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Women's Rights and Customary Law in Namibia: A Conflict between Human and Cultural Rights?

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Violence against women and girls originates essentially from cultural and traditional patterns and harmful practices, language or religion that perpetuates the lower status accorded to women in the family, workplace, the community and society at large. Violence against women and children is made worse by social pressures, women's lack of access to legal information, aid or protection; the lack of laws that effectively and strictly prohibit violence against women and children; inadequate efforts in enforcing existing laws; and absence of educational programmes to address violence at all levels.²

1 Introduction

Since independence in 1990, the government of Namibia has made various efforts in terms of strengthening women's rights, first of all by according gender equality the status of a constitutionally guaranteed fundamental right and by subsequently passing progressive gender-based laws. Moreover, a Ministry of Gender Equality and Child Welfare was established in 2000 with the objective of ensuring the empowerment of women, men and children, and the equality between men and women as prerequisites for full participation in political, legal, social, cultural and economic development. In September 2000, the United Nations Millennium Declaration was adopted, stating that gender equality and the empowerment of women are promoted as effective ways to combat poverty, hunger and disease, and to stimulate development that is truly sustainable.

Yet, women living in traditional settings in particular – and indeed, the vast majority of women in Namibia live in such settings – continue to face challenges in achieving equal treatment compared with their male counterparts. In many spheres of life, and especially under customary law, women are still subject to unequal treatment due to traditional attitudes and gender stereotyping. Tradition, customary law and certain cultural practices are frequently cited to justify patriarchy and men's discriminatory attitudes. This still is a major barrier to women's rights and gender equality, as will be reflected in this article. The challenge is, however, not to vitiate, but to find common ground between gender equality and customary law in Namibia.

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² Government of Namibia. National Gender Policy of 1997.

2 Protection of Women's Rights in Namibia

The starting point for this article was research conducted on the tension between cultural rights and gender equality within the Human Rights and Documentation Centre (HRDC)³ of the University of Namibia's Faculty of Law in 2007 and 2008.⁴ The following paragraphs demonstrate that the legal framework relating to gender-sensitive issues in Namibia is wide-ranging on national, regional and international levels. Some of these legal instruments take up the potential conflicts between women's rights and customary law by aiming to achieve gender integration and equality.

2.1 The National Framework

2.1.1 The Constitution of the Republic of Namibia

The Republic of Namibia, as the country is known today, was declared a German Protectorate in 1884 and a Crown Colony in 1890; thereafter it became known as *Deutsch Süd West Afrika*, *South West Africa* and *South West Africa / Namibia*. The territory remained a German colony until 1915, when it was occupied by South African forces. From 1920 onwards, the territory became a protectorate, i.e. a mandated territory under the protection of South Africa in terms of the Treaty of Versailles. Significant local and international resistance to South Africa's continued domination of the country emerged in the late 1950s and early 1960s.⁵

In the wake of the substantial repression of an incipient nationalist movement within South West Africa, the South West African People's Organisation (SWAPO), under the leadership of Sam Nujoma, was formed in exile in 1960. The organisation committed itself to ongoing efforts to work through international bodies, such as the UN, to pressure the South African government, and took up an armed struggle against the latter. Political and social unrest within Namibia increased markedly over the 1970s, and was often met with repression at the hands of the colonial administration. In 1978, the UN Security Council passed Resolution 435 and authorised the creation of a transition assistance group to monitor the country's transition to independence. In April 1989, the UN began to supervise this transition process, part of which entailed supervising elections for a constituent assembly to be charged with drafting a constitution for the country. After more than a century of domination by other countries, Namibia finally achieved its independence in 1990 after a long struggle on both diplomatic and military fronts.⁶

³ The HRDC is a semi-autonomous component of the Faculty of Law. The HRDC serves the central mission of creating and cultivating a sustainable culture of human rights and democracy in Namibia. Focusing on this mission, the HRDC promotes the implementation of human rights by organising workshops, seminars and conferences, and by reviewing the human rights situation in Namibia and the southern African region. The HRDC organises and conducts training programmes for the broadest possible variety of target groups, and prepares and disseminates materials and information on human rights and related issues. See Ruppel (2008a:131–140 & 2010).

⁴ The results of this research have largely been summarised by Ambunda & de Klerk (2008:43ff).

⁵ Amoo & Skeffers (2008:17).

⁶ (ibid.).

The 1990 Constitution of the Republic of Namibia is the fundamental and supreme law of the land. The Constitution is hailed by some as being among the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 chapters which contain 148 articles that relate to the chapter title. Together, they organise the state and outline the rights and freedoms of people in Namibia.⁷

The Namibian Constitution takes up the issue of gender equality in several Articles. Article 10, which is the most recognisable of the Constitution's provisions that unequivocally guarantees sexual equality, states the following:

- (1) All persons are equal before the law.
- (2) No person shall be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Respect for human dignity, as well as equality and freedom from discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status, are recognised within Chapter 3 as fundamental rights to be respected and upheld by the executive, legislature and judiciary and all organs of the government, as well as by all natural and legal persons in Namibia (Articles 5, 8 and 10, respectively). Within this Chapter dealing with fundamental rights and freedoms, there are further provisions specifically relevant to the rights of women.⁸ The family, as the natural and fundamental group unit of society, is accorded special protection in Article 14. This Article also bars child marriages and states that men and women have equal rights as to marriage, during marriage and at its dissolution. The Constitution also gives special emphasis to women in the provision which authorises affirmative action.⁹ It puts men and women in an identical position with respect to citizenship,¹⁰ including the acquisition of citizenship by marriage.

One provision aimed specifically at enhancing women's rights is contained in the Constitution's Article 95. According to the provision concerned, the state is called to actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society. Specific emphasis is put on the implementation of the principle of non-discrimination in the remuneration of men and women. To this end, many gender-related statutory provisions have been enacted on the basis of the National Gender Policy of November 1997. Taking the Constitution as a foundation, the policy —¹¹

⁷ Ruppel (2008b:208).

⁸ Visser & Ruppel-Schlichting (2008:158f).

⁹ Article 23(3), Namibian Constitution.

¹⁰ Article 4, Namibian Constitution.

¹¹ Section 2.1, National Gender Policy (RoN 1997).

... outlines the framework and sets out principles for the implementation, coordination and monitoring of gender sensitive issues which shall enhance effectiveness in the continued management and planning of the developmental processes in the different cultural, social and economic sectors of the Namibian Nation.

Recognising inter alia that due to traditional attitudes and gender stereotyping, women continue to be under represented, the policy addresses various areas of concern such as gender, poverty and rural development; gender and reproductive health; violence against women and children to name but a few. With regard to women and custom, the policy in the context of providing strategies to address issues related to women and health calls on Government to enact legislation to combat and protect women against socio-cultural practices that make them susceptible to HIV/AIDS and contribute to the spread of HIV/AIDS (Section 5.8.15 of the Policy). Reference to traditional practices harmful to women is furthermore made within the Policy's chapter on violence against women and children: The Policy states that –¹²

violence against women and girls originates essentially from cultural and traditional patterns and harmful practices, language or religion that perpetuates the lower status accorded to women

2.1.2 Statutory Law

Several statutory laws have been enacted and existing laws have been amended on the basis of the 1997 National Gender Policy, which aim at eliminating discrimination against women and promoting gender equality. Indeed, some of the existing laws relating to gender-sensitive issues were enacted even prior to the National Gender Policy coming into being. Enactments that are in one way or another relevant when it comes to the protection of women's rights include the following:

The Children's Status Act¹³

The Children's Status Act provides, inter alia, for children born outside marriage to receive the same treatment before the law as those born inside marriage. The Act also provides for matters relating to custody, access, guardianship and inheritance in relation to children born outside marriage. Specific reference to customary law is made in the context of inheritance, either intestate or by testamentary disposition. In this specific regard, a person born outside marriage is to be treated in the same manner as a person born inside marriage, despite anything to the contrary contained in any statute, common law or customary law.¹⁴

¹² Section 6.6, National Gender Policy (ibid.).

¹³ Act No. 6 of 2006.

¹⁴ For more information on children's rights in Namibia, cf. Ruppel (2009c).

The Combating of Domestic Violence Act¹⁵

The Combating of Domestic Violence Act provides for protection measures in domestic violence cases. The Act defines the terms *domestic violence* and *domestic relationship*. Various types of relationships are covered, including customary or religious marriages. Whether or not specific traditional practices fall under the definition of *violence* in terms of section 2 of the Act has to be determined on a case-by-case basis. The definition was kept intentionally broad by qualifying acts of physical, sexual, economic, emotional, verbal or psychological abuse, as well as acts of intimidation and harassment, as domestic violence.

