

THE MEANINGS OF INHERITANCE

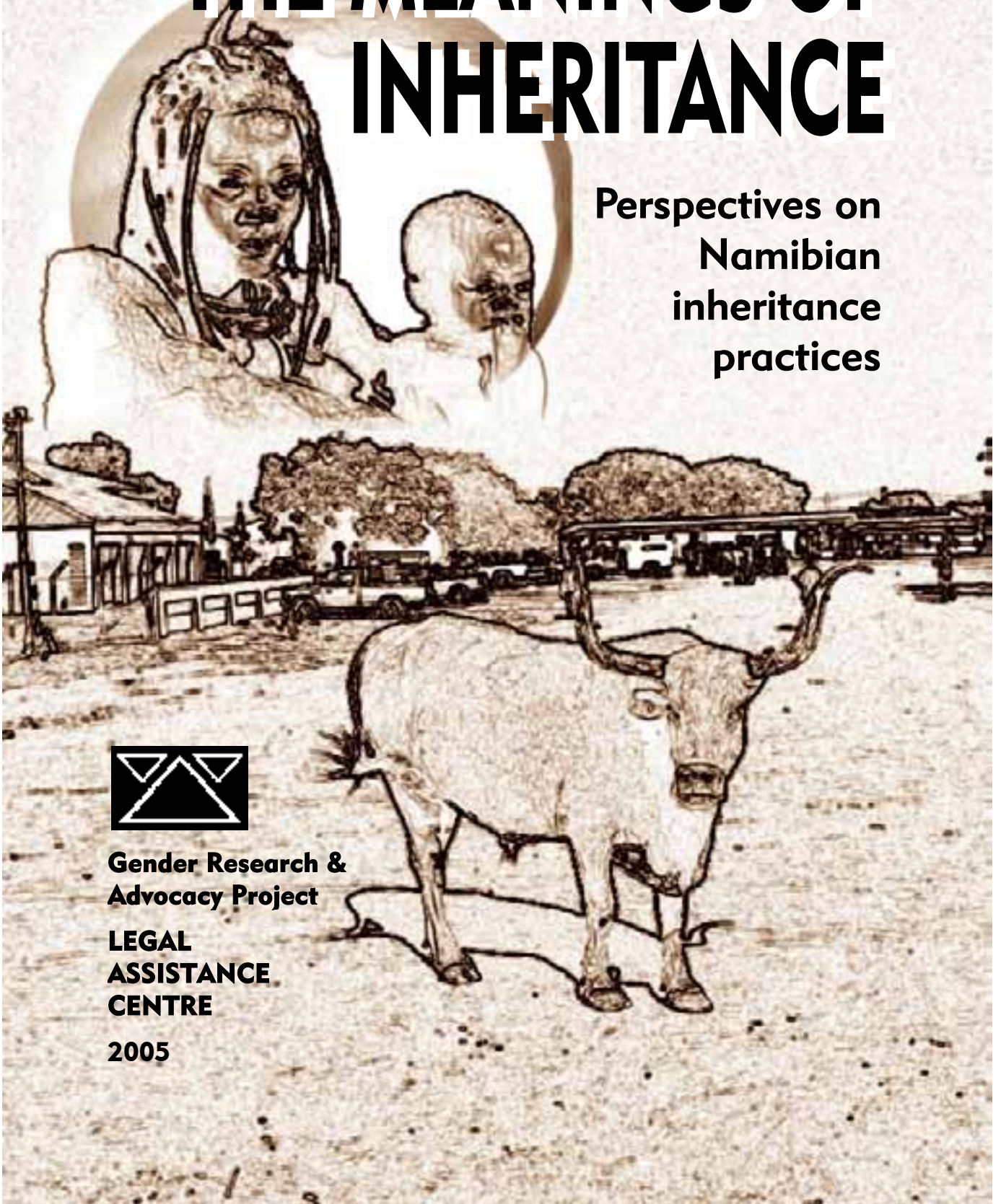
Perspectives on
Namibian
inheritance
practices



**Gender Research &
Advocacy Project**

**LEGAL
ASSISTANCE
CENTRE**

2005



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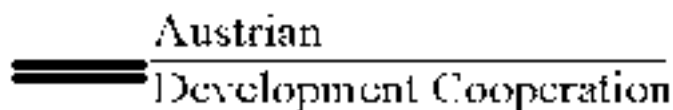
Acknowledgements

This project was planned by Dianne Hubbard, Robert Gordon, Michael Bollig and Mercedes Ovis. Our goal was to bridge the gap between academic discourse and debates on public policy, with a focus on the topical issue of inheritance.

Our thanks to all the contributors for making their important academic work more accessible to the public. We also appreciate the willingness of the contributors to work under tight deadlines.

Contributors were identified and selected by Robert Gordon, with a focus on academics who have conducted field research in Namibia. The essays were compiled and edited by Robert Gordon. Design and layout are by Perri Caplan.

The project was funded by Austrian Development Cooperation through the North-South Institute.



ISBN 99916-63-09-6

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With independence, the new democratically-elected government committed itself to changing not only the shape and form, but also the content of our inherited institutions and relationships. This transformation is an ongoing process that has to be mindful of our complex reality and based on social consensus, which we have to sensibly and consciously build and strengthen.

Hon. Marlene Mungunda,
Minister of Gender Equality and Child Welfare,
Foreword to "Between Yesterday and Tomorrow:
Writings by Namibian Women".

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1: On the Perniciousness of Inheritance Problems

Robert Gordon

All over the world, from the novels of Jane Austin, to soap operas to contemporary African novels and folk-tales, stories of inheritance, and in particular how heirs get “robbed” of their inheritance abound. It is no accident that perhaps the consistently most widely-read pages of a certain Windhoek newspaper are those dealing with wills filed in the Master’s Office.

Indeed one of the earliest stories in the Bible concerns Zelophehad’s daughters in which the Lord instructs: “If a man dies without leaving a son, you shall let his heritage pass on to his daughter; if he has no daughter, you shall give his heritage to his brothers; if he has no brothers, you shall give his heritage to his father’s brothers; if his father has no brothers, you shall give his heritage to his nearest relative in his clan, who shall then take possession of it.” (Numbers 27:2).

Nor are inheritance disputes recent in Namibia. More than a century ago Missionary Wandres wrote that “without a doubt thee most difficult part of Nama and Damara law is the law of inheritance”. German and South African colonial officials stationed in other parts of the country concurred. For example addressing the 1958 Nama Tribal Leaders Conference in Berseba, the Chief Bantu Affairs Commissioner 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*. Officials stationed among the Herero also complained. For example, M. J. Vercueil, an ambitious newly-appointed Herero Affairs Commissioner complained that “especially long outstanding complex estates which no one apparently can resolve, have forced me to be so desk bound that I haven’t yet found time to reconnoiter my district to establish the potential thereof for resettlement purposes” (my translation). These examples can be multiplied many times.

Traditional Authorities and lawyers in Namibia and elsewhere will tell you that the most bitter and often most intractable disputes they

have to deal with concern inheritance. Yet, on the face of it, why indeed should people inherit? Why should anyone get something they didn't work for? It is after all not wealth or property that they have earned, nor in many cases deserve and typically need. Rarely do the fairy tale stories occur of starving or poor people inheriting wealth from rich relatives.

What is it about inheritance that fascinates and forces us to take it so seriously? This is no idle question but one of critical importance as the Government has been compelled as a consequence of the 2003 *Berendt* case to develop a non-discriminatory inheritance law. In addition, some much publicized cases of "widow dispossession", where recently-widowed women were stripped of their houses and more by irate relatives, have done much to focus concern on inheritance practices. This is perhaps then an appropriate occasion to discuss the nature and implications of inheritance. So complex is the nature of inheritance that this is a task fraught with difficulty.

This short collection of essays seeks to address some of the issues surrounding the question of inheritance in Namibia. It is an exercise in what might be termed "public interest" anthropology. Using data derived from a recent evaluation of the state of anthropology in Namibia (Gordon 2000) as well as personal networks, the Gender Research and Advocacy Project of the Legal Assistance Centre contacted a large number of colleagues who had recently done extended fieldwork in Namibia and invited them to contribute short papers on inheritance practices in their field site. The response was extremely heartening. Many made time to contribute to this project and also provided abbreviated articles suitable for placement in the local press, some of which provoked a welcome public response. Unfortunately, some colleagues, both foreign and national, who wanted to contribute were not able to meet the tight time constraints we placed upon them and thus regrettably papers dealing with the situation in the Caprivi, Hereroland, Kavango and Rehoboth areas were not available for our tight schedule. Nevertheless we are grateful to these scholars for their endorsement of this project. Overall then, these papers provide invaluable background to the larger recently-released Legal Assistance Centre report entitled *Customary Laws on Inheritance in Namibia*. The essays have been only lightly edited, so to illustrate the diversity of styles of writing which characterized this project. The different chapters attest to the danger of homogenizing and imposing a uniform set of practices on the Namibian people. They show how variable and locally-specific practice continually upset the conventional wisdom; how inheritance is often pre-mortal, and entails more than simply material goods.

Despite the fascination and importance of inheritance in Namibia – and as the report shows, 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 anyone examines what happens to all households in the end, at dissolution. The AIDS pandemic, however, is forcing a re-evaluation of social research priorities.

Laws, rules and strategies of inheritance are always contextually specific and changing. Perhaps no more powerful factor in this regard is the demographic crisis precipitated by the AIDS pandemic which has seen the average rates for life expectancy plummet by more than 13 years over the last decade. As the key actors become younger and younger, this changes the family dynamic and leads to new justifications and rationales. Thus this is probably a major factor in the widely reported phenomenon of “widow dispossession”, which the perpetrators justify ideologically on the grounds that since the widow is young, she can get remarried again.

Frequently it is easy to dismiss the problem in easy stereotypes. Thus a recent *New York Times* article (18 February 2005) entitled “AIDS and Custom Leave African Families Nothing” by Sharon LaFraniere which was widely reprinted in the global and especially activist media, points to some of the problems of massive over-simplification, bordering on racism. The author claims to deal with the problem of “widow and orphan dispossession” but believes that: “Actually, the answer is simple: custom. Throughout sub-Saharan Africa the death of a father automatically entitles his side of the family to claim most, if not all, of the property he leaves behind, even if it leaves his survivors destitute”. Such naiveté does not work in Namibia. In fact, it smacks of racism.

At a recent high-level conference attended by various international experts and several Namibian Ministers, Namibia’s First lady, Penelope Pohamba made a strong plea that

The practice of evicting widows and their children from the land and stripping them of their properties should not be allowed in an independent Namibia ... I appeal to our traditional leaders to assist people under their jurisdiction, [so] that this practice is done away with. They should deal firmly with people involved in property grabbing.

An FAO study based on a survey of 514 households in northern central Namibia provided some quantitative figures to back up this claim. They found that the deceased husband's family had taken away cattle from 44 percent of widows and orphans surveyed, while 28 percent had lost small livestock and 41 percent had been deprived of farming equipment (Windhoek, 11 July 2005, *Irinnews*).

At the same time the state has been forced to intervene with regard to the number of orphans. The number of orphans is problematic depending on the definition and source. According to Mr. Nhongo, the United Nations Resident Co-Coordinator, an estimated 57 000 children had been orphaned because of Aids (*New Era* 8 July 2005). Yet a month earlier the same newspaper cited a source claiming 156 165 orphans in Namibia (*New Era* 5 June 2005):

Some foster families use the allowance of N\$200 a month to buy new clothes for their own children and then pass on the old clothes to the orphans, while other foster parents are said to be using money for alcohol consumption at *cuca* shops in the villages. Jason Nujoma of the Ministry of Gender Affairs and Child Welfare at Oshakati said they receive many complaints from the community about foster families and parents misusing the Foster Parent Allowance and Maintenance Allowance for their own benefit.

The Foster Parent Allowance is awarded to orphans who lost both parents, while the Maintenance Allowance is given to those who only lost one parent.

Nujoma said grandparents taking care of orphans who lost one parent have complained of the remaining parent, who is sometimes residing in Windhoek, misusing the money intended for the orphan.

While the impact of AIDS on inheritance patterns is still a subject crying out for research, an important aspect of inheritance in an era of AIDS is the "inheritance" of children of the younger deceased. People who inherit children literally inherit a part of the deceased. LeBeau (*personal comment*) for example met an 80-year-old woman who had lost 5 of her adult children to AIDS, and claimed that what she had left to remember them by was the 6 grandchildren she had taken on.

Clearly new modes of inheritance had come into play as well. Another possible new development, although one does not know how much of this is urban legend (since similar tales are told in South Africa) and how much of it is empirically verifiable, concerns widows who have inherited relatively sizeable estates and are HIV positive. Young men try to form relationships with them to access the estate

and thus to have a good time before moving on to the next widow. The supposed rationale is that since they are HIV positive as well, they might as well enjoy life to the end. Such cases do not get reported because widows dispossessed in this manner will face public ridicule for being so gullible to be misled by these young Lotharios (Debie LeBeau, *personal comment*).

The wider implications of inheritance

Apart from the drama of inheritance disputes at the interpersonal level however, inheritance has a major impact on the structural societal level. Economists and historians, whether radical or conservative, agree that inheritance practices are a major factor in promoting inequality in society. This notion is closely tied into the idea shared by a variety of thinkers ranging from Marx to, most recently, the influential Peruvian economist Fernando de Soto that property, especially private property guaranteed by the State was the motor which propelled development.

Most historians agree that the household in a certain form played an important role in facilitating industrialization and capitalism and there is a long debate on the importance of property transmission and how this might have determined household composition, marriage decision-making and sex roles (well summarized by Hartman 2004). An influential contribution to this debate is that of Jack Goody who argues that the plow made land the chief form of wealth and that this led to distinctive inheritance practices, unlike those in societies which depended on the hoe to work the land and thus depended on maximizing female labor through bride-wealth exchanges. Where fixed property became the chief form of livelihood, monogamy rather than polygyny came to predominate due to the need to limit heirs and to discourage divorce. Women now began to receive their own share of their natal family's property through dowry or inheritance, although control of property remained in men's hands.

Goody shows how the evolution of domestic groups shaped the transmission of property and how this in turn fashioned the household. He argues further that the role of the Roman Catholic Church was crucial because the medieval Church by banning marriage within specified degrees of kinship and prohibiting adoption, polygyny, re-marriage, divorce and concubinage as well as giving single women the option to join the Church as nuns, all worked to make it harder for families to guard their property. This made it possible for property

to fall into women's hands and thus into those of priests. This has resulted in the Church becoming the largest multinational corporation in the world. This brief excursus into medieval history suggests that anyone considering changes in inheritance laws should be well aware of the possible spread effects of tinkering even haphazardly.

More recently Francis Fukuyama has added a variation to this theme in his influential 1995 book, *Trust: The Social Virtues and the Creation of Prosperity*. In it he argues that social trust – perhaps the most important form of social capital, that unwritten bond between people that facilitates transactions, empowers individual creativity and justifies collective action – is the fuel that facilitates economic expansion. The ability to compete economically depends on the level of trust and this is facilitated beyond kinship by a range of intermediate civil organizations located between the family and the State. Kinship and related inheritance practices are intimately connected to generating trust. In a particularly striking comparison, he contrasts China and Japan. In the former there is a heavy emphasis on extended families, all males inherit equally and the result is that the ubiquitous form of economic activity is the “family firm” which usually does not expand significantly and typically has a shelf life of about three generations. In Japan, in contrast, inheritance is by primogeniture. The eldest son inherits almost all the property (but has an obligation to help his siblings) and if there is no competent eldest son one will be adopted. In addition Japanese society offers a wide range of intermediate civil organizations, which promote trust beyond kinship. The same model applies to the United States, he claims.

One does not need to be a social scientist to realize that lack of trust is pervasive in Namibia. It starts at the apex with the obsessive concern for security by the founding President, is manifested in a variety of forms, including xenophobia, and permeates even the most intimate of dyads, that of domesticity in the form of ‘domestic’ or ‘intimate interpersonal violence’. Distrust is so common on the Namibian social landscape that it might be seen as a way of life. In Namibia the state is perceived as *ineffective*. In such a situation people are forced to fall back on institutions and people they can rely upon – relatives, even though they might not fully trust them. Indeed in Namibia there is strong evidence that the notion of the family as a harmonious unified whole is something of a romantic myth. Oral evidence and court records suggest that the “family” is fraught with internal tensions and abuses. Nevertheless, the extended family or even the lineage or clan in some cases is held responsible for collective liability, especially

among Herero and Owambo speakers. Be that as it may, in the final analysis, kinship ties however attenuated provide the basis for a degree of trust and obligation not present in the case of complete strangers and the ideology of who shall inherit what gives material manifestation to this.

Of course the protection of private property is also one of the leading justifications for colonial expansion, as we know only too well in Namibia. However in industrialization such development, rather than leading to shared wealth, more frequently fed greedy accumulation. This is why one of the first laws Lenin promulgated when the Soviet Union was created, was the abolition of inheritance. It is not only radical utopians however who feel inheritance is unjust; conservative philosophers like Haslett have also argued that inheritance stifles the entrepreneurial capacity of capitalism. This was brought home to me when growing up in southern Namibia: some friends wanted to know, since I was the eldest son and my father was allegedly rich, why I was working since I was going to inherit all his wealth. It is for this reason that in social democracies like Sweden and even in the Labour-governed United Kingdom, there were heavy “estate taxes” which one had to pay on the deceased’s estate. The justification was that such taxes redistributed this wealth to a common pool which would then be used for the benefit of all. In South Africa there is a death tax of 20% on all estates over a million rand. Recently in the United States the estate taxes applicable to the wealthiest 2% of the population was abolished, largely because almost 40% of the population believed that they were in the top 1% wealth bracket! Namibia has no death tax and to even suggest the imposition of such a tax raises the ire not only of conservative Whites but also of people who regard themselves as committed socialists. Why does inheritance generate such interest and ire? An analysis of what inheritance is, might shed light on this characteristic and at the same time suggest issues which policymakers might and should consider as they formulate new laws dealing with inheritance.

Defining inheritance

The Concise Oxford Dictionary defines inherit as “receive (property, rank, title) by legal descent or succession; derive (quality, character) from one’s progenitors; (abs) succeed as heir”. The term is derived from the Latin *heres*, which is also the root for the term heir, defined as “person receiving or entitled to receive property or rank as legal

representative of former owner; one to whom something (joy, punishment, etc.) is morally due”.

In short, inheritance concerns the transfer of rights to use property, typically in the first instance, between people who are related in a certain way to each other, ie through certain kinship ties. Two things thus need to be discussed: what precisely is inherited and who exactly is the beneficiary?

One needs to get away from the narrow Western view of (private) property that has been aggressively and globally disseminated and ends up treating property as if it were a material object. As Hoebel (1966:424) pointed out: “Property is not a thing, but a network of social relations that governs the conduct of people with respect to the use and disposition of things.” Property relations can only exist between people. One cannot sue or punish a thing, only people. Inheritance then is more than simply the gifting of material wealth. It entails the legal transfer not of property (itself a complex issue), but of rights between people concerning things, roles and ideas. It also includes such things as “names” and position, as Thomas Widlok demonstrates. This is why some Africa scholars have argued that in inheritance one should focus on access rather than property per se, seeing property in terms of the distribution of social entitlements. Such a broader framework allows one to consider both legal and extra-legal mechanisms and structures and the use of resources like knowledge, social networks, coercion, trickery and social identity and thus provides a fuller picture of how and what is at stake.

The importance of such a stance was made clear recently when some traditional leaders were interviewed about inheritance. Houses in urban areas, they said, were inherited by individuals, and could be disposed of as the heir saw fit since the house would be registered in the heir’s name. The pinch-hitting interpreter, a young man from Windhoek respectfully disagreed with the Headman and Councilors. He had recently inherited his mother’s house and had to allow all his siblings and other close relatives access and use of the house, and if he got married he would have to move out. Securing such rights was not a ‘single event’, but entailed a long period of negotiation.

A key characteristic in African inheritance systems is the negotiability of rules and relationships, and these rules and relationships concern rights over persons. Kopytoff & Miers (1977:11 & 9) note that “Africa stands out ... in the legal precision, the multiplicity of detail and variation, and the degree of cultural explicitness in the holding of such rights”. This precision, they suggest, is because “these rights

can be manipulated to increase the number of people in one's kin group, to gather dependents and supporters, and to build wealth and power". Indeed it does not take too much imagination to suggest that Paramount Chief Riruako's recent financial travails might be related precisely to this need to dispense generosity to dependents and supporters in a 'traditional idiom' (*New Era*, 8 March 2005).

These rights and restrictions creep in everywhere. Even that dearly-held belief that anyone can graze their livestock anywhere on communal land, or what is known as a common property regime and seen as the antithesis to Western possessive individualism, is a bit of a myth. Closer examination reveals that even here there are limitations. There is differential access. One must first secure the right to do so from the Traditional Authorities, thus they are more accurately termed **limited** property regimes or perhaps, even better, as communal corporations. This general right of access is a form of communal inheritance that one inherits from one or both parents.

People acquire and entrench rights through a variety of ways, including enlisting the backing of the state and donors, both individual and NGOs, alliance formation and confrontation and they are constantly securing, asserting and vindicating claims to property rights even before the estate is executed (Juul & Lund 2002:2). Especially pertinent in this regard is Lebert's discussion of how complex and flexible inheritance and property concepts are. As she shows, even in matrilineal systems there are strong elements of patrilineality.

Rights to use or possess objects have of course got to be guaranteed, or at least the continued use of these rights must be predictable, and this is where law and the state comes in. By tolerating pluralism, the State is often unable to ensure constancy in rules and hierarchies and if the state's hegemony is challenged, insecurity increases. "Seemingly trivial actions by individuals can undermine state **policy** and the legitimacy of state institutions by simply not respecting the policy and taking their justice-business elsewhere" (Juul & Lund 2002: 14). This leads to the institutional basis for sanctioning and securing property rights becoming uncertain, unstable and fragmented. But just because property is insecure in the absence of law does not mean that it is a mere legal contrivance. On the contrary, there are numerous cases in Namibia where community norms have respected rights to access and property by various insiders. Contrary to notions of "weak" or "failed" states in Africa, the Namibian example shows how the state manages to continually reconstitute its authority through networks that have emerged in the interstices of the state system. In Namibia the

state is not “weak” it is simply ineffective. This is not the place to analyse the causes of ineffectiveness, but Tjombe has recently discussed some of the factors leading to legal inefficiency (Tjombe 2005).

In determining who inherits it is obvious that kinship is important. At root kinship is a way of tracking relatives and determining behaviour towards them. Mechanisms which permit discrimination of relatives from non-relatives are widespread among nonhuman animals. Indeed Ehrlich (2000) suggests its ubiquity is such that there is probably a genetic predisposition for it. He cites the philosopher Mary Midgley’s conclusion: “Some degree of partiality is...built into our social nature. It shows itself not just in favouring kin, but more widely in the way we form attachments or fail to form them, with all the people who are important to us” (2000: 313). The enduring universal persistence of kinship is suggested by the persistence of nepotism and the development of pseudo-kinship systems. It is based on the acknowledgement of genealogical connection derived from bearing and engendering children (Holy 1996). Indeed this is epitomized by the term “testament”, the document that directs how the estate should be dealt with. Its Latin root is the word *testes* which means testicle – the source, if you will, of one’s progeny, at least in one epistemological system. How people are related to the progenitor, usually deceased, enables them and the wider community to identify their interest in the estate, stake a legitimate claim to portions of it and have their rights to such claims recognized.

Kinship as an organizing principle in Namibia has infinitely stronger power than class yet it is indeed surprising that it has been largely ignored in contemporary Namibia. The recent revelations in the *Avid* scandal, where massive amounts of money were siphoned off from the Social Security Commission, have again vividly illustrated the importance of kinship in helping people obtain legal and illegal shares of the pot. 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.

Descent, the way one is considered to be related to a common ancestor, can be reckoned cognatically – that is a relative of both the mother or father’s lines are considered. Sometimes this is referred to as bilateral kinship. The other great class of descent is unilineal, that is, through either the father 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 and other rights (pre-eminently economic) matrilineally.

Namibia is striking for the variety and complexity of its descent systems. People of European origin and many of the San have cognatic systems, while patrilineal descent is found among the Khoekhoegowab and Tswana speakers. Matrilineal descent systems are found in the north among oshiWambo and in the Kavango. Even within these systems, however, there is much variation and complexity. Matrilineal kinship does not mean that there is a matriarchy. On the contrary it simply means that people, generally males, inherit through their mothers.

Descent shapes rules of residence, in Namibia invariably virilocal (home of the husband), or increasingly neo-local, but generally near the husband's natal home. It also moulds inheritance practices and through that, the basis of parental authority.

Anthropologists have, of course, historically been fascinated by kinship systems because despite the thousands of languages and cultures in the world, there are only eight different systems of naming relatives. Understanding this logic, they believed, might unlock our understanding of how the human mind works. A kinship system consists of the total number of terms people use to name people who are believed to be related. The most complex system only has twenty different terms. Most have far fewer. Terms like "father" or "sister" are used for more than one's own immediate biological father or sibling and carry with them expectations of how one should behave towards those so labeled. These terms are also implicitly political. To label someone *Tate* is not just to address them with respect, but to expect a certain type of behavior in return. To call a distant relative "brother" also implies a certain form of behavior and certainly if one is female, suggests that sex and marriage would be taboo. In many places in Namibia the term for cross-cousin, that is one's mother's brother's child or father's sister's child, is the same term as spouse. This is indeed a preferential marriage, and where matrilineal societies are concerned is openly touted as a way to ensure that property remains within the family.

In many societies, including several in Namibia and in Europe, the favored relative as far as inheritance is concerned is often the nephew, especially the mother's brother's son. The term nephew is derived from the Latin *nepos*, which is the same root for the word nepotism. Indeed most nepotism and corruption in Africa and Namibia

is justified and rationalized in terms of kinship obligations. Nepotism, says David Bellow, is motivated not only by a concern for genetic self-perpetuation – it certainly is, at a crude level – but more importantly is “part of a collective strategy focused on the maintenance of social continuity through marriage, reproduction and inheritance” (Bellow 2004:78).

Favorable or preferential treatment of nephews suggests that inheritance does not have to wait until the decease of the putative benefactor. In Herero, for example, the uncle apparently refers to his nephew as *omurie uandje* (he who eats me), ie my heir. It is not only politicians and civil servants who “eat” (that is, enrich themselves because of their position) but relatives as well. Indeed in many African languages, the term for inherit means the same as “eat” (Gluckman 1969:49). This is by no means exceptional. In English law, according to Stroud’s Judicial Dictionary (5th Edition, 1986:1298) “‘To inherit’ (is) held to mean ‘to take’” and inheritor “may be used in the sense merely of ‘taker’”. Similarly, the dominant Biblical sense of inheritance is the enjoyment by a rightful title of that which is not the fruit of personal exertion.

Clearly, when someone dies there are many “takers” who assert claims to access of some part of the deceased’s livelihood based on a range of justifications, from kinship to simple opportunism. It appears that the possessions of the deceased between the period of death and formal reallocation, when it has been “bitten” (as Herero would say), are especially vulnerable to informal redistribution and plain opportunistic theft. On the other hand, during the colonial era the South Africans would try to sell the unclaimed possessions of deceased contract workers and found that there were no buyers, even at give-away prices. Clearly, this was property of a special status. This is not a problem unique to certain parts of Namibia. Who can forget that scene in the movie *Zorba, the Greek* when the villagers move in to possess the property of the foreign lady even while she is dying?

Property is not only bought or worked for. There are many other ways of obtaining it, including conquest, seizure and tribute, although in many cases the border between theft and sanctioned acquisition is hazy. Namibia, of course has a long tradition of such forms of property acquisition. Understanding how possessions undergo this liminal stage (betwixt and between owners) should help us understand the nature of possession. Timing of inheritance is important, as Bollig and especially Klocke-Daffa and Widlok show, with important reminders that pre-mortal inheritance can also occur.

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

How these dilemmas are tackled is the subject of many of these contributions, highlighting the diversity of inheritance systems in Namibia, the plight of widows and orphans, the clash and collaboration between the formal and vernacular legal systems, the possibilities of using vernacular law to improve the position of women and how other countries are trying to deal with these problems.

Variations

Perhaps one of the most important findings to have come out of this collection is the large degree of flexibility people have displayed in dealing with inheritance issues. This is brought out most strongly in Becker's insistence on examining processes rather than static rules, and by comparing LeBeau's findings in Katutura with those of researchers in other parts of the country. For example, LeBeau notes that Namas talk about eldest son inheritance (and many historical accounts agree), yet other researchers like Klocke-Daffa and Gordon and Ovis, working with slightly different groups, found a movement away from primogeniture to ultimogeniture. (See also Lebeau *et al* 2004:124.) Similarly, LeBeau found that urban Owambo practice widow inheritance, but this might be restricted to specific groups within the wider Owambo grouping. Bollig and others have also noted major regional variations even within groups renowned for their ethnic homogeneity, like Herero-speakers.

Many of these changes and variations are undoubtedly connected to the varied impact of globalization in complex ways. LeBeau examines the urban-rural contrast, so common in legal discourse where it is often glossed as "Western" v "Traditional". This dichotomy, she suggests, is invalid and the situation is rather seen as a continuum. Indeed recent work has shown how, contrary to the popular stereotype of the urban sector subsidizing the rural sector, it can in many cases be the exact reverse, with the rural sector subsidizing urban inhabitants with food-stuffs, etc (Frayne 2001). This has important implications in that these rural relatives can put in a strong claim in matters of inheritance and

thus muddy up the tidy “Western/Traditional – urban/rural” dichotomy so dearly beloved by Western-trained lawyers and jurists.

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 behavior which is labeled customary law has been analyzed and critiqued in a variety of places (see eg, Costa 1998 and Gordon 1991 specifically for Namibia). 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. The chapters by Hinz and Becker speak directly to this issue.

Perhaps an apposite illustration of this can be taken from the Old Testament. Israelite law historically recognized only family relationships of blood kinship and this was agnatic. Only relatives on the father’s side were considered family and hence entitled to inherit. As shown in Numbers (27:2) if a man had no sons his property was transferred to his daughter, but there was a supplementary rule which required that the daughter who inherited had to marry into a family of her father’s brothers (Numbers 36:6,11) in order for the property to remain within the clan. This was the situation during the monarchical period (1025-586 BC; 1 Kings 21:3). Biblical legislation also established the right of the firstborn to inherit a double portion of his father’s possessions (as opposed to the single portions each son would obtain; Deuteronomy 21:17). It furthermore prohibited the father from conferring the right of the firstborn upon a younger son (Deuteronomy 21:16), which had been the prevalent practice in the patriarchal period (ca. 2000-1700 BC; Genesis 21:10, 27:37; 1 Chronicles 5:1; 1 Kings 1:11; cf Genesis 48:18-20). The status of the mother had a variable effect. There is evidence that the sons of a concubine did not inherit (Genesis 21:10; 25:5-6; cf Judges 11:1-2), yet at times such sons were considered equal to those born of a wedded wife (Genesis 35:23-26). The right of daughters to inherit along with brothers is mentioned only in the book of Job (42:15). Apart from these dynamic variations, Jewish kinship and inheritance practices have also changed over the long duration, moving from patrilineal to matrilineal and then gradually back to patrilineal but with variation. For example, Jewish religion is still inherited through the mother while material property goes through the father. Such changes can be related to wider factors including landlessness, colonialism and the like.

The New Testament is slightly different. Jesus told parables involving bequests (Matthew 21:38; Luke 15:12 [the Prodigal Son]), but refused to judge the rectitude of an unequal inheritance (Luke 12:13). Perhaps He knew that inheritance problems are largely intractable?

Notions of what exactly is property are also shown to be complex and variable, ranging from individualistic possessive private property so characteristic of capitalism (and accepted by the Western legal profession almost as axiomatic) to corporate or even group based notions of rights to use certain objects and resources both in the past and in the future. Perhaps one of the major parameters of conflict in inheritance concerns this distinction between private individual use rights, as opposed to larger lineage or corporate notions of use rights.

The studies also show that property is not simply material objects but also matters such as obligations (raised by Klocke-Daffa, Widlok and Bollig) and importantly too, as Widlok so eloquently points out, “names”.

Of course one could argue that these variations are simply a product of ethnographic incompetence and one needs to be sensitive to this issue. Ethnographers are especially vulnerable to the charge that they lack linguistic competence and this is emphasized by Kavari’s short essay examining the linguistic terms used in inheritance. In short, how valid are our observations? This is a trite question which needs to be briefly addressed because while we were treated with the utmost respect and assistance by people in the field, some of our colleagues have suggested, only half in jest, that as outsiders one can never understand the intricacies of customary law. We are well aware of the difficulties of translation and 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 and by analogy one has to be German in order to understand the Holocaust, or an Afrikaner in order to understand Apartheid. Afrikaners have given some of the most ignorant and simplistic explanations for Apartheid. The eminent historian Eric Hobsbawm wrote somewhere once 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 logic can be expanded to this situation as well. Indeed I would submit the value of an anthropological perspective resides precisely in its ability to have a broader comparative perspective, to examine the view from the top of the mountain rather than the exquisite beauty of the flowers in minute detail. Yes, one can squabble about precise meanings of words and other minutiae, but structurally the basic principles seem to be linked by a logic that makes them credible.

