

The new law on inheritance -- a law reform that doesn't change much

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In 2003 the High Court of Namibia instructed government to 'harmoniously and effectively review the field of inheritance and administration of deceased estates' by June 2005. By November 2005, after government failed to meet its initial deadline and was granted an extension until 31 December 2005, it passed the Estates and Succession Amendment Bill without debate just before the closure of Parliament. The lack of debate comes as no surprise considering the Act makes no reforms whatsoever to the substantive law of inheritance, but only unifies the manner in which deceased estates are administered. Government has narrowly construed the instructions of the High Court with the result that the new law will be of limited assistance to the many women and children who have been prejudiced by discriminatory inheritance practices, especially under customary systems.

Historically, inheritance in Namibia has been regulated by a dual system with the effect that a person's estate can be distributed either in terms of civil or customary law with race being the determining factor. Under civil law the surviving spouse and children of the deceased inherit in the absence of a will, but they are precluded from inheriting under most customary systems in Namibia. The new law repeals the Administration of Estates (Rehoboth Gebiet) Proclamation and those provisions of the Native Administration Proclamation which apply rules of inheritance based on a complex interplay of race and (for a black person) on the part of Namibia where the person resides, on whether the person is or was a party to a civil or customary marriage, and on what marital property regime applied to the civil marriage. Paradoxically, the new law stipulates that despite the repeal of these racially based provisions, they will still apply in the same way that they did before, if a person dies without leaving a valid will. So, in other words, the racially discriminatory laws are repealed but then brought back in all over again through the backdoor.

In actual fact, the new law changes only the *procedure* for administering estates. In the past, black estates were administered by magistrates while the estates of 'Europeans' were administered by the master of the High Court. The new law stipulates that, irrespective of race, all deceased estates shall be administered in terms of the Administration of Estates Act, by the Master of the High Court. But the new law also says that the Master may now delegate authority to magistrates. Magistrates in the past have been criticized for failing to ensure estates are distributed fairly amongst beneficiaries, because there were no regulations in place and because they were not compelled to report to the Master. The new law to a certain extent addresses this problem in that the powers and functions of the Master may be vested in magistrates and the latter may, on request, be required to provide the Master with information regarding the administration of an estate. It could be argued that the aforesaid provisions, which to a certain degree subject magistrates to the authority of the Master, could compromise the judicial independence magistrates now enjoy since 30 June 2003. It could also be argued that the most likely outcome on administration of estates is that things will continue to work pretty much as they did in the past, unless the Master's office is robust in its oversight of the administration of estates by magistrates.

The Act does not apply retrospectively, with the effect that magistrates will continue to oversee the distribution and liquidation of estates that were in the process of being finalized when the new law became operative. Any person who has an interest in such an estate may however in writing request the Master to administer the estate. The new law took effect on 29 December 2005.

While the repeals are to be welcomed, they clearly will make only the smallest of changes in the way that inheritance works. The new law's silence on the more substantive aspects of inheritance -- arguably the area that was in need of the most urgent reform -- prejudices vulnerable persons, particularly rural women and children whose lives are regulated by customary law.

Thus, the current inheritance laws remain grossly inadequate. The latest law reform not only perpetuates a dual system already found to be

unconstitutional by our High Court, but also retains and endorses gender inequality and racial discrimination in customary inheritance practices. It also does nothing to address the problem of property grabbing, which is reportedly becoming increasingly widespread.

It could be argued that the Namibian Constitution, which recognizes customary law, mandates that a dual system be perpetuated. The perpetuation of such a system should not, however, reinforce historical divisions but should strive to achieve constructive equality which draws on the best of both systems. The new law is but a small step forwards towards this goal.

There will always be some public and political resistance to changes in family law, particularly by those who have benefited from the existing inequalities. Yet government cannot move forward towards meaningful equality if it perpetually ducks the hard questions. It would be wise for government to pay urgent attention to the *real* reform of inheritance laws in Namibia.