

**A CONSTITUTIONAL PERSPECTIVE ON WOMEN'S PROPERTY AND
INHERITANCE RIGHTS WITHIN NAMIBIA'S LEGISLATIVE FRAMEWORK:**

A Collusion Between Two Systems

By Mercedes H. Ovis

Legal Assistance Centre

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Introduction

Recently, on one of my field research trips, a widow relayed the following story to me:

Immediately following her husband's death, she had to retire to her bedroom. She was forced to lie on her bed, facing the wall. She was not allowed to have contact with anyone-let alone speak. Not that any of the other women, especially those that are married, would have wanted to do so. They would have risked facing the same fate that has befallen her. Other widows are allowed to speak to her, even if only, to enquire from her whether she needed any food. If this was not bad enough, another woman who claimed to be her deceased husband's spouse also suddenly appeared. She did not know that her husband was previously married. This woman claimed to be the rightful heir, but so did other members of her husband's family. When she objected, they threatened her with witchcraft. She has since left the farm on which she and her deceased husband lived. She was fortunate enough to have removed her livestock without their knowledge and return to her maternal family. Many women, with the threat of being left destitute, may have had no option but to be inherited by a brother of the deceased husband.

Her story is not unique but reflect the many obstacles that Namibian women face on a daily basis. Since independence not one person in Namibia has challenged in our courts customary rules as they are applied in the distribution of estates.¹ One may compare this unfortunate position with South Africa where women, informed by that country's Constitution, have done so. In the recent landmark decision of the South African Constitutional Court, *Bhe v Magistrate, Khayelitsha*,² this is exactly what happened. The customary law rule of male primogeniture, which favours only male heirs, was found in that court to be unconstitutional. As a consequence, the two **female** illegitimate children of the deceased were held to be the lawful heirs in that instance.

The Recognition of Customary Law within the Constitutional Framework

Currently Namibia, by virtue of its Constitution, recognizes both common and customary law. Article 66(1) of the Constitution provides that both customary and the common law applicable at the date of Independence shall remain valid, provided it does not conflict with the constitution or statutory law. It can further be said that both systems enjoy equal status in that both systems are made subordinate to the Constitution and statutory (civil) law.

¹ The only case that comes close to that is *Berendt v Stuurman*. The applicants in this case challenged the appointment of the executor, who they accused of selling the house behind their back for a price well below market value. The estate fell to be administered and distributed in terms of customary law. As a result the estate could not be distributed in terms of the Administration of Estates Act 66 of 1965(empowers the more sophisticated office of the Master of the High Court to oversee the administration of estates). The court declared sections 18(1) and 18(2) of the Native Administration Proclamation 15 of 1928 as well as the regulations made under section 18(9) unconstitutional and invalid. As an interim measure the court directed that heirs of black estates choose either a magistrate or the Master to administer estates.

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Customary laws are those sets of unwritten laws under which African societies conduct their marriages, divorce, inheritance, land tenure and other such affairs. These laws determine women's status within that society. Many of these laws, which differ from community to community, strongly discriminate against women. For example, women may be regarded as perpetual minors who fall under the tutelage of men and consequently cannot own property. Common law refers to the Roman-Dutch and English law, the dominant legal system, employed in Namibia. Differences between the two systems can be attributed to the fact that the common law has been developed to keep pace with changing socio-economic conditions, whereas no similar development has taken place in respect of customary law. An example of such development under the common law is found in the Married Persons Equality Act 1 of 1996 which abolishes the common law rule in terms of which the husband acquires marital power over his wife and property.³ Only limited parts of the Act have been extended to customary law marriages.⁴

Prior to independence, Namibia fell under the administration of South Africa. Previous rulers sought to give effect to customary law, and enacted several laws which to this day remain applicable in Namibia, despite their apparent unconstitutionality. Article 144(1) provides that all laws in force at the date of independence remain in force until repealed or amended by an Act of Parliament or declared unconstitutional by a competent court. One such law is the Native Administration Proclamation 15 of 1928,⁵ which regulates matters such as marriage and inheritance under customary law.