But even scholars are prone to biases, and in Namibia, as Manfred Hinz points out, there has long been a patrilineal bias in studies and applications of “customary law” derived from the South African experience.

A curmudgeonly conclusion

By way of conclusion I wish, in a curmudgeonly way, to raise some issues for further debate and research.

First, this project and the issue on which it focuses, did not drop ready-packaged from heaven, but is rather the product of a particular moment in the ongoing broader framework of globalization, including especially several universalizing discourses on “human rights” and “gender equity”, as well as the funding priorities of organizations beyond the borders of Namibia which have shaped and been interpreted by local level people, often with contradictory consequences at variance with the original message (see eg Merry & Stern 2005). Lebert’s research (not reported upon here) and my own experience suggests that many males in Hereroland and in Owambo now feel rather threatened by what they perceive to be the domination of law by “women’s rights”, and the consequences of this growing insecurity of men will probably work itself out in unexpected ways.

These comments are germane when one considers the issue of “widow dispossession”, which judging from some news and activist accounts seems to be achieving epidemic proportions. Some observations are necessary here. First, it seems to be located mostly in the so-called “matrilineal belt” in southern central Africa. Second, it is not a recent phenomenon. There is solid historical evidence for it, although to be sure the AIDS pandemic has exacerbated it. Third, there is much hearsay evidence of “widow dispossession”, and this is part of an international discourse which provides not only a vocabulary which is gaining acceptance but is easy to surf on to attract funds. But the evidence is empirically rather weak, as Lebert’s extended fieldwork suggests.

In Namibia the key document cited is the FAO report that is based on research done in 1999. This document provides impressive percentages but again because it is disaggregated and lacks adequate contextualization one cannot say how reliable the data is. As the authors point out, their study was based on the review of literature and field data from two communal area farming regions. Data was

collected through unstructured informal interviews with representatives of Farmer Extension Development (FED) groups and members of households, which were identified to have been affected by HIV-related sickness or death. The limited budget of the study did not allow extensive fieldwork. Altogether, 24 FED groups participated in the study and a total of 22 affected households were interviewed. Although the findings are based on a small number of observations, they confirm previous findings⁴ and can assist in increasing the understanding of the multidimensional impact of the HIV/AIDS pandemic (Engh et al 2000).

It is worth quoting extensively from a recent study based on three in-depth case-studies of the impact of HIV/AIDS on land rights in Kenya:

Although the present study does confirm that HIV/AIDS can aggravate the vulnerability of certain groups to tenure loss, in particular widows, the finding is that the link between HIV/AIDS to land tenure is neither omnipresent nor the norm. The question then must be asked why this study appears to contradict the perception at large, in part based on the findings of other studies, to the effect that tenure loss due to HIV/AIDS is rampant. The main reason is that, by virtue of also studying non-affected households and by probing the circumstances in which tenure changes have occurred, the present study offers a more balanced view than studies that seek out only AIDS-affected households and or assume a necessarily causal link between AIDS and tenure changes ...

Generally speaking, it is difficult to demonstrate that the evidence of absence is not rather an absence of evidence. On the premise, however, that our findings are robust, it suggests that, on the one hand, there is indeed reason to be concerned about the impact of HIV/AIDS on land rights and land access to vulnerable groups ... On the other hand, the other implication is that one should be wary of 'over-privileging' AIDS-affected households to special protective measures, especially given that tenure insecurity is experienced by many households irrespective of their particular exposure to AIDS (Aliber et al 2004:x).

Substituting "widow dispossession" for HIV/AIDS provides an accurate reflection of the situation in Namibia. In my experience, the same few cases of "widow dispossession", atrocious as they are, are recycled time and again. Many long term researchers in the North for example, do not find it so prevalent in their field areas. This is not to deny or even negate 'widow dispossession', but simply to state that it does not occur to the degree which hearsay evidence suggests. Factors which in

all likelihood contributed to its being pushed to the forefront include the current concern about land rights, the push for gender rights, etc.

The important question then is why do these stories enjoy such a high circulation? Widow dispossession stories can be analyzed as moral panics. In essence they are morality tales that stress the importance of proper kinship behavior, especially of the potential widow. One must be “nice” to the potential deceased or suffer the consequences in the court of local public opinion, an especially difficult task for wives since they have generally moved to their husband’s area away from their own natural kinship support network. They are a mode of narrative social control dedicated to keeping unruly females in line in a patriarchal social order that is starting to buckle under the onslaught of a variety of factors, including gender-sensitive legislation.

In commenting on a draft of this conclusion, a fieldworker with extensive long-term Namibian experience noted:

I think that widow dispossession still happens, but not to the extent and severity that it did in the past. The current situation is that most widows now have educated family members who will negotiate on their behalf so that they do not ‘lose everything’, as my interviews show, the widow most often loses the cattle (or some part thereof) because they are seen as belonging to the male extended family to begin with. She also loses some possessions, grain baskets, etc. But it is the type of property that is important in determining if the in-laws take it. What is seen as traditional property is taken and what is seen as ‘modern property’ is more likely to be negotiated. Land, while possibly in the traditional area of the man’s family, is not ‘owned’ by the family (it is communal) and therefore, widows are now being left on the land. The extent of this is also dependent on matrilineal versus patrilineal versus neolocal settlement patterns. Owambo are neolocal, thus the widow is less likely to settle in the in-laws’ area. As for widow dispossession (tales) being a means of female social control, yes, of course, but so much of culture is and it always has been. Thus it would only serve as a social control mechanism if it is really happening, it does not take long for women to learn their rights and thus demand them – in-laws be damned (LeBeau, *personal comment*).

Another issue that must be raised is that there might be some positive benefits in having inheritance disputes: that such disputes are not necessarily bad. When a person dies, they might have died physically but not socially. Typically in most of Namibia, the deceased is promoted to a higher status within his or her clan. As an *aathithi* (Oshindonga),

one is dependent upon being remembered and respected by living relatives and friends. Respect is shown in a variety of ways, including talk, offerings and other actions. If respected, the deceased, it is believed by many Namibians, could help and protect living relatives. This is why funerals are such important social events and why impoverished people will engage in massive expenditure on gravestones and conspicuous funerals.

The social value of property one accumulates during one's life can effect one's posthumous reputation. Kari Miettinen quotes an Uukwanyama teacher from the thirties who could be speaking for most Namibians:

When a person is in this world, he is seeking property. He is seeking it because of his honour, so that people will not laugh at him when he is dead for not having anything to be inherited. If a person does not leave any property to be inherited, he is laughed at and he is said to have been measly and good-for-nothing (Miettinen 2005:41).

Honour is not a personal quality but is rather a collective obligation that belongs to the individual.

An important implication of such a stance is that given the focus on how one is perceived when one dies, a practice still strong as epitomized by the hugely successful funeral insurance policy business and the desire for large tombstones, is that one sure reminder to society and friends concerning one's success in accumulating property is precisely to promote conflict as this constantly reminds the living of the deceased's success in accumulating wealth. In this case, as Lebeau and Klocke-Daffa point out, however, there are important regional variations.

While lawyers might wish away "customary" or 'vernacular' law, the brute fact of the matter is that it will survive. To ignore it is to act rather like Idi Amin who famously solved the unemployment problems in Uganda by simply making unemployment illegal! For all its faults, "customary law" is reasonably effective. Its problem lies more in the issue of location. Most women when they marry move to their husband's areas and thus are placed under the jurisdiction of their husband's customary authorities and as *outsiders* in such circumstances are at a decided disadvantage. Magistrates and other officials in the judicial services are already overburdened and do not have the requisite sensitivity to deal fairly with many inheritance problems. Thus recently for example, the Judge President criticized magistrates for

frequently appointing executors simply “because the family want it” without examining the issues too closely. The Judge President also found that the Native Administration Proclamation did not empower magistrates to appoint estate executors (*Die Republikein*, 19 July 2005).

To sum up: This debate and attempts at inheritance reform must be seen within the longer trajectory of history. This is not the first time a state has attempted to change inheritance practices. Indeed history is littered with past failures, such as the dramatic failures during the French Revolution when the Jacobins tried to abolish primogeniture, allowed illegitimate children to inherit and tried to restrict the power of fathers. Generally they have failed miserably. Likewise Namibian history shows many attempts that have failed. These attempts can be seen as part of the classic struggle of the state versus kinship. It forms part of the ongoing efforts by the (Western) state, which is gradually taking over the functions of the family or kin groups until the family is reduced to simply being a voluntary association. Some foresee a dark scenario where the state becomes the only security for the individual. This does of course promote capitalism as well. As Robin Fox notes: “The state, despite its persecution of the individual from time to time, is much happier dealing with individuals as units rather than with kinship groups for the simple reason that they are easier to control” Thus it comes easily to the nation-state to promote the values of individualism while remaining totally suspicious of the claims of kinship (as cited in Bellow 2004:545). However, as Namibians realize only too well: If a slave can be defined as a person without kin, then a person without kin is nothing but a potential or an actual slave (Bellow 2004: 477). Despite all efforts to abolish the family, its resilience is there for all to see. When the chips are down it is the family or relatives one seeks out.

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2: Take it or leave it: The post- and pre-marital inheritance of San people in the Oshikoto Region

Thomas Widlok

People known in Namibia as San are, generally speaking, not people with a lot of property. In fact it has been argued that their poverty is the most characteristic feature that identifies them (Suzman 2001). Whether this impression is at least partly an effect of dominant stereotypes and a particular approach or not (see Widlok 2004), it is certainly the case that much of their history is a history of disappropriation of their land and resources (see Gordon and Douglas 2000; Widlok 1999). But it is a misconceived idea that people who do not own much would naturally not worry about inheritance. In fact, the opposite may occur: If you own very little, the distribution of the little there is may become even more important than if you own much. Similarly, one may wonder – as many do – why rich people worry so much about inheritance since they live in relative plenty and there should be enough for everyone. There are no “natural rules” governing inheritance. Inheritance is a matter of differing cultural conventions. There is no way of knowing beforehand how a group of people should organize inheritance. You have to go and find out from people how they solve these matters and what they consider to be the relevant issues. An inquiry into inheritance may also be a way to learn about whether the people in question consider themselves to be poor, or impoverished in comparison to others, and what the characteristic flow of goods, gifts and valuables are. This contribution deals with the group of ≠Akhoe Hai//om-speaking people in the north of the Oshikoto region. Given the diversity of groups covered under the term “San”, other inheritance rules and practices are likely to apply in other San settlements around the country. At the same time, some elements of what is described here will sound familiar to members of other ethnic groups in Namibia, in particular to Khoekhoe-speaking people.

To begin with, in some places the question of inheritance itself may be subject to frequent discussion, gossip and debate or it may only be a matter that is brought up when an outsider asks these questions. When someone dies, researchers from outside routinely ask who inherits the items that were owned by the deceased. For instance, when old !Ubeb died, I asked his widow and his children about the inheritance. His eldest son started by saying that he did not want to have his father's bow as he had once killed a man with a bow and went to jail for it for many years and therefore would not want to have the bow. Then !Ubeb's widow talked. She would not even use his personal name but talked about "the man who died" (*nde go //o gaikhoeba*) when she began to explain what should happen and who should get what. In the end it did not happen quite as she said it would: flexibility seemed to be the rule not the exception. Thus, it is not always easy to find out about "inheritance rules", but it is easy to see that there is much more to inheritance than "rules". A child being born, a marriage partner entering the family, and a person passing away are very personal affairs with many social implications to which we rightly attach great importance. It is therefore not surprising that inheritance which is connected to these elementary processes of life touches on key questions of how we see ourselves and others. Inheritance is indeed a matter of life and death. This is particularly true where many people die prematurely. The fact that people grow age and eventually die, continually challenges the established order of things, the social order and the moral order of who owns what. Inheritance is a key field of cultural practices where humans struggle with the dynamic process of life that disrupts any static order.

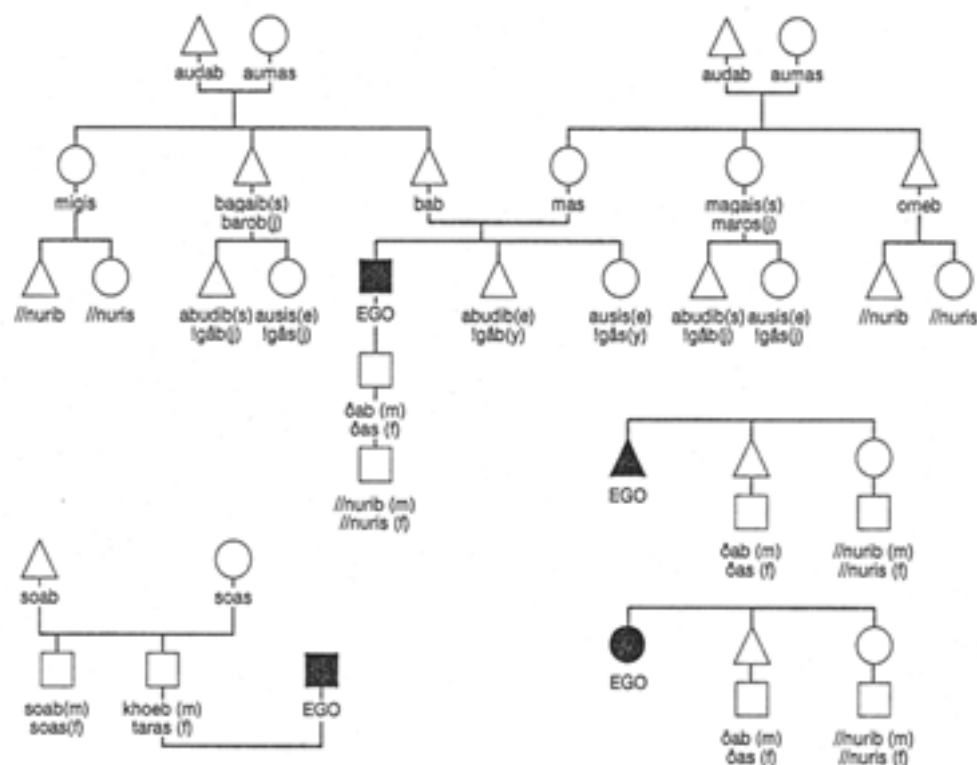
There is much more to inheritance than the legal rules about who gets what after someone has died. Firstly, inheritance rules are part of a complex system of social relations. Secondly, in most cases there is more than a single system at work. And thirdly, much can be learned about the general potential and limitations of inheriting from the various ways in which people deal with inheritance. Learning about individual case studies can become particularly instructive also for people who follow different inheritance rules. This article, therefore, outlines some facts about inheritance that have emerged in the small community of ≠Akhoe Hai//om speaking people in northern Namibia to which !Ubeb and his family belong. Its primary purpose is to widen the comparative scope and perspective on the issue of inheritance.

The first point concerning the ≠Akhoe Hai//om is that inheritance is not limited to what happens after a person dies. This is, of course, a

much more general phenomenon. In Europe, hefty inheritance taxes force many people to practise pre-mortal inheritance in which the inheritance is gifted while the person is still alive. A good part of the exchange relations in many societies can be understood as a form of inheritance. As for the ≠Akhoe Hai//om, inheritance is hardly visible when someone dies because of a strong inclination to avoid anything, including any property items, associated with a dead person. By contrast, the exchanges that go on between living people in their everyday life are of great concern. People share food and other items daily but they also sometimes transfer items of considerable monetary value, eg clothing, tools, or radios and tape recorders. But despite personal sympathies and preferences, people are integrated into a social system of relations that provides them with orientation and to some extent channels their preferences and their decisions. In most societies the kinship system fulfils this role, and this is also true for the ≠Akhoe Hai//om.

The simplest way to begin to understand kinship is by looking at kin terms, although we need to keep in mind from the start that the kinship terminology does not completely determine what people do, it simply makes some strategies appear more natural to people than possible alternatives. Consider Figure 1, which provides a summary of Hai//om kin terms that have strong resemblances to the kinship terms used by Damara (Fuller 1993) and Nama (Hoernlé 1985). As I have shown elsewhere (Widlok 1999:181), there is in fact another set of kinship terms used by the =Akhoe Hai//om which is probably much older and “more traditional” because it shows no interference of Afrikaans, but what is interesting in this context is not so much the individual kin term itself but the system as a whole. And the system as a whole is not only shared by many Khoekhoegowab-speakers, but similarities are to be found also in 19th century Dutch terminology. Alan Barnard (1980:32) has pointed out that the introduction of Afrikaans terms has in fact not greatly changed the structure of the system. Instead, a merging between the old Dutch-Afrikaans system and parts of the Khoekhoe terminology was facilitated by the fact that both kin systems share a rare feature: they use the same term to designate people in one’s own generation as well as in the first (and second) generation down. In Khoekhoe it is the term //nurib or //nuris and in old Dutch-Afrikaans it is the term *neef* or *nicht*, whereas English, German and many other languages distinguish between *nephew* or *niece* on the one hand and *cousins* on the other hand (Barnard 1980: 30).

Figure 1



Other structural features of the ≠Akhoe Hai//om kinship terminology (and that of Nama and Damara) are completely different to Dutch, Afrikaans, English or German but still widely spread across the globe. A major feature to note in this system is that parallel cousins (children of someone's mother's sister and of someone's father's brother) are classified as siblings while cross-cousins are classified differently (though irrespective of whether they are mother's brother's children or father's sister's children). This pattern is matched by the way in which the siblings of one's parents are named. Father's brother is literally called "small father" or "big father", depending on whether they are junior or senior to the father. Correspondingly, mother's sister is literally called "small mother" or "big mother" depending on their seniority. Terminologically, mother's brother and father's sister are particularly marked in this system. They are special. In the old ≠Akhoe Hai//om system the mother's brother has the same kin term (*//naob*) as the grandfather, but father's sister receives a different term. In sum, the relations one has to "uncles/aunts" and "nephews/nieces" are more differentiated than, say, in English and some, but not all, of these

relations seem to be at least as important as relations between parents and children. Moreover, the terminology suggests that relations between grandchildren and grandparents may be as close as some relations in the same generation or the first generation down. It is easy to see how the succession of potential inheritors may be influenced by how relatives are grouped terminologically.

We are now in a better position to understand the inheritance rules that were recorded from !Ubeb's widow. She said that while the hut would be left to rot, household utensils would later be taken by the deceased's family. "Later" is a flexible term because the avoidance is partly conditioned by how closely the items were associated with the dead person, how urgently they are needed by others and how fearful the survivors are of the dead. !Ubeb's widow, for instance, took one mortar with her because she needed it and considered it their joint property but she left another one in the old hut of her deceased husband. The remaining property items are said to be then distributed amongst the children and the "*//nurin*", which refers to a large group of relatives, namely grandchildren but also children and grandchildren of (classificatory) brothers and sisters. There is, therefore, also a limit to what kin terms tell us about what happens in practice. In this particular case some items of everyday use were said to go to !Ubeb's children, for instance the axe, clothes, kitchen utensils and the bow already mentioned. The deceased was also a */gaiaob*, a trance dancer, and his gear (the ornamented skin and little bags he wore during dances) was said to go to his *//nurin*, but only to the adult men among them who were also trance dancers. If there had been any goats to inherit (unfortunately there were none) they should go to his *annosôab* (an old term for the *//nurib* to whom he was mother's brother). A woman, by contrast, would leave her belongings (eg her digging stick or her mortar) to her children's children (*//nurin* or */gôaôan*) and a few things to her daughter (especially beads and necklaces). In other words, some items are marked out for more specific inheritance rules, in this particular instance reflecting the wide-spread rules concerning the mother's brother. But as Radcliffe-Brown (1952) has underlined, we need to look how these specific rules are integrated into the system as a whole. For the ≠Akhoe Hai//om case, I have described the full system in detail elsewhere (Widlok 1999). For instance, parallel cousins are not considered to be marriageable but cross cousins are, which adds another dimension to the system, namely that of affinal relatives. Here, even people speaking very closely related languages differ in their relationships (see Widlok 1999:185). It should suffice to say that

one kinship chart for all is in fact not sufficient. As the two small insets in Figure 1 show, it does matter whether the perspective is that of a male or a female ego. Even after repeated cross-checking, many women insisted that they would call none of their brothers' or sisters' children //nurin, while the male perspective is different.

Another feature that deserves mentioning is the fact that apart from these genealogy-based kin terms that are used to refer to another person, there are other terms of relatedness, and there are several ways to extend the core set of kin terms to make the system classificatory, that is to make it basically all-inclusive. Terms such as /ho (to be in a friendly or joking relationship with someone) or tao (to be in a relationship of restraint or avoidance) are used to classify and extend relations, not only those based on close genealogical links. Joking relations are typically held with cross-cousins (potential marriage partners), and with grandparents and namesakes. Avoidance or respect relations are primarily those of adjacent generations but also in-laws, especially those of the opposite sex. Moreover, all these relationships can be extended beyond two persons using the standard Khoekhoe reciprocal morpheme -gu. The reciprocal is generally used with verbs to express, for instance, the mutual giving of things (*magu*) or mutual assistance and help (*huigu*), but it can also be used with kin terms. ≠Akhoe Hai//om speak of /aigu (being cross-cousins to one another) or khoe!gâgu (being parallel cousins to one another), and they commonly use it to refer to more than two persons who are connected as friends (/hogu) or through the same surname (!naregu, see below), or nowadays to be related as a family (*familigu*). This is more than a manner of speaking because it is a means of drawing closely together people whose relationship may be calculated in a number of different ways. People who have “created” close kin ties in this way throughout their life are also particularly affected when a person with whom one had such a relationship dies. However, above all, these active uses of the kinship system are important for transfers among living people, including what is known as pre-mortal inheritance.

For instance, in this system, the traditionally important asset of inheritance – the arrows used for hunting – is widely distributed among all men. The arrows are also a good example to point out the relevance of pre-mortal inheritance. Since old men are usually not so successful as hunters as more junior men, but often good (or even better) craftsmen in making arrows, it is a common practice for men to exchange arrows. A hunter would therefore carry arrows in his quiver that were

given to him by a number of male relatives or friends. These gifts, like many gifts, are not given as in barter or trade. Rather, the giver retains some property rights attached to the gift, in this case to any animal that may be shot with the help of that arrow. The exchange of arrows is therefore a very effective means to spread the unpredictable risk and success of the hunt among a number of men, but also to even out the different skills of men of different ages and generations. When comparing the ≠Akhoe Hai//om inheritance rules with those of other groups in Namibia, especially with traditional livestock owners, it becomes apparent that the ≠Akhoe Hai//om like many other groups classified as “San” or “Bushmen” are very concerned about the transfer of items between living people, including pre-mortal inheritance, but not so much concerned about any “corporate property” in the form of accumulation of property in a corporate kinship group based on descent instead of marriage. Why this is so is found in another system, namely the personal naming system which is as important for inheritance as the system of kin terms.

≠Akhoe Hai//om have preserved a cross-sex naming system that in the past was more widely spread among Khoekhoegowab-speaking groups. In this system sons receive their mother’s “family name” and daughters receive father’s “family name” (see Hoernlé 1985; Widlok 2000). Figures 2 and 3 indicate how the system works whereby daughters receive their father’s “family name” (*gai/ons*) and sons receive their mother’s *gai/ons* (for details see Widlok 1999, 2000). Again there is more to it than simply selecting a name. In systems where names and family membership (and inheritance) are reckoned either through the male or through the female line, an opposition of family groups emerges that may also be expressed spatially if there is a rule for matrilineal or patrilineal residence. The “clans” or “lineages” that are thereby created may also be seen as the corporate holders of property (in particular the owners of land and status). Cross-sex naming effectively inhibits the emergence of opposed segments of that sort, because in each generation the cards are reshuffled as it were. This does not mean, however, that name identity is unimportant. Rather, the naming system complements the kinship system in that it provides people with an easy tool to establish their relationship even with distant kin. The name can become a short cut to establish a kin relation with someone when genealogical ties are not completely known. As I have shown elsewhere (Widlok 1999), the naming system has even been used to create kinship across ethnic lines because ≠Akhoe Hai//om insist that their system is compatible and their names convertible into

the clan system of neighbouring Ovambo. This has consequences also for interethnic marriages, for the identity of children resulting from such relations and potentially also for the transfer of property. Within the group of ≠Akhoe Hai//om, being of the same “surname” can be used as an important marker of being closely related to one another with implications that also affect the transfer of property and inheritance.

Figure 2

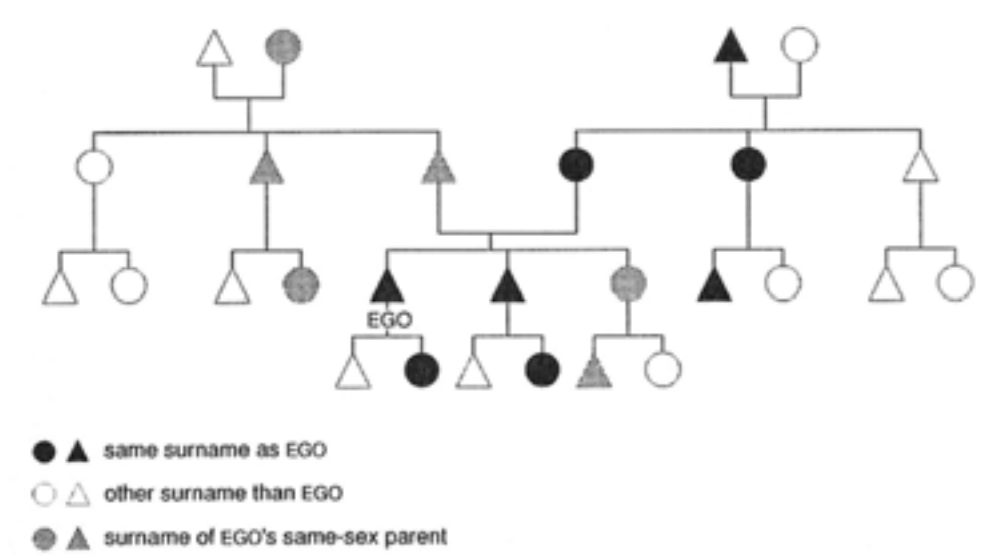
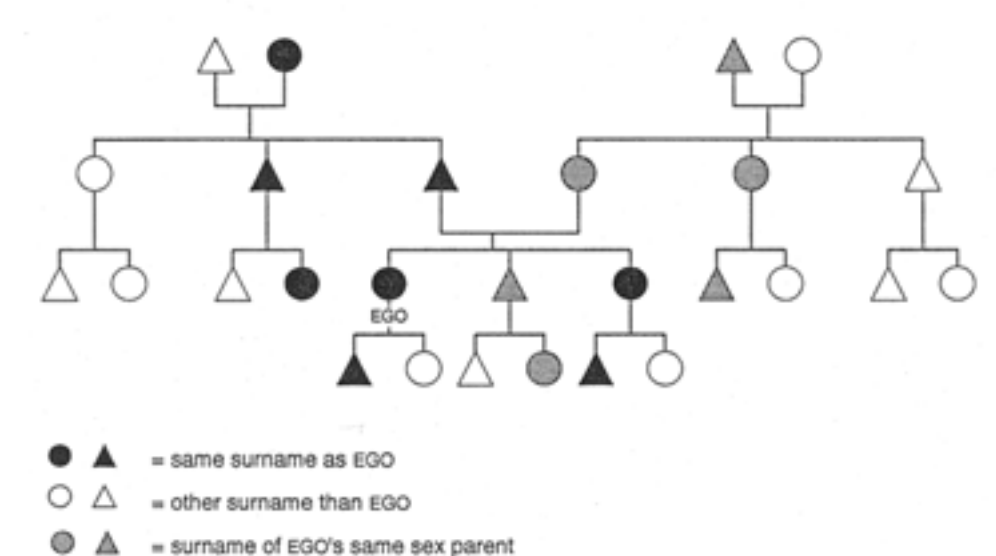


Figure 3



It seems to be a common pattern that neighbouring Ovambo farmers accept a kin relationship and adopt San children, not only those of mixed couples, but that these children are then excluded from inheritance and left without property when they become adults. Especially young men may be integrated as unmarried herdsman but then have to return to their original group, to relearn their language and to find a spouse there. ≠Akhoe Hai//om women, by contrast, are increasingly, if informally, married by male members of other ethnic groups. The family of the wife does not receive bridewealth but a varying degree of support by the inmarrying man. Since bride service is more important in the ≠Akhoe Hai//om system, complemented by gifts between a husband and his in-laws, these interethnic unions follow the locally established pattern. However, it is often a matter of dispute between partners (and the concerned family members more generally) as to where a child of such an interethnic union should reside and where it belongs. ≠Akhoe Hai//om may commonly change their residence throughout their youth; frequently they spend a lot of time with their grandparents, and ill feelings arise when partners from the more dominant ethnic groups do not allow this degree of flexibility. Fathers from other ethnic groups are known to take the children away, in some cases cutting all ties between the child and the child's maternal family.

Equally damaging, and even more frequently occurring, are those cases in which fathers from outside do not support the mother and their children at all. Legally prescribed support is rarely enforced in these communities where the women and their children belong to the ethnic group that is disadvantaged and have no means to file their claims with the authorities and to defend these claims against men from other ethnic groups who are comparatively speaking rich and powerful. Even if claims are filed with the relevant state offices they seem to be rarely enforced. While mothers who have separated from the fathers of their children may be able to claim support through the kinship system when the father belongs to their group and is himself included in the kin network, there is hardly any chance to claim support from men from other ethnic groups who have fathered children. ≠Akhoe Hai//om who enter a union with a woman who already has children usually take over social responsibility also for these children but rarely have sufficient means to cover all the costs involved in raising and educating children in present-day Namibia.

These problems that parents face are then in turn often turned into an excuse by members of other ethnic groups, including representa-

tives of state offices, to exclude the ≠Akhoe Hai//om from decisions concerning their children and to disallow them rights that are by law granted to every person in the country. What is true with regard to the maintenance costs of children is even more pronounced with regard to inheritance. I have not heard of a single case in which a ≠Akhoe Hai//om person with an Ovambo father received an inheritance.

Given the importance of names and the naming system, the interference of the state in these matters has indirectly also been an interference in social relations and relations of exchange and inheritance. Officials have shown little sensitivity in dealing with indigenous names. Speakers of Khoisan languages were most severely hit because the clicks of their language were simply dropped from their names and all kinds of bowdlerized versions of names have entered the identity papers. To change identity cards is a major undertaking for people in the rural parts of Namibia who do not have the necessary resources so that past mistakes are continually reproduced. What is worse, officials not only imposed their orthography and their language conventions onto the names but also the modes of transferring names from one generation to the other. The cross-sex naming system of the ≠Akhoe Hai//om was not recognized. Instead the bureaucrats have imposed their own system, which meant that either they adopted the father's first name as the surname of the child (as was common among Ovambo and is occasionally still practiced by some missionaries and church workers), or linearity was introduced into the system. If a couple was not "officially" married (again according to the standards of the bureaucrats or missionaries) then all children would automatically receive their mother's second name. If they were officially married, they would receive father's second name. The results are a considerable amount of confusion paired with a discriminatory disregard for local practices which do not conform to the dominant model.

The issue of names also illustrates that neither systems of social relatedness nor the inheritance systems that are connected to them develop and exist in isolation. As people mix with one another there have been adaptations and innovations. For instance, the !Xû-speaking people who neighbour the ≠Akhoe Hai//om have developed a naming system that is a blend between the systems used among the Ju'hoan of Nyae Nyae and the ≠Akhoe Hai//om. Their first names are "recycled" from earlier generations, thereby creating bonds of mutual assistance and of shared property, while they also employ (or did employ in the past) a system of "surnames" that is similar to (and compatible with) that of the ≠Akhoe Hai//om. In other words, the systems are not

immutable and rigid but they can be made to deal with new situations, including new situations of interethnic contact and marriage. With the arrival of the state, however, an agent has entered the scene that forges these systems on very unequal terms. The colonial history of name cards for control purposes has been well documented (see Gordon and Douglas 2000). Control of its citizens continues to be an important element for any state, including independent Namibia. This is particularly true where the state draws resources from its citizens (for instance in terms of tax) or hands out assets to the citizens (for instance in terms of subsidies or state pensions). Pensions are important in this respect. Many ≠Akhoe Hai//om, who see the state as having appropriated their land and the resources, consider the state pension system as a form of compensation by those who have (forcefully) taken custody of the inheritance. The state and its officials, needless to say, see things quite differently; they see themselves under conflicting pressures to determine the use of the land, pressures which they say they have largely “inherited” from the past. The inheritance involved here is also a legacy; it is a potential for future generations, but it can equally be a burden.

This brings us back to the property of the deceased as in the case of !Ubeb. More than two months after I had enquired about what would happen to !Ubeb’s belongings, very few of them had in fact been appropriated by other people. The place where ≠Akhoe Hai//om commonly store their everyday belongings is under the roof of their hut, relatively secure from animals and fellow humans. Since a hut is abandoned when someone dies, the belongings are usually just left where they are, inside the deserted hut. The grave of a dead person is also left alone since it is not the basis on which others build their claims or their status. There is much to suggest that the property in use at the time of death is subject to particular treatment because it is so closely associated with the deceased person.

