act also fails to provide for restitution to the rightful beneficiaries of property misappropriated by an offender.¹⁹⁷ Only in the case of minors may a court order an offender to provide compensation for the property concerned.¹⁹⁸

9.60 Widows are entitled to 20% of the estate. Some married women with sons do not believe that widows should inherit such a large portion of the estate as they regard the education of their children as an investment that matures when they are old and their children are expected to provide for them.¹⁹⁹ Other married women feel that 20% of an estate which they have assisted in accumulating is insufficient.²⁰⁰ In some instances, husbands fear that their wives will kill them, as they stand to inherit not only 20% of the estate, but also the 50% of the estate to which their minor children

¹⁸⁹ Section 3.

¹⁹⁰ Section 22(1).

¹⁹¹ Section 65 as amended by Act 13 of 1994.

¹⁹² COHRE (op cit s3 n10), 155.

¹⁹³ <http://www.irf.org.zim/Newsletter/june2004/features.html>.

¹⁹⁴ COHRE (op cit s3 n10), 153; Human Rights Watch, "Report on the Shortcomings and Risk Factors within Zambia's Legal Framework", at <http://www.hrw.org/reports/2003/zambia/zambia.html>.

¹⁹⁵ United States Department of State, "Zambia Report on Human Rights Practices for 1997", at <http://www.usemb.se/human/human97/zambia.html>.

¹⁹⁶ 1995/HP/3818.

¹⁹⁷ Himonga 1995 (op cit n150), 147.

¹⁹⁸ See sections 35(2) and 58(2) of the Intestate Succession Act and the Wills and Administration of Testate Estates Act respectively.

¹⁹⁹ COHRE (op cit s3 n10), 148.

²⁰⁰ Ibid, 149.

are entitled.²⁰¹ Reform measures implemented in 1996 compel widows to share their 20% equally with women who can prove a marital relationship with the deceased. The Act sets no age limit in defining 'children', with the result that major children who may be financially independent can take a large portion of the estate, leaving the widow, who may be old and in need of extra assistance, with only the prescribed 20%.²⁰²

9.61 The Act provides that the surviving spouse or children or both are entitled to the personal chattels of the deceased.²⁰³ In the case of monogamous marriages, they are entitled to the property in equal shares, with the effect that the surviving spouse's share could be insignificant.²⁰⁴ Children entitled to share in the personal chattels may be extramarital children.²⁰⁵ In respect of polygamous marriages, it would appear that only the children whom the deceased man had with his wives are entitled to personal chattels (homestead property).²⁰⁶ As a result, the Act could be interpreted as unjustifiably discriminating between children of monogamous and polygamous marriages.²⁰⁷

9.62 In terms of the Act, the children and spouse of a deceased are entitled to the deceased's house. If the deceased has left more than one house, they have a right to choose a house of their own liking.²⁰⁸ If the deceased is survived by more than one child, the house is to be held by the children as tenants in common. Himonga²⁰⁹ lists as one of the main criticisms of the Act, in respect of both personal chattels and houses, that it aggregates the rights of children and those of their surviving parents.

9.63 The Act excludes from its application land held under customary law,²¹⁰ with the effect that the majority of spouses and children situated in these areas are not provided for.²¹¹

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Section 5.

²⁰⁴ Himonga 1995 (op cit n150), 146.

²⁰⁵ Ibid.

²⁰⁶ Ibid., fn 21.

²⁰⁷ Ibid., fn 2; see also section 3 read with section 10.

²⁰⁸ Section 9.

²⁰⁹ C Himonga, 2001 (op cit n180), 460. In this case of *Zulu v Zulu* 1995/HP/ 2901, the deceased was survived by a widow and her minor child. The deceased's father and his family grabbed all the personal chattels of the deceased before the commencement of the administration of the estate. In the High Court the wife sued for the return of the goods. In her submission the wife stated that she was prepared to waive her right to the personal chattels except for certain items. Despite the fact that the personal chattels waived by the wife included the minor child's share, the court approved her waiver.

²¹⁰ Section 2.

²¹¹ Himonga 1995 (op cit n149), 148.

9.64 Both the Intestate Succession Act and the Wills and Administration of Testate Estate Act provide for the maintenance rights of certain family members of deceased persons who fail to provide for their reasonable maintenance needs by will or in terms of intestate succession rules. The provisions of the Wills and Administration of Testate Estates Act for reasonable maintenance apply *mutatis mutandis* to intestate succession.²¹² The Wills and Administration of Testate Estates Act defines a ‘dependant’ as “a wife, husband, child or parent” of the deceased. The Act thus excludes as dependants relatives to whom the deceased may otherwise have owed a duty of support, based on kinship obligations consistent with African culture.²¹³ The Intestate Succession Act defines ‘dependant’ as a person who was maintained by a deceased person immediately prior to his death and who was living with him, or a minor whose education was being provided for by the deceased and who is incapable of providing for himself or herself.²¹⁴ This definition is wider and more inclusive than the definition of ‘dependant’ in the Wills and Administration of Testate Estates Act. The disadvantage of a wider definition is that multiple dependants who claim maintenance from the estate could reduce the amount of the estate available for the benefit of the minor children of the deceased.²¹⁵

9.65 Despite the drafting of wills, the courts uphold settlement agreements in terms of which parties to a dispute agree to “revoke” the will of the deceased and allow intestate succession rules to apply.²¹⁶ In some instances wills are compromised in favour of customary law.²¹⁷

9.66 The granting of letters of administration is regulated by section 16 of the Intestate Succession Act. Administrators of estates do not always distinguish their position of administrator from that of heir,²¹⁸ with the result that misappropriation of the estate may occur at the hands of unscrupulous administrators.²¹⁹

²¹² See section 5(1) of the Intestate Succession Act and section 20 of the Wills and Administration of Testate Estates Act.

²¹³ See Himonga 2001 (op cit n179), 461-2, citing *M and Seven Others v H and M*, SCZ/11/1991, as authority. In this case an application was made for the maintenance of dependants under the Inheritance (Family Provision) Act 1938 of England. The Act empowered the court to make provision for the reasonable maintenance of a dependent child or spouse. In the High Court, which first heard the matter, the applicants relied on section 12 of the High Court Act (Chapter 27 of the Laws of Zambia), which provides that all statutes of Parliament of the United Kingdom in force in the country be applied subject to “local jurisdiction and circumstances”. The applicants argued that in terms of this provision judges are compelled to enlarge the list of dependants in the Act to include deceased brothers, sisters and aunts, taking into account among other things the kinship and financial claims made on the deceased by the people concerned when he was still alive. The High Court dismissed the application on the grounds that to enlarge the class of dependants would amount to a change in the substance of the will which was unnecessary in terms of section 12 of the High Court Act. The Supreme Court upheld the decision on appeal. The line of argument used by the High Court is similar to the one employed by the South African Constitutional Court in *Volks* (op cit n40).

²¹⁴ Section 3 of the Intestate Succession Act.

²¹⁵ Himonga 2001 (op cit n179), 462-3.

²¹⁶ Himonga 1995 (op cit n149), 151-2, citing *M v M*, 1990/HP/902 (HC Lsk).

²¹⁷ *Ibid*, 153.

²¹⁸ Himonga 2001 (op cit n179), 471.

²¹⁹ See also COHRE (op cit s3 n10), 149.

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Constitutional and international obligations

9.67 Since independence, Zimbabwe's Constitution has undergone several reform efforts, though little thereof has focused on doing away with discriminatory policies.²²⁰ Section 23 prohibits the inclusion of any directly or indirectly discriminatory provision in any law, and prohibits any discriminatory treatment of any person "by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority". Section 23(3), however, provides that in matters of adoption, marriage, divorce and inheritance, and in the application of customary law, the non-discrimination provision shall not apply. Though section 16 guarantees the right to property, section 23(3) essentially negates any real inheritance rights that women living under customary law systems in Zimbabwe could otherwise have enjoyed. In *Magaya v Magaya*²²¹ the Supreme Court relied on section 23(3) of the Constitution in stating that "matters involving succession are exempted from discriminatory provisions". As a result the daughter was barred from inheriting from her father's estate.

9.68 Zimbabwe is a party to several international human rights treaties, most notably CEDAW, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

Inheritance

9.69 The 1997 Administration of Estates Amendment Act²²² repealed the old Administration of Estates Act,²²³ which prescribed that the intestate estate of a deceased devolves in accordance with the customs and usage of the tribe or people to which the deceased belonged. The Amendment Act's main purpose was to ensure that the immediate family of the deceased succeeded to the intestate estate. The Amendment Act now provides that the customary law heir inherits only the name and/or traditional articles that he normally would have received under customary law. Women in registered and unregistered customary marriages are granted the right to inherit the remainder of the estate.²²⁴ The law draws a distinction between customary and civil marriage. A civil marriage is concluded in terms of the Marriage Act²²⁵ and a customary marriage in terms of the Customary Marriages Act.²²⁶

²²⁰ COHRE (op cit s3 n10), 160.

²²¹ [1998] SC 210-98; [1999] (1) ZLR 100 (S).

²²² Act 6 of 1997.

²²³ Ch. 6:01, 1907.

²²⁴ COHRE (op cit s3 n10), 67.

²²⁵ Ch. 5:11, 1983 (orig.), commonly referred to as a "Chapter 37 Marriage".

²²⁶ Ch. 5:07, 1951 (orig.).

