

Women and custom in Namibia: A research overview

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Customary law, culture and gender in Namibia

Customary law can be defined as the law according to which most of the Namibian population 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.¹

Culture, as one underlying component of customary law, implies all issues of human thinking, feeling and behaviour in one or more social or national group. These issues involve religion, philosophy and attitude; social, administrative and legal institutions; clothes; nutrition; architecture; demography; behaviour; the arts; etc. Thus, culture is composed of patterned and interrelated traditions which are transmitted over time by mechanisms based on the human capacity to create linguistic and non-linguistic symbols.²

Even though the word *gender* has sociological and cultural meaning, for the purposes of this paper, its legal meaning is of importance. According to Cotter,³ *gender* can be defined as follows:

... the social attributes and opportunities associated with being female and male and the relationships between women and men, and girls and boys, as well as between women and between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context and time specific, but changeable, since gender determines what is expected, allowed and valued in a woman or a man in a given situation. In most societies, there are differences and inequalities between men and women in the assignment of responsibilities, undertaking of activities, access to and control over resources, and decision-making opportunities

1 Hinz (2003).

2 Bennett (1996a).

3 Locke (1960:305–477, 364–365).

with gender as part of the broader socio-cultural context. Along with gender, there are other important criteria for analysis, including race, class, age and disability, and hence all these can, alone or combined, amount to a type of discrimination.

Until Namibia gained its independence, its society was deeply patriarchal and divided along racial lines. The patriarchal system is one based on that of paterfamilias, i.e. of the man being the head of the household. As such, his wife would be his ‘property’, and would be subordinate to him. However, since the advent of the Namibian Constitution in 1990, there has been a paradigm shift in human rights concepts.

The Namibian Constitution provides a strong backdrop for gender equality in that it is one of the few constitutions in the world that uses gender-neutral language throughout, and it explicitly forbids discrimination on the basis of sex. It provides for equality in all aspects of marriage, and gives special emphasis to women in the provision which authorises affirmative action.⁴ Furthermore, the Constitution explicitly states that customary law survives only to the extent that it does not conflict with the Constitution, meaning that customary law may not, legally, entail any form of sexual discrimination.⁵ It also puts men and women in an identical position with respect to citizenship,⁶ including the acquisition of citizenship by marriage.

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.*

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 the constitutional provisions, particularly

4 Article 23(3), Namibian Constitution.

5 Article 66, Namibian Constitution.

6 Article 4, Namibian Constitution.

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. 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.

Article 19 entails the granting of a right to individuals – and, hence, cultural groups – to practise customary law.⁷ The Namibian government has been committed to the promotion of multilingualism and the maintenance of indigenous practices.

A number of legislative enactments such as the Traditional Authorities Act⁸ have affected customary law. 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.

Other legislation relevant in terms of customary law is the Communal Land Reform Act,⁹ 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

7 Bennett (1996a:29).

8 Act No. 25 of 2000.

9 Act No. 5 of 2002.

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.

The legal dynamics in a traditional community differ substantially from those in urban areas. Catering for this is the Community Courts Act,¹⁰ which provides for the establishment of 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.

There are legal mechanisms in place that work to ensure gender equality; hence, the absence of legal instruments is not the factor that impedes the attainment of gender equality. Rather, what slows its progress is the notion that much of Namibian society is fairly conservative, particularly where issues of morality, customs and family values are concerned.

L Ambunda, one of the authors of this article, put it this way during the expert workshop on 23 September 2008:

Culture may be seen as the way that we live, think, eat, and treat each other as well as the unique lifestyles that differ respectively from other ethnic groups. Culture is in the clothes that we wear as well as things that we do – and which does not necessarily have to be unique. We all share the same fundamental aspects of culture in the sense that most, if not all, ethnic groups in Namibia have indigenous languages; we all have cultural rules and principles that we strictly follow; we have the same respect for our ancestors and we all have certain spiritual rituals that are practised as a means of communicating to the ancestor. Even though the sentimental aspects may differ, we all are culturally inter-related in one way or the other, and therefore no substantive difference ought to be made in respect of the different cultures.