Anthropologists have done considerable comparative research on funeral rituals and have highlighted the fact that very often these involve some kind of second burial after considerable time (see Hertz 2004). The reason for these protracted funeral rituals seems to be that the human body, too, does not simply disappear when someone dies but it decomposes over time leaving the body – and the surviving family members – in a somewhat precarious state of transition. Even if death is “instant” it takes time for a person to change status from living to dead because of the memory process that is involved.



San settlement

One could argue that this is not only true for the association between a dead person and the survivors, but also between dead persons and objects. The very notion of property relies on a memory process whereby elements of the environment are converted into objects of memory, especially the memory of having invested labour into these elements (see Ingold 2005:166). This process of “objectification” allows us to claim that something is owned by us. Combined with an ideology of genealogical ties it allows us to make claims to objects that were owned by someone whom we think has rightfully transferred the objects to us, just as we have “inherited” our personal identity and bodily substance from them.

Thus, if the notion of property essentially relies on a memory process, it should not come as a surprise that these memories may become problematic when the preceding owner is no longer alive and fades away from memory. The objects themselves may be considered to have changed in the process. We now see that although “inheriting” from the preceding generation seems to be “natural” to many, it relies in fact on very specific ideas about what is property and what are considered to be the ways in which generations are linked to one another. The idea that descent lines and property transfer consti-

tute the channels for transmitting everything that counts, from personal identity to inherited property and other endowments that were created in the past but which can be detached from their previous owners, is not shared by everyone. At least the ≠Akhoe Hai//om practices suggest an alternative based on a refusal to see the death of a person as a point of transfer from “one generation to the next” that terminates the life process. Instead, they are more inclined to emphasize the continuity which consists of interwoven engagements between humans at various positions in their life cycles but also including nonhuman beings. One consequence is that most “inheritance” in these contexts should be seen as pre-mortal inheritance, that it is piecemeal and flexible with regard to the contingencies of engagement between persons who are connected with one another along a number of lines, including kin relations and name relations but also by simply sharing their lives with one another.

The alternative view on inheritance is not simply at the level of cultural conventions whereby groups (or individuals within these groups) disagree as to what should be inherited, say, along the paternal or the maternal line of relatives (or not strictly along lines at all as in the =Akhoe Hai//om system). The more radical alternative is that objectification is not the only way of doing things. There is nothing to suggest that everything has to be an object of property and therefore must become an object of inheritance. Human persons are a case in point. Except for situations of slavery we readily accept that even if we invest greatly into fellow human beings they do not become objects that we can own. If we talk of “having” a husband or wife, it is not a property relation. Caring for others, looking after children or frail people, or marriage partners, does not turn them into property objects.

Clearing the ground and tilling the soil, however, is often considered to automatically turn a piece of land into a property object. The problem is that this kind of appropriation of the world often leads to disastrous consequences, in particular when nonhuman species are treated in this way. The objectification of the environment may be said to be the root cause for many ecological problems which in turn cause considerable human suffering.

Inheritance can also be a burden in this sense, initially because we may inherit things that cause conflict or demand certain work from us – but more fundamentally, because the notion that everything is inheritable is also a burden on how we see the world and deal with it. ≠Akhoe Hai//om people have for generations used natural resources such as Mangetti trees, wild animals or water holes. However, although



!Ubeb's widow – flexibility is the rule

(or maybe because) they had to painfully learn how impoverished they are once the trees, the water, wild animals and similar resources are taken away by other people or by the state, they do not consider these aspects of the environment as inheritable objects in the narrow sense. As Ingold (2005:166) has put it more generally, their engagements with the environment, their hunting, gathering, journeying, involves work, care and investment of sorts but they “do not convert nonhumans into detachable objects of memory” or “as heritable property” (see Ingold 2005:169).

It is striking that what is sometimes considered to be “the most ancient way” of life, namely that of hunter-gatherers, has many things in common with modern life which is also characterized by multi-folded relationships. Especially contemporary urban dwellers who are not tightly integrated into “traditional” regimes of property and inheritance relations demand flexible inheritance rules that allow them to incorporate the particular circumstances of their lives. It seems that there is a precedent for this kind of flexibility. There is a tradition of flexibility in systems such as that of the ≠Akhoe Hai//om. The recognition of these inheritance practices is not only a matter of fairness and of the right of the ≠Akhoe Hai//om to continue their cultural practices, but there

is a considerable potential for reflection and innovation for all of us that goes far beyond the single case. There is something like a national heritage of flexible inheritance practices, and its value should not be underestimated. Inheritance and the attachments between people and objects provides a dilemma for each social system. Reconciling a degree of equality between group members and the rights of the individual to control (and transfer) what is considered to be “theirs” is not an easy task, and any solution that has worked satisfactorily for people is worth being considered and maintained as an option for the future.

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3: The inheritance of social obligations among Namibian Khoekhoen

Sabine Klocke-Daffa

Heritage and security

In every society inheritance is conceived of as being a way of transmitting to the next generation what is left after a person dies. Whereas there are many culture specific ways of looking at death and what a person is said to be able to take with them to wherever they might be going, there also seems to be a deep feeling of leaving something behind to the living. In many cases, this is nothing more than a remembrance – a picture, a piece of personal possession or some kind of material or immaterial good. But frequently inheritance is of considerable wealth, meant to be a solid endowment for those who used to be cared for by the deceased. In fact, the German word “Erbe” (Engl.: inheritance, old-Engl.: ierfi) goes back to the Indo-Germanic root “orbho”, which means “orphan”. The meaning of our word “inheritance” thus includes by definition a means of providing for the unprotected.

In Western, or advanced capitalist societies, the status of the person is profoundly connected to their assets and material well-being. Individuals are expected to have the economic means of caring for themselves and those dependant on them, and a “successful person” is the one who manages to do well in life – that is, disposing of all the resources necessary for a decent life. What a “decent life” means is again culturally defined: in Western societies this usually includes that someone should have a house or else a secure place to stay, a regular income in order to provide for the daily necessities and some means to cope with the unforeseeable risks of life.

Any “heritage” or “legacy” that is considered worth mentioning should therefore include some kind of material possessions, whether in cash or in kind, in order to help the heirs in their struggle for a

decent and independent life. There is, in fact, much more a person leaves behind, social relationships and obligations being part of the legacy. But this is usually left to the private sphere. What keeps lawyers busy and can separate families for years are the economic possessions, because these are the assets which in Western society are considered to be valuables, needed for personal success and social reputation.

Inheritance is then considered to be a starting point for the younger generation to build upon, and a basic means of security. Parents who can afford it are usually transferring part of their property (like savings accounts or real estate) to their children long before even considering drawing up a last will. They expect that their heirs are doing their best to increase this stock and will, in turn, pass it on to future generations. Nothing would be more embarrassing than the announced intentions of presumptive heirs that they intended to share their legacy with the poor or use it for their friends. It would not only be considered a waste of what could be profitably used, but also interpreted as an insult to the descendants and their lifelong struggle. Inheritance then contains – almost in a Maussian sense – something like the spirit of a gift: it must be used in the proper, culturally defined way, thus giving something back to the original giver. Accepting a family heritage can be the foundation of the heir's own safety net, but can also encompass heavy obligations.

Inheritance among the Khoekhoen

One can now ask how inheritance is conceived in a society where material assets are not accumulated to a considerable degree.

The Khoekhoen of Namibia, also called Nama, are one of 11 ethnic groups of the country. Even though there is a growing number of Nama living in urban settlements, the majority of them maintain ties or still live in communal areas which until 1993 used to be part of the “Namaland” reserve (now dissected by both the Hardap and Karas Region). As former pastoralists they have always been dependent on their animals, mostly goats and sheep. However, today there are relatively few households living entirely on animals. Most Nama possess no more than 10-20 goats or sheep that are kept among the herds of those who live on farms. In any case, inheritance is not a question of large estates and wealth to be distributed.

Within the past 10 years, when farm land became more available to black farmers due to the selling of private “white” farms, about 30

of the more well-to-do Nama farmers moved out of the communal areas, becoming private owners with large herds of 1 000 or more head of small-stock. It will be interesting to look into future inheritance practices to see what happens to this property, which indeed does amount to considerable wealth. But for most Nama to the present day, there is not much to be distributed in the Western sense of “bequest”. Still, inheritance is a big issue and needs to be discussed and resolved. What, then, is it all about?

If a person feels that his life is coming to an end – whether of old age or sickness – he or she will not hesitate to call the family together. This is not only meant as a last farewell but also as a way of settling inheritance questions. It is not so much the problem of resolving the distribution of material possessions, because this is well settled: the widow or widower keeps the house and a lifelong right of residence; the oldest son will inherit the larger part of the herds and has usually already become an established farmer. All the other children have already been given some sheep or goats at birth as the foundation of their own small flock. If there is no parent left, it is the duty of the youngest child to distribute the remaining estate among all the descendants. The Nama have a strong feeling of equality, and so “everybody in the family must get something”, be they children, siblings or in-laws.

But the distribution of material possessions is not at stake. What a person who is about to die wants to be settled is what is most precious to him: his social obligations. Delegating social responsibilities is generally regulated by cultural norms rather than by national law. Only in case there is no person available will the Namibian state have to interfere.

The one who calls his family at his death-bed will have, well in advance, chosen the persons who can be entrusted with extra obligations and these will be told: “You must now take care of my house and the children left behind”. If there is no trustworthy person in the immediate family, others can be asked – a niece, a nephew or a former foster child. The wish of a dying person cannot be denied, so the person will surely agree. Only in cases of sickness of the chosen person might the last will of a dying person be refused. If the deceased did not have the opportunity to settle matters himself, the family will do so the day after funeral. All the family members present will be asked who is willing and able to take over duties: care for the aged and disabled, pay school fees for relatives, or provide for orphans who might have been left behind.

In most cases people do not even need to be forced to accept this kind of heritage, even though it puts heavy pressure on the individual. It is seen as a duty and a chance, not as a burden.

Social obligations as security network

Why are individual obligations considered to be such a big issue and why are people willing to accept them as part of their heritage? Nama take over social responsibilities at a rather young age, usually with their first own income: they care for those of the family who are in need, pay the bills for the school uniforms of younger siblings, send food and money whenever they are able to do and take children into their homes as soon as they have an own place to stay. Most children in a Nama household are not even relatives of the first degree, but foster children sent by relatives, or school children who need to be looked after, or neglected children from households with alcohol problems, who might not be relatives at all. In times of HIV/AIDS there is also a growing number of orphans distributed among households who are more or less able to care for them. In addition, most adults give to those roaming the streets for food or asking at the front door, and people will also contribute to ritual events like weddings and funerals. In times of crisis – and the AIDS pandemic in Namibia, as in many other African countries, indeed turned out to be a most severe crisis – Nama adults have to contribute considerable amounts of money for funerals on an almost regular base. The individual might consider these duties as depressing at times, and yet be willing to accept them. This can only be understood if we look at the cultural values behind the norms of behavior.

Nama culture is characterized by extensive exchange relationships. In fact, life is conceptualized as being an ongoing process of exchange (see Klocke-Daffa 2001, 2002, 2003, and forthcoming). “Communication” means being in exchange, and that is what life is all about. Giving and taking on a reciprocal basis is not only a way to cope with the risks of life in times of crisis, but a way to organize society and for Nama the only decent way to live. You do not work in order to care for yourself and accumulate wealth but because it helps you to be in the position of a giver (Klocke-Daffa 2000: 39-45). The rule is: you must give if you have and somebody asks you for help. People who “cooperate” are partners in reciprocity. A person who is able to give has every reason to feel happy, because the one who gives will be rewarded by

being given back (which might be more than what he gave in the first place). “Great people” (*kai khoen*) are those who are respected for their social responsibility, not for their material wealth.

This exchange system is not a tradition which needs to be “re-invented” (see Winterfeldt 2002: 234), but is a vital part of Nama identity and in many ways very “modern”. It is supported by a value system which grants social reputation to the givers, and by religious conceptions of the Lord as the ultimate giver of all things. He who gave life expects something back, and will be generous to those who appreciate the gift of life. What you give to others is actually considered to be a gift of gratitude to the Lord, but it also helps to create an ongoing process of rights and obligations, for the benefit of all. “The Lord loves the givers” and will certainly reciprocate. That is why Nama say that wealth derives from giving, not from keeping.

Giving freely to those in need and accepting obligations towards others even in difficult times is highly valued and the prerequisite for becoming a respected member of society. It takes a whole life to build up a solid network of givers and takers, but it “pays”: in reputation, in security, in comfort, in support – more than a single person or family could afford and much more than any modern insurance could offer.

How “successful” a person has been in life can be seen at his funeral, when he virtually “dissolves” into social relationships: anyone who used to know the deceased or his family is expected to show up as a sign of reverence. And they will all contribute – to the costs of the coffin, for clothes, transport, food, flowers, invitation cards, gravestones – thus reasserting the strength of social bonds and a sense of belonging. The more costly a funeral turns out to be (and prices have been rising continuously during the past years), the more members of existing networks will be called “to stand together”, as Nama say. No other social event is more important for the cohesion of communities than a funeral. The concept of the “life-giving death” (de Coppet 1981) can indeed be found in many societies worldwide. For the Nama, too, death seems to be what regenerates social life.

Death does thus not signify the end of existing relationships, but



The Nama prefer expensive coffins. The costs are shared among family, neighbours and friends to show their respect for the deceased and appreciation of social bonds.

might be, on the contrary, the foundation of yet more extensive and profound ones. Young Nama find themselves being respected, cared for, provided with jobs, appointed to distinguished positions and even given money because of their father's or mother's lifelong social efforts. They are deriving benefits from obligations that in turn their parents had accepted a long time ago. Young people are still eager to do just the same.

So to conclude: transmitting social obligations is not so much a questions of putting burdens on those left behind but rather a way of providing a solid basis of security. If properly managed, social obligations are a way of granting access to resources that might be a start for a "successful" individual. This is much the same as with heritage in Western society, but conceived in a very different way.

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4: Inheritance and Maintenance among the Himba of the Kunene Region

Michael Bollig

Rules of inheritance have to accomplish two tasks everywhere in the world: on the one hand the transmission of a bundle of rights from the deceased to his/her heir(s) and on the other hand the transfer of obligations within the kinship network from the dead to the heir(s). Both measures are necessary steps to lower unpredictability and to ensure a minimum stability of social relations and economic viability. When an inheritance case is discussed a bundle of rights – comprising transfer rights, control rights, rights of administration and use rights – which were formerly held by the dead person are often unbundled. It is rather rare that an entire bundle of rights is transferred in a straight way from one person to just one other person. Sets of rights/goods go different ways and are often split between heirs. Rules of inheritance then should solve two problems: they have to transfer rights in an unambiguous manner and have to do the transfer in a way that all participants experience it as just and fair. Different systems of inheritance can be differentiated typologically along three parameters: (1) the number of heirs: there may be just one heir, there may be one heir plus several minor heirs or there may be an equal split between heirs, (2) the point of time of inheritance transfers: inheritance transfers may take place only after the death of a person, but they may also take the form of protracted and repeated transfers before the death of a person as a kind of advance, (3) the separation of the bundle of rights: a bundle of rights may be completely disentangled specifying many different heirs or there may be an emphasis on transferring as much as possible from that bundle of rights to just one heir.

Among the Himba of northern Namibia many things are inherited: surely the inheritance of livestock captures the imagination of local people and has been described prominently in ethnography (Steyn 1977, Malan 1972, Bollig 2005). There is little doubt that also in pure

economic terms the transfer of livestock from the deceased to the heir is central. However, the inheritance of rights in and to ritual (eg the handling of the ancestral fire, the right to taste the milk), access to pastures, water-points and settlement areas, chieftaincy or councillorship as much as personal belongings such as saddles or weapons must be regarded as well.

While the disentangling of a bundle of rights in inheritance is one thing, another aspect has been neglected altogether in anthropological literature but also in legal considerations on traditional inheritance: the aspect of maintenance. While literature is near to mute on this topic, the Himba discuss maintenance obligations of the heir a lot and after inheritance is accomplished an heir's activities and attitude are screened intensely. The dead person of course did not only hold rights but was also the locus of obligations: and not only rights are passed on from generation to generation but obligations are inherited as well. Himba inheritance then does not only care for the transmission of rights but it also tackles the question of care and obligations towards those who are left behind: the care for orphans and widows features prominently in this aspect and is emphasised as much in rituals of inheritance as in the factual division of inheritance. Himba inheritance then is about institutions which regulate the transmission of rights but is also very much about moral obligations.

The Himba I was working with in the northernmost parts of the Kunene region were inheriting most livestock to just one heir and only minor numbers of livestock were going to other matrilineally-related heirs, usually all proper or classificatory maternal nephews of the dead person. To put this in numbers: in a herd consisting of some 600 animals the main heir would take perhaps about 550 and some 50 animals at most would be taken by a number of secondary heirs, the *ovarumate*. Himba further south and all Herero of the Kunene region had different arrangements: the separation between ancestral (*ozondumehupa*) and non-ancestral cattle (*ozondukwa*) there became highly relevant at inheritance, ancestral cattle being inherited within the patriline and non-ancestral cattle inherited along the matriline. Among the Himba I worked with such a split would have meant an almost equal splitting of the herd as about 40% of all cattle were classified as ancestral, and about 60% classified as non-ancestral. Unfortunately other ethnographies on inheritance patterns in the Kunene region do not give any figures on the distribution of ancestral versus non-ancestral cattle, but from the qualitative accounts I got the impression that there the percentage of ancestral cattle within the herd is lower than in the

northern Kunene region, meaning that the major part of the herd is also inherited matrilineally.

All Himba however agree on the fact that all matters pertaining to inheritance should be addressed only after the death of a person. Himba usually have few personal belongings: more expensive goods like saddles obviously also go along matrilineal channels, but not necessarily to the main heir; clothes are often shared between sons. Access to pasture and water is usually derived through one's patriline but this is rather a matter of gaining access to resources and not necessarily connected to the death of a person: a son, of course, has rights in the pastures his father uses as he will be at least nominally under his father's control. However, grazing rights can also be obtained through matrilineal connections and it is frequent that a young man herds in the area his maternal uncle (*ongundwe*) has grazing rights in. The inheritance of political office is another issue altogether and a matter of much controversial discussion. I will not touch upon this disputed topic in much detail here but just state that nowadays inheritance of political office usually goes with the patriline, from father to one of his sons, whereas about one hundred years ago matrilineal inheritance of chieftaincy was also occurring.

Until now I have dealt with inheritance as if property is only inherited from males to male heirs. This is inappropriate: while men factually own most livestock, women do own and inherit livestock as well. In the cases I came across where stock-owning women died, most of their livestock was inherited by their sons and in one case also by a grandson (daughter's son). In all cases livestock was transferred matrilineally. I have also heard of cases where livestock were transferred from a deceased woman to her daughters. Access rights to gardens are usually transferred from mother to daughter.

While it is possible to draw up rules of inheritance and point out typological differences, it is more difficult to distil the rules of maintenance. It is generally said the widows of a deceased man are inherited by the main heir: factually I have witnessed few cases where a widow actually took up permanent residence with the heir. There is obviously a wide space in which a widow can decide by herself where she wants to stay after the death of her husband. However, should she decide in favour of the heir, the heir himself does not seem to have any choice but has to accept her as a further wife in his homestead with all obligations going with this. What about orphans? The heir has a general obligation to care for them. If children are still young he should maintain them at his homestead together with their mother. However, more

often I have witnessed cases where the orphans take up residence together with their mother either at her mother's/father's place or with her maternal uncle. Figures I will present below indicate that the heir adds to the security of orphans by equipping them with numerous cattle on a loan basis. In some cases I witnessed that the heir accepted the inheritance but left the cattle physically with the sons of the deceased. While the property rights in these cattle changed, the use rights stayed within the household.

I will now go into more detail, fleshing out the transfer of rights and discussing aspects of maintenance. The story has to be taken up at the funeral and followed through until the first commemorative ritual usually about a year after the death of a person.

Fixing inheritance and maintenance in ritual

While matters pertaining to the details of inheritance are finally discussed at the first commemoration ceremony for the dead (*okuyam-bera*), the fundamentals are already a topic towards the end of the funeral.

After a person dies, he or she is put into the grave as soon as possible. Whilst the body is being buried, the mourning family sits slightly to one side, wailing loudly, together with male and female relatives who comfort them. A group of men sits or stands near the grave and they will individually or as a group intone songs that honour the deceased. Sometimes men may congregate and dance a war dance "to show that the deceased was a great man" (*ombimbi*). However, such praise songs are only sung if the late person was a senior man. Praise songs alternate with songs of mourning led by senior women and loud wailing which whips up the emotions of everybody present. For younger men, women and children, only songs of mourning are sung. Usually the digging of the grave and the laying down of the corpse is a matter of a few hours and the major ritual then does not take place at the grave but at the homestead of the deceased person, which is referred to as *omutambo* during the funeral and the subsequent mourning period.

After the grave has been closed the mourners return to the deceased's household where the funeral party stays together for up to two months. I will only touch shortly upon the mourning rituals which take place in the household, as this paper is mainly concerned with inheritance and maintenance. Guests will come from far over the next weeks to share the mourning with the relatives. Sometimes

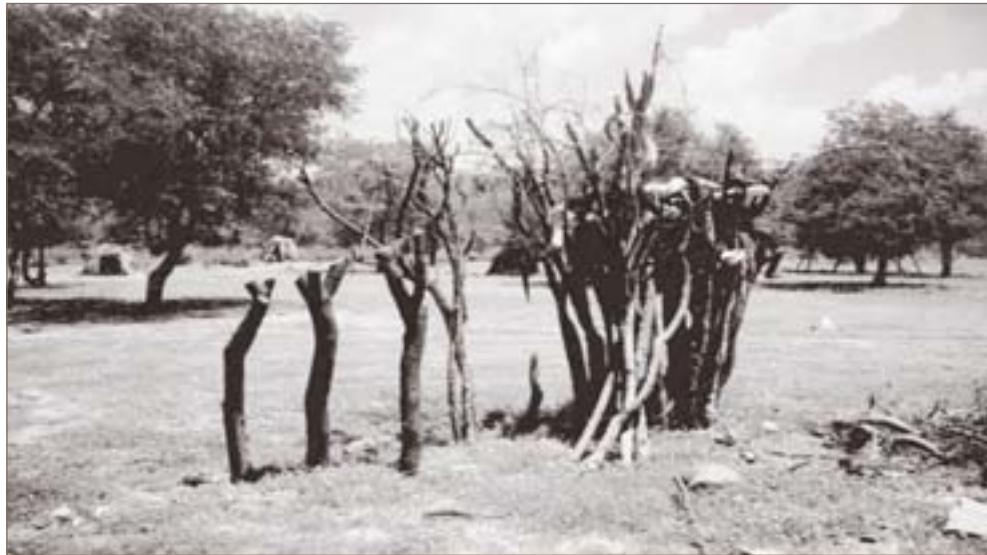
they stay for a week, sometimes for a few months. To provide the mourning party (sometimes several hundred people) with food, numerous animals are slaughtered and maize and alcohol is bought in large quantities. Relatives and neighbours will support the mourning household with gifts of livestock to ease the burden of supplying such large numbers of people with food. However, a major part of the expenditure is taken out of the estate of the deceased.

If a senior man dies, numerous oxen have to be slaughtered in order to provide the skulls for the grave. The grave is decorated with these skulls during the first phase of mourning. A number of oxen are slaughtered within two or three days after the interment. Within the next two or three weeks, up to thirty oxen may be slaughtered for their skulls. Their meat must not be eaten by the mourners and usually all Himba will abstain from eating the meat of an animal which has been slaughtered for this purpose.

The skulls are carefully prepared before they are taken to the grave. Meat and skin is removed and a small hole is drilled or carved into the forehead in order to facilitate fixing the skull to a pole or a tree. Before they are taken to the grave, these skulls are displayed at the holy fire. Then they are taken to the grave by a party of men. About the same time, ie some days after the burial, a fence will be erected around the grave of a senior man and a broken trumpet will be hung on the fence or on one of the poles.

A key part of the ritual, and at the same time the final part of it, is the placement of thick commemorative poles (*ozongunde*) near the ancestral fire. Usually these poles are about 100 to 150 centimetres high and perhaps 20 to 30 centimetres thick (see photo next page). These *ozongunde* are a symbolic reminder of the obligations the heir has towards the orphans. This final ritual is complex and shows the importance this society attributes to the problem of maintenance. For this final part of the ritual a matrilineal relative of the paternal grandfather plays a crucial role. For this person, one can say that "he has given birth to the deceased person's grandfather".

The person chosen walks off from the funeral into the bush for several days and looks for an appropriate pole, preferably from an *omuzumba* tree (*Commiphora africana*). These *Commiphora* poles frequently start to develop re-growth in their new place once it starts to rain heavily, something which is much appreciated and seen as a good omen. It is emphasised that this selection is done with great care. Once the scout has found a suitable pole he will return to the funeral ground and inform the other men about his discovery. The following day



A key part of the Himba mourning ritual, and at the same time the final part of it, is the placement of thick commemorative poles (*ozongunde*) near the ancestral fire.

he will return to the place with the son of the deceased and a group of other men. They approach the tree slowly almost as if they were on a hunt. They will then suddenly jump upon the tree and hold it tight as a group, just as they would do with a precious prey. Then the tree is rubbed with butter-fat which has been brought along in a wooden milk pail. Only then the tree is cut.

At the same time other men at the homestead will start to dig a hole for the pole on the left hand side of the ancestral fire. Here too a man from the deceased man's paternal grandfather's line should give the lead.

When the heavy pole is carried back to the homestead, for the first few steps it should be carried by the son of the deceased alone. If the son is still young or the pole is very heavy, this may be done in a symbolic way with the pole being placed just briefly on the boy's shoulders.

Once the group returning to the homestead with the pole is in sight of the homestead, a second group will start slaughtering an ox. The pole is planted immediately in the specific place on the left of the ancestral fire. It should be put into the ground at the same moment the ox dies nearby. Until the ox has died, the men setting up the pole will hold on to it with both hands. The pole is then firmly set and used immediately in the ritual. The ancestral *ombarara* meat (meat cut from between the hind-legs of the ox) is placed on the pole while the other meat is cut. Once cutting is finished, the *ombarara* meat is

put into the pot first and also served first later on. Before the *ombarara* meat is eaten by the sons of the deceased, it is put in touch with the pole once again so that the ancestor may taste the meat first.

Usually several poles are set: for the sons of each wife of the deceased a pole is set, and these poles are addressed as the *ozongunde yozosewa* (the poles of the orphans). The final pole presents the heir – the *ongunde yomuhite*. While setting this final pole, the heir is given the right to ritually taste the milk of the ancestral cattle (*okumakera*) of the deceased. Once the funeral is finished, the poles of the orphans and the pole of the heir stand next to each other. If soil and weather conditions allow for it, the poles will grow into trees standing next to each other.

Informants were adamant that these *ozongunde* remind the heir of his obligations towards the orphans. They show the legitimacy of the heir's claim to inheritance as much as they point to his obligations regarding maintenance.

While no separate pole is put into the ground for the widow, the ritual is paralleled in another manner. Immediately after the death of a man the central pole of the hut – also addressed as *ongunde* – is torn out. Once the mourning dress is put on, which takes place just a few days after the death, this pole is replaced, the new pole being called *ongunde yomuhepundu*, the pole of the widow. Once again somebody from the dead person's father's father's matriline should do this. However, the replacement of this pole does not involve a lot of ritual; no ox is slaughtered, nor is the pole rubbed with fat.

The entire funeral ritual in general and its final part in particular are set out to re-organise some social relations and to re-emphasise others. Taking off particular bead-work is one way in which women express and visualise their relation to the deceased. Then a lot of emphasis is put on establishing the stability and reliability of the triad deceased/ancestor – heir – orphans. Most symbols being made use of during the ritual subscribe to this aim: bringing home the pole collectively stresses the unity and solidarity within the kinship network, helping the orphan to carry the pole stresses the preparedness to aid him also in other fields, putting the pole into the ground at the same moment the ox dies ties these activities back to the ancestral world as guardians of the cattle herd.

Once the activities directly connected with the burial have ceased, the grave is 'closed' until the first commemoration ritual (*okuyambera*) which takes place about one year later. The first commemoration ritual requires careful preparation. This festivity marks an important

turning point in the history of the household. The mourning dress (hair, ornaments, clothing) is changed again into the normal dress, and inheritance claims are finally settled. A large number of people gather and numerous cattle have to be slaughtered again to supply meat to the guests and to honour the ancestors. The entire herd of the deceased is gathered and even distant cattle camps have to return to the main homestead for the duration of the ritual.

One morning, after the central actors of the ritual have been introduced to the ancestors at the ancestral fire, a large party sets off to the ancestral graves. Many cattle are driven to the graveyard too. The mourners march to the grave, men and women separately. At the grave they congregate and the grave is 'opened' ceremoniously. Everybody must touch the gravestone or some stones on the grave. Finally a ritual fire is kindled at the foot of the grave using fire-sticks (if it is a man's grave). Ashes from this small ritual fire are taken back to the holy fire of the homestead together with some *mopane* leaves from the grave, thereby emphasising the close link between the ancestral graves and the holy fire within the homestead.

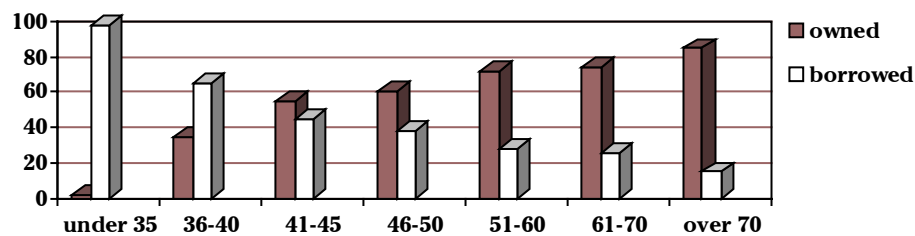
Once the ritual at the graveside is over, again some time passes before the question of inheritance is finally settled. Then elders convene and have all livestock pass in front of them. While the destiny of some animals is undisputed, the fate of other animals will be a matter for prolonged discussions. It is here that elders try to recapitulate the exact ownership status of each animal in order to indicate later on if a particular animal is part and parcel of the inheritance, or if it should be returned to another person whose ownership rights in the animal are more established. It is important and salient that all this is done in the open and in a fairly transparent way: everybody can comment and try to correct decisions and everybody will hear what decision was finally taken.

At each inheritance transfer, several herders, closely related to the deceased matrilineally, may take out a few head of livestock from the herd. The night before the inheritance is finally allotted to the heir by the elders of the clan, they pick out single animals and leave the scene. These secondary heirs are referred to as *ovarumata*, "the biters", and the senior elder over-seeing the entire allotment of livestock is referred to as *omurumatise*, the person who makes (or controls) other people's "biting".

Inheritance of livestock and other forms of livestock exchanges

Property rights in cattle are complex. The household herd rarely consists only of cattle owned by the household head: there are cattle of his wife/his wives, his children and cattle borrowed from various relatives. A look at the distribution of ownership rights within single herds shows the significance of livestock redistribution via loans. The distribution of livestock ownership correlates fairly well with the age of household heads (Fig. 1). While older men sometimes possess up to 100 per cent of their animals themselves, younger household heads borrow up to 98 per cent of their cattle. Cattle are usually loaned within the matrilineal kinship group.

Figure 1: Livestock Ownership According to Age
(n=36 herds, 4 482 animals)



While use rights in livestock are transferred frequently as loans, ownership rights are predominantly transferred after the death of a herd owner. Ideally most livestock is inherited within the matriline (*eanda*), first from the deceased to a brother (of one mother) and then to a sisters' son (ZS), or any equivalent in the matriline (like ZDS or ZDDS).¹ The fact that all cattle are inherited along the matrilineal line among the Himba of the wider Epupa area is astonishing. In most Herero groups (Viehe 1902, Irle 1906, Crandall 1992), and in fact among the western Himba of areas such as Etanga too, ancestral cattle (*ozon-dumehupa*) are inherited patrilineally while non-ancestral cattle (*ozon-dukwa*) are transferred in the matriline.

¹ I use standard ethnographic abbreviations here: M=mother, F=Father, B=Brother, Z=Sister, S=Son, D=Daughter. ZS is thus the abbreviation for sister's son, and ZDDS refers to sister's daughter's daughter's son.