9.70 If a deceased in a civil marriage dies after November 1997 (the “effective date”), the surviving spouse automatically inherits the matrimonial home.²²⁷ If the deceased is survived by children as well, the surviving spouse becomes entitled to a child’s share and a third of the estate or Z\$200 000, whichever is the greater.²²⁸ The remaining two-thirds are inherited by the children. If the estate is worth less than Z\$200 000, the surviving spouse inherits the entire estate.²²⁹ If the deceased is not survived by any children, the surviving spouse inherits Z\$500 000 or half of the estate, whichever is the greater.²³⁰ The remaining half is divided among the deceased’s parents and siblings.²³¹

9.71 In respect of estates of deceased persons who were married in a customary marriage, the Amendment Act provides for complicated family arrangements by making provision for a “Master Plan” of how the estate is to be administered.²³² The Master of the High Court or a magistrate is tasked with overseeing the plan to determine whether or not the needs of the family will be met.²³³ In polygamous marriages, the senior or first wife receives two-thirds of the first third of the estate’s liquidated assets, as she is presumed to have made the biggest contribution to the estate. The remaining wives share equally the remainder of the first third of the estate. If there are children, they share the remaining two-thirds. If a house is occupied by more than one wife, the wives are expected to go on sharing the house if possible.²³⁴ The Amendment Act makes property-grabbing illegal by prohibiting the taking of bequeathed land and property or occupying or using such land and property.²³⁵ The distribution scheme as prescribed by the Amendment Act applies only if the deceased died after the effective date. If the deceased died before the effective date, the estate is distributed in terms of customary law.

9.72 There have been calls recently to revise the Amendment Act.²³⁶ It is silent on land held under customary tenure²³⁷ and it fails to administer the most valuable property to the benefit of all the beneficiaries. In polygamous marriages, the estate may be too small for meaningful distribution amongst the various heirs, thus leaving children unprotected.²³⁸ On the other hand, the parents and siblings of the deceased

²²⁷ COHRE (op cit s3 n10), 167.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid, 168.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ <http://www.irinnews.org.print.asp?ReportID=43985>.

²³⁷ It is said that 86% of women carry out subsistence farming in communal areas. See *ibid*.

²³⁸ *IRN News*, http://www.irinnews.org/report.asp?ReportID=43985&SelectRegion=Southern_Africa&

are allowed to share in the estate only if there are no children, thus property-grabbing by in-laws is encouraged.²³⁹ Women in unregistered customary marriages find it difficult to register their marriages as the cooperation of relatives is required for confirmation. There is therefore a move to allow traditional leaders to certify customary marriages.²⁴⁰

9.73 The Deceased Maintenance Act²⁴¹ provides that a “dependant” may apply for maintenance from the estate of a deceased within three months of the date on which a letter of administration to the executor of the estate is granted.²⁴² Section 2(1) defines ‘dependant’ as a surviving spouse; a divorced spouse; ²⁴³ a minor child; a major child who has a mental or physical disability, is incapable of maintaining himself and was maintained at the time of death by the deceased; a parent who is maintained by the deceased; or any other person who was dependent on maintenance from the deceased or who was entitled to maintenance at the time of the deceased’s death. The category of eligible dependants is therefore fairly broad.

9.74 The court will look at several factors in considering whether an award of maintenance from the estate will be just and equitable.²⁴⁴ Factors to be considered are: the benefits to which the dependants will be entitled either in terms of a will or on intestacy; the period for which maintenance is required; the ability of the dependants to maintain themselves; the number of dependants to be maintained from the estate; the standard of living enjoyed by the dependants prior to the death of the deceased; the reasons the deceased failed to make provision for the dependants; the size and nature of the estate; and the interests of the beneficiaries for whom provision has been made in the will.

9.75 If the applicant is a spouse, the court will take into account his or her age, the nature and duration of the marriage, the contribution the spouse made to the home or in caring for the family, and what the spouse would have become entitled to had the marriage been terminated by divorce instead of death.²⁴⁵

9.76 If the applicant is a child, his or her educational and/or training needs have to be taken into account.²⁴⁶ The deceased’s property and family further enjoy

SelectCountry=ZIMBABWE, site visited 11 April 2005.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ch. 6:03, 1979 (orig.).

²⁴² Section 3(2)(b)(i).

²⁴³ A divorced spouse must show that at the time of the deceased’s death she or he was entitled to maintenance by the deceased in terms of an order of the court.

²⁴⁴ Section 7(2).

²⁴⁵ Section 7(3).

²⁴⁶ Section 7(4).

special protection.²⁴⁷ The law protects the rights of the surviving spouses and children by stipulating that they shall have a right to continue occupying any immovable property of the deceased upon his death. In respect of movable property, they have a right to continue using household goods and effects, implements, tools or vehicles. They also have a right to use and employ any animals and become entitled to any amounts generated from crops that were growing or being produced prior to the death of the deceased. These special protections are limited only by the rights of landlords, mortgagors and creditors.

9.77 Any interference with a person's rights pursuant to the above protections is a punishable offence.²⁴⁸ A party guilty is liable for a fine not exceeding Z\$2 000 or imprisonment for two years. Civil law remedies such as restitution are also available. A person who steals inherited property from a spouse or child must return the property and pay compensation.²⁴⁹ The court is empowered to set aside the disposition of property made by the deceased up to two years prior to his death.²⁵⁰ The court will exercise this power only if it can be proved that it was the intention of the deceased to deprive the dependants of maintenance through the transactions in question.

²⁴⁷ Section 10.

²⁴⁸ Section 10(2)(3).

²⁴⁹ COHRE (op cit s3 n10), 166.

²⁵⁰ Section 12.

10. Recommendations

SOME PRELIMINARY OBSERVATIONS AND QUALIFICATIONS

10.1 The recently completed authoritative United Nations Common Country Assessment argues that Namibia is facing a major triple threat. First there are the multiple impacts of HIV and AIDS; second, the necessity of ensuring household food security; and third, the need to strengthen capacities for governance. Issues concerning inheritance impact directly on each segment of the triple threat.

10.2 In a nutshell, inheritance disputes can be expected to increase and be exacerbated by the fact that life expectancy has plummeted from 63 and 59 for males and females respectively in 1991 to 50 and 48 a bare ten years later. Already the downward spiral for the poor majority in rural areas in terms of food security can be plotted. As a result of increasing competition for scarce resources, the growing number of inheritance disputes is becoming obvious as more and more Namibians approach magistrates for the appointment of executors or take disputes about estates to traditional authorities.

10.3 Inheritance problems and attempts to deal with them, as this report has shown, have a long history in Namibia. Earlier anthropologists, including government ethnologists in Namibia, argued that these problems were the result of economic changes that knocked the original system “out of balance”. In particular a major thrust of argument has been that with the development of pastoralism and “private property”, matrilineal systems of inheritance became unsatisfactory, so there was a gradual transition towards patrilineal systems, especially in the northern regions and among Herero-speakers. Inheritance disputes are believed to result from trying to deal with these conflicting principles. In the 1960s Africanists were debating whether or not matriliney was doomed in Africa, and indeed many experts felt that it was an impediment to development. Apparently one needed to be able to leave one’s estate to one’s own progeny to be really enthused about development and property accumulation. Current indications are, however, that matriliney has shown remarkable resilience and that it is simplistic to see it as an impediment to development.

10.4 Perhaps counter-intuitively, there is some merit in having uncertainty about inheritance. If no one knows who is going to inherit, all the potential heirs tend to be nice to you. In short, in situations where there is no or minimal state-provided social security, the possibility that any number of people might inherit can ensure the care and maintenance of an elderly person. On the other hand, if people know exactly who is going to inherit, there is a fear that the heirs might engage in witchcraft or other forms of foul play to get rid of the person in question.

10.5 Inheritance disputes are part of the human condition. Grief becomes grievance – indeed they have the same semantic root. It is more than simply greed or aggrandisement which propels inheritance disputes (even though no one will ever admit that such base motives play any role in their claims); claims for entitlement to inheritance are also crucial for establishing identity. This becomes clear when one looks at the grammar of acceptable motives for justifying such claims. In addition to blood ties or kinship one can make such claims or try to bolster them with pleas for “compensation” or “deservingness” on the basis of reparations for past injustices, or services rendered. Such motivations implicitly posit a pre-existing social relationship which is out of balance and needs to be redressed.

10.6 In claiming a legacy, potential beneficiaries must do a number of things. They must identify their interests in the property, they must stake a claim, and they must ensure that their entitlement is recognised. Similarly the forum in which their claim is being heard – be it a family meeting, traditional court or formal court – must go through a parallel process. It must identify its interests in the rights of the claimants by asserting its authority, thus acquiring legitimacy and ensuring that its decisions will be respected.

10.7 Inheritance disputes should be seen not as static events but rather as processes. As anthropologist Sally Falk Moore has pointed out, there are two basic processes: processes of regularisation and processes of situational adjustment. Regularisation produces rules and organisation while situational adjustment re-arranges the immediate environment or generates indeterminacy to achieve immediate situational ends. The quest for inheritance rights contains both, and it is the recognition of such processes that gives the law, and the forum in which it is applied, their legitimacy.

10.8 Modern democratic governments are generally uneasy about using custom as a basis for property law: Custom-based property regimes can be rigidly hierarchical, xenophobic, conservative and misogynistic. Indeed customary law’s capacity to deny property rights to women has been cited as a factor in their vulnerability to spousal abuse and even to AIDS. Modern state systems are not designed to handle legal pluralism with its normative multiplicity and fluidity, preferring regulation in terms of unequivocal rules. This leads quite readily to the rise of formalism that is supposedly aimed at “simplifying” claims-clearing practices. The means of choice here is the use of wills, supplemented by clear and uniform statutory rules for intestate estates.