The Maintenance Act¹⁶

The Maintenance Act confers equal rights and obligations on spouses with respect to the support of their children. The Act specifically states that both of a child's parents are liable to maintain that child, regardless of whether the parents are subject to any system of customary law which does not recognise both parents' liability to maintain the child. In the context of customary law, it might be even more complicated to determine whether a person were legally liable to maintain another person. Thus, the Maintenance Act provides that a maintenance court is to have due regard for specific principles – such as the principle that husbands and wives are primarily responsible for each other's maintenance – notwithstanding anything to the contrary in customary law. Furthermore, the petitioning parent can be granted an order to be paid maintenance in kind (goats or cattle) where the father is not employed but owns livestock.

The Maintenance Act was passed by Parliament as a result of the difficulty women continued to experience in securing maintenance from the fathers of their children, as well as in the inefficient operation of maintenance courts. The Act aims at implementing more effective mechanisms for securing maintenance in order to avoid or at least minimise the high number of women facing traditional approaches to maintenance under customary law. Section 3 of the Act states that both parents of a child are liable to maintain that child. This applies regardless of whether the child in question is born inside or outside the marriage of the parents or born of the first, current or subsequent marriage, and regardless of whether the parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child.

Also in terms of the Maintenance Act, single women can legally claim maintenance for their children or for themselves.¹⁷ It is a crime to disobey a maintenance order. In terms of section 39(1), a guilty party will be liable to a monetary fine not exceeding N\$4,000¹⁸ or imprisonment

¹⁵ Act No. 4 of 2003.

¹⁶ Act No. 9 of 2003.

¹⁷ Section 3(2)(a).

¹⁸ N\$ 4.000 is equivalent to approximately € 410.

for a period not exceeding 12 months, or such periodical imprisonment as set out in section 285 of the Criminal Procedures Act.¹⁹

The Combating of Rape Act²⁰

The Combating of Rape Act provides protection to victims of rape and sexual abuse and prescribes stiffer sentences for perpetrators. The offence of rape is committed if a person intentionally under coercive circumstances – including physical force, threats of force, or other circumstances where the victim is intimidated – commits or continues to commit a sexual act with another person or causes another person to commit a sexual act with the perpetrator or with a third person.²¹

Even though the customary laws of many communities include explicit rules for the handling of rape cases and stipulate payments for the crime of rape, the perception that marriage is to be seen as justification for rape is still predominant, especially in rural communities. The Act makes it very clear that marital rape is illegal, however, by stating that no marriage or other relationship constitutes a defence to a charge of rape.²²

The Combating of Immoral Practices Act²³ and the Married Persons Equality Act²⁴

The Combating of Immoral Practices Act has been subject to amendments by the Married Persons Equality Act as well as by the Combating of Immoral Practices Amendment Act.²⁵ The Combating of Immoral Practices Act provides for the combating of brothels, prostitution and other immoral practices and for matters connected with them.

One statutory enactment of specific relevance when it comes to conflicts involving customary law and gender is the Married Persons Equality Act. The intention behind this legal instrument include the abolition of the marital power of the husband over the person and the property of his wife, which power was previously applied in civil marriages, and to amend the matrimonial property law of marriages in community of property. Taking into account the CEDAW²⁶ Committee's concluding comments with regard to Namibia's report to the Committee, it has to be stated that many provisions of the Act are well suited to enhancing gender equality, even with regard to customary law marriages. Article 14, which gives wives and husbands equal power of guardianship in respect of children, notwithstanding anything to the contrary contained in any law or the common law, can be cited as such example. One further positive ef-

¹⁹ Act No. 51 of 1977.

²⁰ Act No. 8 of 2000.

²¹ Section 2, Combating of Rape Act.

²² Section 2(3), Combating of Rape Act.

²³ Act No. 21 of 1980.

²⁴ Act No. 1 of 1996.

²⁵ Act No. 7 of 2000.

²⁶ The Convention on the Elimination of all Forms of Discrimination against Women, cf. *infra*.

fect of the Act is that it fixes the legal age of marriage at 18 years for both boys and girls.²⁷ The abolition of the husband's marital power²⁸ can in fact be regarded as fundamental with regard to gender equality. For this reason, the exception to this provision – which reads that the provisions regarding the abolition of marital power and the consequences thereof are not applicable to marriages by customary law – is observed with great concern.

The Draft Customary Law Marriages Bill

Notably, one draft legal instrument that will have a substantial effect on women and custom in Namibia if it comes into force is the draft of the Recognition of Customary Law Marriages Bill. The draft of the Bill was proposed by the Law Reform and Development Commission,²⁹ but it has not yet been submitted to Parliament. It provides, inter alia, for the full legal recognition of marriages concluded under customary law. The draft of the Bill specifies requirements for and the registration of customary law marriages, as well as for the matrimonial property consequences of customary law marriages. According to the draft, customary law marriages will have full legal recognition – as civil marriages do. The minimum requirements for a customary marriage under the proposed Act are as follows:

- Full age (unless consent from both parents as well as from government is obtained)
- Consent of both intending spouses
- The lack of relationship to each other by affinity or blood to such a degree that their marriage would not be valid in terms of applicable customary law
- Neither prospective spouse is party to an existing customary law marriage or a marriage under the common law.

Thus, bigamy (and polygamy) will be outlawed once the proposed Act comes into force. The Married Persons Equality Act will subsequently be amended to the effect that the provisions of the Act (including the abolition of marital power) apply to all marriages, whether by customary law or contracted under the Marriages Act.³⁰

2.2 Relevant African Legal Instruments

Furthermore, several legal instruments on gender-related issues and women's rights have been adopted in Africa, which are also most relevant for Namibia. The following paragraph focuses

²⁷ This is provided for by section 24 of the Married Persons Equality Act, which amends section 26 of the Marriages Act, 1961 (No. 25 of 1961), as substituted by section 6 of the Marriages, Births and Deaths Amendment Act, 1987 (No. 5 of 1987).

²⁸ Section 2, Married Persons Equality Act.

²⁹ See Namiseb (2008:107ff).

³⁰ Act No. 25 of 1961.

on African institutions such as the African Union (AU) and the Southern African Development Community (SADC) and their gender-related legal instruments.³¹

2.2.1 The OAU, AU and the African Charter for Human and Peoples' Rights

During the time of the 1963 established Organisation of African Unity (OAU), various human rights instruments were already adopted. While the OAU played a significant role in the decolonisation and freedom of countries and peoples, it did not expressly uphold the values inherent in human rights norms and standards as they relate to individuals and groups. Furthermore, by adopting an unconditional position on non-interference, the OAU became ineffective in the promotion and protection of human rights in a decolonised and free Africa.³²

Two important developments extended and deepened Africa's commitment to human rights, democracy, governance and development. The first was the adoption of the African Union's Constitutive Act, which reaffirms Africa's commitment to promote and protect human rights. The second was the New Partnership for Africa's Development (NEPAD), which also places human rights at the centre of development. Both aim to reinforce social, economic and cultural rights, as well as the right to development.

The establishment of the African Union (AU) was hailed as a welcome opportunity to put human rights firmly on the African agenda. The AU's Constitutive Act, adopted in 2000, marks a major departure from the OAU Charter in the following respects:

- Moving from non-interference to non-indifference, including the right of
- the AU to intervene in any member state's affairs
- Explicit recognition of human rights
- Promotion of social, economic and cultural development
- An approach based on human-centred development, and
- Gender equality.³³

The African Charter for Human and Peoples' Rights was adopted in Nairobi, Kenya, in 1981 and came into force in October 1986. Namibia ratified the Charter in 1992. The Charter contains a large number of civil, political, social and cultural rights. The principle of non-discrimination is recognised by Article 2, while Articles 3 and 4 grant the rights to equality and to bodily integrity, and the right to life, respectively. The family is accorded special protection through Article 18, which in its subsection 3 reads that the –

... State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

³¹ Visser & Ruppel-Schlichting (2008:155).

³² Gawanas (2009:135ff).

³³ (ibid.).

