

**WOMEN'S LAND AND PROPERTY RIGHTS: THE MISSING LINK
PROPOSALS FOR THE REFORM OF INHERITANCE LAWS IN NAMIBIA**

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‘...even in a pluralistic society like ours, there are still some cultural traits that we can boast of which have been able to withstand the process of deliberate bastardization.’

Steve Biko, 1971

This paper is based on our Research Report on inheritance under customary law in Namibia. The report, entitled ‘Customary law on inheritance: Issues and questions for consideration in developing new legislation’ will be available as of next week.

Namibia currently maintains dual laws on succession. Estates of deceased persons other than ‘natives’,¹ are regulated by the Intestate Succession Ordinance 12 of 1946 and the Wills Act 7 of 1953 and administered in terms of the Administration of Estates Act 66 of 1965. The estates of persons classified as ‘Basters’ are administered in terms of Proclamation 36 of 1941. The Native Administration Proclamation 15 of 1928 regulates ‘black’ deceased estates. The current dual system, as reflected in the legislative regime which regulates inheritance in Namibia, is not only discriminatory on the basis of race, but also promotes discrimination on the basis of sex, status and birth by virtue of the application of customary law.

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

Since Independence, the Namibian government has enacted several laws not only in an attempt to elevate the status of customary law but also to bring it in line with the Constitution. Customary law enjoys constitutional recognition on par with the common law, provided it does not infringe on the Constitution or statutory (civil) law.² Modern democratic governments are generally uneasy about using custom as a basis for property law: custom-based property regimes can be rigidly hierarchical, xenophobic, conservative and misogynistic. At the same time, experience in other countries shows that an approach, which departs too radically from existing customary law, is likely to be ignored. We too readily assume that all aspects of customary law are discriminatory, discounting its positive aspects in the process. Customary approaches to inheritance provide positive aspects of flexibility, and in some cases spread assets amongst a wide range of family members.

Respect for culture and for customary law, in so far as these do not impinge on other constitutional rights, is a constitutional imperative and as such should not be at the expense of vulnerable women and children. Poverty, unemployment and the impact of HIV/AIDS all lead to the impoverishment of the family. As surviving spouses are most likely to be the primary caretakers in instances where children are orphaned by one parent, a strong argument can be made that surviving spouses and children should enjoy preference in matters of inheritance. Where the surviving spouse is a woman, we know that she faces specific challenges: The literacy level, viewed as an indicator of a country's basic level of socio-economic development, indicates that only 7% of rural women, compared to 25% of urban women, have completed secondary school. Workingwomen who have completed secondary schooling are more likely to earn cash than are less educated women. In

² Article 66(1) of the Namibian Constitution

communal farming areas, approximately 41% of the land is used for agricultural purposes, which accommodates 64% of the Namibian population. Considering that 51% of women work in agriculture, and are therefore less likely to earn cash, rural women in particular find it difficult to amass property. Even if they do have the means to acquire property, cultural presumptions, which deny women the right to own property, operate against them.

In determining who inherits it is obvious that kinship is important. The various kinship systems in Namibia³ have important political, social and economic implications. For example, membership in a certain kinship system determines who has rights to which categories of property in matters of inheritance. Although there are significant differences between these systems they share many characteristics. Differences exist as to how the heirs are defined but for the majority of Namibians, especially those in matrilineal or double descent systems, the surviving spouse, daughters and sons may have limited or no right at all to inherit. For example, in matrilineal communities, the inheriting group includes the husband's male relatives, typically his nephew (his sister's son). The customary successor (usually the nephew) appointed by the kin group takes control of the property as trustee and manages it for the benefit of the inheriting group. Because spouses are not members of each other's matrilineage, a surviving spouse does not inherit from her husband if he dies intestate under customary law in matrilineal and double descent systems. In addition, because children in matrilineal communities belong to their mother's lineage, they also have no right to inherit from their father's estate. In patrilineal systems the spouse fulfill a similar role, and acts as

³ Namibians are either members to patrilineal (Nama and Damara), matrilineal (Ovambo and Kavango Communities), bifurcated (Herero) or 'cognatic' kinship system.

trustee of the estate for the benefit of the children and especially the youngest son because pre-mortals inheritance often takes place. Children and not the wider kin group have first priority in inheriting their parent's estate in patrilineal systems. In certain communities, the treatment of spouses reflects that they are *part* of the estate itself rather than beneficiaries, as indicated by widow (levirate) and widower (sororate) inheritance practices. The differences are significant primarily because they give rise to different sources of conflict surrounding distribution of estates. In patrilineal communities disputes and tensions may give rise to 'intra-family' conflict as children compete over resources whereas in matrilineal and double descent kinship systems disputes may arise between the surviving spouse and nephews.