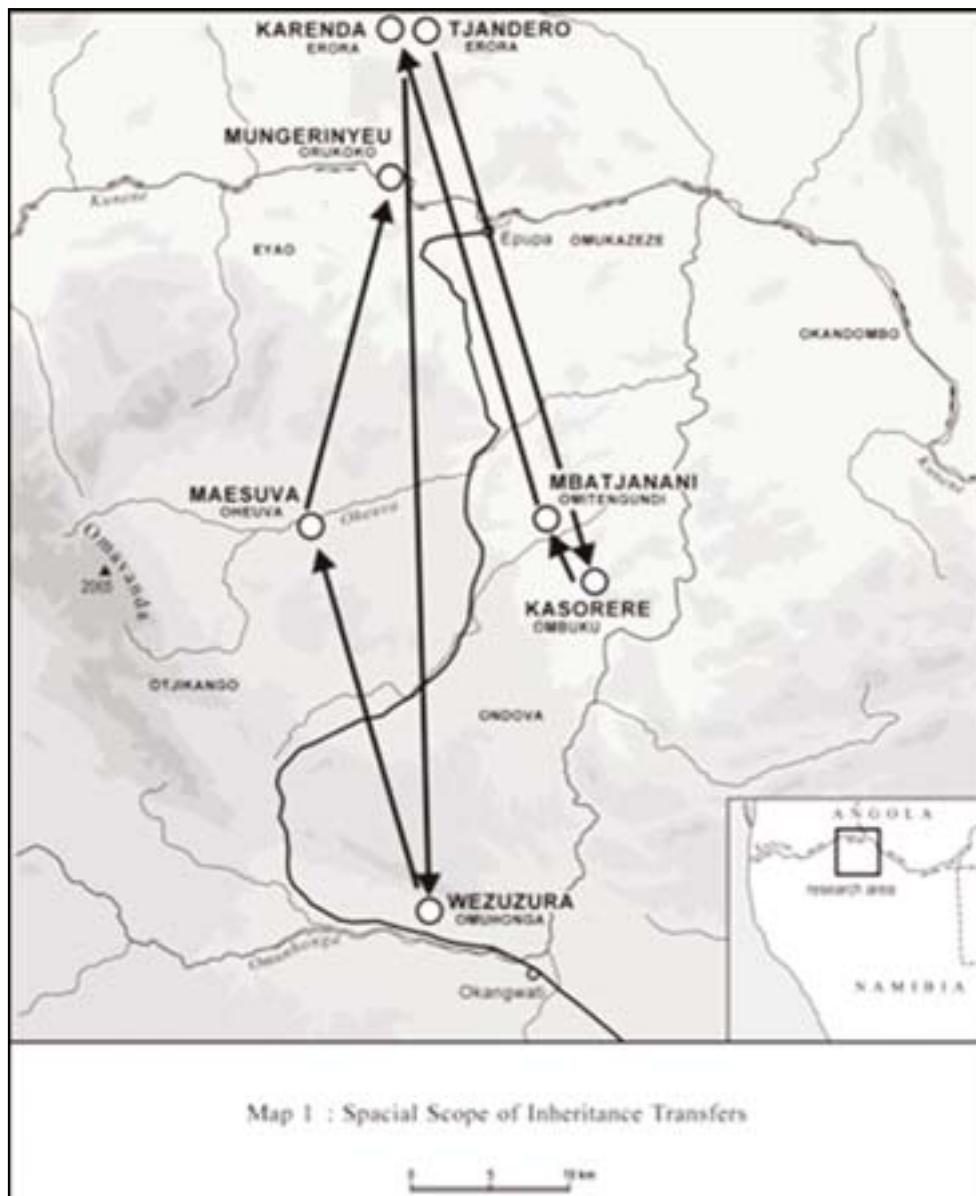
As matrilineal relatives tend not to live together, inheritance usually implies a major shift of the entire household. As it is well known who inherited from whom in the past and who will do so in the future, one may represent inheritance transfers as chains or paths. One such inheritance chain may serve as an example for the spatial scope of inheritance transfers. The example highlights the rules of inheritance as well as the spatial character of transactions.

Tj, an extremely wealthy herder owning about 800 to 1000 cattle, will pass on the entire herd to his sister's son (*omusya*) Ka. Ka., who is already in his sixties and not much younger than his uncle, in turn will pass on the herd to his next younger brother Mb. Mb will once again pass it on to a younger brother, Kar. Then the herd will be transferred to their sisters' sons' line. The first heir of the herd will be Wez, the eldest son of Kas's, Mb's and Kar's oldest sister, Wat. Wez will hand on the herd to his younger brother Maa. If Maa should die, then the sons of Ka's, Mba's and Kar's second eldest sister (Mu and Ma) will inherit and when the herd has been handed down the brotherly line, the herd will fall to the son's of Ka's, Mba's and Kar's third and youngest sister.

The household herd in question will cross the Namibian/Angolan border twice. Within a period of about 30 to 50 years, residential changes of the herd may take place eight times (see map). Inheritance very clearly leads to a continuous redistribution of the regional herd.

While inheritance on the one hand guarantees a concentration of property rights it also leads to a continuous redistribution of use rights in livestock. The case presented above entails the ideal line of inheritance and it is hard to imagine that the inheritance of Tj's herd will actually run on the lines prescribed by several Himba informants. It is obvious that this presentation of inheritance glances over several ambiguities. First of all it is highly unlikely that all the people on the list will be still alive when it is their turn for inheriting livestock. Tj, Ka and Mba are roughly the same age (the oldest perhaps seventy and the youngest sixty), and Wez, Maa, Mu and Ma are all between 25 and 40. Many inheritance transfers include a transfer of property rights from a deceased to his brother. Frequently the brother is roughly the same age as the deceased person. Even transfers from a deceased to his sister's son do not always bridge a generation. Many sisters' sons who were enlisted as heirs were only slightly younger than their mother's brother, as the rule stipulates that the herd must go to the oldest sister's oldest son. In fact, cases in which an entire herd is transferred from a deceased elder to a very young man are rare. Most men who had inheri-

Spatial Scope of Inheritance Transfers



ted a herd had done so when they were older than 45. Of all the animals surveyed which were transferred in inheritance ($n=78$), herders of 60 and above obtained 52%, people between 45 and 59 obtained 44.9% while herders under the age of 45 received just 2.6% of all the inheritance transfers. This means on the one hand that elders succeed in capturing the bigger number of inheritance transfers. On the other hand this implies by necessity that property rights in livestock change

hands rather quickly as older heirs naturally have shorter life spans than younger heirs (see Table 1).

Table 1: Livestock Exchange and the Age of Herders

Type of entry	35	%	40	%	45	%	50	%	60	%	70	%	80	%	Total	%
Borrowed	34	89.5	65	71.4	48	44.0	41	39.8	28	25.9	11	14.1	2	22.2	229	46.9
Given as presents	2	5.3	25	18.6	29	22.3	19	18.4	17	15.7	9	30	1	11.1	100	20.5
Inherited	0	0	2	2.2	24	22.0	11	10.7	37	34.3	4	13.3	0	0	78	16
All other	2	5.3	1	4.3	8	7.2	32	31.1	26	24.1	6	20.0	6	66.6	81	22.7

Table 2 shows the probable life expectancy of elders between the age of 60 to 70. Several models are tested. The life expectancy lies between 13.1 years to 13.9 years for a 60-year-old man, and between 8.1 and 8.5 for a 70-year-old man. Hence, a senior man inheriting a herd will own that herd roughly only between eight and fifteen years. Then the herd will be handed on to the next heir.

Table 2: Life Expectancies of Seniors (according to different models)

Mortality Table/ Model West	Age	life expectancy in years
Level 9, $e_0=40$	60	13,1
	65	10,4
	70	8,1
Level 10, $e_0=42,5$	60	13,5
	65	10,8
	70	8,3
Level 11, $e_0=45$	60	13,9
	65	11,1
	70	8,5

Note: Based on comparative data on mortality rates in sub-Saharan Africa (Coale & Demeny 1966/83) it is fairly sure that the average life expectancy does not lie above 45 years ($e_0 = 45$). A life expectancy of 42.5 or 40 seems to be more likely.

Himba rules of inheritance constitute a system in which many men have a vague chance of becoming owners of large herds at some indefinite time in the future. The practise of inheritance guarantees that most herders will only become wealthy herd owners when they are already quite aged. Many do not cling to their property for long. Property is moved within the matriline from 'station to station' through generations. The 'rotating pot' works like a trans-generational, matriline-

bound savings association: everybody contributes labour and has the hope of being the sole owner of the herd one day.

Inheritance and the maintenance of orphans

Livestock loans of single animals and of entire herds, and livestock transfers at inheritance, are the major institutions for distributing and transferring use rights and property rights in livestock. Bridewealth is low (only two to three head of cattle) and does not play a major role in exchange relations. Livestock exchanges between friends, which are so prominent among East African herders (Bollig 1998), are virtually absent in Himba pastoral economy. Almost a fourth of the entire off-take goes into internal exchanges. When transferring livestock, the Himba differentiate clearly between use rights and ownership rights. Only in the case of inheritance and livestock presents do ownership rights change alongside use rights. In most cases, however, when livestock are given as loans or as camps, only use rights are transferred while ownership rights stay with the original possessor. Livestock loaning as practised among the Himba leads to a situation whereby numerous herders rely almost completely on borrowed stock. For young herders this is the normal situation: they start off with a herd which consists mainly of borrowed livestock and gradually expand their own property. For impoverished herders the dependence on borrowed stock may circumscribe a lifelong problem.

Literature on the Himba (Crandall 1991, 1992, Malan 1972, Steyn 1977) emphasises that livestock loans are habitually donated to members of one's own matriline (*omuhoko*). Looking at quantitative data obtained from 23 informants on exchanges, a clear dominance of intra-matriline exchanges over extra-matriline exchanges is not corroborated. Only 41% (54 out of 135) of all recorded exchanges fell within one's own matriline. For the two matriline dominating the area I did research in, the two sub-clans of *Omukwendata* (*ondjuwo onene* and *ondjuwo onene*), the percentage of intra-matriline exchanges is somewhat higher (44% and 63% respectively) than for the rest. However, the data gathered during fieldwork suggests that clan membership is just one important institution for organising livestock exchange.

A further look at the exact kinship relation between donor and recipient of livestock exchanges shows that livestock loans follow a more complicated path than just an intra-matriclan pattern. Exchanges are not conditioned so much by social structures as on personal

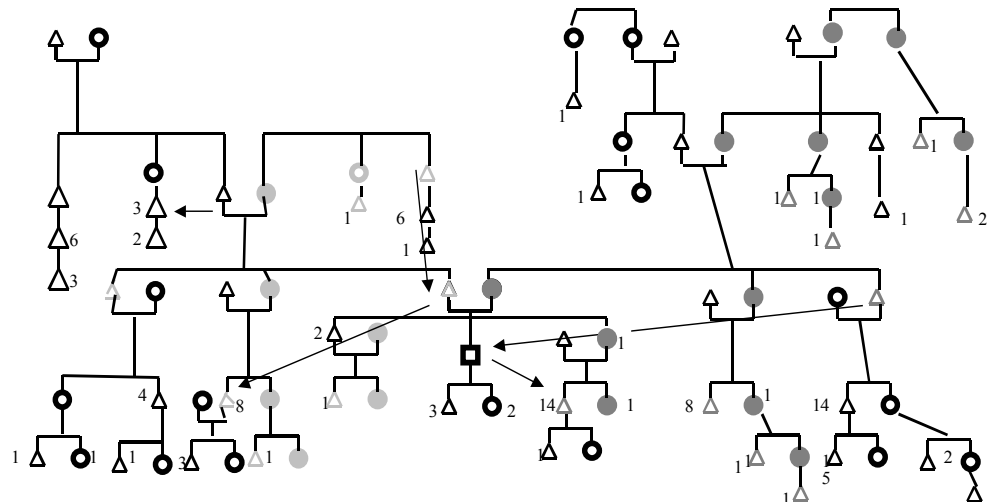
considerations. There are several exchange partners which are clearly preferred to others: these are ZS² (14 out of 91 exchanges for which kinship relation could be established, ie 15.4%), MBS and MBSS (19 exchanges, 20.9%). Of importance further are MZS, MZD, MZDS, MZDDS (11 exchanges, 12.1%), and distantly matrilineally related people (9 exchanges, 9.9%). On the other hand, FZS and FBSS (9 exchanges, 9.9%), FBDS (4 exchanges), FBDD (6 exchanges, 6.6%) and FFBS and FFBSS (9 exchanges, 9.9%) as well as FFDS and FBDSS (5 exchanges, 5.5%) are of some importance. Only a few animals are donated to one's daughters (2 exchanges, 2.2%) and sons (3 exchanges, 3.3%). Three animals were given to brothers and brothers' sons, one to a sister and a further one to a wife's brother. These figures make it obvious that when allocating livestock loans, herders apparently take the relation between past and future inheritance transfers and livestock exchanges into account. ZS will inherit one's entire herd one day. The 14 (15.4%) animals donated to ZS could be regarded as an advance on a future inheritance. If one has inherited from one's MB, frequently animals are left or are given back at some stage to MBS and MBSS (19 animals, 20.9%), that is to the children of the person who leaves the inheritance. FZS is the legal heir of one's father, the person who has inherited one's father's herd after his death. Relations to FZS and FZSS are obviously very close through the inheritance of one's father's property (11 animals). FMBS and FMBSS (9 animals) are related to F via inheritance transfers too: the father of FMBS (ie FMB) has left his herd as inheritance to F. FFZS and FFZSS (5 animals) are connected to FF via an inheritance transfer (FF left his herd as inheritance to FFZS). MZS (and by extension MZD, MZDS and MZDDS) is structurally in the same position as oneself, as he will also inherit from MB (11 animals). Relations are strengthened through the common claim to one herd. In total 63 transfers (69%) can be explained by reference to past and future inheritance exchanges.

Himba try to strengthen ties to potential heirs, to the offspring of one's mother's brother (whose herd one will inherit), and to people one has a common inheritance claim with towards one herd. Livestock loans support and secure individual inheritance claims more than simply enforcing clan solidarity. The fact that an heir often leaves animals with the sons of his deceased uncle shows that he fulfils his

² Again, these are standard ethnographic abbreviations: M=mother, F=Father, B=Brother, Z=Sister, S=Son, D=Daughter. For example, MB refers to mother's brother and MZDDS stand for mother's sister's daughter's daughter's son.

maintenance obligations in quantitative terms too: maintenance is not only a value being propagated at the funeral and then forgotten later on; in many instances the heir will see into it that the sons of the deceased are well equipped with livestock. To put the perspective right: the heir does not denounce his ownership rights in these animals, but he cedes the use rights in them to the benefit of the orphans.

Figure 2: Kinship Relation between Donor and Recipient of Livestock Loans



Note: ■ Ego, ● △ members of ego's patriline, ● △ members of ego's matriline, dashes indicate inheritance transfers; the numbers indicate the number of cattle received or given by ego to a specific relative; the figure shows that factual and potential inheritance transfers as well as matriline membership are important for directing livestock loans. The data base was composed of 98 livestock loans.

Marriage and inheritance

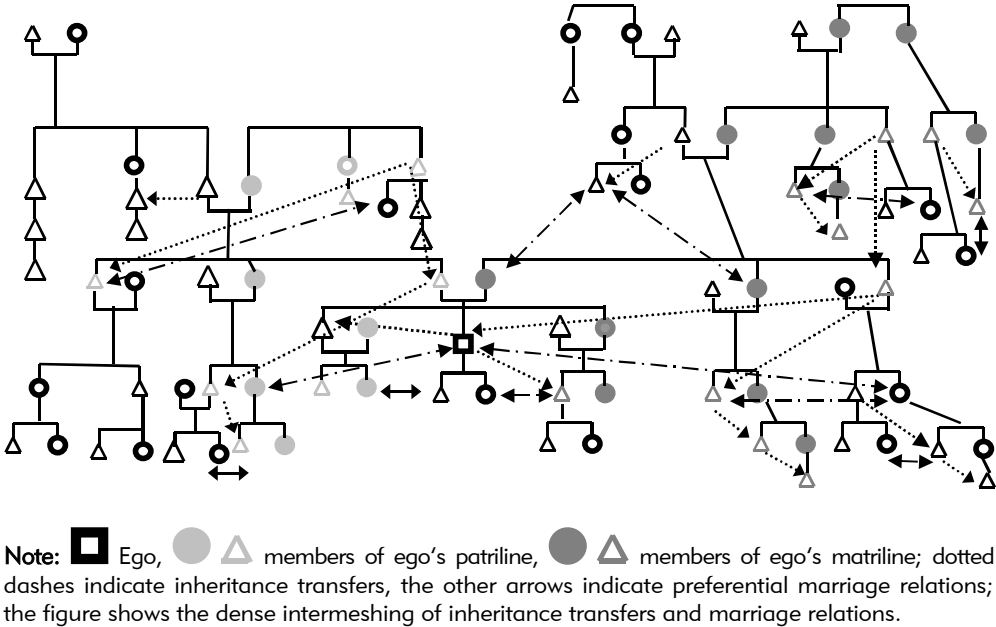
Marriage rules and exchanges at marriage tend to reinforce corporate ownership of livestock by the matriline. The Himba preferably marry cross-cousins, *ovaramwe*. They argue that cross-cousin marriage is the best way to ensure marital stability. Cross-cousins are formally speaking MBD and FZD, but the Himba have a very broad understanding of cross-cousinage and include many kin relations they regard as structurally equivalent into this category. Crandall lists 24 cross-cousin marriages. In his sample the cross-cousinage includes MMBD, MMBDD, MMMBDD, FZDD, FFZD, FFZDD, FZSD, FMZD (Crandall 1992:349). My own data

hints at the same direction. The term *ovaramwe* includes a vast number of relatives who are perceived to be structurally equivalent to FZD and MBD. While factually there is a clear tendency to define this concept very broadly, everybody will be keen on explaining how closely related both spouses are. The vast majority of Himba marriages conform to the prescribed cross-cousin pattern (see Table 3).

Table 3: Cross-Cousin Marriage among the Himba

Matrilateral cross-cousins	Number	Patrilateral cross-cousins	Number
MBD	19 (38%)	FZD	33 (47%)
MBDD, MBDDD, MBDS, MBSD	11 (22%)	FZDD, FZDDD	24 (34%)
MMBD, MMZD, MMZDD, MMMBDDD	10 (20%)	FZSD, FZSDD	2 (3%)
MZD, MZDD	3 (6%)	FFZD, FFFZDDD, FFDD, FFZDD	5 (7%)
MFZSD, MFBD, MFZDD	7 (14%)	FBD, FBSD	4 (6%)
		FMBD	1 (1%)
		ZD	1 (1%)
	50		71

Figure 3: Himba Marriage and Inheritance



The Himba generally claim that marriages should fit broadly into an inheritance strategy. The following reasoning is behind MBD marriages. Ideally the daughter of the person leaving the inheritance marries her father's heir: that is, ego transfers his livestock property to his ZS, who at the same time stands in an MBD relation to his daughter and is

an ideal marriage partner. Modelled over the span of two generations, one could claim that the grandson of the person leaving the inheritance (his SS) will inherit the herd from the ZS of his grandfather. While this second consideration is quite theoretical, the first one is claimed to be the major idea behind marriage strategies. However, factual data on inheritance shows that due to frequent divorces, primogeniture and the complexity of the Himba inheritance system, marriages frequently do not link up with inheritance chains. It rather seems that arranged marriages try to manifest an option for a linkage. Whether this potential link will be realised one day is open for discussion and for a great deal of chance.

Summary and outlook

I have described here a fairly traditional inheritance system. There is little doubt that elements of this system will change rather soon: wealthy livestock owners are buying cars, money resulting from increased sales of livestock and occasional off-farm incomes is deposited in bank accounts, and livestock husbandry in general is becoming more market-orientated. Especially the introduction of money into this pastoral economy will change the rules of inheritance: whereas the origin of livestock is traceable, where does money from? What amounts resulted from the sale of livestock, and what amounts resulted from waged labour? In urban centres also the position of women changes: although I do not see any noticeable impoverishment of women or an increase of female-headed households in the northern parts of the Kunene region, this may well happen within the next decade as a result of rapid population increase at a point where the pastoral economy will find it hard to grow at the same pace. Hence, law reform pertaining to inheritance at the national level should make an attempt not to change the intricate local inheritance which members of the cultural community regard as transparent, just and efficient. It should rather try to prevent detrimental changes which may be connected to economic and social change. Interestingly, such changes may affect the inheritance of access to wells, pastures and settlement areas much earlier than it affects the inheritance of livestock. It is especially the strong sense of maintenance obligations the heir has which should not be undermined by reforms of the inheritance regulations. Perhaps the Himba example shows how well endowed local cultures are with conceptions of maintenance and how such conceptions are put to work.

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5: Estates and systems of inheritance among Ovahimba and Ovaherero in Kaokoland

Jekura Uaurika Kavari

The Ovaherero community (including Ovahimba) is characterized by its dual descent system, which structures its members into *oruzo* 'patrilineage' and *eanda* 'matrilineage' simultaneously. They are patri- or matrilineally related if they are descendants of at least one common ancestor or ancestress, sometimes a mythological figure. This dual descent system has a great impact on distribution of estates and systems of inheritance.

An *ePa*¹ (estate) of a deceased consists of properties which are classified as maternal, paternal and neutral. The particular classification to be used will depend on the history of each item within the deceased's estate and the history of each item will be crucial for determining who is the rightful heir to that particular item. An heir is a person with the legal right to receive the item or property or properties when the owner dies.

Both maternal and paternal properties are a form of heirloom, because they have been handed down in a particular lineage for several generations, for instance from *ooihe* 'fathers' to their *ovanatje* 'sons' and then to their grandsons in case of paternal properties. Maternal properties on the other hand, are handed down from *ozongundwe* 'maternal uncles' to *ovasya* 'maternal nephews' in their proper hierarchical order. When the hierarchy of *ozongundwe* 'uncles' from the most senior to the most junior is completed, the process of inheritance goes over to the hierarchy of *ovasya* 'nephews', again from the most senior to the most junior. Thus the maternal uncle-nephew relationship plays a significant role. In other words, properties in Otjiherero culture are collectively owned by maternal and paternal relatives respectively, because this continuity of inheritance makes them collective properties. In the case of maternal goods, the deceased inherited them from his/her maternal relatives and they have to follow

¹ The noun *ePa* (pl. *omaPa*) is derived from the verb *okuPa* 'to die'.

the hierarchy of the maternal line in their inheritance. In most cases, the maternal property forms the greatest portion of the estate and typically consists of all goods and livestock inherited from maternal relatives; properties acquired by the deceased him/herself; and certain sacred cattle normally proclaimed to be sacred by the deceased himself. In Otjiherero these sacred cattle are known as *ozomwaha*. The main heir(s) or maternal successor(s) are those who belong to the same *eanda* 'matrilineage' as the deceased, ie either *omuangu* 'younger brother' or *omusya* 'nephew'.

Inherited paternal property follows the paternal hierarchy of relatives and largely consists of an *okuruwo* 'sacred shrine', certain sacred cattle known as *ozondumehupa* 'males + to survive' and all tools and instruments associated with the *oruzo* 'patrilineage', *okuruwo* 'sacred shrine' and sacred cattle. The sacred cattle *ozondumehupa* are also associated with the *okuruwo* and, therefore, they belong to the paternal category of the properties. When the owner dies, the paternal male relatives inherit them going from the next paternal younger brother to their sons. The most important paternal relatives here are those who belong to the same *oruzo* 'patrilineage' as the deceased, ie either *omuangu* 'younger brother' or *omuatje* 'son'.

A child becomes a legitimate child of his father only when his mother is married to his/her father or when she/he is officially adopted by his/her father or his/her father's relatives. The *omakombezumo*² 'illegitimate children' are those children whose parents are not married to one another. In the past *omakombezumo* were killed, because it was taboo for a single woman to conceive. Later to avoid them being killed, they were hidden and were considered to be their mothers' sister(s) or brother(s). In other words they were regarded as legitimate children of their grandparents. In order for them to become legitimate children of their biological father(s) the right channels have been followed. The channels include *okuhepura ezumo* 'to report pregnancy', *okupwenisa* 'to give an animal for meal = food for the mother' which also known as *onyanda yomutete* or *yomumbonde*³ 'small livestock for traditional medicines, i.e. normally herbs' and *okuyandja katjivereko*⁴ 'to compensate for care and upbringing of the child'.

² *Omakombezumo* is composed of *omukombe* 'single mother or unmarried person' and *ezumo* 'pregnancy'.

³ The roots of these trees (*omutete* and *omumbonde*) boiled in water are traditional medicines drunk by the mother immediately after she has given birth.

⁴ *Okuyandja katjivereko* literally means to give something as a compensation for carrying on the back. The noun *katjivereko* is derived from the noun *otjivereko*

Firstly when a single woman becomes pregnant, she tells the person who impregnated her. He has to tell his parents about that. After the parents have heard that, they report the pregnancy to the woman's parents or paternal relatives who report it to the maternal relatives, especially *ongundwe* 'mother's brother'.

Immediately after the birth of the baby, the parents of the baby's father have the responsibility to *pwenisa* 'to give food with which medicines will be drunk'.

Sometimes when the baby is to be weaned, the father's mother takes the baby with the consent of both the paternal and maternal relatives of the mother. She keeps the baby in her care until she/he becomes an adult. Therefore the parents of the baby's father do not need to give *katjivereko* 'compensation for the care and upbringing of the child', because she carried and brought up the baby herself.

Nowadays, these channels have to be followed in order for the *omakombezumo* 'illegitimate children' to become legitimate children of their father(s), and then they will become eligible to inherit the paternal property of their father's estate.

Neutral property consists of goods and/or livestock that were given to the deceased as *oviyandjewa*⁵ 'gifts'. They belong neither to the maternal nor paternal side. The giver is the rightful heir to this type of property and is normally not related to the receiver. The donor has the right here to insist on its return or to allow it to be added to the maternal or paternal properties and inherited accordingly.

Before discussing inheritance it is necessary to explain certain Otjiherero words. *Okuhita* (literally: 'to enter') means to inherit the biggest share of the estate: the share that goes to the main heir who is the legal replacement for the deceased. That is, the one who fully 'enters' into the position left vacant by the deceased. The main heir is distinguished from those who *rumata* (literally: 'bite'). These simply take a 'bite' from the estate. They are secondary heirs and only receive a minor share. Therefore, he/she just takes a bite of the estate, as the whole estate is directed to and/or associated with the main heir. In other words he inherits just a small portion of the estate.

Okurya (literally: 'to eat') signifies a leviratic marriage. When the husband dies, the *omuangu* 'younger brother' or *omusya* 'sister's son'

'carrying skin' that on the other hand is derived from the verb *okuvereka* 'to abba or carry someone on one's back'.

⁵ *Oviyandjewa* is derived from the verb *okuyandja* 'to give', particularly meaning 'things just given'.

who is usually the main heir has to 'eat' the widow (*omuhepundu* 'the needy person') of his deceased brother or mother's brother. The term *omuhepundu* is composed of *okuhepa* 'to be in need of something' and *omundu* 'person'. The main difference between *okuramata* 'biting' and *okurya* 'eating' is: when you bite you take off a piece of something and when you eat you take the whole of it. Symbolically, *okurya* 'eating' signifies taking full responsibility for something while *okurumata* 'biting' is restricted to partial responsibility.

Death can also result in sororatic marriage or *okuyaruka mondjuwo* (literally: 'to replace her in her house'). When the wife dies, the main heiress to her estate who is normally her *omuangu* 'younger sister' or her sister's daughter has to replace her. The purpose of leviratic and sororatic marriage is to replace the deceased with someone who would look after the orphans as if they are their own children, because the man will look after his brother's children as his own and the woman would do the same. In other words, it is to avoid alienation, especially between the replacement and the children. Being the younger sister of the deceased or the younger brother of the deceased means they would more readily accept the children as hers or his and this will bring comfort to the bereaved family.

In this replacement custom, the widow is free to accept or reject her husband's younger brother as her new husband. The woman also has a wide range of choices. She has to choose among her possible *ovarye* 'eaters' (= husband's younger brothers and his sisters' sons). If she refuses to choose any of them, she is allowed to say "*me rondo ondundu*" 'I will climb a mountain', symbolically meaning that she will face difficulties of being without a husband. In such a case she will be taken back to her father or her father's sister's son(s).

Sometimes the widow will be allowed to stay with her children, especially when they are old enough to take care of her, although she still has to behave as if she is married to her in-laws. When she is caught having an affair with a man, that man will be fined to pay six cattle, because generally adultery is punishable.

The widower does not have a choice: he is obliged to accept the replacement. This forced acceptance is an implication of experience as expressed in the proverb: '*irwa iho o Pirwa nyoko, nyoko me ku pahere iho warwe*.' 'Your father may die but not your mother, because your mother will find another father for you.' This proverb simply means that if your father dies, your mother will find another man who will treat you with love like your own father, but if your mother dies, your father will find another woman who will hate and mistreat

you. Experience suggests this is generally true, because, in most cases, men easily accept the children of their concubines (fathered by other men) as their own children, but women do not accept children from other women. Women are generally jealous of these children and try their best to get rid of them so that their own children can take over.

Polygamy is a normal practice among the Ovaherero of Kaokoland. In case of death of a husband of a polygamous household, all his wives are divided among the *ovangu* 'younger brothers' and *ovasya* 'sisters' sons', because they have been the deceased legitimate wives. The inherited wife of a senior member stays senior to the inheritor's own wife or wives. Her status remains untouched.

In Otjiherero culture, the senior relative greets the junior first. Note here that "good morning/evening" etc is not considered to be part of the formal greeting, which starts with *kora* 'how are you?'. A junior is not allowed to say '*kora*' to a senior, as asking a question of a senior is regarded as an insult, contempt or disrespect. It is incumbent upon the junior to respond to such a query. As the inherited wife has been a wife of a senior, she will greet her new husband and his wife or wives as she had done before her husband's death. Normally one of the deceased's maternal male relatives, especially the *omuangu* 'younger brother' or *omusya* 'sister's son', inherits the widow, but a paternal brother may inherit her with the maternal relatives' consent.

When the deceased was a keeper of the *okuruwo* 'sacred shrine', the widow continues to occupy the *ondjuwo onene* 'main hut' if she is inherited by a paternal new keeper of the *okuruwo* or until she moves out to her new husband if she is inherited by a maternal relative. If the widow is the mother of the son who inherited the *okuruwo*, she remains in the *ondjuwo onene* 'main hut' and takes care of the fire and other rituals such as lighting the *okuruwo* every morning and evening, especially when she is too old to be inherited.

The children of the deceased should be inherited as well. The man who inherits their mother inherits them as well and they become his children. He will take full responsibility for them, for instance in the event of their marriage negotiations and other social events.

The administration and division of the estate is undertaken by *omuyanwa* 'the deceased's grandfather'⁶ who firstly divides the estate into the three types of properties described above and then decides

⁶ In the absence of the deceased's grandfather (or when he died already), the grandfather's sister's son or any person who belongs to the grandfathers' *eanda*, will take this responsibility.

who is the rightful heir(s) to each category. The widow and children of the deceased act as the witnesses when the estate is being divided into the three categories. They have to relate how each item entered the estate or how it was acquired by the deceased. Then the *omuy-anwa* 'deceased's grandfather' decides how the estate will or should be divided according to customary laws that govern the division of estate. He is the one to assign the estate to the rightful heir(s). The *ihe* normally inherits a bull as a symbol of being the father of the estate, with the bull representing the father of the deceased's livestock.

The deceased's younger sibling (of the same mother and father), *omuangu*, is the main heir to both the deceased's maternal and paternal goods as both belong to the same *eanda* and *oruzo*. If they were from the same mother but different fathers, then he will inherit the maternal properties only, because they belong to the same *eanda*, but a different *oruzo*. He will inherit the paternal properties only if they were from the same father but different mothers, as they belong to the same *oruzo*, but different *omaanda*.

In the absence of a maternal younger brother, the *omusya* 'sister's son' will be the main heir of the maternal properties. This term is derived from the verb *okusya* 'to leave something behind'. This means that the deceased left the estate behind for him. Paternal property goes to the paternal younger brother, and failing such a sibling the elder son of the deceased, *otjiveri*.

Female fathers and male mothers

The kinship system is such that symbolically at least certain gendered terms merge, thus one can have female fathers and male mothers. It is also important to understand these terms because they have major implications for how one behaves and, as we have seen, for inheritance. Aunts and uncles are not simply aunts and uncles in Ovaherero culture. The term for father's sister, *hongaze*, an important personage in Ovaherero society, is a combination of *iho* 'your father' and *ongaze* 'female', which literally means 'your female father'. The father's elder brother is called *honini* which is composed of *iho* 'your father' and *omunene* 'big, great, elder', meaning your great father as he is your father's elder brother. In Ovaherero culture, he is 'your big father' but not your uncle. Similarly the term for father's younger brother *inyangu* (correctly *honyangu* as the Ovazemba currently use it) consists of *iho* 'your father' and *omuangu* 'younger brother' meaning he is 'your small father', again he is not your uncle.

On the mother's side, there are none of these linguistic niceties as found on the father's side. Here there is terminological 'lumping'. In Ovaherero culture all your mother's female siblings are also 'your mothers', it does not matter whether they are male or female. Thus *mamatjiveri* 'mother's elder sister' is derived from a combination of *mama* 'my mother' and *otjiveri* 'first born'. Thus she is my big mother. *Mamangero* 'mother's younger sister' has the suffix *ongero* 'last born', meaning my small mother. Another term, *mamapokati* or 'mother-in-between', is constructed by adding *pokati* 'between' and signifying that she is either 'mother's elder sister but not the oldest' or 'mother's younger sister but not the youngest'.