10.9 However, experiences in other countries show that an approach which departs too radically from existing customary law is likely to be ignored. Moreover, customary law approaches to inheritance provide positive aspects of flexibility, and in some cases spread assets amongst a wide range of family members. Policy-makers too readily assume that all aspects of customary are discriminatory, discounting its positive aspects in the process. Respect for culture and for customary law – insofar as these do not impinge on other constitutional rights – is a constitutional imperative. **Therefore, we recommend that Namibia’s approach to inheritance should be to retain a dual system which incorporates the positive aspects of customary law whilst at the same time ensuring respect for all constitutional rights.**

10.10 The current position of women and children under customary law, as far as inheritance is concerned, remains precarious and violates constitutional guarantees against discrimination on the basis of sex, birth and social status. In terms of customary law, women have limited rights to inherit. Especially vulnerable are younger widows. Not only are they still in the development stage of the household, but typically have not become established members of their husband's community and thus cannot expect much local support. They are frequently accused of killing their husbands with witchcraft and dismissed with the argument "You are young, you can easily remarry". In addition, current civil and customary laws on inheritance do not attach any significant legal status to couples who are cohabiting outside of formal marriages, even if they have been in such a relationship for many years. Such informal relationships are increasing in Namibia, creating a new class of vulnerable "spouses" who need to be protected. Extramarital children are barred from inheriting in terms of our civil law, and enjoy limited inheritance rights in terms of customary law. The number of "illegitimate" children in Namibia is high – and yet even if the fathers are reasonably affluent, such progeny generally do not inherit anything. This situation would be addressed to some extent by provisions in the Children's Status Bill which has already been before the National Assembly, but the bare removal of discrimination contemplated in that Bill is unlikely to be sufficient on its own to give meaningful protection to extramarital children. **Any approach to inheritance which is adopted must keep in mind the need to protect these vulnerable parties.**

10.11 To make meaningful improvements to the position of these vulnerable persons, and to bring customary inheritance practices in line with the Constitution, practical and workable approaches must be adopted. **As a practical approach to ensure equitable economic protection of vulnerable women and children, we propose transforming some inheritance issues into issues of maintenance.**

10.12 The history of administrative attempts to deal with inheritance problems should make one hesitate to recommend anything. Many of the options one would like to suggest have been tried before, without significant success. Nevertheless, the recommendations below are offered for consideration and debate.

RECOMMENDATIONS

Distribution of intestate estates

10.13 The following options are possible.

Option 1: Allow customary law which is consistent with the Constitution to apply in the devolution of estates. Such an approach will validate the constitutional recognition that customary law enjoys.

The advantages and disadvantages of recording customary laws in a written but accessible form has a long history of debate, and it is obvious that there is considerable variation and change even within a single

language group. However, given the small number of kinship systems which form the basis for deciding how estates should be allocated, one approach to consider might be to allow the stakeholders to decide how the estate should be divided – by patrilineal, matrilineal or cognatic principles – and for the magistrate or the Master (or their delegates) then to apply or at least be sensitive to the relevant principles. The state legal system also has to be sensitive to the fact that customary property concepts might be more complex than Roman-Dutch ones. As an example, Herero are adamant that holy cattle cannot go into the wife's line. There is no precedent for this kind of culturally-important property restriction in Namibia's civil law.

Unconstitutional practices or those practices that discriminate against women and children may still be applied under this approach, with the result that those that are aggrieved will have to make court applications to challenge unconstitutional practices. This would allow for gradual changes to customary law rules. However, women – especially in rural areas – may not have the resources to challenge unconstitutional customary practices in courts. Also, given the fact that most wives move to their husband's domicile on marriage, local community courts will in all likelihood have a built-in bias against these women because of their "outsider" status. The status quo would most likely be maintained.

Option 2: Allow the Intestate Succession Ordinance 12 of 1946, appropriately amended, to apply to the devolution of all intestate estates. This approach was recommended in South Africa, but was met with great resistance from those who felt that customary law was being subjugated to the common law. Namibia's Intestate Succession Ordinance in its current form provides protection to surviving spouses and children, but discriminates against extramarital children. However, the Children's Status Bill, if enacted, will amend this unfavourable position under both civil and customary law.

An advantage of this approach would be the statute's clear-cut rules and uniformity.

However, the Intestate Succession Ordinance may be inadequate in addressing certain aspects of inheritance under customary law. It fails to make provision for members of a deceased's extended family who may otherwise have been entitled to inherit, based on their status within a particular kinship system. Thus, surviving spouses and children are more likely to be victims of property grabbing under this system. This approach also lacks the flexibility which is a positive characteristic of many customary law systems of inheritance in Namibia.

Option 3: Allow for fragmentation of the estate, to make provision not only for the surviving spouse and children to inherit, but also members of a deceased's family who may have been entitled to inherit in terms of customary law. It may be difficult to implement such a system in practice. It may also be widely resisted if people are of the opinion that it is too far removed from customary practices, especially where the inheriting group excludes certain categories of beneficiaries who would otherwise have enjoyed preference under customary law. Therefore, it is important

that the category of customary law heirs who will receive a portion of the estate be defined in a way which allows for flexible interpretation – as opposed to the rigid percentages applied in Zambia – to ensure that conflict and property grabbing will be minimised and that Namibia’s different kinship systems are adequately provided for. This third option is in a way a compromise between the discretionary flexibility of option 1 and the rule-bound nature of option 2.

It is important to ensure that a sufficient portion of the estate goes to the surviving spouse and children. But the portion of the estate allocated to the customary law heirs must not be so limited that it exacerbates conflict with the surviving spouse and children of the deceased – keeping in mind the obligations of such heirs under customary law.

Recommendation:

DISTRIBUTION SCHEME FOR INTESTATE ESTATES

Allow for fragmentation of the estate, to make provision for inheritance by the surviving spouse(s) and children, and also the primary customary law heir or heirs (ie the person or persons who would otherwise have enjoyed preference based on their status within a particular kinship system).

The definition of ‘customary law heir(s)’ must be worded in a broad and general manner to allow for differential application in different kinship systems. This definition should not cover all potential customary law heirs who receive remembrances, but only the key person(s) who have traditionally taken on family assets coupled with family responsibilities. If there is no customary law heir (as in the case of families who do not follow customary law), then this portion of the statute would simply fall away.

The customary law heir(s) should not only be entitled to inherit the name and/or traditional articles that they would have become entitled to in terms of customary law, but also a portion of the estate. The portion of the estate allocated to the customary law heir(s) should not be greater than the portion which goes to the surviving spouse and children.

Other potential beneficiaries to whom the deceased would have owed a duty of support should *not* be included in the distribution scheme, but should claim maintenance, as discussed in more detail below. This wider pool of potential beneficiaries should be eligible to receive portions of the estate as heirs only in the absence of a surviving spouse and/or children.

One advantage of this option is that it provides a uniform approach for all persons in Namibia, but still provides an avenue to respect the different customs of different communities.

It might, however, be necessary to qualify such an approach by stating in the law that no discriminatory rules of customary law will be enforced by the state.

Maintenance from the deceased's estate

10.14 One practical approach to ensure equitable economic protection of vulnerable women and children is to transform some inheritance issues into issues of maintenance. Special legislative provision should be made to provide maintenance for those who were dependents of the deceased, and who were made vulnerable or had their vulnerability increased by the death of their main source of maintenance. Given the declining life expectancies of Namibians, this is obviously a matter requiring urgent and immediate attention

10.15 If the deceased had been supporting any extended family members (such as elderly parents), a portion of the estate (especially money) should go to these dependent family members, much like any debts would have to be paid up before any property can be distributed amongst heirs. Making continued maintenance a priority would provide for the least disruption to needy family members, and would likely avert many disputes about succession. Estates may not be adequate to address all maintenance claims, but it makes sense that basic maintenance needs of genuine dependents should take priority. Such priority should not be at the expense of minor children, however.

10.16 One question, which arises in this context, is whether provision for maintenance of dependants from the deceased estate would apply only to intestate estates or also to estates which devolve by will. Freedom of testation, based on the principle of absolute ownership, is strictly guarded under our common law as a matter of public policy.¹ Yet as a matter of public policy, freedom of testation should not override the duty of all persons to make provision for the basic needs of their dependants. It is for this reason that countries such as South Africa, Zimbabwe and Zambia have made provision for the maintenance of the deceased's dependants in situations where a testator has not made adequate provision for their reasonable needs. Zambia and Zimbabwe allow claims of maintenance even where there is a will. Namibia currently has no general maintenance scheme for dependents, as only children of the deceased may claim maintenance from the estate as the law now stands.

10.17 The balance between freedom of testation and the obligation to make provision for dependants is achieved in some jurisdictions through the application of a reasonable needs test, and in other jurisdictions through the apportionment of a percentage of the estate to the dependant.² A percentage of the estate, or minimum share, is sometimes referred to as 'legitimate portion', 'reserve', '*jus relictæ*' or 'widow's share'. In many countries, such as South Africa, 'dependents' are defined in relation to the existence of a marriage, and consequently exclude extended

¹ *Bydewell v Chapman* 1953 (3) SA 514 (A) at 531.

² See in general SA Law Reform Commission *Review of the Law of Succession: The Introduction of a Legitimate Portion or the Granting of a Right to Maintenance to the Surviving Spouse*, Working Paper 13 (May 1986) and Report 22 (August 1987).

classes of dependants such as parents, aunts, nieces, nephews, brothers or sisters. In contrast, Zimbabwe and Zambia define dependants broadly to include a broader range of family members.