10 Act No. 10 of 2003.

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Being culturally oriented and having strong cultural values, I grew up in a rather culturally demanding household. Raised amongst ten siblings, life was easy back then. We grew up knowing that respect for the elders is the first thing on your mind every morning, that girls have to be fetching fire-wood, water, as well as wild fruits. Cooking and pounding mahangu was inevitable for our lives. Everything was basically done by women and girls, day in and out. It came to a point that girls were not allowed to go to school because there would be no one to take care of the old sick grandmother or to cook and take care of the house. Nothing seemed wrong back then. We were not even allowed to sit at the same fire with the man of the house or to eat and drink from the same banquet. This was seen as a taboo or a curse.

Despite all this, the wife, with all her minor children, grandchildren or even great-grandchildren, was only allowed to sleep in a hut (ondjugo) made of a mixture of clay, sand and cow dung. It does not matter how many siblings there were in the household, this hut was seen as the first and last opportunity given to the mother to spend time with her children while they are still young. Upon maturity or from the age of 12, girls may be allowed to sleep with the older female siblings, and boys are normally forced to build their own bedrooms to sleep in. I slept in an ondjugo for the first five years of my life with my siblings, and despite everything, this made me realise that it is important to learn the values and norms that are expected from an individual while still young.

It is absurd to think that the effects of culture can be erased easily. Culture is still strongly embedded within ourselves. The effect of culture can now be found in the additional lifestyles that we experience in our everyday lives, that of being culturally oriented and that of a modern powerful human being. These camouflage lifestyles depend largely on the surrounding circumstances and the associated company. Coming to University and considering the surrounding circumstances of university life, one is expected to be ambitious and focused in order to survive the ever-changing atmosphere of modernity. Going back home means that I have to revert to the well-mannered, respectful me. To my parents, I may be educated and may be well-off on my own, but it is inevitable that they are still planning to one day marry me off traditionally in efudula.¹¹ Do I have the right to object? Having travelled abroad on two separate occasions, it was an honour for me to personally experience a different atmosphere with different external forces. Due to these unfamiliar atmospheres, everything suddenly seemed different and I have somewhat adapted to the way of living and with time, it felt as one could even belong there.

It is painful to think that what has practically been the lifestyle of our ancestors now (at least partially) tends to be bad and illegal for that matter. Now one needs to distinguish between those cultural practices that are wrong and those which aren't. However, what if all practices still seem right in the eyes of the professors? Do we need a piece of paper to tell the elders what to do and what not to do? It is unimaginable for traditional households like the one of my parents to be equally joined by both men and women or that the field should equally belong to women and men. This is not what the ancestors have taught us and we must respect what has been established by them – failure of

11 An initiation ceremony for girls.

which may bring undesirable results. Many believe that a curse may be put upon anyone who does not respect the ancestor's deeds. It is therefore difficult to balance the constitutional principles with the cultural practices since many African societies are very preservative.

The contradiction between the so-called Western concept of human rights, within which gender equality was nurtured, and the patriarchal traditional African values that underpin customary law is likely to continue to raise tensions between pro-reform activists and traditional community leaders, making the reform process –¹²

... a minefield to be traversed slowly and carefully through negotiation and compromise.

Gender roles in various Namibian cultures

Gender roles, i.e. the characteristics, and thus duties and responsibilities attributed to members of the two sexes by virtue of the fact that they are male or female, are most prominent within the sphere of the family household. Duties are divided between husband and wife and siblings based on stereotypes of what men should do and how women should behave – and not necessarily on ability or capacity. Thus, a comprehensive study by the University of Namibia focused on the gender roles men and women are expected to and do fulfil within various ethnic groups.¹³ The concluded research has shown that decision-making powers are usually vested in the man. Women are regarded as dependants and, therefore, are supposed to follow decisions and directions by the man. This applies equally to situations in consultations between husband and wife, where the man has the power to overrule his wife. The research also revealed that there were instances where a man had to consult with a woman or his wife. These were instances that involved the children's education, health or marriage. However, again, resource management or control over resources is vested in the man: the man is regarded as the head of the household and this position gives him absolute control over all household resources such as livestock and income from all sources. This control is exercised even on assets or possessions belonging to the wife at marriage, such as livestock bought in as her dowry. Thus, as the head of the household, men carry the key to the safe. Even food resources fall under the man's supervision. In instances where there is a food shortage, the man has to be served first and any leftovers are shared by the wife and children.¹⁴

A woman may be consulted for suggestions or advice. If a wife's suggestion or advice conflicts with that of her husband, the husband will automatically rule it out. The woman's contribution to decision-making is only recognised