Undoubtedly the most important relative on the mother's side is the mother's brother, *ongundwe*. In accordance with his responsibilities towards his maternal relatives, especially his *ovasya*, 'sisters' children', he is the main male mother. In all negotiations, he will represent the mother's side. For instance, in marriage negotiations, representatives from both sides must be present. Both may be females or males, eg *hongaze* 'father's sister' may stand in as the father and *ongundwe* 'mother's brother' as the mother.

The question '*ongundwee ku u nwina omaere owaäi?*' ('who is your uncle because of whom you are given sacred sour milk?') seeks to establish one's most important aspect of identity. When one arrives at a place where one is unknown, one is asked this question for identification. When it is found that one's uncle is known, one is entitled to drink the sacred sour milk, otherwise one will be given *omaPuka* 'butter milk'. This practice serves to establish one's identity, especially on one's mother's side through the 'male mother'. This is important to determine whether one is a proper Omuhherero or not. One is a proper Omuhherero when at least one's mother is a proper Omuhherero in the sense that she or her mother or grandmothers are not descendants of other ethnic groups who came among the Ovaherero as captives, herd-boys or just friends.

The preferred marriage among the Ovaherero is that the marriage *ovaramwe* 'cross-cousins', ie between mother's brother's daughter and father's sister's son or mother's brother's son and father's sister's daughter. When mother's brother's daughter and father's sister's son are married, the husband is the heir to his wife's father. The purpose of this kind of marriage is thus to limit alienation, conflicts and discomfort caused by the division and distribution of the estate, because the deceased's children and *ovasya* 'sister's children' are moved closer to one another by marriage and the estate will move in cycles.

The maternal kinship also comes into play in other social proceedings such as *ehepu* 'report of death' and *ozombakura* 'special meat given to the maternal relatives'. The noun *ehepu* is derived from the verb *hepura* 'to report'. After the funeral the maternal relatives of the father of the deceased (in cases where the deceased was a man or unmarried woman) or the maternal relatives of the husband of the deceased (in cases where the deceased is a married woman) go to the maternal relatives of the deceased, and they officially report his/her death to them. The purpose of this report is officially to declare that person dead. The *ombakura* (literally 'gift') is a special meat which the father of the bride gives to the maternal relatives of the bride during the wedding ceremony. In so doing the maternal relatives of the bride accept the responsibility as official witnesses of marriage, and also effectively concede that they too approved the marriage.

The systems of inheritance among Ovahimba and Ovaherero are complex and need much more detailed explanation in order for non-Ovaherero to understand. It is important to emphasize here that property normally does not belong to an individual owner but is rather collectively owned by the extended family members. The present owner is strictly speaking really only the custodian of the family property, and charged with maintaining, sustaining and increasing it on behalf of the extended family within the framework of social hierarchy in accordance with the principle of seniority.

This paper has just outlined the basic customary norms. Obviously some people try to deviate from them, creating conflict in the division of estates. Sometimes this may lead to endless court cases. In most cases, conflict arises in the categorization of items into the three types of properties; it does not result from the fact that the relatives do not know who the rightful heir is or should be. Therefore, in conclusion, the inheritance system in the Ovaherero community is a pre-determined semi-automatic process, because people potentially know with certainty who will inherit what from whom, and why.

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6: Inheritance Practices and Property Rights in Ohangwena Region

Joanne Lebert

Rights to inheritance and property are highly contentious amongst the Kwanyama of the Ohangwena region. Experiences of disputes over land and abuses of power in cases of inheritance weave themselves in and out of everyday life. These issues are talked about and debated, daily. Property rights also figure prominently in any discussion of the region's societal ills. However, these grievances and experiences also take on behavioural forms, which respond to and shape underlying processes of societal change. Interpersonal and social behaviours are reworked and balances of power are redefined – particularly between genders, classes and generations. In all their complexity, contemporary patterns of rights and responsibilities represent struggles to make sense of, or to position oneself within, a challenging and largely unfamiliar context. In the case of the Ohangwena region, the environment is one that is increasingly monetized, individualized, inequitable and insecure in ways unknown prior to independence.

This chapter attempts to contribute to a deeper national discussion of property rights, ownership and control. It seeks to provide specific and contemporary examples of practices of inheritance and property rights from the Ohangwena region. In so doing, I emphasize the importance of local context and history without romanticizing notions of community, tradition or even gender, which are experienced differently by different people and themselves form important spheres of power and struggle. For example, who exactly speaks for the community or whose interests are advanced on behalf of the community? Similarly, do all women share the same views and experiences? Do all women live in positions of vulnerability by virtue of their gender? What of the roles of age or class in their intersection with gender? And, where does tradition end and modernity begin? Certainly, this last distinction is more often than not blurred. Certain threads of history may be revisited and reworked, but who chooses which elements of tradition to uphold and which to discard and at what expense? All to say that gender, com-

munity and tradition are neither static concepts, nor are their members or adherents homogeneous and equally empowered to articulate or represent their interests.

Moreover, with reference to tradition and community, in particular “their continued value and contribution need to be measured in relation to current contradictions and needs, rather than some ideal (which is usually static) of social relations of the past” (Walker 2002:9). This article hopes to contribute to such an examination of traditional, communal and gendered ‘contradictions and needs’ in the interest of assisting with the development of appropriate and meaningful socio-legal policies.

The information presented in this article was collected as part of a broader ethnographic work pertaining to intergenerational relations and tensions in Ohangwena and, specifically, their intersection with the promotion of human rights, post-independence (Lebert 2005a; Lebert 2005b).¹ Therefore, the ethnographic material presented in this paper is partial in that it represents information collected tangentially as ‘secondary data’ that fall outside the parameters of my primary research questions. Consequently it should not be viewed as a definitive or authoritative text, but rather as a preliminary contribution to a broader debate about inheritance in Namibia. Nonetheless, this article attempts to pull together a number of threads in order to discern trends in the practices and norms of inheritance specific to the Kwanyama of Ohangwena. Above all else, the clearest trend is that such rights to property vary widely from homestead to homestead, depending largely on the nature of the relationship between husband and wife and/or between this couple and their extended (matrilineal) families. This, again, suggests a need for caution with respect to rigid and static views of tradition, gender and community.

¹ The information contained within this article was derived from research conducted between 2002 and 2004 (15 months in total). The bulk of the fieldwork was carried out in Ohangwena region, a predominantly Kwanyama area, with some archival work and a handful of interviews also conducted in the nation’s capital, Windhoek. Over 100 semi-structured and formal interviews were conducted, as well as several focus group discussions. These interviews and discussions involved traditional authorities, youth leaders, women, church leaders, extension workers (paralegals and social workers), government officials, NGO representatives, police and the local magistrate, in addition to meetings with aggrieved parties in cases of legal disputes. Interviews sometimes included a mapping of contemporary homesteads, the participants’ identification of assets contained within or associated with the homestead, and a follow-up discussion about entitlements and access to these items.

This paper is divided into three sections. First it discusses the four assets identified to be of greatest value to Kwanyama men and women: land and fields, cattle, millet, and children. This is followed by a more general overview of other homestead assets identified by participants when mapping their homesteads (mostly immovable items). The final section consists of general observations and developments with reference to contemporary inheritance practices and norms.

I. Assets identified to be of greatest value

Of all assets, land and fields, cattle, millet, and children were consistently identified to be of greatest importance to Kwanyama men and women.

Land/general (*edu*) and cultivated land/fields (*epiya*)

Today, some married couples view their cultivated or 'sowing' fields (*epiya*) and land (*edu*) as joint assets, while others continue to divide fields into unequal shares. In such cases of unequal division, the husband is allocated the largest portion in accordance with 'tradition'. When fields are considered joint assets, husband and wife tend to share decision-making responsibilities but the husband is often said to work the fields disproportionately less than his wife. He may limit his duties to 'ploughing only'. However, even if decision-making about the land is shared and even if the husband works the fields less than his wife, the husband continues to be the land's sole 'owner'.²

Upon the death of the husband, the widow generally stays on the land, but only if she pays the sub-headman. If she is unable to pay, the oldest adult son may step in to make the payment and assume ownership of the land. He may allow her to stay on the land. If, however, the son's wife does not want to share the homestead with her mother-in-law, the widow can either be chased away or have a smaller homestead built on her son's land. Irrespective of whether or not the widow

² Here, and throughout the paper, 'ownership' is understood as a life-long lease, terminated upon the death of the tenant. Land rights are usually understood as usufructuary rights that is, the rights to use (*usus*), enjoy (*fructus*) and exploit (*abusus*) land (Wanyeki 2003:2). However, for the purposes of this article, important distinctions are drawn between 'ownership' (again, understood as a life-long lease unless indicated otherwise), decision-making (eg to mortgage, sell or trade an asset), work invested or required of a person vis-à-vis an asset (eg planting, harvesting fruit, etc) and, finally, enjoyment or benefit from an asset.

has paid for the property, the fields (*epiya*) (and perhaps even the land (*edu*) in its entirety) are considered to belong to the eldest son, but only if he is considered 'clever'.

In the instance where the wife's death precedes that of her husband, the widowed husband stays on the land and does not pay the sub-headman. If he should die after having remarried, the land will be offered, and passed on, to the most recent wife and then to her eldest son.

If available, land generally tends to be newly allocated (by the sub-headman) to married couples and the elderly.³ Social convention dictates that youth under the age of 35 or even 40 years – and young women, in particular – will not leave their parents' homesteads or be allocated land until they are married. However, a young man may be provided with land (by his parents but with the sub-headman's permission) but, again, only if he plans to marry. And, contrary to tradition, an unmarried woman may now be given land by the sub-headman, but only in exceptional cases, as when 'she has nowhere else to go.' In fact, in spite of custom, anyone today can be allocated land by the sub-headman – assuming it is available – irrespective of status, age or gender, provided they have the financial means to persuade the village sub-headman.

Cattle (eengobe)

The husband owns all, or a far greater share of cattle than his spouse. Even if the wife owns cattle, the husband tends to make all related decisions and is responsible for the bulk of their care and management.

If the wife has her own cows, she will likely have acquired these in one of three ways: she would have been given cows by her father upon marriage; given cows by her husband; or she may have purchased her own over the course of her marriage.⁴ More commonly, the wife will only first acquire cattle upon the death of her husband.

³ "Newly allocated" refers to the transfer of land to an individual of no relation to the previous owner.

⁴ If the wife purchases cows via her own means, she is considered to be the owner of the animals. This is unchanged from historical times where "a man and his wife, too, could do whatever they liked with their own herd (of animals) which they acquired through swapping and buying. Neither had to ask permission of the other for any transactions, be it sale, swapping or slaughter ... In this category men and women were equal: the wife did not have to ask permission from her

Traditionally, upon the occasion of a man's passing, the cattle were reclaimed by his maternal relatives – a practice that continues today, albeit with lesser frequency.⁵ If the widow had, in fact, managed to acquire her own cows prior to her husband's death, these were not to be removed by the deceased's relatives. These animals were to be kept by the widow and ultimately belong to her children. Similarly, the husband's maternal relatives cannot defy the deceased man's wishes by taking the cows he had set aside for his wife and/or her children (usually her sons). Prior to his death, he may have told his wife and children that "if I die, that cow is yours"⁶ but, if his decision was not made public, either in spoken or written form, the widow may be unable to defend her entitlements (as per her husband's wishes) when confronted by her in-laws. It is not unusual for the husband to 'hide' cattle designated for his wife and children (by keeping them separate from the larger herd) so as to ensure their unhindered access upon his death.⁷

husband when she wanted to enter into any transaction with goods from this category" (Wulfhorst: Fb 26, 27; Rautanen: Fb 4; Kotzé: 131f in Delius 1984:134 & 141). As a general rule, then as now, items that are self-made, bought or traded with one's personal money/resources are regarded as the property of that individual. He/she has sole ownership and decision-making power over the item in question (Delius 1984:132-134). In the past, presents which an adult received from a stranger, (ie not from a near relatives), were viewed as having been obtained through one's own energy and thus were considered the property of the recipient.

⁵ A man's matrilineal inheritance traditionally abided by the following rules: Upon his death, the first order of inheritance was the man's eldest living brother or, in the absence of brothers, his eldest sister's eldest son, followed by his sister's daughter's eldest son. If the man had no siblings, inheritance would come to the eldest living male descendant of his mother's sisters (Delius 1984:149-150). In the case of a woman, the first traditional order of inheritance was her children. In the absence of children, her mother received her items followed by her grandmother and, fourthly, her siblings (Delius 1984:151). However, Loeb noted a slightly different order or female inheritance: A woman's daughters inherited ornaments whilst her sons received her cattle. In the absence of a daughter, her sister received her ornaments. In the absence of sons, her brothers received her cattle (Loeb 1962:109 in Delius 1984: 151-152).

⁶ Interview with Meme J., 1 March 2004.

⁷ Drawing from Tönjes, Delius notes that "(the) impoverishment of widows was one of the many reasons which led to modifications of the (matrilineal) system of inheritance already at the end of the traditional time ... (even then) a husband who could afford it, would sell especially cattle at a low price to his wife *with the knowledge of this matrilineal clan* to secure her maintenance after his death" (*my emphasis*) (Tönjes 1911:124-125 in Delius 1984:151). Delius also draws on Josef Kohler (1906), Rautanen and Wulfhorst (1910) and Krafft (1914) who described how fathers

Millet (omahangu)

Traditionally, husband and wife harvested their millet from plots that were disproportionately sized, with the man having the larger plot. He would, naturally, be able to harvest more millet (and possibly other secondary intercrops) than his wife. Their respective millet harvests were also stored in separate storage bins (*eemanda*). The woman's omahangu was consumed first by the family after which the husband's omahangu was eaten.

Today, how a husband and wife apportion their fields and millet harvests varies widely from homestead to homestead. A couple may simply pool together both fields and millet, they may divide fields and millet more equally, or they may live in strict adherence to custom. What is consistent, however, is that the husband owns either equal or more millet than his wife, never less. In cases where the millet is divided, husband and wife are said to own their respective halves. Yet, the woman is not only likely to work and make decisions about her own millet, she is also likely to work and make decisions about her husband's share. In the event of her death, her millet is passed on to the widowed husband, to the children (both girls and boys) and to her maternal family – although it is unclear how and when this distribution occurs, and who gets how much.

Children (*vakwa*)

A fourth asset, consistently identified to be of greatest importance to Kwanyama men and women, is children. Children have traditionally been considered to belong to their mother's family, a fact that some men judge to be unfair. As one elderly community leader said in a particularly sardonic tone:

worked to secure goods for their sons, after his death. As with his wife, a public transaction would help secure the child's well-being: "A father could either sell cattle to his son at a very low price or he could swap them for something which is worth less than cattle" (Delius 1984:156). According to Tönjes (1911:110 in Delius 1984:157), another method of securing his children's well-being was to marry a woman with wealthy brothers. With time, methods involving greater secrecy were adopted as some wealthy fathers chose to bank their money so as to render it inaccessible to the matriclan. Alternatively, sons sometimes buried their father's money to hide it from the deceased's matrilineal family.



Sifting millet (omahangu) in the Ohangwena region



A millet storage basket, or *omanda*

But the children the women gets, it's her family. But, we men have no family at all ... You have children but they are not your family. They belong to your wife. They are the family of your wife. So that's how we are.⁸

The children's mother makes more decisions about their welfare and upbringing than does the father. The mother's brother also tends to play a pivotal role in the children's lives. The mother invests comparatively more time and effort in her children. And, although the mother may benefit more from her children than their father – as when they protect her interests in cases of widow dispossession – she and her maternal family also tend to be held most responsible for a child's socially deviant or criminal behaviour.

Historically, a woman could leave her husband quite easily, possibly because he had more than one wife. The woman was free to leave with her things, even with any cows and/or goats that belonged to her.

⁸ Tate S., 29 May 2003.

However, if she was leaving a man with whom she had had children, she could not take her livestock with her because these animals, in fact, belonged to her children. And, her children stayed with the father in such cases of divorce unless, of course, the man (or his other wife/wives) did not want to look after the children of the woman who sought to leave the relationship and homestead. (It remains unclear as to why the children should stay with the father in cases of divorce when the children 'belong' to the women).

Should the mother pass away, the age of her children largely determines where they will live. If old enough, the children may simply stay in their parents' homestead. If younger, the children may stay with the father – as was tradition – or, alternatively, they may be divided up between families. Although the children may be sent to live with either the mother or the father's family, it is unclear if these adoptive families are restricted to those of matrilineal relation. Regardless of which family the deceased's children are sent to live with, they may suffer discriminatory treatment or even abuse in their adopted homestead. Traditionally, and still today, adopted children may be treated as free labour or afforded lesser status than the other children in the homestead. In cases where children remain with the father, there is a risk that he may push the children out of the homestead if a new wife objects to the presence of children from his previous marriage.

It is noteworthy that the compassion of the woman's maternal family is anticipated and valued, while such emotion was rarely expected from the man's maternal family. Rather, his family is expected to be reasonable. For example, in the event of a mother's death, it was hoped that her maternal family would be sympathetic and not come to claim the deceased's millet, opting rather to leave it for her children. In the event of a man's death, however, it was expected that his maternal family would exercise restraint, restricting their repossession to the deceased husband's items only so as not to unnecessarily or unduly punish the widow.⁹ The widow needs to be left on the land with such essentials as a plough, bed, etc. Concern for the well-being of the

⁹ An elderly woman and widow indicated that, traditionally, if actions by the deceased man's family were thought to be excessively opportunistic, she could go to the sub-headman who would then counsel the offending family. If the family's behaviour continued unabated, the sub-headman could then take the matter to the traditional court. She went on to say that widows no longer bring such matters to the traditional court, opting instead to go to their church warden or limiting their traditional legal recourse to the sub-headman only – though it remains unclear why this has changed. (*Memekulu V.*).

children is more often articulated in the case of the mother's death than of the father's death. Yet, in either case, the children are highly likely to experience increased insecurity.

The HIV/AIDS pandemic has exacerbated the insecurity experienced by children. Not only are large numbers of children losing their parents to the disease, but increasingly find themselves abandoned by the parents' relations, who choose not to be burdened by extra children. Consequently, more and more homesteads in Ohangwena are inhabited and managed solely by children – something that was unheard of until recently. In fact, this new trend co-exists in stark contrast with the prevailing social convention that dictates that youth under the age of 35 years will not manage their own homesteads until married.

It is clear that, in Ohangwena, a child who loses his mother and/or father becomes one of the most highly vulnerable members of society – and more so today than ever before.

II. Homestead assets

Over the course of interviews and focus group discussions, items contained within, or associated with, the homestead were identified and mapped. Entitlements to these assets and their usage were also detailed.

A summary of this collected information is presented below with the caveat that experiences of ownership, decision-making and usage vary a great deal from one homestead to another. The management of immovable and moveable homestead assets depends, perhaps most importantly, on the nature of the relationship between husband and wife. Thus, the following must be read as an overview of trends rather than as a definitive description of homestead life.

Traditional homestead assets

In the Ohangwena region, the husband generally has greater or even exclusive ownership and decision making power over the following immovable assets in and around the homestead: the receiving area (*olupale*); the husband's storeroom and most of its contents, including axes and hoes¹⁰; the sitting room; the room providing shelter from

¹⁰ Each 'room' represents one thatched hut in the homestead compound.

rain; the grasses for thatching (*ediva lokukashula*); and the grasses for pasture (*onhele yukuli fila*). He may have his own bedroom (*oduda yomushamane*) or he and his wife may share a common bedroom. In the latter case, his wife may have decision-making power with regards to the management of the bedroom but the husband maintains ownership and dominant control of the physical structure and its contents.

The wife, on the other hand, has much greater (or exclusive) ownership and decision making power over the following: the kitchen (*epata*); the storeroom for kitchen items (*elimba*) and most of its contents; her bedroom if separate from the man's (*oshakalwa*); the girls' bedroom (*oukadona eduda*) whilst the boys are said to own and make their own decisions about their room (*ovamadi eduda*); the woman's millet storage (*omanda*); the place to stamp omahangu (*oshini*); and the beans as a harvested crop (*omakunde*).

The husband owns the room immediately across from the receiving area (*olupale*), which is also used to receive guests at times (*ondjuwo*). He also owns his container for storing millet (*omanda*) as well as its contents. However, his spouse exercises a certain degree of control as she makes decisions with regards to both the *ondjuwo* and her husband's *omanda*. Similarly, the husband owns the maize (*omapungu*) but related decisions are made in conjunction with his wife. On the other hand, the wife owns the marula tree (*omwongo*)¹¹ but it is her husband who makes related decisions about the fruit tree, its harvest and management.

Husband and wife co-own the sorghum (*oilyavala*) and goats (*oshikombo*), although, in some cases the husband may own more goats than his wife. The couples' children (both boys and girls) may also own goats. The husband makes most decisions with regard to both the family sorghum and goats. The husband and wife may also co-own *omwandi* fruit and embe fruit (*omuve*). However, one person did say that only the wife makes decisions related to embe and that the children were, in fact, the sole owners of the embe fruit.¹²

¹¹ Over the course of fieldwork discussions and interviews, the distinction between the fruit and the fruit tree was not always clearly established and would require follow-up.

¹² Delius draws on a number of historians and missionaries to describe, in general terms, how the Kwanyama managed their fruit trees, traditionally: "Fruit trees which stood on sowing land, were allowed to be used by the tenant and his family. The fruits of such a tree thus did belong to him in the same way as the harvest of his field; the fruit tree was part of his tenure. If, however, the fruit tree standing in the sowing land is a marula tree, then the tenant had to give a share of marula fruits to the sub-headman. Fruit trees not standing on sowing land were harvested



Ohangwena homestead

Other items husband and wife may co-own and make joint-decisions about include: fig trees (*omikwiyu*); palm trees (*omalunga*) and palm tree oil, although the husband may own more trees than his wife; groundnuts (*oshifukwa*), although, in this case, the wife may own disproportionately more than her husband; and chickens (*oxuxa*) and the chicken coop (*oshikuku*). Children may also own chickens.

Division of labour

The wife harvests, cleans and generally works everything but the cattle, although she may even do that in some cases.

Her husband ploughs the fields and may harvest maize, sorghum and embe. He also cuts the grasses for pasture and primarily looks after cattle and goats. How much effort he contributes to the sowing, weeding and harvesting of crops varies widely but such activities tend to be considered as ‘helping’ his wife (and children) with her duties. The husband’s relations (likely maternal, though unsure), may also help to harvest maize and figs.

by the sub-headman. Rautanen on the other hand claims that that person was allowed to harvest a fruit tree which did not stand on sowing land whose sowing land was nearest to that tree” (Wulfhorst: Fb 32; Kotzé 85; Rautanen: Fb 8; Rautanen & Steinmetz 344 in Delius 1984:129-130).

As for the children, the boys are charged with looking after cattle and goats. Both boys and girls harvest embe and figs, work the palm trees, millet and maize. They may also help harvest sorghum.

Non-traditional homestead assets

Non-traditional homestead assets – that is, those which have only recently become more common – such as cars, money and more permanent ‘modern’ houses are viewed as belonging to the person who purchased them. Then again, in some cases, a wife may buy a car with her earnings but register the vehicle in her husband’s name thus making him its legal owner. Money is generally shared by the couple and will go to the surviving spouse upon the other’s death.

‘Modern’ houses, however, seem to be far more contentious upon the death of the husband.¹³ His maternal relatives will often lay claim to the house and want to dismantle the building, either to relocate it elsewhere or to re-use the building materials for other purposes. Another related problem is that the building of such permanent structures within homesteads has meant that their owners are very reluctant to move when there is a transfer of property or conflict within the household. For example, if someone is married into a family and then is either widowed or seeks divorce or, then again, if a long-term guest of a family member is threatened with eviction, they will very likely claim ownership over a ‘modern’ house to contest their forced expulsion. These ‘modern’ houses are talked about in such a way as to anchor individuals to a particular location with greater permanence than before. Alternatively, someone who is threatened with eviction may want compensation for his/her investment, which often prolongs conflict as remaining family members either cannot or will not meet the individual’s demands.

¹³ Again, Delius provides a review of archival materials with regards to property as pertains to the Kwanyama and, more generally, to the Owambo. He states that, traditionally, “houses were regarded as movable property; at least the material from which they were made: wooden poles and the roofs ... A correctly purchased plot with its building stayed the property of the buyer and could consequently be inherited by the matrilineal relatives of the owner.” ‘Correctly purchased’ refers to the permission granted from the sub-headman in addition to the payment for the plot. The sub-headman then decided on the size of the plot, which could not be more than 200 sq. ft and could not be erected on sowing land (Kotzé 84; Rautanen/Steinmetz 344 in Delius 1984:126-127).

III. General observations

Widow dispossession

If my husband passes away, everything will be taken away by the family of the man. And, I will be left with nothing but I'm the one who does all the work like working in the fields ... When we got independence, Meme Netumbo Ndaitwah, she is the one who told people about human rights. She says a woman must have a right.¹⁴

Traditionally, a widow was given one year after the death of her husband to cultivate and harvest a crop. She could then return to her family with greater security and "live happy."¹⁵ But, if she was unable to produce food for herself, or was destitute with children to care for and nowhere to go, she could be provided with some modest assistance.¹⁶ According to one sub-headman, if the deceased left more than one widow and they were equally destitute, these wives may not be eligible for any assistance whatsoever.

Today, widows are still chased from their land upon the death of their husbands, albeit with less and less frequency.¹⁷ If a widow is forced out of her homestead by her deceased husband's family, the widow's mother's family would still be expected to take her in, as she would likely have nowhere else to go. However, unlike tradition, the widow is no longer granted a one-year grace period to acquire some degree of food security before moving on. Rather, she is immediately chased away, often within days of the burial. In fact, it is not unusual for the deceased man's family to descend upon the homestead the day after his burial to reclaim his items.

Of course, not all families partake in such practices of dispossession. Many are respectful of (though not necessarily in agreement with)

¹⁴ Meme C., 22 February 2004.

¹⁵ Meme K., 27 November 2003.

¹⁶ It remains unclear if it is the sub-headman or the deceased husband's family that would assist in such a case. It is also unclear exactly what kinds of assistance could be provided.

¹⁷ Walker, writing about gender and land in Africa, correlates land's increased monetary value and overall reduced availability with the heightened vulnerability of widows: "It appears that as land acquires a value, also as a result of increased pressure on land, widows are more vulnerable to being forced off the land by their inlaws, or by their sons. Widowhood represents one of the crisis moments in a woman's life when her structural vulnerability and her dependence on her male relatives, natal and marital, becomes exposed ..." (Walker 2002:19).

the newly enacted government and customary laws intended to protect widows from forced removals. Yet, those who rob widows of their entitlements to land are not always the deceased husband's family. There are cases where sub-headmen have chased widows off their land even when their respective husbands' families chose not to do so. Allegedly, this is because the headmen wanted to profit from the ensuing land transaction.

Even though a widow may be allowed to stay in her homestead, she may still be dispossessed of the assets she is legally entitled to keep for herself and her children. The husband's family may descend upon the homestead – sometimes in the middle of the night – to take what they believe is rightfully theirs. Widows are often expected to make a one-time payment of N\$200 (and upwards) to their sub-headmen in order to secure their entitlements to their land upon the death of their husbands. There are even reported cases where a homestead resident of maternal relation to the deceased may 'give away' the land, leaving the surviving wife and children with no land to cultivate.

Women with adult male children seem to be best protected when faced with the threat of dispossession or illegal treatment. Of course, this assumes that a mother and son respect one another, for he too may chase her off her land as he takes ownership. Some men have expressed concern that after their death their adult sons will fight over their assets to the detriment of their mother's well-being and security. Then again, some widows are very clear that they do not want to be under their son's control. In either case, the sub-headman will likely parcel off some of the son's land so that the widowed mother may build a place of her own on it.

Attempts to do away with the system of widow dispossession and to enact laws – both formal and customary – to protect women who may face particular vulnerabilities upon the death of their spouse are generally well received locally. However, there is some reluctance by men and women to do away with the system entirely. There are, for example, situations where the system of widow dispossession is thought to be entirely justified, as when the widowed wife is deemed to have 'colonized' her husband or 'acted badly' after his death. Her 'misbehaviour' can include her flaunting the enjoyment of her deceased husband's assets, her 'misuse' of his things or denying his children use of her kitchen items, for instance.¹⁸ Similarly, she may be perceived

¹⁸ It is unclear if this denial of access to her items applies strictly to her deceased husband's children (born of another woman) or equally to the children they parented together.

to have ‘colonized’ her husband by not caring for him over the course of their marriage: She may not have provided him with food when she should have, withheld adequate care or gone out to inappropriate places at all hours, ‘walking up and down like youth’.

Such poor conduct can be said to justify a widow’s dispossession of her land and assets, action that may be openly condoned by community members, irrespective of the law.

The traditional law says ... let’s say, I am living with my husband and I am colonizing the men and people in the community or everybody knows that I am colonizing my husband. If he passes away, I won’t be given that land.¹⁹

It is understood that if someone is unable to be attentive to the needs of others they cannot be trusted with land (although it is not clear whether or not this principle applies equally to both women and men).

When we give land, we look to the person’s behaviour. The law says we must look well... because not all the people can be given the land. If the person cannot take care of others... they must not be given land.”²⁰

Record keeping and wills

The issues of record keeping and access to reliable documentation in cases of inheritance and property rights are fundamental. Although some traditional leaders are keeping adequate records and using official stamps to certify transactions and written agreements, others are not so diligent. Cases that span a period in which there was a transfer of power from one traditional leader to another tend to be particularly confusing. Similarly, absentee land-ownership causes a great deal of confusion.²¹

Handwritten records can also be easily altered, and hard-copy documents can be misplaced. Irrespective of whether such risks are

¹⁹ Meme R., 28 February 2004.

²⁰ Senior Headman, 8 March 2004.

²¹ Delius’ research demonstrates that, traditionally, actual usage of sowing land was not a prerequisite of land tenure. “If a piece of sowing land was not used for a year or two the land did not fall back to the chief automatically but stayed the land of the tenant ... once the fee for the right to use sowing land was paid, the chief was not allowed to reallocate.” (Delius 1984:125-6)

real or imagined, the *suspicion* of fraud heightens tensions and unnecessarily prolongs cases. There is also a prevailing suspicion of written or official documents, resulting in a situation where the contents of a will may not always be readily believed and could be challenged in court.

Most residents of Ohangwena do not have wills. Matters of inheritance may be privately discussed between individuals, but such agreements are neither publicly or legally defensible. Today, in the absence of a will and in cases where parties cannot agree on the distribution of the deceased's assets, the sub-headman may recommend that his maternal family receive a gift in order to maintain peace between families. If there is still acrimony between parties, the sub-headman will take the matter to his Senior Headman.

Conflict resolution and legal pluralism

In cases of inheritance disputes, people most often begin by seeking recourse or assistance via the local system of traditional leadership. The sub-headman (responsible for a ward or *omukunda*) or Junior Headman (responsible for a small cluster of wards) represents the first level of traditional authority to be consulted. If that person is unable to resolve the dispute, the case is brought by the Junior or sub-headman to the Senior Headman (responsible for the district or *efulula*). If the case remains unresolved, it is then presented to the Kwanyama Traditional Council, held monthly in the town of Ohangwena. The Council is presided over by eight Senior Headmen and by King Colonelius Mwetupunga ya Shelungu, who acts as the Council's figurative head.

Namibia's system of legal pluralism allows for formal and customary law to co-exist, provided tradition is respectful of the country's supreme law, the Constitution. Although all citizens are bound by formal law, customary law allows for some degree of flexible membership. In other words, some Kwanyama may choose to ignore customary law and adhere solely to formal law, albeit not easily. More commonly, people seem to opt in and out of the traditional system as they please, positioning themselves to their greatest advantage.

This utilitarian approach to law is coupled with a general lack of enforcement in the traditional system. People often fail to present themselves before the Traditional Council when expected.²² Those

²² Local traditional authorities hope that this problem of enforcement will be partially addressed with the enactment of the Community Courts Act (November 2003), which is expected to cement a closer working relationship with the police.

charged with an infraction or crime may not pay their fines in a timely way, if at all. And, even after the Traditional Council has ruled on a case, parties involved in a dispute may insist that their case be reconsidered. Consequently, cases brought before the Council are often postponed, drawn out, or reopened and reviewed.

‘Government’ law

The introduction of written law and the establishment of legal institutions, post-independence, have been generally accepted by the residents of Ohangwena but with some degree of apprehension. It is acknowledged that disputes over land and abuses of power in cases of inheritance need to be addressed. However, many men and women have expressed frustration that the law seems only to protect the interests of women.

While some clearly misunderstand or fear the assertion of women’s rights, others express a more nuanced critique of ‘government’ law. In fact, it is widely believed that post-independence laws overlook the complexity of gender relations as lived in the North. Even when it is acknowledged that women tend to face greater hardships and vulnerabilities than men, it is felt that current laws fail to account for the strength and power of some women and the weakness or vulnerability of some men.

In cases of inheritance – particularly when a woman is earning an income equal to, or greater than, her spouse – there is a fear that, upon the wife’s death, her maternal family will descend upon the homestead and leave the widowed husband destitute. In other words, it is expected that by increasing a woman’s entitlements, her husband will suffer and automatically assume the position of weaker marital power traditionally assigned to a wife. Of course, the laws protect the interest of widows, irrespective of their gender. Nevertheless, it is widely believed that current laws disproportionately and unfairly favour women.