A special feature of the Charter is that it explicitly imposes duties upon every individual and the community. Every individual has duties towards his or her family and society. Therefore, the rights and freedoms of each individual have to be exercised with due regard to the rights of others, collective security, morality and common interest (Article 27). A duty is imposed upon the individual to respect and consider his/her fellow beings without discrimination (Article 28), and the community is called to, inter alia, respect the family (Article 29).

2.2.2 The Protocol on the Rights of Women in Africa

Although the African Charter on Human and Peoples' Rights provides for the general protection of the rights of women and the principle of non-discrimination on the grounds of sex, it was considered that these provisions did not sufficiently protect women's rights in Africa. Thus, the Protocol on the Rights of Women in Africa was drafted as the first human rights treaty under the African Union to provide specifically for a range of women's rights. It was adopted in 2003 and came into force in November 2005. Namibia ratified the Protocol in 2004. The Protocol's Preamble states that –

... despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.

Traditional cultural practices are considered to be a major impediment to the advancement of women's rights in Africa, as can be taken from the CEDAW Committee's concluding observations on the periodic reports of many African countries.³⁴

The Protocol intends to improve this situation by covering a broad spectrum of women's rights such as the rights to life, dignity, integrity and security; to protection from violence; the prohibition of harmful practices; and marriage and marriage-related rights. With its broad list of rights, the Protocol goes beyond the scope of other gender-related instruments such as CEDAW. On the other hand, the Protocol takes less restrictive positions, e.g. on polygamous marriages, which – according to the UN Human Rights Committee (HRC) as well as to the CEDAW Committee – are incompatible with the principle of equality of treatment and have to be seen as inadmissible discrimination against women and should be abolished wherever they continue to exist. In its Article 6(c), the Protocol only states that –

... monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships[,], are promoted and protected.

It is for obvious reasons that the wording of the AU Protocol is less restrictive than required by the HRC or the CEDAW Committee, as polygamy is permissible under the customary laws of many African states as well as under Islamic personal law, which applies in many African countries.

³⁴ See e.g. CEDAW (2006, 2007b).

It has to be noted that the AU Protocol does not establish a specific body to promote, protect and monitor its effective implementation. This apparently falls within the mandate of the African Commission on Human Rights, established under Part II of the African Charter on Human and Peoples' Rights. This is the body to which periodic reports have to be submitted (Article 26 of the AU Protocol) and to which individual communications alleging a breach of the Protocol's provisions have to be lodged (Article 55 of the African Charter on Human and Peoples' Rights).

2.2.3 The Promotion of Gender Equality in the Southern African Development Community (SADC)

SADC³⁵ was established in Windhoek in 1992 as the successor organisation to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC was established by signature of its constitutive legal instrument, the SADC Treaty. SADC envisages —³⁶

... a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

SADC currently counts 15 states among its members, namely Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,³⁷ South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

Besides the Treaty establishing SADC, which defines human rights, democracy and the rule of law as fundamental principles, the Charter on Fundamental and Social Rights is one of the basic documents related to human rights within SADC. Even though this document is of a more general nature, Article 6 refers to the equal treatment for men and women and calls upon member states to ensure gender equity, i.e. equal treatment and opportunities for men and women.³⁸

The 1997 SADC Declaration on Gender and Development accepts that gender equality is a fundamental human right, and demands the equal representation of women and men in decision-making structures at all levels, as well as women's full access to and control of productive resources such as land, livestock, credit, modern technology and formal employment. However, even though the Declaration has been signed by all SADC member States, it is not a legally binding instrument.

Considering the increasing levels of various forms of violence against women and children in SADC, the SADC Summit signed an Addendum to the 1997 SADC Declaration on Gender and Development known as the 1998 Addendum on the Prevention and Eradication of Violence

³⁵ For more details on SADC, see <http://www.sadc.int/>, last accessed 15 May 2009.

³⁶ (ibid.).

³⁷ The Seychelles was a member of SADC from 1997 to 2004; it rejoined SADC in 2008.

³⁸ Ruppel (2009b:291ff).

against Women and Children. In the Addendum, the Summit resolved to ensure the adoption of specific measures by SADC governments, which include the enactment of legislation, public education, training, the raising of awareness, and the provision of services. Like the Declaration on Gender and Development, the Addendum has been signed by all member States but is not legally binding.

The SADC Gender Unit, established in 1996, is responsible for monitoring and evaluation of all gender-related issues within SADC. In 2003 the SADC Charter on Fundamental and Social Rights was introduced.

Besides the aforementioned provisions and objectives, the SADC legal system offers human rights protection in many legal instruments other than the SADC Treaty. One category of legal documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented; they have the same legal force as the Treaty itself. A Protocol comes into force after two thirds of SADC member states have ratified it. A Protocol legally binds its signatories after ratification.³⁹

Of specific relevance in terms of gender-related instruments within the SADC legal framework is the Protocol on Gender and Development which was signed during the 28th SADC Summit in August 2008.⁴⁰ Recognising that the integration and mainstreaming of gender issues into the SADC legal framework is key to the sustainable development of the SADC region, and taking into account globalisation, human trafficking of women and children, the feminisation of poverty, and violence against women, amongst other things, the Protocol in its 25 Articles expressively address issues such as affirmative action, access to justice, marriage and family rights, gender-based violence, health, HIV and AIDS, and peace-building and conflict resolution. The Protocol provides that, by 2015, member states are obliged to enshrine gender equality in their respective constitutions, and that their constitutions state that the provisions enshrining gender equality take precedence over their customary, religious and other laws.⁴¹

The implementation of the Protocol's provisions is the responsibility of the various SADC member states,⁴² and specific provisions as to monitoring and evaluation are laid down in the Protocol.⁴³ The SADC Tribunal is the judicial body that has jurisdiction over disputes relating to this Protocol.⁴⁴ The Southern African Development Community Tribunal (SADC Tribunal) was established under Article 9 of the SADC Treaty in 1992. The Tribunal is seated in Windhoek, Republic of Namibia.⁴⁵

³⁹ (ibid.).

⁴⁰ See Section 16, Final Communiqué of the 28th Summit of SADC Heads of State and Government held in Sandton, South Africa, 16 to 17 August 2008.

⁴¹ Article 4, SADC Protocol on Gender and Development.

⁴² Article 14, SADC Protocol.

⁴³ Article 17, SADC Protocol.

⁴⁴ Article 18, SADC Protocol.

⁴⁵ For a detailed discussion on the SADC Tribunal and its legal foundations see Ruppel & Bangamwabo

2.3 International Law

The Namibian Constitution's Article 144 provides that general rules of public international law and international agreements binding upon Namibia form part of the law of Namibia without any further transformation or subsequent legislative act. However, as the Constitution is the supreme law of the country, international law has to be in conformity with the provisions of the Constitution in order to apply domestically.

2.3.1 The International Bill of Human Rights

The vast number of human-rights-related legal instruments and institutions under the United Nation's umbrella furnish proof that, on the global level, the United Nations undeniably play the most vital role when it comes to the protection of human rights. On the basis of the Charter of the United Nations agreed to in 1945, five major United Nations legal instruments, known as the International Bill of Human Rights, were established to define and guarantee the protection of human rights.

- The Universal Declaration of Human Rights (1948)
- The International Covenant on Economic, Social and Cultural Rights (1966)
- The International Covenant on Civil and Political Rights (1966)
- The Optional Protocol to the International Covenant on Civil and Political Rights, and
- The Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty.

The Universal Declaration of Human Rights (UDHR) is a basic international statement of the inalienable and inviolable rights of all members of the human family. The Declaration is intended to serve as the common standard of achievement for all peoples and all nations in the global effort to secure universal and effective recognition of the rights and freedoms it lists. The right to equality can be seen as the golden thread of the Declaration. Inter alia, it is laid down that –

- all human beings are born free and equal in dignity and rights (Article 1)
- everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2)
- everyone has the right to life, liberty and security of person (Article 3), and
- all are equal before the law and are entitled without any discrimination to equal protection before the law (Article 7).

(2009a:191ff).

One further provision of specific relevance in terms of specific cultural practices is Article 16. The latter provides that men and women of full age have the right to marry and found a family; that men and women are entitled to equal rights as to marriage, during marriage, and at its dissolution; and that marriage should be entered into only with the free and full consent of the intending spouses. Although the Declaration implicitly recognises that its rights and freedoms may be subject to limitations, such limitations are obliged to be determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others. Furthermore, any such limitations have to meet the just requirements of morality, public order, and general welfare in a democratic society.⁴⁶

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), ratified by Namibia in 1995, provide internal protection for specific rights and freedoms. Both Covenants recognise the right of peoples to self-determination; both have provisions which prohibit all forms of discrimination in the exercise of human rights; and both have the force of law for the countries which have ratified them.