The basis for the recognition of customary law, which enjoyed a marginalized position during the colonial and apartheid era, is founded in our Constitution. Article 19 of the Constitution provides that every person in Namibia is entitled to enjoy, practice, profess, maintain and promote any culture subject to the condition that the right to do so shall not intrude on the rights of others or national interests.⁶ Even though a person has an affirmative right to culture this right is not an absolute right, in that constitutional norms take precedence.

There are several rights protected by our Constitution, in so far as inheritance and marriage is concerned, which directly impacts on the right to culture. These rights are contained in Chapter 3 of the Constitution. The most significant of these fundamental human rights are equality before the law⁷ and the prohibition of discrimination on grounds of sex, race, colour, ethnic origin or social and economic status.⁸ These rights have a significant impact on customary law as customary law is still largely influenced and characterized by cultural values which reinforce patriarchal attitudes.

³ Section 2 of the Married Persons Equality Act

⁴ For example, Section 2 of the Married Persons Equality Act applies only to spouses who have concluded a civil marriage. Only section 14 (guardianship of children), section 13 (domicile of married women) and section 14 (domicile of children under the age of 18) of the Act apply to both customary and civil marriages. Section 16 stipulates which sections of the Act are not applicable to 'marriages by customary law'.

⁵ Parts of the Proclamation have since been repealed.

⁶ Article 19.

⁷ Article 10(1)

⁸ Article 10(2)

Other equally important rights protect human dignity, the family, marriage 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 different 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.

The Constitution explicitly recognize that the family is the ‘fundamental group unit of society and is entitled to protection by society and the State’.¹⁰ Article 14 provides that all men and women shall have equal rights as to marriage, during marriage and when a marriage is dissolved (such as by death or divorce). Marriage can only take place with the full consent of both persons involved. The Constitution provides that all Namibian citizens have the right to acquire, own and dispose immovable and immovable property and to bequeath their property to their heirs and legatees.¹¹

Where are we in terms of Law Reform?

In order to fully appreciate the urgent need for reform one need to understand why it is that that the Native Administration Proclamation 15 of 1928 is unconstitutional. The Native Administration Proclamation 15 of 1928 sets up different rules in respect of marriage and inheritance, based on such factors as where the person resides; whether the person was a party to a civil or customary marriage; the marital regime applicable to the civil marriage- the determining factor being what race a person belongs to. The devolution of estates of persons other than black persons are regulated by the Intestate Succession Ordinance 12 of 1946 and the Wills Act 7 of 1953, and administered in terms of the Administration of Estates Act 66 of 1965.

The unfair application of the two different systems can be illustrated by the following example: A person who dies intestate (i.e without leaving a will) as a general

⁹Article 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 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).

¹¹Article 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 be persons who are not Namibian citizens’.

rule will have his estate devolved in terms of ‘ black law and custom’. Under customary law the surviving spouse and the children are seldom the preferred heirs. Often they are violently dispossessed of property by relatives following their husbands’ death. Property grabbing has steadily increased in Namibia. In terms of the Intestate Succession Ordinance 12 of 1946 the surviving spouse and children are the preferred heirs.

Namibia’s international, regional and domestic (as reflected in its Constitution) obligations, compels it to reform laws such as the Native Administration Proclamation 15 of 1928 to bring them in line with the Namibian Constitution. Since independence, the Namibian government has enacted several laws not only to bring customary law in line with the Constitution but also to elevate the status of customary law. The Communal Land Reform Act 5 of 2002,¹² the Traditional Authorities Act 25 of 2000 and the Customary Courts Act 10 of 2003 are examples of such attempts. Namibia has been sluggish in introducing laws regulating customary marriage and inheritance. Two years ago the judiciary expressed its dissatisfaction with this state of affairs as follows:¹³

‘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 field of inheritance and administration of deceased estates is unacceptable.(my emphasis).’