Another related concern is that, regardless of the intent of current laws, people do not have equal access to the legal system. Rather, it is experienced as the exclusive domain of the powerful and wealthy. These privileged few can afford lawyers and work the system in their favour.

However, I maintain that strengthening the relationship between traditional leaders and local police will not necessarily lead to greater respect for the law and for human rights law, in particular (Lebert 2005a; Lebert 2005b).

In the villages, those who have a basic knowledge of the law and wish to protect themselves and their spouse's and children's rights to property, have no access to meaningful (formal) legal recourse. Depending on one's location, police are rarely easily accessible and can be unpredictable in their sympathies and in their own knowledge or enforcement of laws. In some cases, the sub-headman and other community leaders may knowingly turn a blind eye to situations of inheritance rights violations.

Fewer women are being chased from their homestead and land when widowed. Similarly, more and more are allowed to keep their husband's assets upon their death. However, despite the fact that more families are acquiescing to government law, many continue to *want* to lay claim to their deceased relative's assets. It is not unusual for a widow to be harassed by her deceased husband's family. Its members may do so either to acquire the deceased's items or to express their opposition to the widow's continued presence and/or usage of the homestead and its contents.

The widow may live in fear that her spouse's family will come to her in the dark of night to claim these items (as does happen). One woman expressed fear for her personal safety and for that of her children. She may be verbally abused, spoken of negatively and/or publicly shamed. There is also the threat of witchcraft, whereby her husband's family may accuse the widow of having orchestrated her husband's death in order to profit from it. In all of these cases, such threats to one's physical integrity, dignity and honour may make the widow's life intolerable in spite of the legal protection afforded to her.

IV. Analytical overview

Issues of property rights and inheritance amongst the Kwanyama of the Ohangwena region are of fundamental importance, particularly in an environment marked by heightened socio-economic insecurity. This overview of contemporary practices of ownership, decision-making, and usage points to a number of needs, contradictions, and trends worthy of careful consideration when developing related socio-legal policies.

Above all else, the clearest discernable rule is that variability and malleability are the norm in customary practices of property rights and inheritance. Patterns of asset management and inheritance are heavily influenced by the nature of family relations and the personality of indi-

viduals involved. How a husband and wife relate to one another, the type of relationship they each maintain with their respective extended (especially matrilineal) families, and the nature of a woman's relationship with her children (and sons, in particular) often determine which family members will assume which rights and responsibilities upon the death of an individual.

It is no coincidence that assets identified to be of greatest value – land and fields, cattle, millet, and children – are also most central to livelihood and survival in Namibia's North. For analytical purposes, these assets can also be viewed as those that are most 'public' in the sense that they extend beyond the palisade walls of the homestead: they are physically in touch with, and integral to, the broader community while also holding very high symbolic and emotional value.

At the same time, it appears that these same highly valued assets have increasingly been shifted away from a matrilineal system of inheritance to a system whereby one's primary heirs are one's (only) spouse and children. In other words, the rights of the extended matrilineal family have been increasingly subsumed to those of the nuclear family unit – a historical process that appears to have been accelerated, post-independence.

In matters of inheritance, the rights of widows and children may be better protected as a direct result of this shift. However, it is interesting to note that as the rights of extended family members have been curtailed, commitments to responsibilities traditionally assigned to these same members have weakened. This is most evident by the absence of care for orphans and the creation of an entirely new social phenomenon, that of child-headed homesteads.

Assets that are considered to be of secondary or lesser importance may, more often than not, be conceived of as belonging to either the husband or the wife, as in keeping with tradition. Often, there is a fairly clear distinction with respect to the rights and responsibilities connected to such items – ie who makes decisions about it, who works it, who benefits from it, who owns it, and of course, the inheritance rights attached to the item.

This overview and, specifically, the distinction between ownership, decision-making, usage and enjoyment raises more questions worthy of deeper study. Setting this contemporary information against a history of gendered property relations would be of great value. Equally significant would be researching how these roles came into existence and how they have been justified over time. Also, a better understanding as to the symbolic meaning and economic value of each and every one

of these assets would offer up important insights into the dynamics of power experienced between men and women.

However, what can be maintained and what is of tremendous importance to a discussion of contemporary issues of property rights in Northern Namibia is the fact that some extended families continue to claim homestead items based on such gendered patterns of ownership.²³ In other words, fewer and fewer widows may be chased from their land upon the death of their husbands, but the deceased's matrilineal relatives may still descend upon the homestead to reclaim *moveable* items that had belonged to the husband. His cattle will be claimed first. Other items may include building materials (from his rooms), his rooms' contents such as hoes and axes, 'modern' items purchased or constructed by the deceased, and gifts given to his wife.²⁴ Even if a couple had pooled their assets or viewed them as co-owned, these may still be appropriated by the deceased husband's matrilineal family.

Although fewer and fewer women are chased from their land and homestead when widowed, those that are so dispossessed, today, seem far less secure than in the past. In cases of dispossession of moveable or immoveable property, the broader community often seems to be complicit: traditional leaders, neighbours and police may all turn a blind eye to such violations of formal and revised traditional law. It may also be that the widow is thought to have been 'deserving' of such retribution (as when she has breached social norms) or that matters of inheritance are considered to be internal to the families concerned. Most likely, it is thought that the widow in question will (or has already) descended upon her brothers' respective homesteads in turn. She either has or is expected to act no differently when an opportunity presents itself upon the death of a male sibling.

This latter view suggests a utilitarian approach to law, where formal law is considered a nuisance or even a threat up until one's own rights are violated. Still with reference to formal law, it is popularly believed that women's rights inherently disadvantage men. Although this critique is largely based on a misinterpretation of women's rights, it

²³ Again, whether such patterns of ownership as described above are, in fact, true to 'tradition', 're-traditionalized', newly invented or any combination of these would require further investigation.

²⁴ With regards to modern items, a public proof of ownership is required. For example, if a widowed woman claims ownership of a modern house, she must be prepared to have witnesses to bear truth to the fact that she purchased the materials with her own money or contracted labour for its construction.

remains a call to acknowledge the complexities of male/female power dynamics – as reflected in homestead asset management and ownership. Moreover, the experiences and identity of women differ widely throughout the region and within communities: age and class in particular are pivotal differences between women.

When considering responses to customary inheritance practices and property rights, national policy and law-makers need to take into account the nuances of power operating at a local level. Idealized and static notions of community, tradition and even gender need to be acknowledged if the interests of the most vulnerable in society are to be attended to. Moreover, consideration of local needs must take into account broader historical, political and socio-economic processes for these shape how people make sense of their lives because, ultimately, ‘struggles over resources’ are ‘struggles over meaning’ (Li 1996:501). Policy and formal legal mechanisms must be flexible enough to accommodate and respond to such social change, yet provide meaningful access to reasonable recourse for those most disadvantaged in society.

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7: 'It all depends on the family': Revisiting laws and practices of inheritance in Namibia

Heike Becker

The changing contexts of Namibian discourses on inheritance laws

In Namibia, like in other countries in the southern African region, 'customary laws' on inheritance have been a major concern for many years. More than fifty years ago, the Superintendent of the Finnish Mission approached the Native Commissioner, Ovamboland with the following words:

Officer Sir ... when a Ovambo man dies, his relatives, from the same mother as he, will come and take away all property which belong to the deceased, sometimes even the clothes the deceased husband had given his wife. Very often the widow and children – the children of the late husband too – must leave the craal and field without getting nothing which did not clearly belong to the widow. ¹

Missionary Viktor Alho reported, further, that 'the unscrupulous practice of the above law' had been extensively discussed in the Synod of the Evangelical Lutheran Church in Ovamboland at Engela, 31 August to 2 September 1950, which had been attended by 28 Ovambo pastors, 58 delegates of the various congregations, and six of the Finnish missionaries. The Synod requested the administration to look into the matter as, "it seems impossible to establish civilized and Christianized family life amongst the Ovambo people so long the present Ovambo law of inheritance is necessarily in force in regard to the Christians too. [sic]"²

¹ Auala ELCIN Library and Archives; Correspondence with Government Officials 1944-1950 Ecij.

² Ibid.

At the time, the Lutherans' stated concern was primarily with the presumed incompatibility of the 'native law' and the 'Christian' lifestyle, which the church wished to promote. After Namibian independence in 1990, the parameters of the inheritance debate shifted from those earlier moral concerns to the inheritance laws' detrimental effect on 'women's rights' (compare Namibia Development Trust 1994). Even more recently, from the late 1990s onwards, inheritance-related worries have come to focus on the welfare of the increasing numbers of children orphaned by the HIV/AIDS pandemic.

Research conducted in August 1998 at various locations in northern Namibia found that 'AIDS orphans' were affected in several ways. HIV/AIDS often aggravated poverty. Orphans suffered emotionally not only because of the loss of their loved ones but also because they were in a number of cases relegated to being a second-class child in the (extended) family. They lost out with respect to education if there was no one to pay their school fees, or to encourage them to continue their schooling. Yet, this research among rural and urban Owambo also emphasised that the circumstances of orphans might in many instances deteriorate due to the loss of inheritance rights (LeBeau et al 1999: 110-115).

At about the same time, the first study on Namibian orphans commissioned by the Namibian Ministry of Health and Social Services (MOHSS) and the United Nations Children's Fund (UNICEF) contained many grizzly tales of the plight of orphaned children where greedy relatives had grabbed whatever belongings had remained after the parents' death, and had left the children destitute. In other cases, the children's mother was still alive, but the husband's relatives had simply stripped her and the children of any property the deceased husband had left behind (MOHSS/UNICEF 1998).

As a follow-up, UNICEF commissioned another study on orphans and inheritance-related matters, for which I was contracted as the principal researcher. In June and July 1999 I, together with student assistants, conducted research in six Namibian regions on inheritance practices, with a focus on 'customary laws' of inheritance and guardianship, and the oral or written designation of estates.³ This paper

³ The research was carried out under the auspices of the Centre for Applied Social Sciences (CASS), a sociolegal research unit affiliated to the Law Faculty of the University of Namibia (UNAM). Thanks are due to the field researchers on the project: Sophia Amoo, Sacky Kadhila Amoomo, Linda Dumba, Piteimo Hainyanyula, Anne-Doris Hans, Matilda Jankie, Monica Kalondo, Cons Karamata, Mervin Konzonguizi, Immaculate Mogotsi, Filip Shilongo and Hipura Ujaha.

revisits some of the (thus far unpublished) findings of this consultancy research (Becker 1999).

Terminology and concepts: What is 'law'?

The findings of the research on inheritance and guardianship have challenged me to rethink and explore a set of questions related to the research and conceptualisation of 'customary law' from a social science perspective. For many years, authors who have written about and within the context of the anthropology of law (or 'legal anthropology', as this sub-discipline of social and cultural anthropology is usually called) have argued about the meanings of the word 'law'. Already in the 1960s, the influential anthropologist Max Gluckman critically asked, 'what is law?'. Quite rightly, Gluckman argued that assumptions that it 'must have one meaning, and one meaning only' provided a wrong perception:

Indeed, in any language most words which refer to important social phenomena – as 'law' obviously does – are likely to have several referents and to cover a wide range of meanings. ... If jurisprudence is full of controversy centring on how 'law' should be defined, the terminological disputes are increased when tribal societies, with their very different cultures, are investigated. Since our own words for 'law' and related phenomena are already loaded with meaning – indeed many ambiguous meanings – students of tribal societies run into difficulties as soon as they try to apply these words to activities in other cultures. (Gluckman 1965: 178-9)

Six of the thirteen Namibian regions were selected as study sites; within each region the research was directed to specific socio-spatial locales: Katutura (Khomas), the Subia area and Katima Mulilo (Caprivi), the Epako township of Gobabis (Omaheke), Rehoboth (Hardap), Opuwo and Himba people (Kunene), and OuKwanyama (Ohangwena). The study population thus included a fair cross-section of rural, semi-urban and urban localities, and allowed glimpses of how different kinship systems might impact on inheritance practices, as the locales included matrilineal (Kwanyama), patrilineal (Baster and Nama groups), double descent (Herero and Himba), and cognatic patterns (Subia and other groups in Caprivi).

Field research was based on qualitative social research methods and conducted by field researchers who were mostly UNAM senior law students. Key informant interviews with legal officers, office bearers of traditional authorities, social workers, health workers, ministers of religion, AIDS counsellors, regional and local councillors, and other community leaders provided the core of the data. In each region two focus group discussions with men and women respectively provided a 'commoner' perspective on inheritance and guardianship practices. Two individual in-depth interviews per region were conducted with widows and widowers.

Despite these ambiguities, Gluckman proposed the continued use of the legal terminology – as derived from Western-based legal systems – for the sake of clarity. Already at the time, others, among them another prominent anthropologist, Paul Bohannan, criticised this usage. Bohannan suggested that, as ‘law’ was not a useful category in cross-cultural research, social institutions should rather be described in local terms but not be labelled in terms of the technical language of Western law systems (cf. Caplan 1995a: 6-7).

Yet, for some time to come, mainstream legal anthropology continued to research ‘law’, understood as located in specific forms of social organisation and bureaucratic procedures, often focusing on courts and rules. More recent work, however, has seen a shift towards a broader perspective on dispute settlement and the politics of argument (compare, e.g., Caplan 1995b). This paradigmatic shift has also found its way into the conceptual framework of innovative work carried out by (socio-)legal researchers on inheritance in southern Africa. The regional report drawn up by the *Women and Law in Southern Africa Research Project (WLSA)* on widowhood, inheritance laws, customs and practices presents a good example of this tendency (Ncube & Stewart 1995). The Zimbabwean law researchers Beatrice Donzwa, Welshman Ncube and Julie Stewart suggest that ‘law’, even if qualified as ‘living law’, is a problematic term to describe ‘the operation of other normative systems, such as ‘customs and practices’ and it would, thus, seem preferable to refer to the daily regulatory processes and procedures as ‘custom and practices’ (Donzwa, Ncube & Stewart 1995: 75).

Interestingly, Donzwa, Ncube & Stewart titled their paper ‘Playing with the Rules’. It appears, however, that the recent critical thinking about law and local practices has generally not yet found the way from the academic arena into public discourses, popular publications,⁴ and applied research. These continue to focus on customary law *rules*, even where they attempt to incorporate practice on the ground. My own past research on inheritance provides a good example for this usage. Despite the methodological emphasis on practices (‘what is really happening’), the conceptual framework of the original study set out from the assumption that inheritance practices were largely governed by ‘customary

⁴ Compare, for instance, the publication by Wits University Emeritus Professor of Anthropology, David Hammond-Tooke (1993). This popular, lavishly illustrated coffee-table style book, which is still in print and widely available in bookstores directed at the general reading public, draws a distinct line between ‘custom’ and ‘laws’ applied by a court (Hammond-Tooke 1993: 91).

laws', which were conceived of as sets of 'rules'. The inherent tension between methodology and conceptual framework becomes obvious in the following extended passage extracted from the research report that was submitted to UNICEF in October 1999:

Considering the role of inheritance under customary laws several aspects needed to be taken into account. The research looked particularly at the inheritance rights children have under the different Namibian customary laws. The investigation focused primarily on the customary opportunities children have to inherit from their parents, and only took a secondary look at their possible titles to inheritance from paternal or maternal relatives. In connection with the inheritance rights of children the research further took a broader look at the role of customary law in governing inheritance and customary *practices* of inheritance ('what is really happening'), as opposed to 'rules'. The focus on customary practices finally required an analysis of recent changes in the area of inheritance and concurrent changes of the concept of 'the family'.

The research found much variation on the issue of inheritance rights of children under customary laws. Under most customary laws, children have had certain inheritance rights to either their parents' estates, or to those of certain relatives. Inheritance from a maternal or paternal relative has been more strongly provided for in those communities where the membership of either a matrilineage or a patrilineage, or both as in the Herero double descent kinship system, has played a significant role. On the other hand, inheritance rights to the estate of the parents have dominated in those customary laws where the function of the lineage has been limited. This is most clearly exemplified in the Western-rooted kinship system which revolves around the nuclear family. However, it appears that also the cognatic kin relations which have been predominant in the communities in the Caprivi have lacked a commitment to a wider lineage, and inheritance has largely been passed on from the parents to their own children. (Becker 1999: 6)

Thus far, these were rather predictable findings in the context of 'customary law' research in Namibia where, unlike in South Africa, there have never been determined efforts to codify a unified 'African customary law' for the whole of the country. Bennett's generalised commentary certainly never applied to Namibia that, 'customary law is neither vague nor uncertain, since the principle of patrilineality is clear and well established. ... [and] During marriage a wife's acquisitions become her husband's property.' (Bennett 1995: 126). Yet, the

analysis of the data, while emphasising the apparent contradictions between rules and practices, remained limited precisely because it remained dependent on the legal referents to 'laws', 'rights', and the somewhat formalistic understanding of kinship 'systems'.

Playing with the rules

However, as the findings demonstrated, 'customary laws', understood as 'rules', which could be enforced through sanctions were far less significant for inheritance practices in at least five of the six Namibian regions where the study was carried out than generally assumed in past and present public and popular discourses.⁵

The high level of flexibility of inheritance practices at most of the study sites was indeed the most significant finding of the study. In the Ohangwena region, for example, the general picture showed that while the matrilineal inheritance, or rather its negative distortion of 'property grabbing' was reported as being fairly common, there was a distinct feeling among the informants that the 'rules are flexible' or even that there were 'no rules in place'. Practices were said to vary widely. In the Ohangwena region cases were reported where children had inherited from their late father, or where the maternal family, the widow and the orphans all received an equal share in the estate. The general feeling was that 'it all depends on the family'. If the deceased had a good relationship with his or her relatives, the maternal family was less inclined to strip the orphans of any belongings. However, the practice was often undermined by a 'black sheep' in the family, ie, a member of the deceased's maternal family who employed the notion of traditional succession to 'grab' as much property as possible. Some informants felt that such a practice was not only due to individual personalities and family relationships, but partly depended also on the family's economic situation. The desperately poor were said to be more inclined to 'grab' whenever an opportunity arose.

Ohangwena appeared to be by no means exceptional. In a similar fashion, the conditions and relationships of an individual family were said to alter or even cancel customary law rules in other parts of Namibia. In the Caprivi, too, many informants emphasised that the rules of inheritance varied widely and were handled in a highly flexible

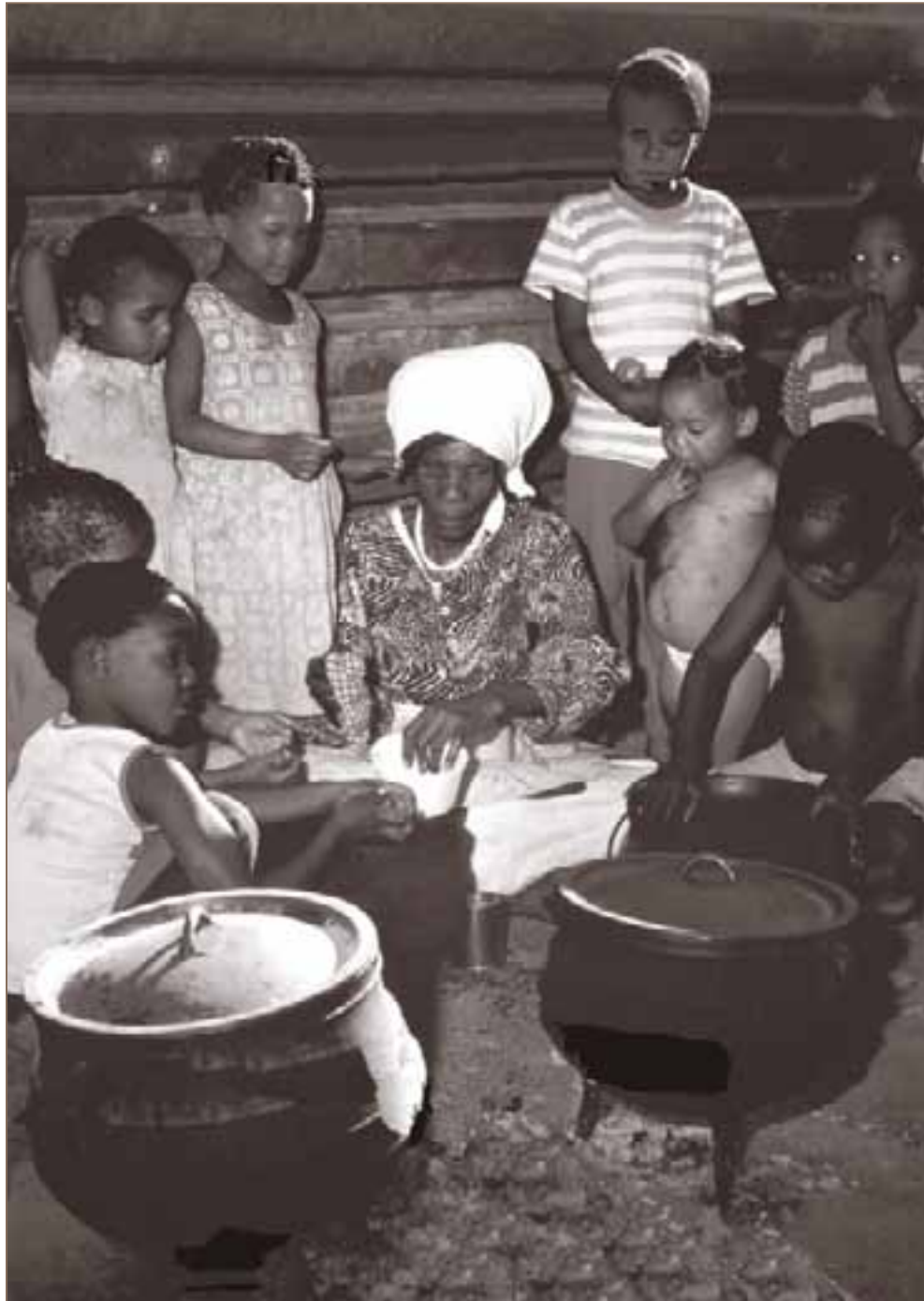
⁵ The exception was the north Kunene region where the informants, all identified as Himba, presented a picture of more rigidity in the application of 'customary laws' of inheritance.

manner. As much as in Ohangwena, the different practices were said to depend in the first place on the individual family. People regarded the family's relative affluence, and their sense of 'understanding' of the orphans' needs as determining factors. Several informants expressed grave concern about the increasing incidence of 'property grabbing' in the region, which they argued was entirely 'non-traditional'. However, it appears that the practice where relatives of a deceased man 'grab' his property has become much more common recently in this north-eastern part of Namibia. As some of our informants in Katima Mulilo stressed, property grabbing had increasingly become socially acceptable during the late 1990s. Again, the least affluent sections of the community were reportedly more given to the practice. Several informants claimed that there was a direct connection between the HIV/AIDS pandemic and the emergence of the practice in this part of Namibia, as it had become more common at the same time as the number of deaths caused by AIDS skyrocketed in the Caprivi, where the deadly consequences of the pandemic had manifested themselves earlier than elsewhere in Namibia. A number of people, thus, did not see much difference between property grabbing and another trend of changing inheritance practices in the wake of the HIV/AIDS pandemic, namely that those infected, particularly men, often tended to squander whatever they had when they learned about their HIV positive status. AIDS had caused people 'to live fast', or so it was said.

A great deal of flexibility also emerged from the research in Gobabis (Omaheke region) and Rehoboth (Hardap region), both best characterised as peri-urban areas with relatively, though not entirely, homogenous populations. The only study site where rules appeared to be applied in a less flexible manner was among the Himba of the Kunene region.

Urban Katutura presented yet another picture. It appears from the research that the people who have been resident more permanently in Katutura have developed a common distinct concept of family responsibility and inheritance practices irrespective of their 'culture of origin'. There was no disagreement among Katutura residents of different language backgrounds in the depiction of their inheritance practices. In contrast, many informants drew comparisons between the situation in the city and that in the rural areas. Customary law rules were said to be hardly significant for the way in which long-time city dwellers handled inheritance. This became apparent through the contrasting views of a group of recent migrants from Owambo, who now lived in the informal settlement at Babilon, Katutura. These recent arrivals in the city sketched a very different concept of the family as the basis of

inheritance practices, which they unanimously painted as the extended matrilineal family where all adults had the duty to look after the extended family's children and handle inheritance in line with Owambo 'law and custom'. Interestingly, the recent immigrants from the rural



north-central regions appeared to be less flexible in their depiction of inheritance practices than people in Ohangwena.⁶

Several informants of various cultural backgrounds who had been living in Windhoek for a longer period volunteered information on the conspicuous differences in inheritance rules and practices between their area of origin and that of Katutura. On the one hand, they tended to describe the practices in their home area ('our culture') in terms that often pretty much matched rule-based customary law, quite in contrast to those people who were interviewed in some of the very same rural areas. On the other hand, irrespective of where they or their parents hailed from originally, city dwellers said that, as urban residents they would inherit from their parents, and from their siblings, but rarely from any maternal or paternal relatives. Children were particularly likely to inherit their parents' house, money, and insurance policies. While both male and female children were said to inherit from a deceased parent, several informants stressed gendered practices: fathers tended to leave their more valuable possessions, such as motor vehicles and money, to their sons. In the case of a mother's death, gendered patterns appeared to be blurred. Some Katutura residents suggested that daughters were usually their mother's main heirs, but this was contradicted by others who maintained that mothers usually bequeathed equal shares to their children regardless of the children's sex. Whatever the details of each case, it became clear that in the case of urbanised Katutura residents, relatives, if they at all received a share in the estate, were more likely to inherit the deceased's personal belongings such as clothing, jewellery or trinkets, while the valuable assets went to his or her children.

The research demonstrated that practices in many instances overrode rules of inheritance. In like manner, the situation of who takes responsibility for the children of deceased parents was generally presented as one of a high degree of flexibility. It was found at all study sites that people had developed a range of practices to ensure that orphaned children were taken care of by the extended family. The understanding of 'taking care' further appears to extend to both the day-to-day care for the child and the decision-making on his or her behalf. Across Namibia it was said that the person who looked after the child on a daily basis was usually also the orphan's guardian. Interestingly, the control of the child's inherited property, where there was any to speak of, was found to provide an important aspect of the concept of guardianship.

⁶ This may owe, in part, to the fact that they were mostly young and single.

'Taking care of' an orphan child and the control of that child's inherited property (in such cases as there was any) were said to usually go 'hand in hand'. This concept is, however, by no means owed to customary law rules. In the Ohangwena region, for example, informants claimed that 'previously' orphans would have gone to live with their maternal relatives, whereas the paternal relatives would have inherited the lion's share of the deceased parents' belongings as those were regarded as the deceased husband's property. It goes beyond the confines of this brief paper to explore in some detail whether earlier practices indeed strictly followed such stipulated rules. It is more interesting, perhaps, to see this specific form of cultural memory as an indication of a now well-established trend towards notions of individual property and inheritance. Obviously, these notions cancel out customary law rules which were based on joint family (lineage) property. Across the country it was said repeatedly that relatives in some cases only agreed to take in orphans in order to gain control of their inherited property for their own benefit. The young heirs themselves might benefit very little from the property which had been bequeathed to them.

At all study sites informants stressed that these practices were derived less from customary rules than they were designed to suit individual circumstances. It appears, however, that grandparents and the deceased parent's brothers and sisters were most likely to take custody of an orphaned child. Whereas, in line with different concepts of family and kinship, maternal relatives were preferential caregivers and guardians at some locales, at others these were more often from the paternal family. However, informants across Namibia suggested that in most regions earlier 'rules' on who was to be an orphan's caregiver and guardian had become even more flexible than they were in previous times. It was reported at various sites, for instance, that in the case of orphans who had lost both parents, the paternal and maternal families would often come together and take a joint decision on who should take care of such children.

A focus on practices

In this paper, I have pointed out the high degree of flexibility of inheritance practices almost everywhere in contemporary Namibia. It is by no means my intention to deflect attention from certain problematic and at times discriminatory inheritance practices, particularly the frequently reported, deplorable 'custom' of property grabbing by relatives

of a deceased husband and father. Yet, I have argued that a shift in focus from inheritance rules to practices allows for new perspectives in research, advocacy, law reform and education. Efforts to amend detrimental practices, as common as they may currently be in certain parts of the country, may receive a boost if documented, alternative 'best practices' can demonstrate that so-called customary laws of inheritance are by no means compelling.

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8: In Small Things Stolen: The Archeology of Inheritance versus Property Grabbing in Katutura¹

Debie LeBeau

Background

Katutura is the large African settlement on the outskirts of Windhoek, the capital city of Namibia. The people in Katutura are the most ethnically diverse and urbanised of all regions in Namibia. About 90% of the Katutura population are ethnically Owambo, Herero, Nama and Damara. Currently, immigration (along with AIDS) is one of the most significant transformational factors influencing the structure and composition of Katutura's population (LeBeau 2003:71). Since independence the rate of immigration has increased substantially, with the Khomas Region having a growth rate of 4% (the national average is 2.6%), and 93% of the people living in urban areas (primarily the greater Windhoek area) (NPC 2003:4,10). Most of the people in Katutura have strong ties to their rural families and/or places of origin. Indeed, Frayne (1992:184) found that over half of the population had migrated to Katutura within the ten years preceding his research and estimated that less than a fourth of the population were born in Katutura.

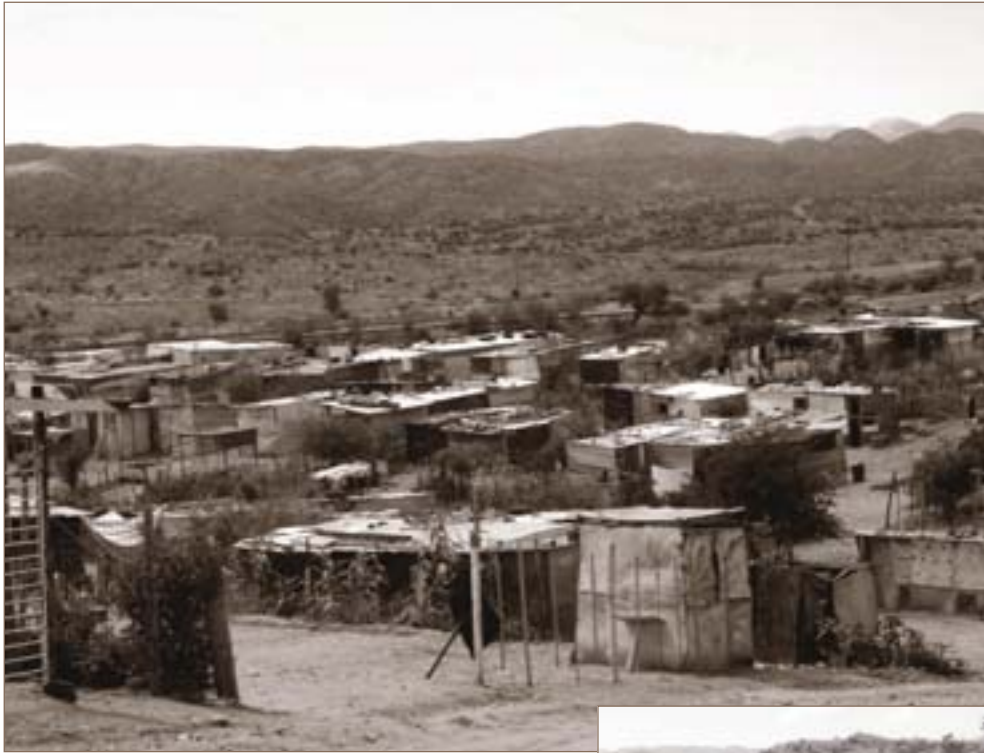
However, this migration is not a simple uni-directional phenomenon, but is cyclical in nature whereby migrants are central to a web of rural-urban familial and social relationships. As has been found in other African countries, migration from rural to urban areas exhibits a high degree of complexity of social relationships that are interwoven between rural and urban loci (cf Webb 1997:13; Spiegel 1999:9;

¹ Some interviews used in this paper were collected by Michael Conteh as part of a joint research project with the Legal Assistance Centre (LAC) and the Gender Training and Research Project at the University of Namibia. Supplemental interviews were conducted by the author, while others were collected with the assistance of Monica Nganjone of the LAC.