Similar to the Universal Declaration of Human Rights, the ICESCR and the ICCPR bar all forms of discrimination. As to gender-related human rights, specific attention has to be given to those provisions that relate to family and marriage. These are of particular relevance when it comes to specific cultural practices that potentially violate women's rights. Article 3 of the ICESCR encourages States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights as set forth by the Covenant. The protection of the family as the natural and fundamental group unit of society is accorded special protection in Article 10, which – like the UDHR and the ICCPR – states that marriage should only be entered into with the free consent of the intending spouses. Specific rights pertinent to non-discrimination are also contained in the ICCPR and, again, one Article in particular takes up the issue of family and marriages (Article 23). Of equal importance with regard to women and customary practices are the rights to self-determination (Article 1), to be free from torture or cruel, inhuman or degrading treatment (Article 7), and to equality before the law (Article 26).

Apart from the aforementioned legal instruments, which are of a more general nature, further specific gender-related commitments have been formulated under the United Nations' framework and will be discussed hereinafter.

2.3.2 The Declaration on the Elimination of Discrimination against Women

The 1967 Declaration on the Elimination of Discrimination against Women, issued by the United Nations' General Assembly four decades ago, was a crucial step in the process of drafting international gender-specific legal instruments. The Declaration which is not binding, states

⁴⁶ Visser & Ruppel-Schlichting (2008:151ff).

that discrimination against women is fundamentally unjust and constitutes an offence against human dignity (Article 1). The Declaration also calls for the abolition of laws and customs which discriminate against women, for equality under the law to be recognised, and for states to ratify and implement existing UN human rights instruments against discrimination (Article 2). The rights to education, to vote and to enjoy full equality in civil law, particularly in respect of marriage and divorce, are emphasised in the Declaration, while it also calls for child marriages to be outlawed (Article 6).⁴⁷

2.3.3 *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*

CEDAW was adopted in 1979, and came into force in 1981. CEDAW has to be seen as a milestone in gender-related legislation as it is the first legally binding instrument relating to women's rights in particular. As of August 2008, the Convention had 185 members, including Namibia, which ratified the Convention in 1992. CEDAW provides the foundation for realising equality between women and men. States Parties are obliged to take all appropriate measures, including legislation and temporary special measures, to ensure that women enjoy all their human rights and fundamental freedoms.

One of the Convention's mainstays is the definition of the term *discrimination against women* as (Article 1) –

... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

States Parties are required to enshrine gender equality into their domestic legislation, repeal all discriminatory provisions in their laws, and enact new provisions to guard against discrimination against women. They are also obliged to establish tribunals and public institutions to guarantee women effective protection against discrimination, as well as to take steps to eliminate all forms of discrimination practised against women by individuals, organisations, and enterprises (Article 2). One provision specifically relevant for women and custom is Article 5, which states that measures have to be taken to –

... modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

It has to be noted that CEDAW permits ratification subject to certain reservations, provided that such reservations are not incompatible with the object and purpose of the Convention. A number of states enter reservations to particular Articles on the grounds that national law, tradi-

⁴⁷ (ibid.).

tion, religion or culture are not congruent with the principles of the Convention, and purport to justify the reservation on that basis. Namibia has not reserved any such right under CEDAW.

One specific feature of CEDAW is that each State Party has to submit periodic reports on measures they have taken to comply with their obligations under CEDAW. These reports are examined and commented on by the Committee on the Elimination of Discrimination against Women, established under CEDAW.

In its concluding comments on Namibia's combined second and third periodic reports submitted according to Article 18 of CEDAW⁴⁸ with regard to women and custom in Namibia, the Committee expressed its concern about, inter alia, the persistence of strong patriarchal attitudes and stereotypes in regard to the roles and responsibilities of women and men in the family and society. Furthermore, the Committee was concerned that the Traditional Authorities Act,⁴⁹ which gives traditional authorities the right to supervise and ensure the observance of customary law, may have a negative impact on women in cases where such laws perpetuate the use of customs and cultural and traditional practices that are harmful to and discriminate against women. The Committee, therefore, called on Namibia to study the impact of the implementation of the Traditional Authorities Act as well as the Community Courts Act⁵⁰ so as to ensure that customs and cultural and traditional practices that were in fact harmful to and discriminated against women were discontinued.

The Optional Protocol to CEDAW adopted by the United Nations General Assembly in 1999 entered into force in December 2000, and was signed and ratified by Namibia in May 2000. Members to the Optional Protocol recognise the competence of the Convention's monitoring body, the Committee on the Elimination of Discrimination against Women, to receive and consider complaints from individuals or groups within its jurisdiction.

2.3.4 The Declaration on the Elimination of Violence against Women

The Declaration on the Elimination of Violence against Women (1993) is a further commitment by the UN that relates to the topic of this publication. It goes without saying that violence against women is not a problem peculiar to women living in traditional settings. Unfortunately, violence against women occurs in all socio-economic and educational classes and cuts across cultural and religious barriers. However, the perception that women are subordinated to their male partners still predominates in large parts of traditional communities, and in many cases, tradition is considered to be a justification for violence against women. Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female circumcision. The Declaration defines the term *violence against women* as (Article 1) –

⁴⁸ CEDAW (2007a).

⁴⁹ Act No. 25 of 2000.

⁵⁰ Act No. 10 of 2003.

... any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

States are called to condemn violence against women and not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination (Article 4).

Two major documents that still need to be mentioned here, are the *Beijing Declaration* and the *Beijing Platform for Action*, resulted from the UN's Fourth World Conference on Women, titled "Action for Equality, Development and Peace", which was held in Beijing in 1995. The Beijing Declaration embodies the commitment of the international community to the advancement of women and to the implementation of the Platform for Action, ensuring that a gender perspective is reflected in all policies and programmes at national, regional and international levels. The Beijing Platform for Action, on the other hand, sets out a number of actions for national and international implementation for the advancement of women. Both documents contain several sections that relate either directly or indirectly to issues around women and custom. For instance, the Platform for Action states that violence against women, including physical, sexual and psychological violence occurring in the family such as marital rape, female genital mutilation and other traditional practices harmful to women, have to be prevented and eliminated.⁵¹

3 Customary Law in Namibia

3.1 *The Constitutional Recognition of Customary Law and Cultural Rights*

Customary law is the law according to which most of the Namibian population live. It regulates marriage, divorce, inheritance and land tenure, amongst other things. Thus, customary law is a body of norms, customs and beliefs relevant for most Namibians. However, despite this relevance for the majority of the population, customary law has for a time been marginalised and even ignored owing to colonial rule. Customary law is a complex, dynamic system which has constantly evolved in response to a wide variety of internal needs and external influences.⁵²

All evidence alluding to the living reality of customary law shows that the law has developed ways and means of preserving its essence in spite of any impairment. In this regard, Article 66(1) of the Constitution reads as follows:

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

Therefore, Article 66(1) puts customary law on the same footing as any other law of the country as far as its constitutionality is concerned. This means that customary law has to comply with

⁵¹ For a Collection of most relevant national, regional and international legal texts of instruments dealing with the protection of women's rights in Namibia, see Ruppel (2008c:173-224).

⁵² Hinz (2003).

the constitutional provisions, particularly Chapter 3, which contains fundamental human rights and freedoms. Thus, the constitutional recognition of customary law protects it against arbitrary inroads, and places a legal duty upon national lawmakers to treat customary law like any other law as regards its repeal or amendment.⁵³

When it comes to *cultural rights* Article 19 of the Constitution provides the rudiments of a new cultural approach to customary law:

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

With Article 19 the right to culture is guaranteed under the Bill of Rights in the Constitution as well as in Article 15(1)(a) of the ICESCR. In terms of these two legal obligations, the government is required to take legislative and administrative measures to ensure the fulfilment of these rights. The right to profess, maintain and promote a language arose in the case of *Government of the Republic of Namibia v Cultura 2000*.⁵⁴ The respondents – an association for the preservation of the cultural activities of white Namibians – argued, inter alia, that the State Repudiation Act,⁵⁵ whereby the government had sought to deprive the respondents of certain monies and property allocated to them by the previous administration, was unconstitutional since it was repugnant to Article 19. The Supreme Court rejected this argument without examining it in great detail, holding that the repudiation effected by section 2(1) of the Act was lawful in terms of Article 140(3) of the Constitution. The judgment in this case makes it clear that the right to culture is not absolute: it is subject to the provisions of the Constitution and, thus, cannot impinge on the rights of others or the national interest. This qualification is important because the right to cultural life and traditions – given that many traditional practices are sexually discriminatory – could potentially clash with constitutional rights on non-discrimination and with women’s rights.⁵⁶

3.2 Customary Marriages

Namibia has two types of marriage systems, namely the civil system, and customary marriage.⁵⁷ Civil marriage is solemnised by civil or religious rites, while customary marriage is based on tradition. Before a customary marriage comes into existence, the prospective spouses and their families negotiate the marriage, exchange marriage considerations, establish a matrimonial residence, and perform traditional ceremonies.⁵⁸

⁵³ (ibid.).