12 Munalula (2006:2).

13 Ipinge et al. (2000).

14 (ibid.).

on matters that pertain to the children. A woman does not have any power to control household resources. The study revealed that women lose control over their possessions to their husbands upon marriage. It was reported that some women go to their husband's home with their livestock as their dowry. Upon reaching the husband's homestead, the wife's cattle may still be referred to as belonging to her. The same principle is exercised in instances when a woman is engaged in formal or informal income-generating schemes: the income is automatically transferred to the husband. There is a trend of female oppression at the cultural level because patriarchal systems vest in men the position of head of the household and overall power figure demanding respect. Men enjoy the right to make decisions and to control the family's resources, while women are left to handle the day-to-day administration of the household. This socialisation of women and girls leads to their development of an inferiority complex when they have to compete with men in the job market or in the urban household, creating a vicious cycle of inferiority throughout the life of a female Namibian.¹⁵

In the *Oshiwambo*-speaking communities, many symbolisms reflected by similes are attached to the concept of *man*. Amongst others, a man is symbolised as an axe. The meaning of the simile derives from the belief in these communities that an axe is an indispensable tool. Symbolisms are also attached to the concept of *womanhood*. Thus, a woman portrayed as a pot of clay. This simile refers to the assumed physical weakness of a woman and that she receives help and caring from the man. A man's roles and responsibilities in *Oshiwambo*-speaking communities are to look after livestock, collect salt from the pans of Etosha, and to hunt game for meat. It is also the man's responsibility to build huts for family shelter, as well as storage barns for the *mahangu* (pearl millet) harvest. Furthermore, the man has to provide water for his family by digging wells, and he has to plough the field for cultivation. When the family needs *mahangu*, it is the man's responsibility to give the *mahangu* from the granary to the woman to cook it.

¹⁵ See article in this publication by OC Ruppel on the implications of violence against women.

The culture of *Oshiwambo*-speaking communities requires that a woman prepares food for the household, and tills, ploughs and weeds the crop fields. She is expected to harvest her crop and pound the *mahangu* into flour. Other household roles a woman is meant to perform include caring for the family, collecting water, weaving baskets and making clay pots – both as cooking utensils in the homestead and for income-generation – and to brew traditional alcoholic beverages.

The culture of *Oshiwambo*-speaking communities recognises the man as the head of the household. Due to this elevated position, the man is the one who makes the decisions on all matters of major concern. The man will at times be required to consult his wife on some issues, but his word is final. In cases where there is no husband in the house, the eldest son makes all the major decisions. According to the tradition of *Oshiwambo*-speaking communities, a man is always older than a woman – irrespective of his or her actual age. As mentioned above, the man controls and has authority over the household resources. He allocates land for cultivation to his wife or wives on the smaller, less fertile plots of ground, while he takes the larger and more fertile land. The husband also decides when to plough, and normally his fields are ploughed first. A woman may make suggestions, but her decisions cannot be recognised as binding.¹⁶

In the Caprivi Region,¹⁷ a man is regarded as the head of the household and backbone of the family. A woman is seen as needing her husband's support. A man is also recognised as the owner of land rights, the head of the household, responsible for providing for the family's basic needs such as food, clothing and security. The man is also responsible for lighting the traditional fire and performing rituals before hunting, herding the cattle, and milking cows. Tending to political and social issues is also the domain reserved for men in the Caprivi Region.

The definition of the concept *woman* in Caprivi is that she is biologically different from a man. A woman is traditionally taken to be responsible for taking care of the family in terms of health and nutrition, sending children to school, and other domestic chores such as cleaning the home and attending to visitors. She is regarded as the owner of the house, but not the head of the household.

There exists a joint decision-making practice between husband and wife among the people of the Caprivi because of the common view that men and women

16 (ibid.).

17 Also referred to as *Caprivi* from here on.

have joint possession of whatever resources a married couple has, although men are more responsible for decisions pertaining to livestock. Decision-making over finances is normally shared, although the husband also has more authority and control over the final decision.

The Topnaar people of the Kuiseb River praise a man by referring to him as *tsabib*, a tough tree that can survive for a long time without water. The interpretation is that a man should be tough, enduring, strong, and able to protect his household at all times.