Winterfelt 2002:39-74). Some of these various inter-related dimensions include culture and economic interdependence, thereby making the urban migrant part of the rural cultural and economic milieu. Spiegel (1999:2-5,7) suggests that there are no clear dichotomous rural versus urban land spaces, but that a rural-urban nexus should be considered a single social field due to these significant rural and urban linkages, as well as migrants' perpetuation of a quasi-rural lifestyle – the results of which he calls 'revillagised'. However, this network of relationships is not a single social continuum of relations between rural and urban family members due to 1) distance separating the groups; 2) problems in communication; and 3) urban relatives being more distantly related to the migrant than rural relatives. Thus this network of social relationships represents a set of interwoven social contacts that are not as coherent as a single family unit, but are socially fragmented (LeBeau 2004:50). Even for non-migrant urban dwellers, most have social relations with rural extended family. LeBeau (2003:71) found that 92% of her Katutura research population had family in the rural areas who they visit on a regular basis. This complex web of rural and urban social relationship creates a dilemma for urban dwellers who are expected to uphold cultural values and maintain familial linkages, while at the same time aspiring to amassing wealth and an urban lifestyle. This contradiction between rural customs and urban values plays itself out in the arena of inheritance where actors may not share the same beliefs and goals for the distribution of property.²

This study reports on some findings derived from a recently completed study (LeBeau et al 2004), but has its specific focus on the urban nexus that is Windhoek. It is based on some 28 interviews and focus group discussions with about 64 people. Data for this paper is derived from two separate periods. In 2001-2002 eight key informant interviews with community leaders and 4 focus group discussions with Katutura community members were conducted by a supervisor and a local language speaker. In 2005 an abbreviated version of the same sets of questions was used by the author to collect data from an additional 5

² In this paper the term 'tradition' is used to denote beliefs and behaviours that predate colonial contact. The terms 'cultural', 'custom' or 'customary' are used to denote contemporary beliefs and behaviours that may have been altered with colonial contact. The terms 'culture', 'community' and 'society' are used to denote a group of people who are ethnically related and have more-or-less homogeneous beliefs and behaviours. This system of reference, although not perfect, is an attempt to delineate terms in common usage that may influence the way people think about contested sites of inheritance.



An informal settlement in Katutura

A typical shanty in the settlement



A section of Katutura near "Wanaheda", "Soweto" and "Luxury Hill"

key informant interviews and 5 focus group discussions. Data collected in 2005 did not differ significantly from that previously collected. In both instances, interviews were stratified by age (25-40 and 40+ years old), ethnicity (although there were a couple of mixed ethnicity focus group discussions), and sex (male and female). Community leaders included people such as school principals, business people, elders with traditional knowledge, political leaders and church leaders.

Culture and contradiction

Culturally, who a person is related to – forms of tracing descent – and the nature of the relationship often determine who has the right to which categories of property when a person dies (LeBeau et al 2004:ii). In Katutura there is basically patrilineal descent (Nama and Damara communities), matrilineal (Owambo communities) and double descent (Herero communities). Under civil law a written will guides the division of property after death, while principles of civil law are applied to intestate deaths. Under customary law the customs and norms of the culture under consideration dictate rules of inheritance. The rules of inheritance differ from culture to culture but the most striking differences are between matrilineal and patrilineal communities (LeBeau et al 2004:xi). In matrilineal communities the deceased husband's family, customarily his male relatives – traditionally his nephews but in contemporary society all of his relatives – typically inherit all matrimonial property regardless of how or who brought the property into the marriage. In patrilineal communities it is frequently the deceased husband's children – usually his first-born son – who inherit the husband's property.³ In patrilineal societies the widow is more likely to be seen as owning part of the matrimonial property, to inherit from the husband's portion of the property or maintain control over property inherited by her children if the children are still too young to manage the estate (LeBeau et al 2004:xi). Therefore, patrilineal inheritance does not significantly stand at odds with western forms of inheritance – as does matrilineal inheritance. In double descent systems as found among Herero-speakers, economic rights and objects are inherited matrilineally while political and religious rights and objects are inherited patrilineally.

³ This paper will only deal with that happens to property after a man dies because this is the most often found site of contention. As will be discussed in the paper, when a woman dies, the man retains most marital property with little or no protest from the deceased woman's relatives.

Customarily, in most matrilineal societies, after the funeral of the man, his male relatives come together to discuss the distribution of property. The time period between the funeral and the distribution of property varies from immediately after the funeral to one year later. This distribution may also involve the headman of the area. All of the deceased man's male relatives sit together and there is one trusted member of the family whom the deceased has told what property he owned and how he wanted his property distributed. This 'oral will' is widely known to the other family members. The family then distributes a portion of the deceased man's property and decides who is to inherit the homestead, the man's widow and children and the bulk of the estate. In some cultures (such as Herero) the widow is consulted about who she would like to inherit her, while in other cultures (such as Owambo) the woman is not consulted (although there is evidence of change here). In this case if the widow does not agree with who is to inherit her and the children, she can leave the homestead with little or nothing and return to her parents' homestead.

In patrilineal societies, usually a widow and her children inherit a deceased man's property, with the widow retaining rights of control over the property either until she dies or until her children are old enough to decide how they would like to use what they have inherited from their father. Patrilineal inheritance only rarely causes a problem for Katutura residents, with the primary factor being whether the couple were married in community of property (meaning the widow owns half of the estate) or out of community of property (meaning that what each person owns has to be calculated). Within patrilineal communities, disputes arise over rights to distribute property and which property is to be distributed – issues similar to those arising under civil law.

However, in the urban areas, matrilineal inheritance practices are at odds with western concepts of property ownership. The complex link between an urban dweller and his or her rural family can often lead to social tensions and internal psychological conflict for the urban person – the urban person is expected to uphold these cultural norms and practices, while at the same time having been exposed to western concepts. Often it is not the urban family that seeks to enforce such cultural norms, but rural relatives who attempt to uphold cultural norms of inheritance – which favour the deceased man's extended family. On the other hand, many people in Katutura are western in world view – which typically favours widows' and children's rights to inheritance. In addition, urban women who have greater access to legal support such as legal assistance, courts and the judicial process, are in a better

position to uphold their rights to property and inheritance.⁴ These contradictory and oftentimes clashing perspectives can lead to rural relatives, who feel that they have a cultural right to property amassed by their male relative, ‘grabbing’ property upon his death – often in illicit ways.⁵ A Katutura business woman explains this contradiction of perspectives:

The woman is the one who is supposed to inherit all those things, because they work together with the man. They are the ones who are paying for that property together. But now with the in-laws you have a problem. They might say ‘no, it’s our brother’s things’, while they don’t know who bought what. We say ‘we bought something also’. Now they come and say this is for our brother. So, you just watch. Whatever that remains, you just take that.

She explains that typically the deceased man’s relatives take cattle, the house, cars and even the television because they refuse to acknowledge that a woman could have financially contributed to the household for these items. The business woman continues by explaining that if the couple were not married, and especially if the woman had not yet had children, she is in an even more precarious position for claiming some of the communal assets. The business woman says “*No children? Again, if it’s the family to the man, they will come and grab everything*”.

Why accumulate property? The question is often culturally framed. For example, many headmen do not derive their social standing from how much wealth they accumulate but rather from how much wealth they have at their command for those in their tutelage when times are hard. It is better to give much away and have a lot of people come to your funeral. For this reason, Ouma, a prominent Nama healer, is still talked about as though she were alive. It is Ouma’s house and Ouma’s grandchildren and (importantly for the family) who will inherit Ouma’s spirit. Almost all of the female grandchildren have told me they are sup-

⁴ The Namibian Constitution guarantees the right to own property and also declares that discrimination based on among others, gender, is a right enshrined in Article 10 of the Namibian Constitution. In addition, the Constitution allows for the use of customary laws and practices, as long as they do not violate rights guaranteed in the Constitution (LeBeau et al 2004:i,14). Therefore, such customary inheritance practices are unconstitutional, although these customary laws and practices have only partly been tested in court.

⁵ The term ‘property grabbing’ has come into common usage in contemporary Namibia to connote the act of relatives descending upon a grieving widow and children and removing property that was amassed by the couple during marriage.

posed to inherit her ancestor's spirit. No one has so far. Who inherits it will most probably be the one that is best able to show that she can be the matriarch of the family – therefore they compete (in discourse more than reality) about who has done the most for the family since Ouma has passed.

Some people see the property that is left behind as being a marker of wealth, while others see the social relations left behind as being more important. The huge insurance policies and big tombstones and large funerals, however, are not about the property the person has, because at the funeral one cannot see the material wealth. However, it is the social standing that is flaunted at the funeral. Having a prominent person, such as a professor or a doctor, eulogize a person is taken as great proof that this was indeed an important person. If you have to rent a bus to take the people from the church to the grave, then you are very wealthy.

Of course all of this emphasis varies by culture; Nama emphasise social relations (see also Klocke-Daffa in this volume) while Owambo and Whites look more at material wealth. This is often related to a developed sense of “entitlement” to the deceased's property. Even Nama informants now report that some in-laws now try to use Owambo inheritance patterns and some have also tried to claim that uncles should support children, not fathers. Oftentimes culture is fluid and people pick-and-choose that part of culture that will benefit them.

Inheritance: ownership as ideology or greed

Several informants discuss the psychological and social contradictions inherent in trying to apply cultural norms and practices to an urban lifestyle. Younger, more western-oriented people indicate that although they know the cultural norms, they do not think that these should be practiced in Katutura because such practices violate a person's Constitutional rights.

Conversely, slightly older men think that customary methods of marriage and inheritance are better. These men (between 25 and 40 years old) reason that ‘modern’ marriages often end in divorce, but traditional ones do not, therefore ‘modern’ forms of marriage have failed for Africans and they feel that people will go back to customary marriages because “*women feel proud when their marriage is officially or traditionally ordained*”. These men went on to explain that even if women did work and earn the money to buy their own homes, they

would not stay alone in these houses because women “*need men to be with them, women cannot take authority, they need men to tell them what to do*”. As the men talked in more detail about customary laws they decided that if customary laws could be codified into civil law, then more people would be willing to accept them, even though they recognise that customary laws violate human rights. They discuss this among themselves:

Halfiku says: “*We are more traditional than European, but we are governed by the European laws. Our traditional laws have got no authority, but if traditional laws are promoted and they become legal, I think we will take a different perspective.*”

Tobias retorts: “*I don’t think we can convert these laws that put women in awkward positions. Fundamentally it is because they are a serious human rights abuse ... But I also don’t think we will be able to suddenly remove these laws.*”

However, most women who were interviewed did not share these men’s sentimentality for cultural practices that discriminate against women. Young women feel it is appalling that a deceased man’s family feels that they have a right to property that is amassed during the marriage. These women feel that it is the greed of men that leads to such situations and that now women have legal recourse if the deceased man’s family tries to take the communal property. Indeed, these young women also do not feel that marriage in contemporary society is an imperative and one informant brazenly says, “*I mean, marriage is just a piece of paper ... I’m single. I’m not married. What do you wanna know?*” – to which the rest of the women respond by laughing.

Often when discussing issues of inheritance, some informants describe customary ideals, to which other members of the interview group respond that these are the areas that are changing and people should not always talk about the ‘old’ ways but should recognise what is really happening in contemporary society. Often the discussion is heated and contentious, as the following exchange between two young informants exemplifies:

John: “*No, that’s what I’m saying, because you are just talking about times that are changing you see.*”

Elmo: “*Comrade, have you noticed that traditions are strong, but now they have been infiltrated by some of these practices which we do not want, we want to put an end to this.*”

Thomas: *“That’s why I’m saying it’s important that we don’t discriminate because when you grow up you are going to have the same mentality. ... Because now your mentality is already full of this colonial attitude to say, this person is more important than that one.”*

Some informants explain that emotions run high when discussing inheritance because property that is inherited has a much stronger sentimental value than property which is purchased. These informants argue that although greed sometimes comes into play with inheritance, there are also emotional factors at work. One older Owambo man explains:

If you inherit something from your family lineage, that one you take very close to your heart because you have inherited it and if an animal just comes among your livestock, then you don’t have so much attachment. It is less important than the rest of the livestock. Ja, something that you’ve bought with money is less important than something you’ve inherited, so there are those degrees of importance.

Several informants make the distinction between rural and urban patterns of inheritance by indicating that ‘traditional’ items should still be inherited through customary inheritance, while urban and ‘modern’ property might be disposed of differently. Items specially described as being best inherited culturally are land, cattle and other livestock, as well as the traditional homestead. Another older Owambo man explains:

It depends on the importance of that property. For example you inherit a piece of land from somebody who died ... it is the decision of the extended family where also headmen are involved. So, inheritance of a goat and the inheritance of an ox, there is also a difference. A goat can be decided at a very low level, but things like cattle, they have to be decided by the head of the extended family, he needs to be there. ... The piece of land belongs to a man. A man has to occupy a piece of land that belongs to his lineage – or extended family. So now if he dies, of course the piece of land will remain the property of the extended family. So the woman just has to leave. The extended family feels entitled to that land and the issue of property, especially animals. But now when it comes to cars, money and small household things, they are not very important to the extended family, but of course money depends on what amount. If it’s a big amount again the extended family should decide how they should distribute it.

Given this informant's emphasis on amounts and values, it would seem that sentimental value is only one aspect of how strongly the deceased's extended family feels about what is inherited – the other factor is clearly value of the property. This informant is saying that basically anything of value should go to the deceased man's extended family and the widow and children can be left with the less valuable assets. Herero informants identify similar property as belonging to the man's side of the family and thus only inheritable by the man's extended family. These items are identified as land, homesteads, tractors, cars, cattle, donkeys and the deceased man's clothes. The deceased man's family would also inherit any money left behind, while the widow would inherit cooking pots, traditional necklaces, beds and cupboards. However, this informant says that it is possible for an adult son of the deceased man to inherit some of his property and thereby use this property to care for his mother. Conversely, Nama informants indicate that the homestead and all of its contents are usually inherited by the oldest son, while the daughters inherit kitchenware such as cutlery and pots. However, if the widow is still alive, she is allowed to stay in the house until she dies. If the family is young, then property is *"kept within the framework of the homestead. It is just there and it remains there"* with the widow and children.

Older men also discussed the emotional and social contradictions with the changing rules of inheritance. One older Owambo man, while explaining the new rules of inheritance whereby a widow is not stripped of property after the death of her husband, also says that he may not follow these rules and *"if my uncle dies, I am only going to take the cattle and run with them"*.

It is clear that not all informants feel that sentiment and 'tradition' alone are motivational factors in inheritance, and see customary forms of inheritance as having been manipulated by people looking to enrich themselves. Indeed, some young men say that *"the household head and customary law inventors are colleagues"* who conspire to rob women of property. Slightly older men also discuss the problems with customary inheritance rules being used for modern property. They recognise the fact that these customs are no longer being upheld in the manner they were intended and that the deceased's relatives exploit customary systems of inheritance for their own benefit. They explain that traditionally the relative that inherited a deceased man's property did not own it, but was only the custodian of the property, to be used for the benefit of the widow and children; however, people have gotten greedy and use the property for their own benefit. These young men explain:

You see in the urban set up men like our uncles and our brothers when they inherit they are playing that role of custodian over the family. But now what their brothers left they are using the personal belongings that have been inherited for their own use, for unnecessary luxury, flamboyant life. They were supposed to have taken a custodian role. Therefore I would have my things to remain with my wife and kids so they don't suffer. ... it is because of too much greed, especially men they want to manipulate for that flamboyant lifestyle.

Some young women explain that it is not only the deceased's male relatives who abuse inheritance, but that even their female relatives are now trying to get hold of a deceased man's property, although they see this as completely unacceptable. They say that today *"There are crazy women who want to inherit from their uncle. ... Yeah, we do have such crazy women"*. It is clear that many people have decided that inheritance is not only about being left something to remember the deceased by or as a family heirloom, but inheritance in a world of amassed wealth is now yet another method of 'getting rich quick'.

One group of young women discuss a story of attempted property grabbing in Katutura, but that the deceased man's nuclear family was able to retain much of their urban property because they had receipts showing that the property did not belong to the deceased man.

Beth tells the story: *"I have this friend that passed away about two years ago. Okay the father was a teacher, the mother was a nurse. So the kids were all working, but when the [deceased man's] family came they wanted to take everything. They took all the cows [in the rural area], which they gave to the man's nephew, while the man had a son. But they never gave the son anything. Then they wanted to take even the chairs and everything in the house in town. But luckily those kids had papers which proved that those things did not belong to their father. But if it wasn't because of those papers, even the TV could have gone. Think about this, those kids had been staying in this house for years with their TV. If their father died and they did not have the papers, it's like their lives would have to start new."*

Appalled, Jessica questions: *"But who follows it? I mean really, who follows it? Because apparently it's not a personal thing, who will supervise the inheritance?"*

Lisa jumps in and says: *"My dear, they do it. The husband's family, they do it. But as I said in today's world they can't do that anymore."*

Beth retorts: *"They DO ... what I know is mostly they will never leave the car. They'll always inherit the car. ... If they feel pity for you, then they'll just leave one bed. And really, you just depend on the family, because some do inherit the whole household. Whereas some families say, 'we're just gonna leave everything with the wife and the kids'"*.

Now the women are greatly upset. They discuss how the man's family tried to take any thing they can get their hands on. Even when there is an insurance policy that names the widow as beneficiary, the deceased man's family tried to force her to turn the money over to them. In some instances, the family has been known to steal the policy or tried to get it declared void if the widow refuses to turn the money over to them.

Beth explains what happened in this situation: *"That man was working and he has policies and things that only the woman has a right to go and collect that money. And that's where now women are punishing the husband's families, because if they mistreat you, obviously you decide let the money just turn to the government, I'm not gonna take it out."*

The women conclude by noting the intrinsic inconsistency of customary inheritance: *"What is really ironic about this whole issue, when a woman dies – a married woman – what does the woman's family do? They just leave everything to the husband. But on a reverse case when the husband dies, his family takes everything."*

Young women recognise the discrimination within these customary rules of inheritance and feel that these are outdated, violate women's rights, and therefore should no longer be practiced. However, men are more likely to agree with the ideal cultural norm that all property belongs to the man and that women typically own 'small things' such as cooking pans and kitchenware. One young man says:

I am sticking to the traditions of culture for my pride ... We've been educated in such a way that a man is superior to a woman. Or a woman is inferior to a man.

However, not all men in the group felt that blindly following such cultural practices was acceptable:

Now with the modern change you'd find that within our culture we appreciate the father's kids. ... You'd find that sometimes it's

respected, but then again you'd find those who are hard-headed and stick to their culture. For some who have not been exposed to these new changes then they would still prefer to use the same system where they take everything and you don't get anything.

Widow and children inheritance

Under matrilineal customary laws when a man dies one of his male relatives – usually the deceased husband's brother, nephew or uncle – will 'inherit' his widow (levirate). The husband's extended family decides who will inherit the widow and sends the man to take over the household of the deceased man (LeBeau et al 2004:44). If the widow does not want to be inherited, she has to leave the household and all of its property and return to her natal extended family. In most cases the widow is expected to have sexual relations with the man who inherits her, unless she is elderly in which case the couple will simply live together. Conversely, a widower is inherited by one of his deceased wife's female relatives (sororate) – usually the deceased wife's younger sister, cousin or niece. Again, the widower is expected to have sexual relations with his new wife. Of interest is the fact that widowers are said to have more latitude in deciding whether or not they want to be inherited (LeBeau et al 2004:44). Again there appear to be regional variations; people from Kwambi and Mbalantu discuss widow inheritance while Ndonga and Kwanyama do not. This might be correlated with the development of "lobola" payments in these areas. In fact while the literature on Owambo inheritance appears to be silent on the question of "widow inheritance", I have found scattered evidence for it. It seems that even the Ndonga and Kwanyama have had widow inheritance, but that it started to 'go out of fashion' in the 70s and 80s. Some of this was due to modernisation, but also due to the church, which took a dim view of anything non-Western and therefore non-Christian.

A reliable Owambo commentator claims that there have been a few cases of it as recently as 2 years ago, but that these usually involve rich widows. Where the man's extended family cannot get their hands on the property any other way, they come to the homestead and then tell the widow that under Owambo custom they are inheriting her and often the headman (who is given a 'cut') will support this. The commentator claims it is purely property grabbing because no one tries to inherit poor widows anymore. He says that the man's family still inherits very often, but does not get all of the property any longer. Usually

they get the man's cattle (not the widow or children's cattle of their own) and mahangu and some larger property (tractors, cars) and larger household property – but it is mostly cattle and mahangu. He observed that widows being totally dispossessed of their belongings only rarely happens – usually she or more likely a member of her family will intervene and negotiate on her behalf.

Some young men recognise that the traditional form of property inheritance, whereby the deceased's brother or uncle assumed all responsibility for the family, as well as taking all of the property to be used in the care of the family, no longer works and that now these relatives wait for the man to die, only to take his property. In this instance, the man's male relative is supposed to inherit his widow and children as well as his property, but in recent times the relatives of the deceased man divide the property among themselves and leave the widow with no means to support the children. Culturally only part of the property would have been inherited by the family members who were not going to inherit his widow and children, and these were typically always his male relatives. Again this custom has been 'modified', whereby all of the deceased man's relatives try to take as much as they can get from the estate.

When asked about widow inheritance, young people from Katutura indicate that they are aware of the practice, and that it is still practiced in the rural areas; however, they do not feel that it is acceptable any more, particularly with the possibility that the husband could have died of AIDS and thus the widow could also be HIV positive, or indeed the prospective husband could be infected. Nama women in their mid to late 20s say there have been many changes in widow inheritance, especially since the advent of AIDS. The first example they give is that women today have learned how to satisfy themselves sexually so that they do not have to rely on a man as much. Therefore, if a widow is not sexually attracted to a man she is supposed to be inherited by, she can say no. Another young woman explains that her in-laws should not be so quick to give her another husband because she "*might already have something going on*" and therefore does not need her husband's brother to satisfy her.

Older informants also discuss widow inheritance, but also say that it is not really practiced in the urban areas. An Owambo business woman explains that now the widow can decide if she wants to be inherited because she knows the behaviour of her in-laws, so she will know if she wants to stay in that family. The Herero informants say that sometimes the man will treat the widow as his wife and expect

sexual relations with her, while other times he will only care for the widow and children. Of concern is the fact that this as well as other informants indicate that the practice of widow inheritance does *not* seem to have changed due to the AIDS pandemic.

The young women say that forms of widow inheritance depend on whether the person who died was young or old. If a young person dies, then it might have been AIDS and so the widow should be left without a partner because she might also be HIV positive. However, one of the other women in the group disagrees and says:

Yeah, but besides that, If you're an intelligent grown up then why should you be afraid of AIDS when you can use protection? It doesn't mean if you're single you have to go sleep with every second man coming your way. Try and find a trustworthy man and if it has to go to that extent, go and do blood tests.

However, another group member went on to explain that AIDS really has changed the practice of widow inheritance: older women are afraid to be inherited, thinking the husband's brother might have HIV, while when a man dies there is always the question of what he died from, which has to be considered before the in-laws consider having one of their family members inherit the widow.

Most informants do not think that AIDS has changed the way people inherit property, but that one change is that people who are HIV positive know that they will die and so they write a will to be sure that "*their property is not misused by a family member*". Another way that AIDS has changed inheritance practices is that now when parents die due to AIDS, there are orphans who must be inherited by the extended family – usually by the deceased mother's female relatives such as her mother or sisters.

Several young men claim that in today's society, people do not inherit children to take care of them, but usually look to inherit children whose parents were financially well off.

One young man says:

One needs to take into consideration what keeps happening now with the modern influence. Parents used to adopt their own grandsons in the past genuinely. Currently our traditions have been infiltrated by the European system whereby money plays a role. For example, if the Kuanyamas were poor, useless failures and they die and their kids are around, ... I would not even prefer to rush there. But if I know that the Kuanyamas were well off and everything is okay and we are likely also to benefit, then that's

when I'll bring in kids. So this is just one of the things that has influenced our culture currently.

Changes in inheritance due to urban attributes

Informants identify a variety of urban attributes that contribute to the changing practices of inheritance. For example, many informants identify the fact that in the urban areas women work and contribute to the household economy and thus own some of the marital property, while other informants note that the more educated the couple, the more likely they are not to follow customary inheritance patterns. Some informants also note that depriving a widow and children of inheritance is against their human rights and that urbanised women are now more aware of their rights and have access to legal means of redress should their rights be violated.

Some men note that in the urban setting, both men and women work, therefore not all marital property belongs to the deceased husband. The business woman from Katutura also discusses the fact that in the urban areas women also work and contribute to the household; she says that although sometimes rural relatives refuse to recognise this, *“most people now understand that property must be shared. It is not for some other family to come and say, ‘you are just a woman and not a man’”*. Even older Owambo men acknowledge that urban women contribute to the household economics, although one Owambo community leader says that this is not true of rural women. He says: *“In the urban setting if the two are working, of course they have to use their money towards the common property of the household, while in the rural setting, especially the wife does not put so much money towards the common household”*.

Although several informants indicate that the deceased man's extended family members sometimes inherit the bulk of the estate, many informants also indicate that they feel this is wrong and that education plays a part in this understanding. Even the older Owambo man says: *“People with higher education really want to depart from that tradition because it's undermining and robs women”*.

The Herero informant says that not only are women and children more aware of their rights but that

people's minds are also changing, slowly but surely. People are influenced by those who are back from Western countries. Inheritance today is a bit different because it now recognises women and

children. Today one will hear that a deceased man was married, but his property was not distributed, it was left in his house for the woman and children. In this case only the livestock will be distributed because livestock belong to the man's relatives. [The change is due to] awareness of laws that protect women and children as well human rights and the influence of those who have stayed in Western countries and come back with Western approaches.

Other key informants indicate that inheritance patterns have also begun to change in the rural areas because now widows are consulted about the inheritance of the land. One older Owambo man explains that in the past widows were chased from the land or had to pay the headman for the right to stay on the land but

now if you die, no one touches the property. Before the family of the man would move things. Now you don't move things. ... All this property belongs to the house, to the wife and children. ... At this moment we don't say women are not allowed to own property. Because all the women are working and they buy property.

Community of property

Many informants say that the way in which the couple is married has an impact on what is thought to belong to the widow. If the couple were married in community of property then half of the property belongs to the widow, while the other half of the property can be divided by the deceased's relatives. If the couple were married out of community of property, then it is thought that the deceased man's family has a right to most of the property because it is believed that he was the primary person who had amassed the communal property.

One older Owambo man explains:

It depends on the marriage. Because if it's a marriage in community of property, it means each one owns half of that estate. So now a woman has got the right to divide half of the entire estate or property. If a woman is married for example out of community of property, of course she doesn't have all the freedom to divide property in case of death.

In the past, marriages in the rural areas were assumed to be out of community of property unless otherwise stipulated at the time of the marriage. This opened the way for customary laws of inheritance to be

applied to all of the marital assets, because under customary law it is assumed that all property belonged to the deceased man and therefore it could be distributed according to the customs of the people involved (LeBeau et al 2004:23-26). In this situation, the widow will not inherit in a matrilineal or bifurcated descent system.

Urban and/or educated women have now become aware of the importance of marrying in community of property, because they will then have a share of massed communal assets upon death or divorce. This marital regime at least protects half of the communal assets from marauding relatives when a widow and children are in the process of grieving for a lost family member. However, as will be discussed later, enforcing such legal protections in the rural areas is more difficult.

Whether you 'will' or not

Written wills are still not very common in Namibia, although several informants discuss having experience with estates that were governed by written wills. Some younger men explain that

people have realised the power of the will and more and more people, even our grandfather is writing a will. They do not leave it to tradition to decide on inheritance. ... people recognise the economic situation that prevails and they know about the flamboyancy and greed of people. So these days they leave the woman with all the belongings of the husband to care of the family”.

The older Owambo man explains that in the past, “*the way they used to inherit property, it was the decision of the elders in the extended family. But now it is the people themselves – the owners of the property – who decide through wills or through documents how their property should be divided. So there is a big difference.*”

Most informants say that the deceased's family will respect a written will because most people will not go against the wishes of someone who has died out of respect for the dead, but also for fear of spiritual retribution in the form of witchcraft or being haunted by the deceased's ghost. Even with an oral will, most family members will not go against such wishes, as long as the person giving the oral testimony is creditable. However, if the deceased wills property to his widow, and the rural relatives are desperate enough, they may contravene the written will or attempt to hide the fact that the deceased had a will. One Herero informant says that even when the deceased's family members

are informed about the will, they may choose to go against the written will. She says:

Written wills are not yet accepted by family members. I believe many people go against it for the simple reason that they want to distribute the deceased's property in a way that will benefit them without taking, for example the spouse into consideration. Many times when the elderly people are not happy with what is written in the will, either because it is against their custom or just not in their favour, they will simply ignore it. ... [or they] go to traditional court or to civil court for this will to be declared invalid or some parts of it.

The group of slightly older men say that often people decide whether or not to accept a written will based on whether or not it benefits themselves. These men feel that greed is the primary motivational factor for not wanting to follow a written will, and that in the rural areas people will not follow what is in a written will if it is not in keeping with customary rules of inheritance. They explain that

written wills are strictly applied to towns and cities. But most people who live in towns, they also have belongings in farms and reserves. But once these people go [to the reserves] my friends, these things will not be decided by the lawyers. Those things, they would tell the lawyer, 'you do not belong here'. ... When you come there you will not even find the cattle. ... You know if you have a good lawyer who knows the law, all those people that do things contrary to the will are criminally liable. There is a criminal clause if you don't abide by the will, those people can be prosecuted. But they do not feel this law can apply to them. They say no one has more say than the family. ... I have even seen that people start to have grudges against each other whether it's your brother or your sister or your mother, because of these modern wills. They are not accepted, because they deviate from the norms ... it is not good.

However, given that civil law supersedes customary law, courts uphold the written will. Indeed, in recent years there have been several long and costly court battles between in-laws who want the written will overturned, and widows and/or children who seek to uphold the written will. In such cases, the court has upheld the terms of the written will.

However, it is clear that most people do not like written wills, some because they fear they will lose out on inheriting and others because they feel written wills are only used to go against custom. Many informants use negative terms and connotations to describe written wills,

implying that a written will is not positive tool to ensure the deceased's wishes are respected, but is a negative tool to be used against the deceased man's family. One older informant says that written wills are often made in secret because if the extended family finds out that a man is leaving his property to his wife and/or children they might be angry with him and try to get him to change his mind. The business woman says that a written will must still be according to cultural norms, because "*you cannot write something which you know in our culture will not be allowed*". If the written will goes against customary law, she feels it can simply be discarded or overturned in court. Conversely, one older Owambo man indicates that if a person wants to leave property to someone who would not inherit under customary practices, then it is best for him or her to leave a will. He states that the deceased's extended family will not go against the will because they know that in civil court they will lose, since a written will is superior to customary laws.

Some informants discuss negative aspects of having a written will in that wills restrict who can access money and under which circumstances, which may lead to a temporary lowering of the benefactor's standard of living. One young man gives the following example:

If Mao had well-to-do parents and they both perish. Mao was living in Ludwigsdorf [a high-income area], he had everything that he needed. So maybe Mao is left, maybe he's twelve years old and there was a will that he can only get that money when he's twenty-one. The grandparents in the rural area are not too well-to-do, but maybe they're the only ones that can take care of the child. That Mao will have to re-orientate his way of living from that high society life to a more medium-low life.

In this case, Mao may have to become used to a lower lifestyle until he turns twenty-one, but at least he will be able to make his own choice about the disposition of the money at that time. As discussed previously, young people themselves have seen that in cases where the child's inheritance is not protected, there is no guarantee that the money will be used for the child's maintenance, but the child could end up with no inheritance and no one to care for him or her.

Conclusions

This paper shows that traditionally in matrilineal societies a deceased man's male family members have been the preferred heirs to property with the understanding that the male relative who inherits the widow also inherits the bulk of the estate, with the intention that this property is to be used for the maintenance and care of the widow and children. However, with modernisation have come vastly larger and more valuable estates than had been the case within traditional societies. In the past an estate typically consisted of communal rights to land, a homestead and livestock. In contemporary Namibia people have begun amassing wealth in the form of large herds of cattle, large homesteads with modern houses, tractors, cars, televisions and modern houses in the urban areas. With disparities in income, with more well off urban families and poor rural relatives, many people have begun to manipulate customary methods of inheritance to 'grab' wealth that they would not otherwise have access to, thereby changing the form that this inheritance had previously taken (whereby only men inherited) as well as the original purpose of caring for the widow and children after the husband's death. In essence, this form of inheritance ultimately functioned to leave the widow and children destitute. However, as urbanisation brought about greater wealth, it also brought about better education for women and greater access to civil legal support for retaining property after the death of a spouse.

In contemporary Katutura, there are still instances of in particular rural extended family members who attempt to access the deceased man's property, sometimes with some success and other times without success. In most instances, widows negotiate with their in-laws and are able to retain much of the urban communal assets. Some legal structures that have come into place to assist widows in retaining their marital property are wills in which the deceased has designated his widow and children beneficiaries, marriage in community of property which gives widows legal ownership of half of the communal assets, and the changing of inheritance laws with courts recognising that customary laws of inheritance are unconstitutional because they discriminate on the basis of sex and deny women their fundamental right to own property. Other changes that can be seen within the Katutura population include a change in common perceptions about a woman's right to own property, widows and children as preferred heirs to the man's estate, and the extinction of widow inheritance which also

disadvantaged widows as they were perpetually under the control of their deceased husband's family.

However, if there is one aspect of inheritance this paper most aptly highlights, it is the social contradictions and emotional confusion surrounding changing customary norms and practices. The contradiction between rural customs and urban values plays itself out in the arena of inheritance where actors may not share the same beliefs and goals for the distribution of property. Is it the deceased man's extended family's right to inherit property he has amassed because they are related to him through descent? Or have these cultural norms been so twisted by the desire to 'grab' wealth that they are dysfunctional in the urbanised Katutura setting? Is it still true that small things inherited (or small things stolen for that matter) are more important than large things purchased?