⁵⁴ 1994 (1) SA 407 (NmS).

⁵⁵ Act No. 32 of 1992.

⁵⁶ Naldi (1995:96).

⁵⁷ Friesen (1998:1).

⁵⁸ (ibid.).

3.2.1 A Living Reality

There are still many people in Namibia who marry under customary law.⁵⁹ While 19% of Namibia's population as a whole are married under civil law, 9% are married under customary law. In the Caprivi Region, for example, 34% marry under customary law, compared with 5% under civil law. In the Kavango Region, 29% get married traditionally against 13% who opt for a civil marriage.⁶⁰

As head of the house, men traditionally make the final decision with regard to household property, decisions about livestock, and property disposal and acquisition. In many Namibian traditional societies, there is rarely a time in a woman's life when she is not under the direct control of a man. Even though women can head households, in a customary marriage the man is mostly regarded as head of the household. According to LeBeau et al.,⁶¹ it is evident that women (and female children) do many more chores than men; and they do these chores more frequently than the men do theirs. Women are required to cultivate the field, fetch water and wood, buy goods at shops and markets, make and sell baskets, process *mahangu*,⁶² feed the family, and watch over the children. This clearly shows that women carry out the tasks of production while men reap the benefits. In the *Oshiwambo*-speaking society, men have control over arable land and divide their land between themselves and their wives. Although men allocate themselves the larger portion, women are responsible for cultivating the crops not only on her smaller portion but on all of the homestead's arable land. Despite this, the men may keep the produce for the land for their own use, while women use their produce to feed the family.

Although it is clear that women are the primary users of the agricultural environment,⁶³ women do not have the ability to own land rights or have usufruct over such land rights: they can only do so indirectly, i.e. via their husband or other male relatives. The Legal Assistance Centre (LAC)⁶⁴ reported that women have some control over their own individual property in matrilineal communities, like that of the Owambo. However, the husband's consent for some property transactions may be needed. Conversely, a husband does not need his wife's consent. Modern consumer goods which confer status – such as motor vehicles, land and cattle – tend to be treated in practice as male property, regardless of which spouse actually acquired them. The LAC report also showed that, in Herero communities, women could individually own and control property, including cattle, but that male consent was necessary – at least as a formality.

⁵⁹ The following data are found in NPC (2003).

⁶⁰ Ambunda & de Klerk (2008:69).

⁶¹ LeBeau et al. (2004:80).

⁶² *Mahangu*, pearl millet (*pennisetum glaucum*) is the most widely grown type of millet in Namibia.

⁶³ The data indicated that 50% of all women in Namibia work in agriculture, compared with 43% of men (ibid.:11).

⁶⁴ LAC (2005).

The Namibian Constitution specifically refers to customary marriages in two of its Articles.⁶⁵ But what is the status of customary marriages in Namibia? Associated with the recognition of a customary marriage, the following questions arise:

- What are the criteria of a valid customary marriage?
- What are the rules governing the relationship between spouses?
- What is the matrimonial property regime? What are grounds for divorce?
- And how is divorce effected?⁶⁶

Although customary law provides some answers to some aspects of these questions, legal certainty for the parties to such marriages, certainty for the benefit of the children, certainty for the public with which spouses entertain transactions requires more legislative intervention in terms of a statute comparable to the Marriage Act⁶⁷ or the Married Persons Equality Act,⁶⁸ to name only two that focus specifically on civil marriages.

3.2.2 *Bride Price*

Traditionally, marriage is regarded as an arrangement between the kinship groups of the man and the woman. Most traditional communities undertake to pay a bride price⁶⁹ to the women's kinship group. This payment establishes a social relationship between the groups and, in the process, gives the man and his kinship group certain rights of control over the woman.

In many customary law systems, the payment of a marriage consideration or lobola is the principal criterion for a valid customary marriage. Thus, the bride price is used to distinguish a valid marriage from a non-formalised union. Lobola, as the criterion for a valid customary marriage, is tendered by the groom or his parents to the bride's parents. This is usually paid in full and can be in the form of cattle or money.⁷⁰

In Namibia, the payment of lobola is not exercised by all traditional communities.⁷¹ Therefore, lobola is not a major criterion for the validity of a customary marriage in terms of all customary systems, because it varies in form, function and value from community to community. In matrilineal communities,⁷² for example, lobola is not a major criterion; but the giving of small

⁶⁵ Article 4(3)(b), which addresses the acquisition of citizenship, and Article 12(1)(f), concerning the privilege to withhold testimony against themselves or their spouses.

⁶⁶ See Hinz (2008:95ff).

⁶⁷ Act No. 25 of 1961, as amended.

⁶⁸ Act No. 1 of 1996. Cf. section 16 of the Act, which takes note of customary marriages, but explicitly excludes the applicability of the most important achievements of the Act to customary marriages.

⁶⁹ Which the Herero call *otjitungya*, the Nama and Damara call */gu\|gab*, the Owambo call *iigonda*, and the Caprivians call *malobolo*. In many southern African communities it is known as *lobola* or *lobolo*.

⁷⁰ In the past, lobola could also be and in fact was paid in the form of hoes.

⁷¹ Ambunda & de Klerk (2008:54).

⁷² The *Oshiwambo*-speaking and Kavango communities.

gifts⁷³ and/or services rendered over a period of time⁷⁴ are considered the main elements in validating a customary marriage.⁷⁵ The wedding ox commonly given in Owambo communities does not perform the same function as a marriage consideration, although it is referred to as lobola;⁷⁶ for this reason, the donation of the wedding ox is termed a marriage ratification custom.⁷⁷ The wedding gifts given in matrilineal communities are also termed a marriage ratification custom because they serve to ratify the marriage, rather than as a way of preventing divorce.⁷⁸ In the case of divorce, these presents do not need to be returned because they are not of high value.

A marriage consideration is mostly only required as the principal criterion in the patrilineal and cognate communities in Namibia. In these communities, the value of the lobola is high, and is determined by the bride's family. Lobola is traditionally paid in full in the form of cattle or money; however, it can also now be paid in instalments. The main function of the bride price is to prevent divorce: on the wife's side of the family, it is potentially difficult to have to return a significant sum of money or head of cattle to her husband or his family; the same difficulties occur from the husband's side, since he and his family would have to forfeit such sum or cattle.⁷⁹

In patrilineal communities such as the Herero, lobola has the effect of legalising the marriage and establishing patrilineal affiliation for any children born of the marriage. The wife, however, remains part of her own female line, because of the double-descent kinship system practised by the Herero.⁸⁰ In Caprivi communities, the payment of lobola – or *malobolo* as they refer to it – is the main criterion for distinguishing a valid customary marriage from a non-formalised one. This custom has been passed from generation to generation. The consent of both spouses' parents is also required, but its effect is not greater than that of lobola: even if parental consent has been given but lobola has not, the marriage is not valid until the lobola has been paid. This simply means that, without lobola, there is no valid marriage under Caprivi customary law, irrespective of whether the bride is a virgin, a widow, a divorcée, a young woman, or a mature woman.

In the past, lobola was – comparatively speaking – cheap and was paid in the form of either an axe or a hoe. This the bridegroom had to give to the bride's parents either before or as he came to take his bride. Today, lobola is expensive, and consists of large sums of money and many head of cattle.

Many misunderstandings and misinterpretations regarding the role and meaning of lobola exist. Some people believe that paying lobola means 'buying' the bride. On the other hand it is

⁷³ In Owambo communities, the gifts are given by the bridegroom to the bride's parents.

⁷⁴ This is referred to as a *bride service*, and is a custom practised by Kavango communities.

⁷⁵ Bennett (1995:103).