A 2004 Human Rights Committee Report on the International Covenant on Civil and Political Rights reflects the urgent need for law reform in Namibia in light of the deficiency in inheritance rights as a result of the non-recognition of customary marriages in Namibia.¹⁴ Since 1992, the Law Reform Development Commission (LRDC) has been engaged in projects related to family law in general and customary law.¹⁵ Only recently has the LRDC released a proposed Bill on the Recognition of Customary Marriage.¹⁶ Following the *Berendt v Stuurman*¹⁷ case over two years ago, Parliament has been put on notice to introduce a new regime that regulates inheritance following the invalidation of certain provisions of the Native Administration Proclamation 15 of 1928. The deadline set is for 30 June 2005, but to date no proposed Bill that regulates inheritance under customary law has been released.

¹² The Act provides that a customary land right must be re-allocated to the surviving spouse upon the death of the spouse in whose name the land was registered. Entering into a second or subsequent marriage does not affect the surviving spouse’s title to the right so allocated (see Section 26 (2) (a) read with Section 26 (3), Section 26(4)).

¹³ (Note ...Berendt Below)

¹⁴ 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 the inheritance and land ownership...[and] encouraged the state to take effective measures.’ (July 2004)

¹⁵ See for example Succession and Estates (Project 6) dealing with succession and administration of estates; Divorce Project (Project 8) and the Customary Law Marriages Project (Project 7) of the LRDC; See also D. Hubbard ‘Proposals for the Law Reform on the Recognition of Customary Marriages’ 1999 Legal Assistance Centre available at <<http://www.lac.org.na/dept/grap/research/customary.pdf>>.

¹⁶ Ibid dated October 2004.

¹⁷ (P) A 105/2003

In this paper I will only focus on intestate succession (i.e where a person dies without leaving a valid will). Any reform effort in Namibia will have to address the scenario where persons who were dependant on the deceased leaves a will has been disinherited. Countries such as Zambia and Zimbabwe have followed such an approach by making provision for wives, parents and other dependants to claim maintenance from the deceased's estate.

The Application of the Native Administration Proclamation 15 of 1928

The distinction between common and customary law are not as clear as I have made it out to be. The Native Administration Proclamation 15 of 1928 promotes the oscillation between the two systems with the result that women's property and inheritance rights are determined by a 'confusing web of customary and civil law'.¹⁸ This is partly due to the complicated manner in which the Native Administration Proclamation 15 of 1928 was made applicable in Namibia.

In the event that a black person who resides outside the old Police Zone dies intestate, his estate devolves as follows in terms of Regulation GN 70:

- If the deceased at the time of his death, was
 - 1) a partner in a civil marriage in community of property or under ante-nuptial contract; or
 - 2) a widow, widower or divorcee of a civil 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, then the property shall devolve as if he had been a 'European'.
- If the deceased does not fall into one of the stated categories, the property will 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 ante-nuptial contract his estate is distributed as if he had 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 in order of preference. If the deceased does not fall into either of the classes prescribed by Regulation GN 70, customary law applies.

The default marital regime for marriages between Africans outside 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 that-

¹⁸ D. Hubbard and E. Zuma 'Marital Property and Inheritance in Namibia' 2004 *Womens Property and Inheritance rights in Namibia* Reimers & Spence (eds)

‘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 than 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 shall result from their marriage, and thereupon such community shall result from their marriage’.

It occurs in practice that such declarations are not properly executed,¹⁹ with the result that even if it was the intention of the parties to contract a marriage in community of property, such marriages are out of community of property. As a consequence such estates fall to be administered in terms of customary law. In the absence of law reform, our courts now recognize that couples affected by the marital property rules in the Native Administration proclamation may conclude an express or implied antenuptial agreement between themselves which will regulate the property consequences of the marriage between the two of them.²⁰ Such an unregistered antenuptial agreement is not enforceable against third parties.

If a black person dies intestate within the old Police Zone then irrespective of the manner in which he married, his estate is administered in terms of customary law. People, especially women and children) are increasingly becoming dissatisfied with the application of customary law in the distribution of intestate estates.