10.18 It is trite law in South Africa that children, including extramarital and adopted children, may not only inherit intestate, but can also claim maintenance when left destitute as a result of not being provided for in the deceased's will. The maintenance and education of a testator's minor children, whether extramarital or not, constitute a claim against the testate estate³ where no provision have been made for a child in a will.⁴ Even though such a claim is subordinate to that of creditors,⁵ it has precedence above those of heirs and legatees.⁶

10.19 A surviving spouse had no claim for maintenance under the common law,⁷ until South Africa's Maintenance of Surviving Spouse Act 27 of 1990 was passed. This Act provides the surviving spouse with a claim against the estate of the first-dying spouse for the provision of reasonable maintenance needs in so far as he or she is unable to provide therefore from his or her own means.⁸ A spouse is entitled to maintenance only until re-marriage or death. The South African Law Commission rejected the view that the court be empowered to award an 'equitable portion' of a deceased estate.⁹

10.20 In terms of the South African Act, three factors have to be taken into account when determining the reasonable needs of a spouse:¹⁰ the amount in the deceased's estate available for distribution; the existing and expected means, earning capacity, financial needs and obligations of the survivor; and the standard of living of the survivor during the marriage and the survivor's age at the time of death of the predeceasing spouse. The SALC recommended that the conduct of the spouse during the marriage should *not* be taken into account.¹¹

³ *Glazer v Glazer* 1963 4 SA 694 (A) 706, 707; *Hoffmann v Herden* 1982 2 SA 274; *Ex parte Jacobs* 1982 2 SA 276 (O).

⁴ Even though this imposes on the testator's freedom of testation, such a limitation is justifiable in terms of the 1996 Constitution.

⁵ *Lotz v Boedel van der Merwe* 1958 (2) PHM16 (O).

⁶ *Ritchken's Executors v Ritchken* 1924 WLD 17; *In re Estate Visser* 1948 3 SA 1129 (C).

⁷ *Glazer* case (op cit n3). Under the Roman Dutch Law most marriages were-in community of property, with the result that the surviving spouse automatically had a share in the joint estate which the deceased could not deprive him or her of. But persons married out of community of property had no such protection.

⁸ Section 2(1).

⁹ Had it been accepted, this proposal would have been incorporated into the Matrimonial Property Bill.

¹⁰ Section 3.

¹¹ SALC 2004 (op cit s9 n17).

10.21 The surviving spouse's 'own means' is defined by the Act as 'any money or property or other financial benefit' which accrues to a survivor in terms of the 'matrimonial property law or the law of succession or otherwise at the death of the deceased's spouse'.¹² This definition is not exhaustive, and capital as well as income may be considered.¹³ The term 'survivor' covers only a surviving spouse in a marriage dissolved by death.¹⁴

10.22 In Zimbabwe and Zambia dependants are broadly defined to include family members other than wives and children. Persons who were in fact dependent on the deceased for their reasonable maintenance needs at the time of the deceased's death are included. A variety of factors are taken into account prior to an award for maintenance being made, including: the size and nature of the estate; the period for which maintenance is required; the ability of the dependant to maintain himself or herself; and the number of dependants to be maintained from the estate.

10.23 Three options for maintenance could be considered:

Option 1: Any proposed legislation could guard the principle of freedom of testacy and provide **no maintenance to widows and dependants from a testate estate**. Such an approach would not be in compliance with Namibia's constitutional and international obligations, and would in particular prejudice women and other vulnerable family members to whom the deceased may have owed a duty of support in terms of customary law.

Option 2: Proposed legislation could opt for a legitimate portion system using a **fixed percentage**, to be provided to the widow (and/or the deceased's children) from a testate or intestate estate. This system is used in Ireland. Using a fixed percentage system would have the effect that the surviving spouse will receive a fixed amount from the estate irrespective of his or her maintenance requirements, age or her earning capacity. The advantage of such a system is that surviving spouses would automatically be entitled to a fixed amount without having to incur the expense and difficulty of applying to court for maintenance from the deceased's estate. The disadvantage is that this approach excludes other dependents and is not consonant with need.

Option 3: Proposed legislation could incorporate **maintenance from a testate or intestate estate by means of an application process that is initiated by the widow or other dependants of the deceased**. This approach is followed in South Africa, Zambia and Zimbabwe. This approach would appear to be the most workable, as only those in need would be provided with support from the estate, without compromising the freedom

¹² Section 1.

¹³ MM Corbett, Gys Hofmeyer & E Khan, "The law of succession in South Africa", Lansdowne Juta Law 2001.

¹⁴ *Volks* case (op cit s9 n40).

of testacy principle or intestacy rules. Dependants other than widows should also be allowed to apply for support from the deceased's estate. Since such a maintenance system would be based on need, as opposed to a fixed formula or percentage, it would make it more likely that those in the most need would receive adequate support. Such an approach would, in a way, institutionalise the duty of support which has always been part of succession under customary law. The primary disadvantage is the greater administrative burden involved in assessing needs-based claims. Another disadvantage of this approach is the fear that persons in need might not have the requisite knowledge or ability to assert their claims.

Recommendation:

MAINTENANCE FROM THE DECEASED'S ESTATE

Provision should be made for dependants, based on their reasonable maintenance needs, to apply for maintenance within a prescribed period. Maintenance should be available to all dependents of the deceased whose reasonable maintenance needs are not adequately provided for by will or in terms of intestate succession rules. For example, if the spouse and children receive an adequate portion of the estate as a result of a will or through application of the rules for intestate inheritance, then they would not need to apply for maintenance from the estate.

Dependants should be defined broadly to include a surviving spouse; a divorced spouse who was entitled to maintenance; partners in informal relationships; minor children (including extramarital children, formally-adopted children and children informally adopted in terms of customary law); major children who have a mental or physical disability or educational needs, are incapable of maintaining themselves and were maintained by the deceased at the time of the deceased's death; a parent who was being maintained by the deceased; or any other person who was dependant on the deceased at the time of the deceased's death.

A grant for maintenance should be in the form of a single lump sum payment, periodical payments, or a grant of an interest in an immovable property for life or a lesser period.

Providing maintenance for dependents in this way would ensure that the most needy family members are provided for, and would probably avert many disputes about inheritance.

Definition of 'surviving spouse'

10.24 According to the Demographic and Health Survey conducted by the Ministry of Health and Social Services in 1992, 12,5% of marriages in Namibia are polygamous. A similar survey in 2000 indicated that the percentage of polygamous marriages had dropped by only 0,5%. The women who reported that their husbands had other wives were mainly rural women from the Caprivi, Ohangwena, Kavango and Omusati Regions.

10.25 Even if polygamous marriages are declining, there is a rise in informal relationships. According to Vision 2030, "Polygamous marriages are declining in number, while informal relationships and adultery remain common, and are thought to be rising". The 2001 census however indicates that since 1991 there has been a decrease, from 12% to 7%, in couples identifying themselves as 'married consensually' (considered themselves married without having formalised the union). On the other hand, 16% of the national sample of women interviewed for the Namibia Demographic and Health Survey 2000 reported that they were "living together" with a partner in an informal marriage. It seems that the informal relationships which may be to some extent replacing polygamy are hard to measure, precisely because of their informality. However, it can be assumed as a conservative estimate that at least 12% to 15% of Namibians are involved in informal relationships.¹⁵

10.26 The Recognition of Customary Law Marriages Bill¹⁶ in its present form regulates only customary marriages, and does not take into account other forms of relationships, such as informal partnerships. This Bill also proposes to outlaw future polygamous marriages. Parties who have in good faith entered into a polygamous marriage after the Bill becomes law may be prejudiced. By failing to accommodate future polygamous marriages, the Bill if enacted in its current form, will operate in a discriminatory fashion. It is mainly women who are negatively affected by polygamy and the Bill therefore raises issues of gender equality. The outlawing of polygamy may also give rise to more parties cohabiting informally, without any legal protection.

10.27 There is a real possibility that any proposed law on inheritance will exclude deserving partners from its application if a narrow definition is afforded to the term 'surviving spouse'. Any law on inheritance, to be effective in ensuring the financial security of all women in the position of widows, needs to give the term 'surviving spouse' a more inclusive definition.

¹⁵ LeBeau et al (op cit s1 n6), 17.

¹⁶ LRDC 12, Report on Customary Law Marriages, Project 7 (October 2004).

Recommendation:
DEFINITION OF 'SURVIVING SPOUSE'

It is recommended that the term 'surviving spouse' be defined broadly to include surviving partners in long-standing informal relationships (ie of at least three years' duration) and surviving partners in past or future polygamous marriages.

Polygamous marriages

10.28 In terms of The Recognition of Customary Law Marriages Bill, as stated above, existing polygamous marriages will enjoy legal recognition. Any proposed law on inheritance will consequently have to make provision for the manner in which these estates are distributed. Here we briefly re-cap the approaches used in some other countries.

10.29 In Zimbabwe, the senior wife receives preferential treatment as she is presumed to have made the biggest contribution to the amassing of the estate. As a consequence, she becomes entitled to two-thirds of the first-third of the estate's liquidated estate, while the remaining wives share equally the remainder of the first third of the estate.

10.30 In South Africa, the interim regime provides that if there is more than one surviving spouse, sections 1(1)(c)(1) and 1(4)(f) of the Intestate Succession Act apply, subject to certain qualifications. These sections deal with portions of the estate which a single surviving spouse is entitled to, equivalent to a child's share, a rule which is to be similarly applied to multiple wives.

10.31 In Zambia, if there is more than one spouse, the twenty percent of the estate that devolves upon the surviving spouses is divided amongst them proportional to the duration of their respective marriages.

10.32 The following options could be considered:

Option 1: Divide the estate into fractions, with the senior wife receiving a larger proportion than the remaining wives. This approach was followed in Zimbabwe, but has been criticised for not ensuring an equitable distribution between the various spouses, especially in cases where the senior wife's house property is regarded as less valuable than the property of the others. The scheme also potentially prejudices the interests of children.

Option 2: Take the portion of the estate that would go to a single surviving spouse in terms of the distribution scheme recommended above, and divide it proportionally to the duration of the marriages amongst the various spouses. This approach was followed in Zambia.