⁷⁶ (*ibid.*).

⁷⁷ Becker & Hinz (1995:51).

⁷⁸ (*ibid.*).

⁷⁹ (*ibid.*).

⁸⁰ Bennett (1995:104).

argued that lobola was not, and is still not, meant to ‘buy’ a bride, but to secure marriage and prevent divorce. Therefore, lobola is meant to serve as the security in a customary marriage, with the effect of preventing both the spouses and their respective parents from the consequences that arise in the event of divorce. As lobola is meant to secure customary marriages, in the event of divorce there are conditions attached to lobola; these will determine whether the lobola is returned to the groom and his parents by the bride’s parents, or whether the groom and his family forfeit the lobola.⁸¹

3.2.3 Polygamy and Polygyny

In social anthropology, *polygamy* is the practice of being married to more than one spouse at the same time. Historically, polygamy has been practised as polygyny, which is one man having more than one wife; in other cultures it is practised as *polyandry*, i.e. one woman having more than one husband; less commonly, polygamy can be practised as group marriage by one person who has many wives as well as many husbands at the same time. Polygyny is practised in a traditional sense in many African cultures and countries today, including Namibia. It appears more often in patriarchal societies.⁸² As a customary marriage, polygyny is not mere cohabitation and informal union: it is a process, and its specifications differ from community to community.⁸³

Polygyny has proponents and opponents in the Namibian society and in Africa at large: Some argue that it objectifies women, purporting that it is a vehicle for the oppression of women in marriage. Others expressed the opinion that women did not consider themselves as being oppressed by their customary laws, and that they embraced these laws and practiced them proudly. For example, the practice of polygyny that is often seen as oppressive by society was embraced as a way to ensure that no children were born out of wedlock, and to ensure that all the women who formed part of the traditional community were married and could be looked after by their husband.⁸⁴

What, however, is a fact in Namibia is that polygyny is not on par with civil marriage in terms of legal recognition by the state. So far only civil marriages are recorded in the marriage register of the Department of Civic Affairs and are accorded marriage certificates.⁸⁵ Perhaps the most significant distinguishing factor between a civil and customary marriage is that polygyny is not only a private arrangement between the couple, but also a union of two families.⁸⁶

As explained above, various laws outlining the framework that supports the implementation of gender-related constitutional issues have been passed, and policies and programmes

⁸¹ Ambunda & de Klerk (2008:56).

⁸² Stone (2006:Ch. 6).

⁸³ Ambunda & de Klerk (2008:69).

⁸⁴ For different viewpoints see Ambunda & de Klerk (2008:69ff) and Anyolo (2008:83ff).

⁸⁵ Ministry of Home Affairs Marriage Register.

⁸⁶ Bennett (2004).

that promote and sustain equality for all have been developed,⁸⁷ but the question of polygyny has not yet been successfully addressed. In this regard, experts on the 23-member Committee on the Elimination of Discrimination against Women⁸⁸ in 1997 had the following comment on Namibia's first country report:

Namibia should address the question of polygamy. It is further said that even countries where there were religious sanctions for such marriages, efforts were being made to discourage them.

It was stressed that since a majority of Namibians were Christian, it should be easier to prevent polygynous marriages.⁸⁹ The 2005 CEDAW consideration of Namibia's 2nd and 3rd periodic reports takes up this issue and states that polygyny has been identified as area of concern by the Committee but has so far not received the required attention.⁹⁰ Women in polygynous partnerships are not afforded legal protection under the general law system because, currently, only civil marriages are given full recognition by the state's legislation.⁹¹ For example, the famous legislation⁹² which removes the common law principle of a husband's marital power is not applicable to marriages by customary law; hence the abolition of marital power has no effect on women in polygynous marriages. It is presumed, therefore, that the consequences of the non-recognition of polygyny, a practice which is simply left to function in a legal vacuum, may result in the violation of women's rights. Since the Namibian Government introduced the Married Persons Equality Act, it is difficult to understand why the principles therein do not apply to customary marriages.

3.3 Women's Land and Property Rights under Customary Law

Most customary systems in Namibia traditionally reflect that women do not own or inherit land. This is partly because women are perceived to be part of the wealth of the community, and therefore cannot be the locus of land right grants. For most women, access to land is via a system of vicarious ownership through men such as husbands, fathers, uncles, brothers and sons. Customary rules, therefore, have the effect of excluding females from the clan or community entity. In most ethnic groups, a married woman does not own property during marriage. Customarily, especially in the rural areas, women in many Namibian cultures are not allowed to own property and do not have control over family finances. Thus, most rural women depend

⁸⁷ The National Gender Policy of 1997.

⁸⁸ This is the monitoring body for CEDAW, in accordance with Article 18 of the Convention. According to Article 18, state parties are required to submit reports within one year after accession, and thereafter at least every four years.

⁸⁹ Friesen (1998).

⁹⁰ See CEDAW Consideration of reports submitted by state parties under Article 18 CEDAW (CEDAW/C/NAM/2-3 dated 2 September 2005).

⁹¹ Such as the Marriages Act, 1961 (No. 25 of 1961).

⁹² The Married Persons Equality Act, 1996 (No. 1 of 1996).

on their husbands to give them money or to send money to them from the urban areas. In effect, therefore, women face continued dependence on men for money – which contributes to maintaining their lower social status vis-à-vis men, and places them at risk of poverty, exploitation, and gender-based violence.⁹³ The woman's entire property even that acquired before her marriage is under the sole control of her husband. The control exercised by women over land is over use rather than control or ownership of the rights to it. This subordination of women socially and economically renders them less competitive than they should be under the current economic structuring of society.⁹⁴

The issue of women and land rights was taken up in 1995 when the Ministry of Agriculture, Water and Rural Development (MAWRD) adopted a National Agricultural Policy, which highlighted the need to secure the participation of women in agricultural development, and stated that women needed to be recognised as farmers in their own right. According to the Policy, women's access to and control over household resources were marginal. It stated that a specific strategy would be employed to ensure that women farmers were not excluded from the government's commitment to provide for the basic needs of all Namibians. The Policy added that the role of women in agricultural development needed to be re-emphasised and their participation in agricultural organisations ensured. More importantly, the prevalent socio-cultural norms which related to women needed to be changed, according to the Policy, which also emphasised the need to assist women in overcoming constraints to their participation in development efforts related to the lack of skills and poor access to services and finance. Furthermore, the Policy initiated the debate on law reform in regard to the above. A subsequent major development for rural women came in the form of the Communal (Agricultural) Land Reform Act.⁹⁵ In terms of the Act, men and women are equally eligible for individual rights to communal land, and the treatment of widows and widowers is identical. This law alters current practice in some areas, where a widow can be dispossessed of the communal occupation fee.⁹⁶

3.4 Customary Succession and Inheritance Law

In Namibia, succession is governed by both common law and customary law. The relatively simple and clear-cut modern inheritance law privileges the surviving partner to the marriage and their children. Customary inheritance law, however, recognises the interest to distribute shares of the estate to the family. Under today's customary law, succession is intestate, universal and onerous. An heir generally inherits not only the property, but also the responsibilities of the deceased, particularly the duty to support surviving relatives. Among Herero communities, for example, the eldest son succeeds the deceased should the head of the family die. If the de-

⁹³ Ambunda & de Klerk (2008:57).

⁹⁴ Bennett (1996).

⁹⁵ Act No. 5 of 2002.

⁹⁶ MAWRD (1995).

ceased had more than one wife, it would normally be the eldest son of his first wife. The Caprivi Region is the only area where widows regularly inherit their deceased husband's property – a practice that is said to be necessary to provide for any surviving children.⁹⁷

Article 14(1) of the Namibian Constitution requires both husband and wife to be treated equally if their marriage is to be dissolved. This poses a major challenge to customary practice, which excludes widows from inheriting. The constitutional guarantee pertaining to equal treatment might be enough to overturn the customary bar on widows inheriting, despite their right to maintenance from the estate. Therefore, any customary laws that profess that the deceased heir be male would constitute prima facie discrimination against female descendants. Admittedly, a widow usually has the right to insist that the heir maintain her out of the deceased estate, but that right may be hedged with restrictions such as the widow being required to continue residing at the deceased's homestead and performing her "wifely" duties.