According to Damara culture, a *woman* is defined as the foundation of the house. This definition is referred to in Damara as *!gao!gaos*: the one whose character and efforts hold everything together. A woman is also regarded as the *sau-aos*, meaning “keeper of the house”. The Daure Damara describe a woman as the one who keeps the fire burning, meaning that she is the keeper of secrets. This description is also found among the Khorixas Damara as the two groups live close to each other and intermarry.

The Damara in general regard the woman as the right hand of the man. The main responsibilities of the man in Damara culture are to provide meat and food for the household, provide water and firewood, and to build huts. Men are also responsible for looking after livestock and crops, and have to plant and harvest the crops. In Damara culture, women are responsible for cooking and collect *veldkos* (literally, “bush food”, i.e. all kinds of edible plants growing in the wild), referred to as *sau-I*, *bosau-I*, *#aun*, etc. She is also required to assist in building huts, while her special responsibilities are to raise the children and supervise all household assets. While Damara men are mainly responsible for the livestock and any farming implements belonging to the household, Damara women have decision-making powers on issues that pertain to the household, such as kitchen utensils.

Men in the Nama culture are referred to as *father* and *head of the family*. In these roles, the man provides for all the physical needs of the family. A woman is culturally defined among the Nama as *mother*, *creator* and *sister*. The Keetmanshoop Nama refer to a woman as an egg due to her reproductive role and her physical weakness compared with a man’s strength. The Hoachanas Nama, on the other hand, refer to women by their reproductive role, as *creators*. Other statuses accorded to women among the Nama are that of caretaker of the household, helper, and advisor to men.¹⁸

18 (ibid.).

The above research results reflect the prevalence of stereotyping in the various indigenous cultures. Moreover, the long-lasting effects of apartheid and supremacist thinking, and its perfidious aim to divide and rule certainly contributed to the maintenance of such gender and role conceptions in Namibian society at large, up to the present day.

Grounds of disadvantage? Women under customary law

Worldwide, both women and men play important roles in the production of goods and services for a nation's economy. Most women have the extra burden of caring for children, the sick and the elderly, as well as management of the household. Yet women are deprived of equal access to resources, participation in decision-making, and even the right to make their own decisions. As a result, women have been more adversely affected by economic recession than their male counterparts, and have usually been the main victims of structural adjustment programmes. Even though the legal status of women has changed substantially since Namibia's independence, their social status remains relatively unchanged in many segments of the population. This divergence between women's legal status and their social status is, as will be shown in the following discussion, a contributing factor to the violence being perpetrated 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. An example is the concept of *egalitarianism*, which is still strong amongst the San and under which both men and women still have relatively equal gender roles. In precolonial Herero society, the gender distinction between men and women was weak; but in contemporary Herero society, men are considered *omuhona* (a term once referring to chiefs). In *Oshiwambo*-speaking communities, women are and have always been subordinate to men in all spheres of public and private life.

Bennett¹⁹ is of the opinion that the status of African women is 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",²⁰ 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. Legal systems that endorse patriarchy, as customary

19 Bennett (1996a).

20 Oxford Dictionary (2002).

law does, deny women three powers essential to realising their autonomy; in common-law terms, these are contractual and proprietary capacity, and *locus standi in judicio*.²¹

As pointed out earlier, the universal justification for treating women as inferior is that they are intellectually immature and, therefore, cannot form proper judgments. Women are demoted to the status of children and, like children, they are subordinated to the control of a senior male guardian. It does not follow that customary law regards women as slaves or chattels. On the contrary: if a woman were wronged, her dignity as a human being would be recognised and she would be entitled to claim redress for any damages she has suffered. But she would not be allowed to take action directly; in all such cases, the woman's guardian would have to act for her. Areas in which the subordinate position of women can be visibly traced include education, decision-making, customary marriage, land rights and property, and maintenance, as will be shown below.

Education

One of the grounds which gave women a lower status in society against their male counterparts could be the issue that most women and girls were not allowed to either enrol for or finish at least secondary school. Thus, their enrolment was 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. Young women might be expelled because of pregnancy or might be denied the opportunity to resume their education after childbirth.²² It is discriminatory to deny a girl child the opportunity to resume her education after her pregnancy, whereas the boys who father such children are allowed to remain in school.