Option 3: If the Intestate Succession Ordinance is made applicable in the devolution of the estate, allow each spouse to receive a child's share or an amount which together with her half share by virtue of the marriage does not exceed N\$50 000, whichever is the greater. This approach is followed in South Africa. It has been suggested there that the following factors should be taken into account in calculating a child's share in this situation: (a) a child's share will be determined by taking into account that there is more than one surviving spouse; (b) provision will be made for each surviving spouse to inherit the minimum if there is not enough in the estate (c) in the event that the estate does not provide for the minimum, the surviving spouses will share in the estate equally.

Option 4: Exclude the house property of each spouse from immediate distribution, and leave it in the possession of the relevant spouse, with the spouse's share of the estate under the basis distribution scheme being otherwise shared equitably amongst all the spouses. In polygamous households each wife establishes a separate house when she marries, with the result that property accruing to her house is kept strictly separate from other house property. Any proposed law should recognise house property so that spouses in polygamous marriages each retain a right of use in their homes and household effects. Only the residue of the estate should be distributed immediately amongst the multiple wives and/or children and other beneficiaries identified by statute. The house property could be distributed as part of the estate if the relevant surviving spouse remarries or if the children who were residing in that house at the time of the deceased's death all become majors. This idea is simply a variation of the proposed treatment of the marital home and its contents in monogamous marriage, discussed in more detail below.

Recommendation: POLYGAMOUS MARRIAGES

Exclude house property from immediately distribution so that all surviving spouses, including multiple spouses, retain their home and household effects. Such an approach will not only best serve the interests of the wives and children in polygamous customary marriages but would better reflect the economic contribution that each surviving spouse has made to a particular house. Under this approach, heirs other than children will not be unjustifiably enriched.

The residue of the estate should devolve in accordance with the chosen distribution scheme, with multiple spouses taking equal shares of the portion of the estate designated for the surviving spouse. Duration of marriage should not determine the amount to be received by each spouse, as this does not take into account their actual contributions or the particular needs of their children.

Administrators should have regard to equity and take into account the age, educational needs and economic means of the various children when dividing the spousal portion of the estate amongst multiple spouses. It is consequently recommended that administrators should not be required to distribute this portion of the estate according to any prescribed fractions, but may depart from the basic premise of equal shares if equity so dictates.

In respect of communal land (which is owned by the state and cannot form part of the estate of the deceased), we suggest an amendment to the Communal Land Reform Act to clarify the position of multiple wives.

The marital home and household contents

10.33 An additional option for protecting vulnerable family members would be to legislate that the marital home and its essential furnishings should go to the surviving spouse and dependent children (if any). One option would be to give the surviving spouse and minor children a right of use until all the children reach the age of majority, at which stage the marital home could be dispersed in the same manner as the other assets in the estate.

10.34 Legislation in Ghana, Zambia and Zimbabwe makes special provision for the deceased spouse to be guaranteed rights to the marital home and its contents, such as the household goods. There is an international trend towards securing at least a right of occupation to surviving spouses and children.

10.35 In Zambia¹⁷ the deceased's surviving spouse or spouses and children are entitled to the house (if any) as tenants in common. This right terminates upon remarriage. As long as the surviving spouse remains unmarried, she or he enjoys a life interest in the common property and all the rights of a co-owner. Even though the surviving spouse's interest in the common property (as a tenant in common) is real property, she or he cannot, on that basis alone, force the other co-owners to dissolve the tenancy in common. A demand to dissolve the tenancy in common in these circumstances would undermine the interest of the children (the other co-owners) whose ownership is not limited in the same way as that of the spouse, and would also seem to be contrary to the tenor of the provision as a whole. Problems arise in practice between children of the deceased spouse by another partner (ie children of the deceased who are not also children of the surviving spouse) and between surviving co-wives.

10.36 In Zambia, the only way the surviving spouse or any other beneficiary can have a separate individual share of the estate is by the partition of the property, by sale in lieu of partition and the distribution of the proceeds of sale, by rent for occupation or by consensual buy out.

¹⁷ See discussion of Zambian law in section 9 of this report.

Partition – refers to the division of the common property and the allocation of the divided parts to the co-owners. Partition puts an end to community of ownership between some or all of the co-owners. However, partition is only feasible and appropriate where the property subject to the tenancy in common is large. As few people in Zambia own large houses, the house or matrimonial home of an average person would be too small for partition.

Sale in lieu of partition – any co-owner, including a tenant for life, may apply to the court for the sale of the property in lieu of partition and a distribution of the sales thereof. Upon such an application, the court must order a sale unless it sees good reason to the contrary. The burden of showing good reason rests upon the party who opposes the sale. The burden will be discharged by proving that great hardship would be inflicted on one of the parties, especially when the court considers that the party requesting a sale is actuated by vindictive motives and that the property has temporarily much depreciated in value. Nevertheless the court retains a discretion to order a sale if it appears to the court that it would be more beneficial to the interested parties to order a sale than a partition. This is determined on the basis of an examination of the nature of the property, the absence of disability of some of the parties, the number of parties interested in the sale and any other circumstances. The disadvantage of such a sale is that the shared proceeds of the sale will, in most cases, never be enough to enable the individual family members to buy their own houses to live in.

Rent for occupation – A party in exclusive occupation of the common property may be charged a reasonable rent for its occupation, while an allowance is made for the costs incurred by him or her in repairs to the property. In the Zambian High Court decision of *Estate of Lungu and others v Lungu*¹⁸ rent for occupation was deemed to be the best solution to the conflict between the deceased's children from his previous marriage and the widow and her children. Only so far as this method allows the retention of the house in the family is it a better solution than the sale of the house.

Consensual buy out – co-owners may buy shares in the common property of the parties wishing to sell the property. Problems arise where there is lack of consensus. Himonga¹⁹ recommends that the court should force a buy-out on unwilling parties, in order to ensure the retention of the matrimonial home for the benefit of the needy members of the deceased's family. In the case of *Kamwi v. Masiye*²⁰ the court ordered a

¹⁸ 1997 HP/1695.

¹⁹ Chuma Himonga, "Zambia: Inheritance conflicts over the matrimonial home: Safeguarding the family against homelessness", *International Survey of Family Law*, at 467.

²⁰ 1999/HP/492. The deceased was survived by six children from his previous marriage and a widow. He had no children with the widow. The deceased's ex-wife made the widow's continued stay unbearable. It was held that the wife was the surviving spouse of the deceased and therefore entitled to the matrimonial home as a tenant in common. The court refused an application for sale and instead

buy-out in order to secure the house for the benefit of the minor children of the deceased.

Recommendation:

SPECIAL TREATMENT OF THE MARITAL HOME AND CONTENTS

Allow the surviving spouse and any minor children who were residing in the house at the time of the death of the deceased to retain a right of residence as tenants in common, which would cease in respect of the spouse upon remarriage or in respect of the children upon attaining the age of majority. The basic household furnishings should remain with the marital home during the period of continued residence by the spouse and/or children.

The value of the house (if any) should form part of the estate along with all other property and ultimately be distributed in the same way as the rest of the estate – the distribution should merely be deferred. Rent for occupation and/or consensual buy-out could be provided as mechanisms for adjustment, as in the case of Zambia. If the surviving spouse and children did not wish to remain in the home at any stage during their entitlement to it, the deferred distribution could then proceed.

This approach may admittedly disadvantage other heirs if the house is the main component of the estate. However, in a small estate, the distribution of percentages to a wide range of heirs is unlikely to satisfy the needs of all of these family members even if the house is included. It would seem better to at least allow the household of the deceased to remain intact in such cases.

Proof of customary marriages

10.37 Currently in Namibia, the law does not require the registration of customary marriages, which makes it difficult to establish proof of marriage. The Recognition of Customary Law Marriages Bill, once enacted, will alleviate some of the problems associated with proving the existence of valid customary marriages. However, experiences in South Africa and Ghana have shown that even if the law requires registration of customary marriages, parties may be frustrated in doing so or may simply fail to register their marriages. Both widows and widowers may be prejudiced if the family denies their marital status. The consequences for women under such scenarios may be more severe if account is taken of the fact that women under customary law generally find it difficult to establish ownership over property

made an order to have the interest of the widow in the house extinguished by a cash payment, reasoning that selling the house would deprive the children of a future home.

acquired through their own efforts. If they are excluded from intestate inheritance, they may be left without access to property which they have helped to amass.

10.38 The Recognition of Customary Law Marriages Bill provides that if one party refuses to consent to the registration of the marriage, then consent to registration will be deemed to exist if it is clear that the person has tacitly given his or her free and voluntary consent to the marriage or voluntarily ratified the marriage. Customary law marriage officers based in the community will be tasked with registration of marriages. Registration is therefore accessible.

10.39 In terms of the Bill, the minister responsible for regional government is tasked with making regulations prescribing the procedure for application for the registration of a customary marriage.²¹ Experiences in South Africa have shown that that prescribed forms and procedures may operate to the disadvantage of spouses seeking registration of customary marriages. Regulations therefore need to be lenient to facilitate as opposed to frustrating registration. For example, witnesses from each side of the family need not necessarily be present.

Recommendation:

PROOF OF CUSTOMARY MARRIAGES

The Recognition of Customary Marriages Bill should ensure that the requirements for registration do not serve as a bar to the recognition of valid customary marriages for purposes of succession.

‘Incomplete’ customary rites

10.40 Problems of proof will not arise in contexts where the couples have registered their customary marriages. It is envisaged that there are two instances under which parties to customary marriages may find it difficult to establish proof of marriage, in the absence of registration. Firstly, family members of the deceased may claim that the widow was not a valid customary law wife despite their knowledge that the customary marital rights were fully or partially performed. Secondly, a man and women may have lived together as husband and wife and held themselves out to the community as such, even though the customary law rites were not fully performed.

10.41 The judiciary’s approach in *Esselfie v Quarcoo*²² is useful in this regard. The court in this instance, unlike in South Africa,²³ looked beyond whether customary

²¹ See section 13(1) in general. Regulations may also differ from community to community. See section 13(3)(a).