Women’s Property and Inheritance rights under Customary Law

Family relations in Namibia are largely regulated by customary law. ‘Family’ refers to individuals related by blood rather than marriage. Kinship systems consequently affect inheritance. Kinship determines how one should behave, where one might live, who one may marry and how one might inherit. In Namibia there is basically matrilineal descent (Owambo and Kavango communities), patrilineal descent (Nama and Damara) and bifurcated descent (Herero communities). Caprivi communities are ‘cognatic’ in that they are matrilineal with strong patrilineal influence. In a patrilineal community property, status and rights are transmitted in the ‘father’s line’ while in matrilineal community these are transmitted in the ‘mother’s line’. Matrilineal does not necessarily imply matriarchal with the effect that males are still regarded as the head of the family. Although significant differences between matrilineal, patrilineal, cognatic and bifurcated communities exists with respect to the way customary law defines the composition of the inheriting group, the spouse does not have a right to inherit from the estate.²¹ In some

¹⁹ L. Agnew & D. Hubbard ‘Marital Property Regimes and the Native Administration Proclamation’ Legal Assistance Centre August 2001 3-4.

²⁰ *Mofuka v Mofuka*, unreported judgement, High Court 14 November and Supreme Court, 20 November 2003.

²¹ Surviving spouses in the patrilineal kinship communities the LAC has researched enjoy significantly more rights than that of spouses in other kinship communities. However, since the

instances she may be seen as part of the estate, to be inherited by a brother of her deceased husband, as reflected in the following statement:

‘In Himba culture, my husband/wife is one’s property and when death strikes, they can be inherited’.²²

Widow and widower inheritance is still common amongst the Owambo, Herero and Lozi.²³ This practice was meant to protect minor children and young widows, but in the face of HIV/AIDS one seriously has to question whether such practices are to be tolerated. It would appear that the practice no longer serves its original purpose and is merely enforced to ensure that the deceased’s relatives retain material property.²⁴

The inheriting group merely bears a moral responsibility to maintain the widow and the children until she remarries or refuses an offer to marriage from a member of the lineage. The differences between the various kinship systems are only significant in as far as the sources of conflict that may arise. In a matrilineal system for example the intestate’s sister and her children (his nieces and nephews) are the primary beneficiaries and therefore most likely to challenge the widow’s claim to a share in the estate. In patrilineal systems, where the youngest son is the preferred heir, conflict may arise between siblings. Where women do inherit, it would appear that widows are precluded from inheriting property of value, such as land, buildings and large movable properties such as cars and tractors.²⁵ Things are changing under customary law, but slowly. One group of women we interviewed stated that women are now permitted to own livestock, but that their livestock is not marked. If they want to do so, they have to ask permission from their husbands.

Under customary law husbands and wives retain any separate property they may have acquired prior to marriage and property acquired during marriage. Women’s self-acquired property is not always acknowledged as they have great difficulty in establishing ownership. They lack records of contributions made (particularly significant if the woman is illiterate). There is also a cultural presumption that all the property of the married couple belongs to the husband. Women may not have knowledge of the business affairs of her husband, further prejudicing her ability to establish ownership. She may also make non-pecuniary contributions to the amassing of the estate. Women in polygamous marriages are particularly vulnerable.

Conclusion

ultimate heir is still the youngest son, the surviving spouse should rather be seen as a trustee of the estate. She only administers the estate on behalf of the ultimate heir.

²² Jekura Kavari, lecturer in African languages at the University of Namibia, quoted in the *New Era*, ‘No Inheritance fights among Himba’ (date?)

²³ D. LeBeau et al ‘Women’s Property and Inheritance Rights in Namibia’ 2004 42

²⁴ *Ibid*

²⁵ *Ibid* 50

Even though we recognize that law reform is urgently awaited in respect of inheritance under customary law, we are of the opinion that any such attempt should not be done without wide consultation. If we fail to consult those most affected by any such reform efforts we run the risk of creating mere paper laws.