Decision-making

Gender issues relating to decision-making are mainly related to power and the control of daily activities in society. This ranges from the household, at the lowest level, to Cabinet at the apex. The under-representation of women at levels of public decision-making is an ascertainable gender issue, whereas traditional beliefs and practices in respect of women and decision-making differ from one community to the next and are harder to ascertain.²³

21 Bennett (1995:80).

22 Many of these effects came from different cultural practices where girls are married off by their parents at a very young age.

23 NPC (1995:110).

Women have little decision-making power in household matters and were typically not part of traditional authorities. This inability to exert control over community decisions negates women's access to material wealth and to land. The presence of women in traditional positions is most notable in the Okavango Region, where women have been known to be traditional rulers. There are also indications that, in some traditional *Oshiwambo*-speaking communities, women had de facto power through their relationship to a male affine. However, women being traditional leaders cannot be taken to imply that women are given equal opportunity in community decision-making processes. This is because most female community members complain that traditional authorities and customary courts discriminate against women, since the positions of chiefs and headmen are mostly occupied by men.²⁴

Customary marriages

Traditional marriages have been identified as one of the grounds for disadvantage when it comes to attaining or determining gender equality. 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 price²⁵ 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.²⁶

In Namibia, the payment of lobola is not exercised by all traditional communities. 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,²⁷ for example, lobola

24 LeBeau et al. (2004:15).

25 Which the Herero call *otjitunya*, 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*.

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

27 The *Oshiwambo*-speaking and Kavango communities.

is not a major criterion; but the giving of small gifts²⁸ and/or services rendered over a period of time²⁹ are considered the main elements in validating a customary marriage.³⁰ 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*;³¹ for this reason, the donation of the wedding ox is termed a *marriage ratification custom*.³² 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.³³ In the case of divorce, these presents do not need to be returned because they are not of high value.

Generally, a marriage consideration is 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.³⁴ 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.³⁵

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.³⁶ 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.

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

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

30 Bennett (1995:103).

31 (ibid.).

32 Becker & Hinz (1995:51).

33 (ibid.).

34 In the past, lobola was paid in the form of hoes.

35 Becker & Hinz (1995:51).

36 Bennett (1995:104).

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.

Generally, there appear to be many misunderstandings and misinterpretations regarding the role and meaning of lobola. Many people believe that paying lobola means 'buying' the bride. Traditionally, this interpretation is wrong and unacceptable, as women are not a tradable commodity and should never be perceived as such; 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.

Land rights and property

As head of the house, the men traditionally make the final decision with regard to household property, decisions about livestock, and property disposal and acquisition. In many 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 marriage the man is still regarded as head of the household. According to LeBeau et al.,³⁷ 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*, 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.³⁸

37 LeBeau et al. (2004:80).

38 (ibid.:10).

Although it is clear that women are the primary users of the agricultural environment,³⁹ 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)⁴⁰ 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.

Under most customary systems, women – at least traditionally – 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. Widowed women traditionally do not inherit land, but are allowed to remain on the matrimonial land and home until their death or remarriage. Over the past decade, however, even this social safety net has eroded, with male heirs tending to sell off their rights to the land, leaving widows landless and homeless. In most ethnic groups, a married woman does not own property during marriage. All her property, even that acquired before her marriage, is under the sole control of her husband. Bennett⁴¹ was of the opinion that 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.

Women in the communal areas of Namibia, especially those that are married, are in a difficult position because, customarily, women in many Namibian cultures are not allowed to own property and do not have control over family finances. Thus, most rural women depend 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

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

40 LAC (2005b).

41 Bennett (1996a).

gender-based violence.⁴² According to an assessment of gender issues amongst the San, control over income within communities varies greatly; in most instances, money is seen as the sole property of the person earning it.⁴³

In general, there are four basic reasons for women's lack of access to property, namely –

- laws that discriminate against women
- the prejudicial application of property laws
- women's lack of awareness about their legal rights, and
- women's lack of confidence to take action when their rights have been violated.

Upon the dissolution of customary marriages, the distribution of property is negotiated between the spouse and his/her relatives, without reference to any court.⁴⁴ Thus, common law principles which guide maintenance, the distribution of the matrimonial estate, and custody of children of the marriage play no role in customary law. Customs regarding property division upon divorce may vary greatly among communities and, therefore, reflect different realities in this respect. As regards divorce, several grounds have been recognised under Namibia's various customary systems. These include adultery by the wife, taking a second wife without the consent of the first one, barrenness, and various forms of unacceptable behaviour such as drunkenness, witchcraft or neglect of the children. However, it is supported that ownership of property upon divorce is not decisive, and that the wife's position may be dependent on the husband's goodwill.