²² *Esselfie v Quarcoo* [1992] 2 Ghana L. Report.

²³ Discussion in L Mbhatha “Reforming the customary law of succession” (2002) 18 *SAJHR* 259.

rites were completed or not, and considered collectively a broad spectrum of factors. The court held that although the customary law marriage rites had not been performed, the requirements for a *de facto* customary marriage had been met: the parties had cohabited as husband and wife for seven years and had children together; the women's family visited the home of the partners during their cohabitation; the widower had performed customary funeral rites of a son-in-law at the death of the deceased woman's father; had sent drinks to the deceased woman's family as an admission of pregnancy and had provided the grave in his capacity as the deceased woman's husband. This approach, although useful, may appear to convert all informal relationships into customary marriages.

Recommendation:
'INCOMPLETE' CUSTOMARY RITES

Where *incomplete* customary rites have been performed, but where there have been an implied or actual agreement to perform customary rights, the surviving spouse of such marriages should be included in the term 'surviving spouse'.

Where *no* rites have been performed, the surviving partner should be treated as a party to an informal partnership, provided the term 'surviving spouse' is extended to partners in informal relationships.

In the event that the law does not afford protection to surviving partners in informal partnerships, it is recommended that the term 'surviving spouse' should include a partner of a customary marriage where the customary rites were not performed but where the parties lived together as husband and wife and obtained the actual or implied consent of their families to the marriage. The parties in such circumstances may have performed other customary rites which are not necessarily related to rites required to be performed *before* the marriage is concluded but which married couples are expected, by the community or each other's family members, to perform *during the subsistence of a marriage*. The relationship so established would be treated as a putative marriage.

Related and supporting 'marital' unions

10.42 Under customary law there are related and supporting customary unions which are not strictly regarded as marriages – particularly the levirate and sororate, which are both still practised in Namibia. In these practices, the widow or widower is 'inherited' by the deceased's brother or sister, along with responsibility for the deceased's children. The South African Law Commission has indicated that even though these practices are 'primitive' and 'degrading' they are 'realities' and

consequently should enjoy protection.²⁴ The impact of HIV/AIDS makes it difficult to justify the practice, but its persistence cannot be ignored. The question therefore is whether or not such widows/widowers and their children should have any claim on the estate of the person who 'inherited' them.

Option 1: Allow spouses and children born from these unions to be deemed the spouses and children of the deceased who was notionally their 'husband' and 'father', with a right to inherit intestate.

Option 2: Do not allow spouses and children born from these unions to be deemed spouses and children of the deceased who was notionally their 'husband' and 'father', and provide no access to the assets of the deceased.

Option 3: Allow spouses and children born from these unions to claim maintenance from the deceased who was notionally their 'husband' and 'father'. A claim for maintenance is justified in that the notional 'husband' and 'father' had a duty of support in terms of customary law to such spouses and children.

Recommendation:

RELATED AND SUPPORTING 'MARITAL' UNIONS

Allow spouses and children born from these unions to claim maintenance from the deceased who was notionally their 'husband' and 'father', as dependents of the deceased.

Children informally adopted in terms of customary law

10.43 The Children's Act 33 of 1960 regulates formal adoption in Namibia. Formal adoption is said to have been conceived in the interests of parentless children, by placing them in a home with the primary aim of protecting their welfare. Formal adoption, unlike fostering²⁵, is not common in Southern Africa.²⁶

10.44 Under customary law, perpetuation of the bloodline takes precedence.²⁷ Informal, non-statutory adoptions may be becoming much more common, particularly with the impact of HIV/AIDS.²⁸

²⁴ SALC 2004 (op cit s9 n17), 78.

²⁵ With fostering the intention is not to sever all ties with the biological parents.

²⁶ Bennett 1991 (op cit s5 n7), 377.

²⁷ Bennett 1991 (op cit s5 n7), 375-378. Bennett argues that the customary law institution of 'adoption' resembles early Roman law adoption.

10.45 Children who have been formally adopted in terms of the Children's Act inherit from their adoptive parents in the same way as biological children – because the adoptive parents have stepped into the shoes of the biological parents in every way. The question to be addressed is inheritance by children adopted informally under customary law.

Option 1: Do not allow children informally adopted in terms of customary law to inherit. If children informally adopted in terms of customary law are not allowed to inherit, this would arguably raise a question of unfair discrimination, on the grounds that non-statutorily adopted children are being treated less favourably than statutorily adopted children. On the other hand, it can be convincingly argued that these two classes of children are not similarly situated.

Option 2: Allow children informally adopted in terms of customary law to inherit. In South Africa, the South African Law Commission recommended that children adopted by customary law should not be precluded from inheriting. However, the state should not be seen as encouraging informal adoptions which may not always be in the best interest of the children.²⁹

Recommendation:

CHILDREN INFORMALLY ADOPTED UNDER CUSTOMARY LAW

Do not allow children informally adopted in terms of customary law to inherit, but permit them to claim maintenance from the estate of a deceased adoptive parent as dependents.

Should any property be excluded from the estate?

10.46 Customary law distinguishes between house, family and personal property.³⁰ **House property** may include items such as household effects or property allotted by the head of the household to a particular house, property acquired by a minor, bridewealth received for daughters in a house, and fines and damages.

²⁸ It should be noted that the line between fostering and informal adoption under customary law is blurred. The forthcoming Child Care and Protection Act is expected to make provision for long-term foster care by extended family members which could provide increased protection to children in such circumstances.

²⁹ The government has indicated that it has to take into account the best interest of children in respect of informal adoptions and that they “have to work out something in that area”. See Final Report on an Eastern and Southern African Workshop on Children affected by HIV/AIDS held in Windhoek on 30 November 2002 and available at <http://www.fhi.org>. See also Bennett 1991 (op cit s5 n7), 377.

³⁰ Bennett 1991 (op cit s5 n7), 229-242.

House property is utilised for the common good of the family.³¹ The Native Administration Proclamation 15 of 1928 defines a house as the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each native woman.³² **Family property** is property which belongs collectively to family members. It may include the earnings of the family head together with his inheritance, or property bought with such earnings or inheritance, property of a house without an heir or bridewealth.³³ **Personal property** is property which is regarded as of an 'intimate nature' and which serves the interests of the individual only.³⁴

10.47 The distinction between house, family and personal property is not always clear, particularly under the influence of commercial dealings in capital assets, the enhanced earning power of family members³⁵ and competition over resources.

10.48 The distinction between family property and personal property depends on the function that the property serves and the family status of the person who was allocated the property.³⁶ In respect of inherited property, the heir merely acts as trustee of the property to the benefit of dependants. Such property not only serves the interests of the heir, but also provides for the support of the deceased's wife and children.

10.49 In Ghana and Zambia, family property has been excluded from the estate to be devolved. We envisage that disputes will arise if property classified as either family or personal property is excluded from the proposed intestate succession scheme. The Law Reform and Development Commission's Report on Customary Law Marriages proposes that the marital property regime for future customary marriages will be 'in community of property', while existing customary marriages will be regulated by the applicable customary law. It is generally assumed that under customary law the husband and wife each retain the separate property they own prior to marriage and own separately as individuals any property acquired during marriage. If the proposed Bill is enacted, the 'in community of property regime' that will be applied to future customary marriages will have the effect that family property will be considered part of the joint estate. This may lead to a situation where women enter into marriages with the sole purpose of accessing inherited property to which they would not otherwise have been entitled. For this reason it has been suggested in South Africa that family property should be excluded from the joint estate.³⁷

³¹ Ibid, 235.

³² Section 25.

³³ Bennett 1991 (op cit s5 n7), 237-238.

³⁴ Ibid, 238.

³⁵ Ibid.

³⁶ Mbhatha (op cit n25).

³⁷ Ibid, 286.

10.50 Where disputes arise as to the classification of family property, courts should consider under such circumstances the registration documents available, whether the deceased had the means to acquire property and the nature and extent of the family's assistance. If the family made only a minimal contribution to the accumulation of the property, such property should not be excluded from the estate.

10.51 It may be difficult for a spouse to contest the nature and scope of the family's contribution to the disputed property. Couples seldom keep records of the acquisitions they have made. Also, the gendered roles of spouses may have the effect that the widow may have little direct knowledge about the acquisition of certain property or her husband's business affairs. The burden of proof should be on the family members who allege that the disputed property is family property.

10.52 Under customary law, property which was acquired with the sole efforts of the wife may be regarded as the husband's property. In Namibia, such notions affect rural and urban women alike:

Example 1:

"I am the only one who works. I bought a vehicle. With that vehicle he visited his mistress. When the mistress' husband caught him at the house in bed with his wife, he had to flee. My husband had to flee like the day he was born [meaning he was naked]. He had no time to get the vehicle. That vehicle is regarded as my husband's. I could not claim it, but it was my vehicle."³⁸

Example 2:

"When I was working, I contributed to the purchase of several homes that we now own. I spent my salary on taking care of our daily needs. Now that I am not working, my husband does not want to provide me with any money to take care of our daily needs – not even money generated from the income of those homes. I am unable to buy sanitary towels for myself or food for the children. They keep asking me why there is no food in the house. I do not tell them that it is because their father does not want to give me any money. I do not want to talk badly of my husband to my children."³⁹

10.53 Women generally find it difficult to establish ownership of property, even where they are in a position to do so. This is mainly due to cultural presumptions or norms which operate against women. Women who are illiterate may be particularly prejudiced. There is also considerable social pressure on women to register personal property in the names of their husbands.

³⁸ Interview with middle-aged rural woman 2005.

³⁹ Interview with middle-aged urban woman 2004.