In South Africa, in sharp contrast to Namibia, inheritance almost exclusively follows a patrilineal model and this is recognized in the legislative regime which was uncritically applied to Namibia.⁴ The legislative regime and the rule of male primogeniture were recently successfully challenged in South Africa's Constitutional Court.⁵ Inheritance based on

⁴ Namibia's Native Administration Proclamation 15 of 1928 is patterned on South Africa's Black Administration Act 38 of 1927. In 2003 the High Court in *Berendt v Stuurman* (Unreported Judgment Case No. (P) A 105/2003) declared section 18(1), 18(2) and 18(9) as well as the regulation (GN 70 of 1 April 1954 (hereinafter referred to as 'Regulation GN 70') made under section 18(9) of Proclamation 15 of 1928 unconstitutional. The applicants in this matter contended that the relevant sections and the regulation be set aside as discriminatory, racist and outdated due to the fact that the provisions subject black estates to a 'legislative regime which discriminates against them on the ground of race'. The unconstitutional provisions and Regulation GN 70 continue to apply until such time as new legislation is introduced to remedy the defect. Parliament has been given until 30 June 2005 to review the whole field of inheritance and the administration of deceased estates. In the interim, black persons may either report estates to the Master of the High Court or to Magistrates. Parties are also free to request that the Master administer a deceased's estate in terms of the Administration of Estates Act 66 of 1965.

⁵ *Bhe v Magistrate, Khayelitsha* CCT 49/03. Courts in South Africa have been inundated with cases in which the constitutional validity of existing laws on inheritance in the context of customary law was challenged. The most recent cases, *Charlotte Shibi v Mmantabeni Freddy Sithole & Others* (CCT 69/03) and the *South African Human Rights Commission & Another v The President of the Republic of South Africa & Another* (CCT 50/03), are consolidated in the landmark judgment, *Bhe v Magistrate, Khayelitsha*. In the *Shibi* case the sister of an unmarried brother sought confirmation of an order of the Pretoria High Court that established that she, and not the brother's two male cousins, should be the sole heir of his intestate estate. In the *South African Human Rights Commission* case the relief sought by the Commission, which acted in its own interest and that of the public, was

primogeniture means that the eldest son or most senior male in the family inherits the deceased's estate. The South African Constitutional Court stated that the rule prevents (a) widows from inheriting as the intestate heirs of their late husbands; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents and (d) extra-marital children from inheriting from their fathers.⁶ The rule consequently constitutes unfair discrimination on the basis of gender and birth underpinned by male domination and therefore '...constitutes a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality...'⁷ The rule of male primogeniture may not be strictly applied in Namibia, but the argument can be advanced that inheritance practices are similarly incompatible with the constitutional guarantee of equality as they prevent 1) widows from inheriting from their husbands' estate; 2) daughters from inheriting from their parents; 3) children, based on birth or status, from inheriting from their parents and 4) extra-marital children from inheriting from their fathers.

It is against this background that we have formulated our recommendations. We know that legislative reform is only one aspect of addressing the many challenges facing women's property rights. The recently completed authoritative United Nations Common

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

⁶ Ibid 88

⁷ Ibid 88, 91

Country Assessment argues that Namibia is facing a major triple threat. First, there are the multiple impacts of HIV and AIDS; second, the necessity of ensuring household food security; and third, the need to strengthen capacities for governance. Issues concerning inheritance impact directly on each segment of the triple threat. Inheritance disputes can be expected to increase and be exacerbated by the fact that life expectancy has plummeted from 63 and 59 for males and females respectively in 1991 to 50 and 48 a bare ten years later. Any effort on the part of government to improve the property/inheritance rights of women in general requires initiatives that are specifically focused on the most vulnerable members of Namibian society. Such a 'bottom-up' approach must transcend law reform initiatives and requires a commitment on the part of government to provide both political leadership and resources if the status of women is to be improved as demanded by government's domestic and international obligations.

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

2. DISTRIBUTION OF INTESTATE ESTATES: Allow for fragmentation of the estate, to make provision for inheritance by the surviving spouse(s) and children, and also the

primary customary law heir or heirs (ie the person or persons who would otherwise have enjoyed preference based on their status within a particular kinship system).

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

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

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

3. **MAINTENANCE FROM THE DECEASED'S ESTATE:** Provision should be made for dependants, based on their reasonable maintenance needs, to apply for maintenance within a prescribed period. Maintenance should be available to all dependents of the deceased whose reasonable maintenance needs are not adequately provided for by will or in terms of intestate succession rules. **D**ependants should be defined broadly to include the surviving spouse and children, as well as any other person who was actually dependant

on the deceased at the time of the deceased's death. Providing maintenance for dependents in this way would ensure that the most needy family members are provided for, and would probably avert many disputes about inheritance.

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

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

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

I started off this paper by quoting Steve Biko. Why you may ask? Whenever it seems that attempts are being made to improve the status of women under customary law or discriminatory aspects of customary law is challenged by women (men invariably present themselves as the 'custodians' of culture or customary law), allegations are made such as the one I have heard recently: 'African culture has been buried with the likes of Steve Biko'. If he was alive today, and we were to ask him for an opinion on which aspect of African

culture we should adopt in order to address the many challenges facing women's property and inheritance rights, I imagine his answer would be as follows:

'We regard our living together not as an unfortunate mishap warranting endless competition among us but as a deliberate act of God to make us a community of brothers and sisters jointly involved in the quest for a composite answer to the varied problems of life.' (emphasis added)

That which we purport to be African culture today- that which we seek to preserve- unfortunately treats women as 'outsiders', unworthy of protection under the law. I firmly believe this is the only aspect of 'African culture' that should be buried. Let us as men and women work together and withstand attempts that deliberately seek to bastardize African culture and leave us with no cultural traits to boast of.