For example, the Subiya of the Caprivi Region maintain that property is divided equally amongst the spouses in the event of a divorce. Divorcing Herero or Owambo couples tend to follow a fairly strict concept of separate property, even though some members of *Oshiwanbo*-speaking communities say that the wife has the right to at least some of the household property acquired during the marriage. Division of property during divorce proceedings in a customary marriage becomes more complicated, depending on who initiates the divorce and if there is a guilty party or not.⁴⁵ If either of the spouses desires a divorce, however, substantive grounds have to be articulated. Failure to provide such grounds usually results in that spouse not receiving any of the marital property.

42 LeBeau et al. (2004:14).

43 LAC (2005b:85).

44 Except the Nama, who divorce only through the courts.

45 LAC (2005b:88).

The rules governing inheritance in Namibia were influenced by the advent of colonialism (1884) as well as apartheid (1915). Inheritance and succession laws were determined by colonial statutes, which made a distinction between the blacks, the so-called coloureds, and the whites. The Intestate Succession Ordinance 12 of 1946, for example, determined the dissolution of property for all except black Namibians. The Native Administration Proclamation 15 of 1928 regulated the process of succession for black men, but only those living in certain parts of Namibia. These regulations made the type of marriage and the marital property regime the criteria for determining the rules of intestate succession that applied to blacks. The Proclamation only applied north of the so-called Police Zone⁴⁶, and provided that the estates of all black persons regardless of the circumstances of any marriage they may have entered into, were to be distributed according to native laws and customs. This is a clear picture that, despite the Proclamation, communities were nevertheless at liberty to apply their customs and traditions with regard to inheritance. Women were still left with the little that they owned during the duration of these marriages, since they had limited or no rights to real property such as land rights and cattle.

The issue of women and land rights was taken up in October 1995 when the Ministry of Agriculture, Water and Rural Development (MAWRD) adopted a National Agricultural Policy. This Policy 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.⁴⁷ In terms of the Act, men and women are equally eligible for individual rights to communal land, and the

46 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).

47 Act No. 5 of 2002.

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. The MAWRD conducted several training workshops in 2004 to sensitise extension officers about gender equality by equipping them with gender analysis skills. In order to increase the efficiency of extension services in general, 12 Agricultural and Rural Development Centres were set up around the country.⁴⁸

Maintenance

The Maintenance Act⁴⁹ 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.⁵⁰ It is a crime to disobey a maintenance order. In terms of section 39(1), a guilty party will be liable to a fine not exceeding N\$4,000 or imprisonment for a period not exceeding 12 months, or such periodical imprisonment as set out in section 285 of the Criminal Procedures Act.⁵¹

Until recently, Namibian law stated that children born out of a marriage could not inherit intestate from their biological fathers. This has been changed by the Children's Status Act,⁵² which now provides that, despite anything to the contrary contained in any statutes, common law or customary law, a person born outside 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.

48 MAWRD (1995).

49 Act No. 9 of 2003.

50 Section 3(2)(a).

51 Act No. 51 of 1977.

52 Act No. 6 of 2006.

The human rights of women subject to customary law

Equality between men and women is a fundamental principle of the United Nations, which is underpinned by the Universal Declaration of Human Rights (UDHR). The UDHR is only a declaration, however, meaning that its force is of a moral nature. Nonetheless, it is substantiated by the UN Charter, which all member states swear to uphold. Namibia has been a UN member since independence in 1990. A bare 18 years on, and with limited resources, Namibia has made great strides towards gender equality. Significant changes have taken place not only in terms of law reform, but also at a structural level with the adoption of the National Gender Policy. But the most important achievement for the cause of gender equality was the elevation in 2000 of the Department of Women Affairs to a fully-fledged Ministry of Women Affairs and Child Welfare, recently renamed as the Ministry of Gender Equality and Child Welfare. The upgrading does not only mean that the women of Namibia have a representative at Cabinet level with a vote, but it also serves as an effective platform for the advancing of gender-oriented activities.