10.54 In Namibia there is a tendency amongst wives to mark their livestock, even if the husband's permission to do so is still required. The marking of livestock by wives in these communities is a recent development. During the course of the marriage a husband may under certain circumstances acknowledge a wife's ownership to certain forms of property. For example, if a husband needs to sell a 'tollie' (a young ox) – to pay school fees or taxes for example – he may ask the wife for permission to sell one of her oxen and then compensate her by replacing the ox with a heifer. But this does not guarantee in the case of unmarked livestock that the family will similarly recognise the wife's title to the livestock, once the husband is deceased. In one case, a widow removed from her deceased husband's estate her unmarked livestock before anyone could lay claim to it. If widows are secure in the knowledge that their property will be excluded from the intestate's estate, they may not be forced to resort to practices which may expose them to criminal liability.

10.55 Admittedly, problems may arise with the interpretation of personal property. When disputes arise, regard should be had to the length of the marriage, whether the wife is employed, how much she earned compared with her husband, and the nature of the wife's contribution to the economic unit of the family.

10.56 Personal property, as illustrated in our examples above, may take many forms. Women's contribution to the accumulation of property may be either pecuniary or non-pecuniary. Giving recognition to non-pecuniary contributions to the accumulation of property (such as reproduction and labour in the fields) is particularly relevant to rural women.

10.57 In Kenya, such non-pecuniary contributions are recognised. In *Kivuitu v Kivuitu*⁴⁰ contributions were extended to encompass non-financial forms such as the work of an urban housewife and a wife of a rural home, with Justice Omollo stating that "these women do definitely contribute to the acquisition of property even though their contribution is not quantified in monetary terms."⁴¹ In Tanzania, the Law of Marriage 1971 integrated the law on marital property for all forms of marriage. This law established a system of separation of property. Section 114(2) B provides that the "contribution made by each party in money, or work towards acquiring of assets" will be considered by the courts, which have reportedly begun to "incline towards equality of division."⁴² As in Kenya, caring for the children and home has also been recognised by the courts as a relevant contribution.⁴³

⁴⁰ 1991 2 Kenyan Appeal Reports 241.

⁴¹ Celestine, Nyamua Musembi, 2002, "'Sitting on her husband's back with her hands in his pockets': Commentary on Judicial Decision-Making in Marital Property Cases in Kenya", *The International Survey of Family Law*, 235.

⁴² JS Read, "Milestone in the integration of personal laws: the new law of marriage and divorce in Tanzania" [1972] 16 (1) *JAL* 19.

⁴³ A Armstrong et al (op cit s3 n14), 345. See the discussion of the case of *Bi Hava Mohamed v. Ally Sefu*.

10.58 Against this background of property issues, there are two ways to conceptualise the issue of what property should be included in the estate of the deceased:

Option 1: One approach would be to **address the issue through law reforms on marital property**. The estate of the deceased comprises only the property which belonged to the deceased – half of the joint estate in a marriage ‘in community of property’, or the property that was individually owned by the deceased in a marriage ‘out of community of property’.

If the question is addressed through marital property reforms, it is not a succession question per se. The division of marital property might take place in the context of divorce, in deciding how to divide the property of the couple, or in the case of death, in determining what property formed part of the estate of the deceased.

One advantage to this approach is that the question of which property belongs to whom could in theory be addressed during the subsistence of the marriage, or while both spouses are still alive – if the marital property regimes made applicable to customary marriage are well-understood and applied by the public. However, most people do not plan for the future in this way, so there might still be disputes about what property rightfully belongs in the estate of the deceased even under this approach.

A disadvantage to this approach is that the marital property approach obviously applies only to married couples. It would not exclude family property from the estate of the deceased in the case of the death of a single person or a widow/widower who had inherited family property.

Option 2: Family property in Namibia is of sentimental value. As stated by LeBeau,⁴⁴ “How do you tell people they have to give a woman (who is considered not related to them) a piece of their ancestral land?” The second option would therefore be to **exclude (a) family property and (b) personal property of the surviving spouse from the estate of the deceased, regardless of the marital property regime which applies**. The exclusion of family property would apply in all cases, not just to married persons.

It is recommended that these two exclusions should be applied together – if family property is excluded from the intestate and testate estate, then the personal property acquired by a spouse, whether through pecuniary or non-pecuniary contributions, should be similarly excluded. In Ghana for example, only family property has been excluded with the effect that surviving spouses’ claims to personal property have been disregarded specifically *because* such property has not been excluded from the deceased’s estate.

⁴⁴ LeBeau et al (op cit s1 n6), 55.

Recommendation:**PROPERTY TO BE EXCLUDED FROM THE ESTATE**

It is recommended that both family and the personal property of the surviving spouse, whether acquired through pecuniary or non-pecuniary means, be excluded from the deceased's estate to be devolved. Such an exclusion should apply both in respect of testate and intestate inheritance, and irrespective of the marital regime applicable to the marriage.

This approach respects the fact that property ownership under customary law is different from that under the Roman-Dutch common law, and may involve multiple family members. It also gives additional protection to a surviving spouse, especially a wife who may have contributed to the acquisition of property, in light of customary law's reluctance to recognise women's entitlements to property.

A potential disadvantage of this approach is that it may give rise to disputes about the nature of various items of property.

Recommendations on the treatment of house property have been made above in the section on polygamous marriages.

Debts of the estate

10.59 Inheritance under customary law, as stated earlier, is onerous and universal in that the heir succeeds not only to the property of the deceased, but also to his obligations, past and future.⁴⁵ Unlike heirs under the civil law, customary law heirs have the burden of extinguishing the debts of the deceased. A possible reason why the heir will assume this burden is an obligation to 'preserve' or keep intact the estate for future generations. As explained by residents in Vaalgras, the estate is symbolic of the Holy Fire and has to be passed on to future generations. As suggested in South Africa, once the material needs of the deceased's surviving family are secured, equity dictates that the customary law heir's responsibility for the deceased's debts should cease.⁴⁶

⁴⁵ See in general SALC 2004 (op cit s9 n17), 4.8.2.

⁴⁶ Ibid, 4.9.3.4.

Recommendation:
DEBTS OF THE ESTATE

It is recommended that customary law heirs should not be burdened with a personal obligation to extinguish the debts of the deceased. Debts should be dealt with in the course of the administration of the estate, before distribution, as in the case of civil law. The provision of maintenance from the estate for dependents will also relieve the customary law heir of personal responsibility for this traditional obligation. It would be good to formalise such responsibilities, as nowadays not all customary law heirs shoulder their traditional responsibilities reliably.

Small estates

10.60 Along the lines of what has been suggested in Ghana, Zambia and Zimbabwe, any proposed law should make provision for estates of a certain value to be exempted from any distribution mechanism. The Administration of Estates Act already makes provision for the Master to dispense with the appointment of an executor in respect of estates below a certain value.⁴⁷

Recommendation:
SMALL ESTATES

It is recommended that estates below a certain value should automatically devolve upon the surviving spouse. If there is no surviving spouse, then the entire estate should go to the deceased's children. Failing both spouse and children, other potential recipients could be ranked in order of priority. The objective should be to avoid the fragmentation of small estates to the point that no one receives any meaningful benefit.

Administration of estates

10.61 This study has focused mainly on substantive issues related to inheritance under customary law, and will therefore make recommendations on only some aspects of the administration of estates.

10.62 The administration of black deceased estates is currently overseen by magistrates. Parties are however free to decide that the Master of the High Court should oversee the administration of estates in terms of the Administration of Estates Act 66

⁴⁷ Section 18(3) of the Administration of Estates Act 66 of 1967.

of 1965.⁴⁸ There is a possibility that community courts could in theory also serve this function.

10.63 A major complaint heard throughout this study was how ill-prepared and ill-suited magistrates were to appoint executors. Frequently the executor appointed was simply the first person who applied, without due consideration of other potentially better qualified candidates. There was little concern or consideration for the customary law implications of the choice. In one particularly notorious case four different executors were appointed. People strongly urged that all executors be registered at the Master's Office to avoid duplication and fraud.

10.64 Another source of complaints centres on magistrates' alleged lack of concern about debts which the deceased might have incurred. There was much support for the notion that the Master's Office should be decentralised, or at least regionalised, and that specially trained officials should have oversight in such matters.

Option 1: Allow **community courts** to oversee the administration of customary estates. Community courts are easily accessible. However, justices appointed by the Minister and adjudicators may be more familiar with customary law, and may continue applying discriminatory customary rules as opposed to those prescribed by the proposed law. This has been the experience in Zambia's Local Courts. Unless specialised training is provided, it is difficult to envisage that such an option will be workable. It is recommended that if community courts are to have some jurisdiction in respect of inheritance matters, such jurisdiction should be limited to small estates.

Option 2: Assuming an inheritance dispute, traditional authorities are often the first port of call. Therefore, estates could be administered by **traditional authorities**. People are familiar with them and believe they will not cost as much as having to brief a lawyer to appear in a magistrate's court.

Recognised traditional authorities are part of the reality in contemporary Namibia and their numbers appear set to increase. Generally we found traditional authorities to be more tolerant and sensitive to issues of gender equity than some of the younger tertiary-educated elected officials. Rather than being reactionary colonial holdovers, they impressed with their pragmatism and insights. The history of inheritance disputes in Owambo areas shows that they have been important innovators. The question one should ask is why they failed to address problems with customary law inheritance systems successfully.