Property grabbing has been identified as one of the worst disadvantages in customary marriage. It is the ill-treatment of widows after their husband's death. The matrilineal family members of the late husband are the ones normally involved in property grabbing. This inheritance practice is defined as stripping a woman of her right to property as provided for under Article 16 of the Constitution and Article 5 of CEDAW. Another practice is the evicting of the widow and her children from the late husband's land – and even from the spouses' common house.⁹⁸

The issues at hand in customary inheritance law are even more complicated than in customary family law.⁹⁹ The death of a person leaving his or her estate accessible in one way or another to all sorts of legitimate as well as illegitimate interests characterises the special vulnerability of the estate. Less powerful, but nevertheless legitimate interests (interests of women and children) thus call for more protection.¹⁰⁰

3.5 Extramarital Children under Customary Law

Under common law, an extramarital (i.e. illegitimate¹⁰¹) child was previously unable to be an intestate heir of his father's or his paternal relatives. The rule that an illegitimate child could not inherit intestate from his father was applied in the Namibian case of *Lotta Frans v Pasche and Others*.¹⁰² Since 2006 the Children's Status Act¹⁰³ now provides that, despite anything to the contrary contained in any statutes, common law or customary law (sic), a person born outside

⁹⁷ Ambunda & de Klerk (2008:72f)

⁹⁸ (ibid.).

⁹⁹ Proof of this is also the confusing legislation inherited from the colonial administration; cf. the collection of laws contained in Bekker & Hinz (2000).

¹⁰⁰ Hinz (2008:99f).

¹⁰¹ Reference to *illegitimate* defines a child whose father and mother were not legally married to each other at the time of the child's conception or birth or at any subsequent time.

¹⁰² P11548/2005 (2007) NAHC 49.

¹⁰³ Act No. 6 of 2006.

marriage is obliged, for purposes of inheritance, either intestate or by testamentary disposition, to be treated in the same manner as a person born inside marriage.

3.6 Customary Law and Recent Statutory Enactments

3.6.1 The Traditional Authorities Act¹⁰⁴

A number of legislative enactments such as the Traditional Authorities Act have affected customary law.¹⁰⁵ This piece of legislation provides for the establishment of traditional authorities within traditional communities, and defines the powers and duties of appointed traditional leaders. The Act also defines the scope of the mandate of traditional leaders and, thus, limits the autonomous, oppressive or tyrannical use of power by chiefs and headmen. In addition, the Act expressly sets out ways in which to settle disputes within the traditional community. Therefore, traditional leaders have to observe certain regulations before adjudicating on disputes. According to the Act, the Minister of Regional and Local Government, Housing and Rural Development has the responsibility of supervising traditional authorities. In this way, too, traditional leaders can be held accountable for failing to observe constitutional provisions and statutory regulations.

3.6.2 The Communal Land Reform Act¹⁰⁶

Other legislation relevant in terms of customary law and women's rights is the Communal Land Reform Act, which makes it categorically clear that all communal land belongs to the state, but that the government has the responsibility of administering the land in the best interests of the traditional communities concerned. According to the Act, the communal land is held in trust by the government to promote the economic and social development of the people living in communal areas. The Communal Land Reform Act grants women equal rights when they apply for communal land, and protects the surviving spouse of the deceased holder of a customary land right by giving the surviving spouse, who are women in most cases, the right to apply to the chief or traditional authority to reallocate such right in his/her name. According to section 4(1) (d) of this Act, Communal Land Boards, who are responsible for the ratification of land rights, are obliged to include at least four women. This means that women are given an active role in the decision-making processes regarding land allocation in communal areas.

3.6.3. The Community Courts Act¹⁰⁷

The legal dynamics in a traditional community differ substantially from those in urban areas. Catering for this is the Community Courts Act, which provides for the establishment of

¹⁰⁴ Act No. 25 of 2000.

¹⁰⁵ Hinz & Ruppel (2008:57).

¹⁰⁶ Act No. 5 of 2002.

¹⁰⁷ Act No. 10 of 2003.

community courts. These courts immediately lift the burden of costs for potential litigants in traditional communities. Aggrieved persons can now institute legal proceedings in their communities, under the laws that they trust, and can be awarded the remedies that they perceive as justified. According to section 13 of this Act, the law applicable in litigation is the customary law of the community concerned; but if the litigants are connected with different systems of customary laws, the court a quo is obliged to apply the customary law which it considers just and fair. It is clear that community courts have an administrative role; thus, in line with Article 18 of the Constitution, they are obliged to act fairly and reasonably, and to comply with the requirements imposed on them by common law and any other relevant legislation. Therefore, any person that is aggrieved by the exercise of a community court's powers has the right to seek redress before a competent court. In such cases, in terms of section 26 of the Act, it would be a magistrate's court.

4 Further Challenges for Women's Rights in Namibia

Even though the legal status of women has changed substantially since independence, their social status remains relatively unchanged in many segments of the Namibian population. This divergence between women's legal status and social status is a contributing factor to the violence against women. In traditional African societies, a woman's gender identity is influenced by her position in the family. Attitudes towards gender in different ethnic groups vary from relative equality to rigid inequality. The status of African women is, however, often dictated by a deeply entrenched tradition of patriarchy. *Patriarchy* can be defined as "a form of social organization in which the father or eldest male is the head of the family and descent is reckoned through the male line",¹⁰⁸ and is generally understood as the control exercised by senior men over the property and lives of women and young men. The empowerment of men entails a corresponding disempowerment of women, who are deprived of their rights and the capacities necessary to deal with the world at large.¹⁰⁹

With the advent of constitutionalism and the rule of law, many women are finally given the opportunity to create their own self-images within their respective communities and, in so doing, to overcome subordination and be on an equal footing with their male counterparts. However, due to a lack of knowledge about their rights, the majority of women are still not in a position where they have the power of choice. Despite government efforts, the concept of *gender equality* is still foreign to many traditional communities; thus, women still experience discrimination in different areas.

Education has been defined as a major key to successfully overcoming the subordinate position held by women within society. Women need to be educated with regard to their constitu-

¹⁰⁸ *Oxford Dictionary* (2002).

¹⁰⁹ Bennett (1995:80).

tional rights and those guaranteed under different pieces of legislation. One major element contributing to the fact that women have a lower status in society against their male counterparts is that most women and girls were not allowed to either enrol for or finish at least secondary school. Thus, their enrolment still is relatively low. Some of the reasons for withdrawal from primary education are the need to work at an early age or to care for younger siblings. At the secondary level, the reasons for withdrawal are more likely related to behavioural factors. Teenage pregnancy accounts for a sizable number of female dropouts.¹¹⁰

A further element which ties in well with little or no education is the unquestioning belief in the supernatural powers of witchcraft. This is a controlling force in the lives of many rural people, and no less so in the lives of rural women, who are easily blackmailed due to their generally low level of education. The fear of a spell being cast over her or her family by a witchdoctor¹¹¹ is so real that a rural woman would do anything to avert such evils. The unconditional fear of witchdoctors, who dress up in cowhide, are often under the influence of alcohol while ‘treating’ people, and who call up the ‘spirits’ of ‘the ancestors’ to advise them on how to treat people, is the ideal platform from which to extort cash, material goods or even sexual favours from gullible women and young girls.¹¹²

In a survey conducted in 2007/2008 it was found that “tradition promoted beating and that beating was still part of the traditional concept of education”. It was even said that “beating was a sign of love and that it was used to discipline women”. Statements as the aforementioned demonstrate that violence against women is still part of daily life in traditional communities.¹¹³

5 Women’s Rights a Threat to Custom and Customary Law?

Certain conceptions related to women’s rights and gender equality, especially in the rural areas, are often seen as ‘Western’ concepts. Indeed, some even say such concepts interfere with cultural values. This fear expresses a notion of being almost helplessly exposed to a foreign threat. The increasing process of globalisation has substantially contributed not only to a concomitantly growing recognition of cultural diversity, but also to the weakening of the ethical foundation of societies. Societies which have not developed as a part of the mainland of Western human rights experience problems in accepting these as a valid, worldwide legal perception.

For example, the payment of a bride price is still one major criterion for a valid customary marriage as a formalised union. From a Western conception, lobola would easily be categorised as a literal means of ‘buying’ a bride. Traditionally, this interpretation is wrong and unaccep-

¹¹⁰ Ambunda & de Klerk (2008:53).

¹¹¹ A clear distinction is made here between *witchdoctor* and *traditional healer*. The latter have done much to complement what mainstream health professionals offer in terms of tested traditional medicines.

¹¹² De Klerk (2008:40).