Besides the government's ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 28 February 1995, Namibia had ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 23 November 1992, and has to date submitted three UN country reports on the legislative, judicial, administrative or other measures which Namibia has adopted to give effect to the CEDAW provisions and on the progress made in this respect. These actions are in keeping with Article 144 of the Constitution, which provides as follows in respect of international law:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

One of the fundamental principles of the United Nations, as the supreme protector of human rights, is the notion of equal rights for women. The Preamble to the Charter of the United Nations sets the following as a basic goal:

[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small,...

Article 1 of the Charter continues by proclaiming that one of its purposes is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all people –

... without distinction as to race, sex, language or religion.

Through the Charter, Namibia as a member of the United Nations is under a legal obligation to strive towards the full realisation of human rights for all persons. The provisions of the Charter regarding equal rights for women have been refined and developed in a number of international instruments. The first of these is the UDHR, adopted on 10 December 1948. The Declaration specifically proclaims the entitlement of all to enjoy the extensive human rights and fundamental freedoms set out –⁵³

... without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or any other status.

It also states that all persons are equal before the law; that all are entitled, without any discrimination, to equal protection of the law; and that all are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.

The supreme law promoting gender equality in Namibia is the Namibian Constitution,⁵⁴ adopted by the Constituent Assembly in February 1990. Article 144 of the Constitution incorporates all international instruments that Namibia has ratified into Namibia's legislative sphere. Hence, all the Conventions ratified above have thus been fully acknowledged as Namibian law.

The UN General Assembly adopted CEDAW in 1979 to reinforce the provisions of existing international instruments and thereby combat the continuing discrimination against women. This is clearly described in the Preamble to CEDAW.

In terms of the ICCPR, everyone has the right everywhere to be recognised as a person before the law⁵⁵ and all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law prohibits any discrimination and guarantee all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵⁶

The ICESCR confers that, in terms of equal rights, the States Parties to the Covenant undertake to guarantee that the rights enunciated in the Covenant will

53 Article 2.

54 Act No. 1 of 1990.

55 Article 16.

56 Article 26.

be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,⁵⁷ and undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant.⁵⁸

States are therefore required to ensure that no discrimination is experienced by any individual on a daily basis, through active law review and change, where necessary, as well as through administrative practice. According to Namibia's second and third country reports on CEDAW,⁵⁹ the Committee on the Elimination of Discrimination against Women had praised Namibia for, *inter alia*, its frank, detailed and well-structured first country report. It had also congratulated Namibia for ratifying CEDAW without reservation, and for involving non-governmental organisations (NGOs) in preparing the report. However, the Committee cited the following three problems as obstacles to Namibia's gender equality programme:

- Discrimination arising from customary laws
- The general lack of public knowledge of human rights and the law, and
- The poverty which prevents the majority of women in Namibia from fulfilling their aspirations.

The Namibian Constitution explicitly forbids discrimination on the basis of sex. The case of *Myburgh v Commercial Bank of Namibia*⁶⁰ is the locus classicus in the interpretation of Articles 10 and 16 of the Constitution. The *Myburgh* case began as an appeal by Ms Myburgh to the High Court against a judgment that she pay N\$115,927.92 to the Commercial Bank of Namibia. The High Court held that the common law rule that a woman married in community of property could not be sued discriminated against wives on the grounds of their sex, contrary to Article 10(2) of the Constitution, because it treated husbands and wives differently. The court also found that the common law rule was contrary to Article 16(1) of the Constitution, as husbands and wives were entitled to equality during marriage. The High Court continued that the rule had violated Ms Myburgh's right to dignity in terms of Article 8(1), noting that the right to equality was based on the idea that every person possessed equal human dignity. The High Court then considered whether the rule had become unconstitutional

57 Article 2(2).

58 Article 3.

59 MWACW (2004).

60 1999 NR 287 (HC); 2000 NR 255 (SC).

and unlawful when the Constitution came onto force on 21 March 1990, or only when the Married Persons Equality Act⁶¹ came into force on 15 July 1996. Ms Myburgh had signed the loan agreement before 15 July 1996, but Commercial Bank had sued her after this date. Article 66(1) of the Constitution provides that common law would remain in force, except where it conflicted with the Constitution. The court concluded that, because the common law was in conflict with the Constitution, it had become unconstitutional once the Constitution had come into force at independence. The Court therefore held that Commercial Bank could sue Ms Myburgh, and her appeal was dismissed.