In many of the contemporary cases noted in Owambo areas, the problem was not "customary law" per se, but rather local interpretations of what was right, aggravated by people's refusal to obey injunctions issued by traditional authorities. The simplistic model of traditional authorities and

⁴⁸ Berendt case (op cit s1 n3).

the modern state competing for legitimacy simply does not hold. Both are apparently losing legitimacy simultaneously, and both have used one another to bolster credibility

People have time and again in Namibia been able to re-imagine “tradition” and adapt it to contemporary realities. One issue which needs to be reinterpreted concerns the role of females in traditional authorities. The historical record shows that there were female rulers in Namibia, and royal females were frequently heavily involved in political intrigue and decision-making. There were even cases of noblewomen being appointed as headmen. Among the Kwambi since 1993 each ward has a female representative who is charged with looking after female interests. Indeed in some areas of Owambo, female traditional councilors now outnumber their male counterparts. And it is not only matrilineal kinship groups who are open to promoting gender equity among traditional authorities. At least two Nama groups have female Chiefs, and Chief Immanuel Gaseb of the /Oe-#gan recently acknowledged the crucial role the Chief’s mother has played in Damara society. Namibia should encourage the trend of recognising and enhancing the role of women in traditional authorities. Not only would this promote more gender equity in general, but it would also work both directly and indirectly towards more equity in inheritance disputes.

Option 3: Allow **magistrates** to administer customary estates. Since 30 June 2003, magistrates enjoy some judicial independence,⁴⁹ and to ‘subject’ them to the authority of the Master may undermine their independence.⁵⁰ Notwithstanding, it is noteworthy to mention that magistrates’ offices in Namibia currently do serve as ‘service points’. The main complaint from beneficiaries is that there are no regulations in place to ensure that estates are administered fairly.⁵¹ There is also nothing to compel magistrates to ‘report’ to the Master.⁵²

Option 4: Allow the **Master of the High Court** to administer deceased estates in terms of the Administration of Estates Act 66 of 1965, appropriately amended. The Master’s Office is currently located in Windhoek, and is inaccessible to the majority of Namibians. Thus, without some form of decentralisation, the status quo is likely to be maintained, with families opting to distribute estates privately.

⁴⁹ Magistrates Act 3 of 2003.

⁵⁰ LRDC, *Consultation: Succession and Estates*, Project 6, February 2005.

⁵¹ Malan, the government ethnologist, for example reported in 1977 that in Owambo “There are also cases where Estates given by the Magistrate’s Court to the wife of the deceased were later redistributed under supervision of the tribal court so that matrilineal relatives of the deceased can also get a share.” (NAN J6/4/2 1977, our translation)

⁵² Interview with Administrator of Estates, 15 February 2005.

Recommendation:
ADMINISTRATION OF ESTATES

We recommend that the Master's Office be decentralised, as suggested by the Law Reform and Development Commission,⁵³ and that the Administration of Estates Act 66 of 1965, appropriately amended, be made applicable to all estates.

Property grabbing

10.65 Property grabbing, which is the grabbing, seizing, diverting or dispossessing the property of deceased person,⁵⁴ is not a new phenomenon in Namibia. It has roots going back at least a hundred years, but it has been exacerbated in recent years by a number of factors including plummeting life expectancy caused by the AIDS pandemic and crass consumerism promoted by globalisation.⁵⁵ White⁵⁶ argues that the term 'property grabbing' is inadequate, as it is a term used for 'circumventing' the act of theft and fails to describe aspects of gender-based violence. The term 'property dispossession' is therefore preferred as it refers to the 'permanent taking of property', irrespective of claims of ownership, from the spouse and/or children of a deceased upon his or her death.⁵⁷ Property grabbing may also take on more subtle forms, as frequently happens in Namibia. For example, a surviving spouse may, under pressure from the family, be compelled to withdraw large amounts of cash under the pretext that the cash will be utilised for funeral expenses.

10.66 In countries such as Zambia and Ghana, the practice of property grabbing has been addressed under inheritance laws. But the sanctions prescribed under these laws may be inadequate in deterring incidences of property grabbing. For example, in Zambia sanctions have been criticised for being too lenient and for failing to provide for compensation to the victims of property grabbing.

10.67 In Namibia, another alternative will be to deal with incidences of property grabbing under the Combating of Domestic Violence Act 4 of 2003. A person in a domestic relationship who is a victim of property grabbing could on the basis of economic abuse apply for a protection order.⁵⁸ However, the Act in its present

⁵³ LRDC (op cit n50).

⁵⁴ S Venekai-Rudo White et al, 2002, *Dispossessing the Widow in Malawi: Gender Based Violence in Malawi*, 24.

⁵⁵ LeBeau (op cit s1 n6), 54.

⁵⁶ White et al (op cit n54), 24.

⁵⁷ Ibid, 25.

⁵⁸ Section 14. A protection order granted in terms of the Act has the effect of restraining a person against whom it was granted not to subject the complainant to domestic violence. A protection order may contain provisions directing that one party retain possession of specified personal property,

form may be too narrowly construed to address instances of property grabbing adequately. A complainant in a domestic relationship can only seek a protection order against another person in that domestic relationship.⁵⁹ Remedies afforded in terms of the Act may also not be adequate.⁶⁰

Recommendation:
PROPERTY GRABBING

While recognising the potential relevance of the provisions on economic abuse in the Combating of Domestic Violence Act, we recommend that Namibia also make property grabbing a criminal offence with stiff penalties, and provide restitution or compensation for the victim.

CONCLUDING REMARKS

Burial arrangements

10.68 A testator may make provision in a will for the manner in which he or she wishes to be buried. In Namibia the practice is that the testator will make specific provision as to how he should be buried. In some instances specific money is set aside for funeral arrangements and directions are given as to the type of coffin that has to be purchased.⁶¹ In the absence of any specific provision, the heir usually determines the time and place of the funeral.

10.69 In South Africa, some women requested that burial arrangements be addressed in proposed legislation on succession. The problem in South Africa seems to be that heirs sometimes utilise estate assets to defray funeral costs, rather than for maintenance of the deceased's dependents. This concern did not emerge in our research in Namibia. The problem here seems to be rather that people feel that deceased persons do not get proper burials anymore (cheap coffins being used, funeral insurance funds being used for other purposes, etc). However, this concern

including but not limited to transport, agricultural implements, livestock and other personal effects. A person who breaches a protection order commits an offence and is liable on conviction to a fine which does not exceed N\$8000 or imprisonment not exceeding two years or both.

⁵⁹ Section 4(1). A domestic relationship includes persons who are in a relationship of marriage, including a customary marriage; persons of the opposite sex who are in informal relationships; persons who have or are expecting a child together; parents and biological or adoptive children; family members related by consanguinity, affinity or adoption, provided that they have some additional nexus such as the sharing of a residency or financial dependency; and persons who *would* be family members if a cohabiting couple were married.

⁶⁰ See Section 14.

⁶¹ Interview with Administrator of Estates, 15 February 2005.

does not seem to affect inheritance rights, and so we offer no recommendation on burial arrangements in this report.

Appointment of guardianship

10.70 The Matrimonial Affairs Act 37 of 1953 prevents a parent of a minor from appointing any person as guardian of a minor by will, unless such parent was the sole natural guardian immediately prior to death.⁶² The issue of guardianship for children born both inside and outside marriage is currently being addressed by the Children's Status Bill, and so need not be covered in law reform on succession.

Traditional leaders: succession and property

10.71 Succession to the position of traditional leader is currently regulated by the Traditional Authorities Act 25 of 2000, and need not be addressed in any proposed law on inheritance. The succession process has now been democratised. Sections 4 and 8 deal with the designation, and removal and succession of traditional leaders respectively. Property which a traditional leader controls and possesses in his capacity as traditional leader should also be excluded from the operation of any law. This approach was followed in South Africa and is recommended for Namibia.

Is a will the way?

10.72 Wills, as shown, have a long history in Namibia. There are apparently some cases (although we never managed to locate them) where the deceased had drawn up a will but where the traditional authorities intervened and allocated the estate according to traditional principles and exigencies.

10.73 This study, as well as LAC field research on marital property regimes (publication forthcoming), points to the following recommendations on wills:

- (1) **The race and gender based restrictions on the power to make wills imposed by the Native Administration Proclamation 15 of 1928 must be repealed.** The patchwork of overlapping regulations issued in terms of that proclamation have the result that a black person in Kavango, Eastern Caprivi or Owambo has full power to bequeath his or her estate by will – but a black man in any other part of Namibia does not have full testamentary freedom. He does not have the legal power to leave by will (a) movable property allotted to or accruing under customary law to any woman with whom he lived in a customary union or (b) any movable property accruing under customary law to a particular “house”. Property which falls into these two categories must be distributed according to

⁶² Section 5(3)(b).


customary law. If these provisions were repealed, other non-discriminatory measures in the form of maintenance from the estate of a deceased and the exclusion of certain property from the estates of deceased persons (both discussed above) could be used to protect spouses in customary law marriages.

- (2) An **intensive education campaign** needs to be launched so that all Namibians are aware of their rights to write a written will and their responsibility to see that any will of a deceased relative is respected. Despite the sterling work done by a number of NGOs on educating the public about wills and the meaning of being married in or out of community of property, general knowledge about these subjects, even amongst the educated strata, is abysmal. There are several cultural characteristics which mitigate against people writing wills and one must be sensitive to these

Perhaps a useful strategy here might be to run workshops for church officials and perhaps more importantly to negotiate with the Department of Basic Education about the feasibility of incorporating pertinent materials about wills (and human rights) into the school curricula. Officials at the Namibian Institute for Educational Development in Okahandja were strongly supportive of the idea to consider incorporating such knowledge and issues under the rubric of “life skills”.

- (3) As has been attempted in South Africa, “**will writing days**” could be tried out where a specific venue is chosen and a specific date and people are invited to come and write their wills with the support of volunteer paralegals and lawyers.
- (4) Another possibility to increase the number of written wills would be to pass a law that **anyone opening a savings account must write a will** with the help of the savings institution. Similarly anyone buying a house could be required to write a will.
- (5) As a method of reducing the incidence of fraudulent wills, or wills that are not respected, there could be an **official depository of written wills at the Master’s Office**.



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