¹¹³ Ruppel / Mchombu / Kandjii-Murangi (2008:119ff).

table, as women are not a tradable commodity. From a cultural perspective, however, lobola is seen as a means to secure the marriage and prevent divorce.

Another example for differing attitudes towards cultural practices is reflected by the debate around polygyny. The opponents of the institution argue that polygyny objectifies women, and that it is a vehicle for oppressing women within a marriage. The institution's proponents, however, argue that the polygynous marriage keeps families together and lends extra dignity and respect to the woman. Polygyny, in the latter view, is socially valuable in that it provides women with security in terms of a division of labour, a division of household responsibilities, and the provision of companionship, while simultaneously minimising sexual and reproduction demands on the single woman.

In other words, people have different perceptions about culture depending on their individual backgrounds and the power of choice. The enforceability of these perceptions largely depends on the power relations within a specific community or society. However, cultural aspects of customary law that are inhuman and discriminatory should not endanger the existence of customary law as a system of laws that governs the way of life of most Africans. The solution is not to abolish customary law, but rather to have such law ascertained.¹¹⁴ One should not be too hasty, making sweeping judgements of customary practices from the outside; rather, one should try to see the customs from the viewpoints of the people who practise them on a daily basis. The abolition of customary law would mean erasing the *modus operandi* of various ethnic groups from the broad spectrum of Namibian society. Instead, one should identify the sensitive aspects under customary practices that do not conform to the constitutional principles of equality, fairness, and justice, and apply law reform.¹¹⁵

6 Some Recommendations for Law Reform

Past projects of the Law Reform and Development Commission have already ushered in very positive changes.¹¹⁶ The discriminatory concept of *marital power*, for example, was abolished by the Married Persons Equality Act.¹¹⁷ The Domestic Violence Project has been implemented,

¹¹⁴ Thus, the Ascertainment of Customary Laws Project at the HRDC ultimately seeks to ascertain and eventually publish all the customary laws of Namibia in one collection. The implementation of the Community Courts Act, 2003 (No. 10 of 2003) will be impossible for the courts without having such laws in writing. Without written laws, customary law will continue to be a threat to women. Comprehensive research has already been conducted in order to collect the various laws. In consultative meetings traditional communities were requested to write down their respective customary laws. The 2010 ascertainment publication (volume 1) will satisfy the interest in such laws from various parts of society, and will facilitate an understanding of such law for traditional, national and international community members alike, as well as law students, the legal fraternity, and future generations. By writing down these laws, constitutional aspects can be discussed and during this process customary laws can be brought in line with constitutional principles where necessary. The Ascertainment of Customary Laws Project is funded by the Finnish Embassy in Windhoek. Cf. Ruppel (2010).

¹¹⁵ Ruppel (2008c:23f).

¹¹⁶ Namiseb (2008:112).

¹¹⁷ Act No. 1 of 1996. It has to be noted, however, that the abolition of marital power is not applicable to custom-

and the Combating of Rape Act¹¹⁸ as well as the Combating of Domestic Violence Act¹¹⁹ have been enacted, both aiming at combating violence against women.

In order to protect women more adequately customary marriages need to be clothed with the same legal recognition attached to civil law marriages. Not only are customary marriages generally not recognised under Namibian law, most of the provisions of the Married Persons Equality Act do not apply to them either. It is imperative, therefore, that an enabling piece of legislation which will recognise customary law marriages so as to bring them on par with common law marriages is realised in near future. The registration of customary law marriages should be made mandatory, so that the question of marital status becomes more certain and easier to prove. To encourage registration of customary law marriages, awareness campaigns should be undertaken to sensitise the public about the need to register.¹²⁰

Women further experience problems pertaining to marriage regimes and the dissolution of marriage. In general, marriages are either in community of property or out of community of property. The particular problem is that black couples living north the so-called Police Zone¹²¹ are, by law, regarded to be married out of community of property.¹²² Divorce is a pressing issue for women across the board. The current legal set-up, in terms of which specific grounds for divorce are required, is problematic for spouses; and the fact that the spouses want to get divorced per se shows the breakdown of marriage. Furthermore, establishing specific grounds for divorce often results in assignments of guilt and in the deterioration of the spouses' relationship, which at the stage of divorce is critical in any event. As the requirements for divorce are considered to be problematic by many, spouses live separate lives while continuing to be officially married. The problems surface when one of the spouses passes away and the marriage is terminated by death. Disputes over property will then be inevitable.¹²³

With regards to the reform of customary inheritance law, three different options have been proposed so far: The first is to have a two-path system of inheritance. This would allow for customary law estates to be dealt with according to the applicable customs. The remaining estates will follow the route of common law and the Intestate Succession Ordinance. The latter system will allow for widows to inherit. The problem with this approach is that it may be discriminatory; however, it would allow for the choice of personal law, i.e. whether customary law or common law and the Intestate Succession Ordinance are to be applied. Nonetheless, the

ary law marriages. Cf. section 16 of the Act.

¹¹⁸ Act No. 8 of 2000.

¹¹⁹ Act No. 4 of 2003.

¹²⁰ Ambunda & de Klerk (2008:80).

¹²¹ The Police Zone consisted of southern and central Namibia to which white settlement was directed. Unlike the territories north of this so-called Red Line, which were governed through a system of indirect rule, in the Police Zone the Administration employed policies of direct control. See Amoo & Skeffers (2008:28).

¹²² Section 17(6), 18(3) and 18(9) of Native Administration Proclamation 15 of 1928, which was made applicable to the area north of the Police Zone from 1 August 1950 onwards.

¹²³ Namiseb (2008:111).

applicable customary laws need to be in line with the Constitution if inheritance based on customary law is allowed. The second option is a one path system in which the entire estate will be inherited by the surviving spouse and the deceased's descendants. This option completely overrules customary law and may seem like a total imposition of the Roman–Dutch common-law-based system; in fact, it does not find favour with traditional authorities. This system may also infringe on the provisions of the Constitution, which guarantees the right to culture. The third option would be a combined approach, aiming to reconcile the first two options. In terms of this third option, a fixed percentage is allocated to the surviving spouse, and another fixed percentage to customary law heirs. This option will offer some protection to widows, while giving effect to the constitutional right to culture.¹²⁴

7 Conclusion

The legal framework relating to gender-sensitive issues in Namibia is wide-ranging on international, regional and national levels. Some of these legal instruments take up the potential conflicts between gender equality and customary law by aiming to achieve gender integration and equality. Furthermore, it needs to be stressed that effective implementation, enforcement and monitoring procedures are essential in order to put all these theoretical legal provisions into practice. In this regard, it is imperative that awareness about these issues is raised, and that the rationale and contents of gender-related legal instruments are brought to the grass-roots level. This article aimed to explain the most important legal texts and provisions to the reader to better understand how women's rights face potential limitations of customary law and practice in Namibia. The article does, however, not claim to be fully comprehensive, which would obviously exceed the purpose of such article.

What became clear from the above is that law reform is an important aspect pertaining to the status of women, reconciling women's rights and customary law in Namibia. The various international, regional and domestic human rights instruments need to be amplified through specific law reform efforts in order to ensure that the rights contained in such instruments are given practical effect. Namibians also deserve the fruits of such law reform efforts. This end will not be served if the recommendations in law reform reports are not implemented. More conscious efforts need to be made to have these recommendations implemented by the relevant government offices, ministries or agencies.

The younger generation needs to be educated about what their traditions mean. The older generation needs to be informed about concepts which, at first sight, seem alien to them but are not in fact so. Education has always been an empowering force; thus, it should be used to uplift rural women and lead to a gradual shift in mindset – particularly among men. Most importantly,

¹²⁴ (ibid.).

women all over Namibia need to be given the power of choice, which includes the power to choose whether or not to enter into a polygynous marriage, the power to choose whether to marry in terms of customary law or civil law, and the power to choose whether or not to accept a bride price. With regard to the question whether or not women do in fact have the power of choice, dependency still plays a major role. Such dependency can only be diminished by means of empowerment and socio-economic development. If women are free from dependency they will also be free from violence.

Namibia has a dual legal system. Besides the common law inherited from the Roman–Dutch system, there are also the customary laws of the people of Namibia. *Customary law* is the law administered by traditional communities. But how does one reconcile the basic human rights of individuals, especially women, with the traditions and heritage in a society such as Namibia, which flourishes on its cultural diversity? The challenge is not to vitiate, but to find common ground between women’s rights, gender equality, customary law and practice in Namibia.

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