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9: *Bhe v the Magistrate of Khayelitsha*, or African customary law before the constitution¹

Manfred O Hinz

The judgment in the *Bhe* case or, to quote its full title:

Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another

was handed down by the Constitutional Court of South Africa on 15 October 2004 and reported earlier this year.²

The delivery of the judgment prompted a South African customary law scholar to approach the organisers of the annual meeting of the Southern African Anthropologists of last year with a last-minute request for an *ad hoc* presentation on the *Bhe* case. The learned colleague's request was accepted and the participants in the meeting were subsequently allowed to listen to what was styled by the presenter as an *obituary*, an *obituary of customary succession law*: The decision of the South African Constitutional Court in the case of *Bhe, Shibi and Others*, so he claimed, laid customary succession law eventually to eternal rest, leaving us, the guardians of African customary law in Academia, disinherited. Has the *Bhe* case really closed the chapter on the customary law of succession?

The debate about the *Bhe* and *Shibi* cases, as they went through the various stages of adjudication, enjoyed considerable publicity, even outside legal and legal anthropological circles.³ Traditional governance

¹ Paper originally presented at SOAS, University of London, London, 7 February 2005.

² In Butterworths Constitutional Law Reports: 2005 (1) BCLR 1 (CC).

³ Cf eg E Knoetze, "End of the road for customary law of succession?" in: *Tydskrift vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 2004:515ff; IP Maithufi; GMB Moloi, "Customary law of succession" in *ibid*:446; and C Himonga and R Manjoo,

and customary law are in South Africa, in Namibia, and elsewhere in Africa, irrespective of whether one approves or not, the first and often exclusive spheres of order and law (and this not restricted to the law of persons and the family). The case now decided by the highest court in South Africa, which is widely respected by legal lawyers and scholars beyond the borders of South Africa, will indeed influence future approaches to customary succession law. Moreover the *Bhe* case will also have consequences for the still under-explored field of the *jurisprudence of African customary law*.⁴

The facts of the cases inform us about the reasons for their publicity:

The *Bhe* case⁵

Ms Bhe and the deceased, Mr Mgolombane, both of Xhosa origin, were living together from 1990 until the death of Mr Mgolombane in 2002. They occupied a shelter in the informal settlement of Khayelitsha, Cape Town. Two daughters were born to the couple.

While Ms Bhe and the father of the deceased were in agreement that Ms Bhe and Mr Mgolombane were not formally married, Mr Mgolombane's father insisted that his son had paid *lobolo*, ie marriage consideration in accordance with Xhosa customary law.

Mr Mgolombane was able to obtain subsidies from a public housing scheme, which he used to purchase the land on which they lived as well as building material to replace the shelter with a house. Mr Mgolombane, however, died intestate before he could construct the house, leaving behind, apart from the land on which the shelter was erected, building materials and various other movable items, jointly bought by the couple over the years of their living together.

In accordance with the Black Administration Act 38 of 1927, Regulations for the Administration and Distribution of the Estates of Deceased Blacks (GN R 200 of 1987), the Intestate Succession Act 81 of 1987 and with reference to African customary law, the Magistrate of Khayelitsha appointed the father of the deceased to be the representative and sole heir of the estate.

"What's in a name? The identity and reform of customary law in South Africa's Constitutional dispensation" in MO Hinz (ed.), *Governance in traditional authority*. Münster 2005: Lit Verlag (forthcoming).

⁴ Or *traditional African jurisprudence*, as Sachs, J, put it in *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

⁵ 2005 (1) BCLR at 5ff.

When the father of the deceased and appointed representative of the estate indicated that he intended to sell the land on which the shelter of the couple was built in order to be able to defray expenses incurred in connection with the funeral of his son, Ms Bhe obtained an interdict from the High Court of Cape Town to prevent the father from proceeding with the sale. The challenge of the appointment of the father of the deceased as representative and sole heir was also successful. The High Court of Cape Town declared the relevant parts of the Black Administration Act, certain parts of the Regulations made under it and a relevant section of the Intestate Succession Act unconstitutional.

The Court also declared, as applied for by Ms Bhe, that her two children were to be the only heirs of her late partner.

The Shibi case⁶

Ms Shibi is the sister of Mr Sithole who died intestate. Mr Sithole had no children and was not survived by a parent or grandparent. The closest male relatives of Mr Sithole were two cousins.

The magistrate in whose jurisdiction the estate fell invoked the same provisions of the Black Administration Act, the Regulations made under it, and African customary law. Their application to the case resulted in the appointment of one of the two cousins as the representative of the estate, and the subsequent declaration of a cousin as the sole heir to the estate.

Ms Shibi challenged the decision of the magistrate and applied for an order from the High Court of Pretoria to be declared the sole heir to her brother's estate. With arguments similar to the ones of the High Court of Cape Town in the *Bhe* case, the High Court of Pretoria decided in favour of Ms Shibi.

The Constitutional Court of South Africa upheld the constitutional rulings of the courts *a quo* and confirmed the declarations issued with respect to the positions of heirs. With respect to the status of the two daughters of Ms Bhe and Mr Mgolombane, the Court did not find any reason why the two should be discriminated against because of the fact that the parents were not formally married.

Going further than the *Bhe* decision of the High Court, the Constitutional Court ordered that

⁶ At 8ff.

the rule of male primogeniture as it applies in customary law to inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. (44)

Instead, the Constitutional Court declared the Intestate Succession Act applicable, but modifiable by order of the court to allow spouses in polygynous marriages the same child's shares as provided for in monogamous marriages.

The judgment of the Constitutional Court was written by Deputy Chief Justice Langa and delivered as a majority decision. It is accompanied by a dissenting vote by Judge Ngcobo, which does not result in different orders with respect to the specific applications of Ms Bhe and Ms Shibi. The dissenting vote explicitly confirmed what the majority decision ruled in favour of the applications.

Judge Ngcobo summarises what he found impossible to accept in the majority vote in this way:

[In his judgment, the Deputy Chief Justice] concludes that (a) it is inappropriate to develop the rule of primogeniture; and (b) the Intestate Succession Act should, in the interim, govern all the estates that were previously governed by ... [the Black Administration Act]. I do not agree. In my view, the rule of male primogeniture should be developed in order to bring it in line with the rights in the Bill of Rights. Pending the enactment of the legislation to determine when indigenous law is applicable, both indigenous law of succession and the Intestate Succession Act should apply subject to the Constitution and the requirements of fairness, justice and equity, bearing in mind the interests of minor children and other dependants of the deceased family head. (46)

In other words, and in view of the corresponding conclusions with respect to the cases of *Bhe* and *Shibi*, the difference between the majority judgment and the dissenting opinion lies more in the avenues for change preferred by the two judges.

The leading arguments in both parts of the judgment in terms of their weight and value in the jurisprudence of customary law thus need to be examined. This paper intends to contribute to this, giving the Namibian perspective a particular place. Emphasis will be placed on what approach to customary law the judges of the constitutional court have employed, or in other words: whether the constitutional judges have called on customary law to *appear before the constitution* with

the *presumption of innocence* (as it would follow from the recognition of customary law in the Constitution of South Africa, putting it at par with the inherited Roman-Dutch common law),⁷ or with the *prejudiced decision of constitutional guilt* (as it appears often to be the view held in legal and more so extra-legal circles).

The Bhe case and attempts to reconstruct African customary law

Before examining the main arguments and their debate, some introductory observations about the statutory framework with regard to inheritance are needed. What the Black Administration Act entails for South Africa can be found almost identically worded for Namibia in the Native Administration Proclamation 15 of 1928. The same applies to the contents of the respective Namibian intestate succession statutes.⁸

Relevant parts of the quoted South African and Namibian laws have survived the change to democracy in South Africa and the independence of Namibia. Law reform in both countries has been engaged in projects to address urgent changes in the customary inheritance law. Already in 2001 the Constitutional Court of South Africa declared (in *Moseneke v The Master*⁹) certain parts of the law applicable to so-called “black estates” unconstitutional. A case decided by the Namibian High Court in 2003 (*Berendt and Another v Stuurman and Others* – so far unreported), followed the South African example and set a deadline for the Namibian legislature to enact the necessary changes by 30 June 2005.¹⁰

⁷ Sec 211(3) of the South African Constitution, or art 66(1) of the Constitution of Namibia. (The text of both provisions is quoted below.)

⁸ Cf eg the Intestate Succession Amendment Act 15 of 1982, amending the Intestate Succession Ordinance 12 of 1946. Succession statutes are contained in S Bekker & MO Hinz (eds), *The law of persons and family law: Statutory enactments and other material*, 5th ed. Windhoek 2000: CASS Paper No 46. I leave aside the special Namibian distinction between the law applicable to what is still today called the *Police Zone* and the law applicable outside the said zone. This colonial division of the country introduced by the first colonial authority in Namibia, Imperial Germany, is still legally applicable through provisions of the Native Administration Proclamation as yet not repealed.

⁹ *Moseneke and Others v The Master and Another* 2001 (2) BCLR 103 (CC).

¹⁰ However, the relevant authorities were not able to meet the date given and applied for an extension to the end of 2005, which was granted by the Namibian High Court. See report in *The Namibian*, 22 June 2005:5.

The main points of interest in the legislative framework are these:

- 1) All property left by a deceased male black is expected to be administered under “Black law and custom”¹¹ unless certain circumstances lead to an alternative treatment, ie the treatment “*as if the deceased had been a European*”. Recognised circumstances were, eg a marriage in community of property or under ante-nuptial contract.
- 2) While the statutory intestate succession law provides in principle for intestate estates to be administered by the Master of the High Court, “Black estates” are exempted from the jurisdiction of the Master. For these estates, the magistrate has the power to appoint anybody whom he or she thinks competent “to render a just, true and exact account of his administration of the estate”. (13)
- 3) The last-quoted part is the entry point into African customary law, or whatever the magistrate involved, *assumes*¹² to be such customary law.

This is why the magistrate in *Bhe* appointed the father of the deceased, and the magistrate in *Shibi* one of the cousins.

That neither the deceased’s children in the *Bhe* case nor the sister of the deceased in the *Shibi* case were considered to be heirs followed from the application of what one can call *presumed customary law*, according to which the rule of *male primogeniture* qualifies only male descendants in their order of seniority to become heirs, disqualifying all females, ie the daughters of the deceased Mr Mgolombane in the *Bhe* case and the sister of the deceased Mr Sithole in the *Shibi* case.

The complex reasoning in the majority judgment and in the dissenting opinion will be investigated under two aspects. The first relates to the *concept* of customary law as it is employed in the judgment, but also to the understanding of the principles that govern the *dogmatic operation of customary law*. The second aspect focuses on the rules

¹¹ So the racist language in the law! Namibian statutes use *native* instead of *black*.

¹² The following will show why it is justified to hold that magistrates and judges apply very often what they *assume* to be the customary law applicable to the case.

of application of customary succession law as set out in the Black Administration Act and related rules, examining specifically the *connecting factors* stipulated in the law for the application of customary succession law, the customary rule of male primogeniture, and the constitutional review thereof.

The position of customary law in the new African constitutionalism and the principles that govern the dogmatic operation of customary law

The new constitutional orders of South Africa and Namibia both recognise African customary law as part of the law of the land. The Namibian Constitution of 1990 and the post-apartheid South African Constitutions of 1993 and 1996 accord African customary law the same place in the legal hierarchy as common law.

Article 66, sub-article 1, of the Constitution of Namibia says:

Both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary law does not conflict with this Constitution or any other statutory law.

Sub-section 3 of section 211 of the 1996 Constitution of South Africa reads:

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

“Customary law as protected by and subject to the Constitution in its own right”, summarises the position of customary law in the *Bhe* case especially if seen in conjunction with the constitutional guarantees of the *right to culture and cultural diversity*.¹³

This constitutionally enshrined approach has abolished the previous practice, which used to measure customary law against common

¹³ Cf at 15ff in the *Bhe* case; and further secs 30 and 31 of the Constitution of South Africa; art 19 of the Constitution of Namibia.

law¹⁴ – a practice, which is said to have been responsible for the *fossilisation* of customary law! The new constitutional order redirected the application and interpretation of customary law towards the *grundnorm* of the state.

In other words, being freed from the bonds of common law, customary law has been granted the space to be a *semi-autonomous*¹⁵ legal system within the wider national legal order, as the customary law has to accept requirements determined in the constitution.¹⁶

The reason for granting customary law autonomy can be found in the following quote from the majority opinion in the *Bhe* case. After referring to the “inherent flexibility of the system of customary law”, which the Court calls one of customary law’s “constructive facets”, the Court says:

Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu. These valuable aspects of customary law more than justify its protection by the Constitution.
(17)

Ubuntu is best translated as *humanness*. *Ubuntu* has become one of the leading concepts in recent currents of African philosophy.¹⁷ *Ubuntu*

¹⁴ Cf here for Namibia: *Ndsiro v Mbanderu Community* 1986 (2) SA 532 (SWA) and *Pack v Muundjua; Tjipetekera v Muundjua* 1989 (3) SA 556 (SWA). The position held in the two cases was overruled in *Kakujaha v Tribal Court of Okahitua*, Supreme Court of South West Africa, 20 March 1989 (unreported). Some aspects of the cases are discussed in MO Hinz, *Customary law in Namibia: Development and perspective*, 8th ed. Windhoek 2003: CASS Paper No 50:86ff.

¹⁵ A term with a special meaning in the debate about legal (and political) pluralism. Cf J Griffiths, “What is legal pluralism” in *Journal of Legal Pluralism and Unofficial Law* (24), 1986:29ff.

¹⁶ Or in more precise legal anthropological terms: The customary law of a given community operates as one part of a plurality of legal systems in which the national legal order claims superiority by virtue of the constitution.

¹⁷ MB Ramose explored *ubuntu* in a comprehensive philosophical manner by looking at various societal aspects in his *African Philosophy through ubuntu*, Harare 1999 (revised edition 2002): Mond Books Publishers; cf in particular the chapters on politics (103ff) and on law (81ff).

achieved special political and legal meaning with its acceptance as a key value in the so-called *Postamble* of the 1993 Interim Constitution of South Africa and maybe more so with its dogmatic use in the death penalty case of the South African Constitutional Court of 1995.¹⁸

The dissenting opinion has no problems with this prescribed approach to customary law, but takes it one step further by emphasising, beyond the principal constitutional recognition of customary law, the equally constitutional obligation to “develop indigenous law so as to bring it in line with the rights in the Bill of Rights”.¹⁹ The obligation to develop customary law is found in the Constitution of South Africa, which states in section 39, sub-section 2:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.²⁰

As one can already anticipate from the above reference to common law as the primary point of concern for customary law in the pre-democratic dispensation of South Africa (and Namibia for that matter), the attempts in the *Bhe* case to determine the appropriate location of customary law in the overall legal order have far-reaching consequences, *inter alia*, for the *ascertainment of customary law*.²¹

Preparing the ground for a new definition of the ascertainment of customary law, the majority judgment holds:

What needs to be emphasised is that, because of the dynamic nature of society, *official customary law* as it exists in the text books and the Act is generally a poor reflection, if not a distortion of the true customary law. [my emphasis] (30)

¹⁸ *S v Makwanyane*, see footnote 4 above.

¹⁹ At page 48.

²⁰ The Constitution of Namibia does not contain a provision of this kind. However, when analysing the Namibian judiciary’s approach to constitutional interpretation one finds enough references that support the view that the constitutional obligations in Namibia do not differ substantially from what the South African Constitution stated in explicit terms. See, eg, *Government of the Republic of Namibia and Another v Cultura* 2000 1993 NR 328.

²¹ Which in the case of Namibia has found its statutory place in section 3(1)(a) of the Traditional Authorities Act 25 of 2000 (as one of the general functions of traditional authorities), and in section 14 of the Community Courts Act 10 of 2003 (as a procedural rule to apply in case a community court entertains doubt as to the existence of customary law).

Given this perspective and the view, previously generally accepted, that customary law is primarily to be ascertained through textbooks with authority and decided cases, the Court takes note of an important jurisprudential debate about the possibility of using the concept of *living law* as an alternative approach to ascertaining customary law.

The notion of *living law* was first coined by the Austrian scholar Eugen Ehrlich.²² After the introduction of the Austrian Civil Code, Ehrlich did empirical legal research in some remote areas of the then Austrian monarchy and found that the “seven tribes of the Bukowina”, which he was able to identify, followed seven legal orders, all different from the legal order as decreed by the central authority in Vienna.²³ Ehrlich called these different law-ways *living laws* (*lebendes Recht*).²⁴

The concept of *living law* has a long history in legal anthropology and sociology, originating when lawyers and anthropologists accepted that customary law, recorded in textbooks, codes or court cases, was not necessarily the customary law practiced by the people.²⁵ The *Women and the Law Project* implemented in a number of Southern African countries²⁶ used the concept of living law successfully in showing that customary law realities were very often different from what the official surface offered.

Living law was employed in the reasoning of a court of law for the first time in the South African case of *Mthembu v Letsela*²⁷ and subsequently further elaborated on in an article by two South African scholars, Himonga and Bosch, who in essence pleaded that the statutory use of the term *customary law* be read to mean the *living law*.²⁸

²² E Ehrlich, *Grundlegung der Soziologie des Rechts*, 3rd ed, 1967, Berlin: Duncker & Humblot:293ff.

²³ See here Ehrlich's *Recht und Leben. Gesammelte Schriften zur Rechtsstatistik und Freirechtslehre*, selected and introduced by M Rehbinder, 1967, Berlin: Duncker & Humblot:43ff.

²⁴ “Law-ways” refers to the combination of formal and informal rules which guide behaviour, derived from Hoebel.

²⁵ See here MO Hinz, *Customary law in Namibia: Development and perspective*, 8th ed, 2003, Windhoek: CASS Paper No 50:45ff.

²⁶ See eg A Armstrong & W Ncube (eds), *Women and Law in Southern Africa*, 1987, Harare: Zimbabwe Publishing House; A Weis Bentzon, A Hellum, J Stewart, W Ncube, T Agersnap (eds), *Pursuing grounded theory in law. South-North experiences in developing women's law*, 1998, Oslo/Harare: Tano Aschehoug & Mond Books.

²⁷ *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA).

²⁸ C Himonga & C Bosch, “The application of African customary law under the Constitution of South Africa: Problems solve or just a beginning?” in SALJ (117), 2000:306ff.

The majority judgment in the *Bhe* case notes the living law approach, but has not too much sympathy for it. The majority judge accepts that the reference to *living law* is

an acknowledgment of the rules that are adapted to fit in with changed circumstances. The problem with the adaptations is that they are ad hoc and not uniform. (30)

When reaching the possibility of developing customary law to “promote the spirit, purport and objects of the Bill of Rights” the judge concludes by saying:

In order to ... [develop customary law in the said direction], the Court would first have to determine the true content of customary law as it is today and to give effect to it in its order. There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of “living” customary law, as distinct from official customary law, but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights. (36)

In the conclusion this point will be returned to. I submit that what the majority judge excludes as difficult to achieve, in actual fact is impossible to achieve, and indeed, marks a point in his argument which eventually prevents him from getting to the *true* reality of customary law(s) as the law(s) of self-organised communities!

The dissenting judge differs from this in *two* ways, and it thus enables him to overcome the aforementioned impasse of the majority judgment at least partly. First, he holds against the magistrates who were originally involved that they did not even attempt to ascertain the currently living law relevant to the cases.²⁹ I use the word *currently living* because the judge, and this is his second point, accepts the law as it was applied by the magistrates as law that was, indeed, the law in place when it was recorded, but was overtaken by later developments. In other words, the judge places the so-called official customary law in context in order to be able to assess line of developments, which again developed the law away from what it used to be when recorded.

²⁹ At page 50.

Assessing the Black Administration Act rules concerning the application of customary law to inheritance: What does it tell us about the constitutional review of male primogeniture?

How does the interpretation of the Act inform one about the constitutional review of male primogeniture? Majority and dissenting opinion have no problems in declaring the way in which the Black Administration Act (and the Native Administration Proclamation in the case of Namibia) *construct the application of customary inheritance law* by referring to being *black* as unconstitutional.

The Court repeats its *pain* at seeing that the Black Administration Act, which played an instrumental role in the administration of apartheid, has still survived and recalls what was said in *Moseneke v The Master*³⁰:

It is an affront to all of us that people are still treated as ‘blacks’ rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour. (25)

The gap created by the unconstitutionality of sections of the Act is filled by making the Intestate Succession Act applicable, albeit in a modified manner, which allows for accepting as heirs surviving spouses in polygynous marriages.

The dissenting judge acknowledged that in particular the Regulations enacted under the Act encompass mechanisms for dealing with a conflict of laws. Nevertheless, he does not see the possibility to remedy the defect of the Regulations:

It is true that the regulations in effect are a choice of law mechanism. They regulate the circumstances in which indigenous law applies. Stripped of their racist purpose and effect, some of the provisions are of the kind found in choice of law statutes. However, to cure the constitutional defect in the regulations would require this Court to engage in detailed legislation, a task which belongs to Parliament. (69)

³⁰ See above, footnote 9.

Accessing the Intestate Succession Act is for the dissenting judge one of the main points of disagreement with the majority view. For the dissenting judge the most appropriate option in the application of law

lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) respect the right of communities to observe cultures and customs which they hold dear; (b) preserve indigenous law subject to the Constitution; and (c) protect vulnerable members of the family. (72)

The judge summarises this by holding:

In my view, the question whether indigenous law is applicable should in the first place be determined by agreement. After the burial, it is common for the family [I add in South Africa as in Namibia] to meet and decide what should happen to the deceased's estate. If an agreement can be reached there seems to be no reason for any interference. (73)

Majority judgment and dissenting opinion also diverge widely in addressing the question about the constitutional assessment of the *rule of male primogeniture*.

While the majority opinion argues the unconstitutionality in a straightforward manner, the dissenting judge explores instead the constitutionally advised possibility of developing customary law. In doing so, the judge of the dissenting opinion is able to preserve customary law concepts, which are, so to say, *hidden behind the surface of obvious constitutional problems*. His starting point in developing customary law away from the principle of male primogeniture, without abandoning relevant parts of customary law and replacing it one-dimensionally with so-called modern law (in this case the statutory intestate succession law), the judge refers to earlier scholarly writing to emphasise customary law's relevant distinction between *succession* and *inheritance*.³¹ Indeed, indigenous terminology suggests the validity of the distinction, as we know, for example in the Otjiherero distinction between *eanda* and *oruzo* in the so-called double decent systems.³²

³¹ See the references at 52ff.

³² See eg the comprehensive study on the law of the Ovahimba: E Okupa, *Ethno-jurisprudence of children's rights. A study of the Himba of Namibia*, 1996, London: PhD SOAS: 86ff.

While *inheritance* appears to be appropriate in cases of transfer of rights of property or, in different terms, transfer of rights to private commodities, *succession* implies the transfer of societal rights (and duties), often expressed in categories of status.

The rule of primogeniture has its place in the field of succession according to the dissenting judge. Succession, however, cannot be understood without taking note of the core principles of African traditional societies, such as *ubuntu*. For *ubuntu*, one of the implied principles is *Umuntu ngumuntu ngabantu*, or: *The human being is a human being because of other human beings*. The dissenting judge recalls this in order to argue the socio-political importance of the successor to the deceased head of household. However, instead of *successor*, the judge refers to the indigenous term *indlalifa* and explains:

Indlalifa takes over the powers and responsibilities of the deceased family head. The responsibilities relate to the duty to support and maintain all the dependants of the deceased. This process is metaphorically expressed by the phrase ‘the indlalifa steps into the shoes of the deceased head and takes over control of the family property’.
(54)

With this control, the *indlalifa* holds family assets in trust, meaning that the *indlalifa* is not the owner of the assets in terms of common property law.

The crucial turn in the argument of the dissenting judge³³ is that, noting that customary law now recognises women as household heads because of changed social and political circumstances, he accepts the possibility of the further existence of primogeniture, which would, however, be open equally to men and women. The judge concludes:

The defect in the rule of male primogeniture is that it excludes women from being considered for succession to the deceased family estate. In this regard it deviates from ... [the equality provision] of the Constitution. It needs to be developed so as to bring it in line with our Bill of Rights. This can be achieved by removing the reference to a male so as to allow an eldest daughter to succeed to the deceased estate. (68)

³³ Here in particular referring to deliberations by IP Maithufi, “The constitutionality of the rule of male primogeniture in customary law of intestate succession” in *THRHR* 1998:142ff.

Concluding observations

It would require a separate endeavour to review the arguments and orders in the *Bhe* case in terms of their necessity to respond to the applications made to the court and determining what is *ratio decidendi* and what are *obiter dicta*. Such a review would reveal that much would qualify to be *obiter dicta* and not to be binding precedent. Indeed, even if one came to a different conclusion, many orders of the court are of a transitional nature only, as they anticipate responsive legislative action.

The special *caveat* in the orders of the court that “any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced” (45) certainly has its grounds in the transitional weight of the judgment.

It is necessary to make this point if only to relieve the atmosphere that the *Bhe* decision spells the end of customary inheritance law, but also to emphasise that the *Bhe* case is part of an ongoing discourse – apart from the fact that the *Bhe* case is not binding as far Namibia is concerned! Mourning the end of customary inheritance law may be left to those who believe in traditions that have value because of the fact that they are traditions. Law is part of human society and changes with the changes of societies. Obsolete law will go, new law will come. Law might be outlawed, but nevertheless reflect the aspirations of the people better than what has been officially put in place of the law to be said to be illegal – and continue to rule the affairs of a community as still living law!

In view of this, I conclude by making three final observations, which are meant to show the way forward in the needed attempt to do justice to customary law:

First, neither the majority judgment nor the dissenting vote have placed customary law in the position of prejudiced unconstitutionality, as was often done in half-informed discussions. Both parts of the judgments, albeit the dissenting vote more than the majority judgment, have tried to give customary law a place of its own within the wider legal order.

The dissenting judge convincingly recalled the position taken in the *Certification of the Constitution* case before the Constitutional Court,³⁴ in which the Court cautioned that, indeed, a “destructive

³⁴ *Ex parte Chairperson of the Constitution of the Constituent Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253.

confrontation between the Bill of Rights and legislation, on the one hand, and indigenous law, on the other, need not take place". (70)

Whether this appeal for a *soft constitutional approach*³⁵ will have an impact, especially when it comes to the final legislative decision as to whether or not customary inheritance law will remain an option and if so in what form, has yet to be seen.

While the South African Law Commission holds that the adjusted Intestate Succession Act would do, the Namibian Law Reform and Development Commission proposes to make *lifestyle, acceptance of traditional authority, marriage under customary law*, etc the decisive connecting factors, however, giving the Master's Office the last word to place an estate under the administration of the Master, if *the nature or size of the estate justifies such determination*.³⁶

Second, the even more promising result in the complex reasoning of the *Bhe* case is that again both the majority and the dissenting vote have substantially contributed to the *development of rules that govern the dogmatic operation of African customary law*. How?

Our law libraries are full of literature on the structure and functioning of what we are used to calling modern legal systems. Compared to this, our knowledge of the dogmatic operation of customary law-ways is limited. Hart claims that what he calls *primitive legal systems* are deficient of secondary rules.³⁷ Not arguing with Hart's use of the term *primitive* and its application to contemporary traditional systems in Africa, I take it from Hart's view that the meaning and functioning of secondary rules differ from law-way to law-way.

My own studies³⁸ suggest that we do not know enough about the functioning of secondary rules in these systems of law. We do not know much about the role and weight of references to values, as they flow, eg, from *ubuntu* as a source of political and legal philosophy.

With a few exceptions,³⁹ legal ethnographical records do usually not give much attention to the jurisprudence of customary law. The

³⁵ So MO Hinz, "Jurisprudence and anthropology", in *Anthropology Southern Africa* (26) 2003:114ff.

³⁶ According to a communication from the Law Reform and Development Commission.

³⁷ HLA Hart, *The concept of law*, 2nd ed, 1994, Oxford: Oxford University Press: 79ff.

³⁸ In particular within the framework of the *Constitution and Customary Law Project* (CoCuP) of the Centre for Applied Social Sciences (CASS) in the Faculty of Law of the University of Namibia, for which extensive field work was conducted in some selected communities of northern Namibia between 1995 and 2000.

³⁹ See eg M Gluckman, *The ideas in Brotsé jurisprudence, 1965*, New Haven & London: Yale University Press, or LA Fallers, *Law without precedent: Legal ideas in*

double challenge on the basis of which the *Bhe* case is argued, namely the challenge to the constitutional supremacy posed by customary law, as well as the challenge to customary law by constitutional expectations, made an important contribution to the development of the jurisprudence of customary law.

The officialisation of African customary law following its constitutional recognition has started moving customary law to a level of legal publicity for which a process towards *jurisprudentialisation* is unavoidable. The *Bhe* case stands next to the death penalty case of *S v Makwanyana* in this direction. *S v Makwanyana*, as quoted above, opened the way into African jurisprudence. What the Court achieved with the references to *ubuntu* was a set of arguments against the constitutionality of the death penalty, which were put at par with arguments derived from the Constitution and international human rights instruments. By arguing in such a manner, the Court broadened the legitimacy of its decision by reaching out to the majority of South African people, for which *ubuntu*-derived principles were closer than principles developed from the international human rights debate and even the constitution of South Africa.⁴⁰

Thirdly: The third and rather provocative observation is to comment on one crucial statement made in the *Bhe* case in the construction of its concept of customary law, or more accurately, the jurisprudential conceptualisation of customary laws.

The overall inherent problem with customary law is to determine its place in the legal hierarchy of a given legal system. Or put differently: whose law is customary law? The judge of the dissenting opinion responds:

Like all laws, indigenous law now derives its force from the Constitution. (48)

And as this is so, one has to conclude, all the relevant organs of the state, the courts and Parliament have the authority to change customary law.

What neither the majority vote nor the dissenting judge have noted is that the many customary laws in existence in countries such as South

action in the courts of colonial Busoga, 1969, Chicago & London: University of Chicago Press.

⁴⁰ See here also my already quoted article: "Jurisprudence and anthropology" at 116ff.

Africa, Namibia and others have their source in internal processes of the very communities to which the laws apply. In other words, not only is the source of legitimacy of customary law different from the source of legitimacy of state law, but the *owners of the customary laws* are communities and this is irrespective of the supreme constitutional responsibility of the organs of the state towards human rights and the rule of law.⁴¹

It may have come as a surprise to some who still believe in the Kelsenian theory of state-centred law and authority that first the Namibian legislature and later the legislature of South Africa confirmed in recent legislation the authority of traditional communities to *make customary law*.⁴² This authority is, indeed, nothing more than the confirmation of an authority, existing as traditional leaders have kept on saying, *since time immemorial*.

Given this, one understands the need to question the efficiency of state-court ordered inroads into customary law and this irrespective of the additional question of the validity of the doctrine of *stare decisis* in adjudications under customary law. It was certainly not enough, as was done in the *Bhe* case, to “deliver copies of the directions and the two applications for confirmation to the Chairperson of the National House of Traditional Leaders” in South Africa, as one can read in the introductory paragraphs of the case.⁴³

One can also read that the National House of Traditional Leaders did not respond. We do not know why. What we could ask, however, is whether the delivery of the copies of the directions and the applications to the National House of Traditional Leaders was the right way to solicit the voice of the tradition! Nowhere was the oral testimony of traditional expert witness considered, as the more appropriate way of getting down to the living law. Nowhere was an approach to law reform considered that would give the owners of the law the first opportunity to make the necessary changes or only to testify to the already enacted changes.

⁴¹ Cf MO Hinz, “The ‘traditional’ of traditional government: traditional versus democracy-based legitimacy” in FM d’Engelbronner-Kolff, MO Hinz, & JL Sindano (eds), *Traditional authority and democracy in Southern Africa*, 1998 Windhoek: New Namibia Books: 1ff.

⁴² See section 3(3)(c) of the Namibian Traditional Authorities Act 25 of 2000; but see also section 2(3) of the South African Traditional Leadership and Governance Framework Amendment Act 41 of 2003.

⁴³ 2005 (1) BCLR 1 at 4.

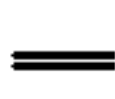
Are we conditioned to think that customary law will change only because the Constitutional Court of South Africa decrees its change? Are we made to think that, eg, the Otjiherero-speaking people of Kaokoland (Kunene Region) in Namibia will change their rules of male primogeniture only because the Supreme Court of Namibia could follow the South African example in ruling against this?⁴⁴

Affirmative answers to these questions are still to be found in the state-centred minds of many lawyers! Affirmative answers to these questions will create another *fossilisation* of customary law, which one may name *constitutional fossilisation*, and which will be another addition to what Patrick Glenn holds against an unfortunate dominant African jurisprudential perception: “Western culture in Africa has a ‘big mouth and small ears’.”⁴⁵

⁴⁴ This question is not posed to argue *against* the power of the supreme legislature to amend customary law (so explicitly stated in article 66(2) of the Constitution of Namibia) as such, but *for* involving the owners of customary law (in whatsoever form) in the process of amending customary law, as it was, eg, considered in *S v Sipula* 1994 NR 41 HC.

⁴⁵ HP Glenn, *Legal traditions of the world: Sustainable diversity in law*, 2nd ed, 2004, Oxford: Oxford University Press: 84. I thank my friend and colleague Prof W Menski, SOAS, who drew my attention to Glenn’s book.



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