Affirmative Action

In line with Article 6 of the ICESCR, which states that the States Parties to the Covenant recognise the right to work, every person has the right to the opportunity to gain his/her living by work which s/he freely chooses or accepts. Furthermore, the States Parties commit themselves to take appropriate steps to safeguard this right. In addition, Article 23 of the Constitution places special emphasis on women in this regard, and stipulates the following:

- (1) *The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and ... such practices, and the propagation of such practices, may be rendered criminally punishable*
- (2) *Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices*
- (3) *In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged to play a full, equal and effective role in the political, social, economic and cultural life of the nation.*

In line with the above relevant constitutional provision, the Affirmative Action (Employment) Act⁶² has improved the participation of previously disadvantaged groups (such as blacks, women, and persons with disabilities) in the formal workforce. Employers with more than 50 employees are now required to prepare Affirmative Action plans with clear time frames that target women, amongst others. Affirmative Action measures to be implemented include the following:

61 Act No. 1 of 1996.

62 Act No. 29 of 1998.

- (1) *[T]he removal of employment barriers; such as bias in recruitment, interviewing and testing procedures;*
- (2) *[P]ositive measures; such as special training courses; and*
- (3) *[R]easonable accommodation measures; such as steps to enable people with disabilities to hold jobs and advance in employment. All the goals of the affirmative action plan need to be monitored and evaluated through sufficient procedures.*

Through the Co-operatives Act,⁶³ Affirmative Action has also been made applicable to women working outside the formal employment sector, particularly rural women. Section 29(2)(b) of the Act provides as follows:

... any co-operative which has a substantial number of women members must ensure that there is at least one woman on its board, as a means to increase the representation of women in management positions.

The above provision applies to any cooperative with more than five women amongst its members, or with women numbering more than one-third of its members (whichever is the lesser). Affirmative provisions have also been made applicable to statutory bodies and boards ranging from the Social Security Commission to the National Sport Commission. The Social Security Act⁶⁴ requires female representation from government, trade unions and employers' organisations on the Social Security Commission. The Namibia Sports Act⁶⁵ requires that at least 3 of the 14 members of the National Sports Commission have to be women. The Act also specifies that the Sports Development Fund established for the development of sports in Namibia –

... shall be used to enhance the sports persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices ...

This provision could be used as the basis for Affirmative Action for women in this field.

As regards gender equality in education, the National Vocational Training Act⁶⁶ requires a cross-section of female representation on the Vocational Training Board. The Polytechnic of Namibia Act⁶⁷ requires the Council of the Polytechnic to include one person appointed by the Minister of Education to represent the

63 Act No. 23 of 1996.

64 Act No. 34 of 1994.

65 Act No. 7 of 1995.

66 Act No. 14 of 1994.

67 Act No. 33 of 1994.

interests of women. The Namibia Film Commission Act⁶⁸ requires that one-third of the eight members of the Board be women. These Acts give a clear indication that government has taken the interests of women to heart, and has been prompt to promote women's interests in order to rectify the inequality between genders that existed previously.

Equality and non-discrimination

Article 15 of CEDAW confirms women's equality with men before the law, and requires States Parties to guarantee women's equality with men in areas of civil law where women have traditionally been discriminated against. However, much of the discrimination against women takes place in their homes by their husbands, their families, and their communities. This area of discrimination is usually based on long-standing cultural or religious practices; thus, it is one of the most difficult areas to penetrate and one of the most resistant to change. Customary property law often still discriminates against women and the girl child, in that only male children are able to inherit the family land, and that husbands in customary law attain automatic ownership over all their wife's property upon marriage. However, the drafters of CEDAW realised that changes in these areas were essential in order for women to attain full equality.

The Namibian Constitution provides that all persons are equal before the law and that discrimination on the basis of sex is explicitly forbidden. To this end, the Married Persons Equality Act⁶⁹ was promulgated. In terms of the Act, a husband's marital power as the head of the household has been abolished. It provides for equal power of spouses married in community of property to dispose of the assets of their joint estate, to contract debts for which the joint estate is liable, and to administer the joint estate. The Act also provides for women married in community of property to have equal access to bank loans and ownership of property without the consent of their partner.⁷⁰ This law, however, except for giving husbands and wives in both customary and civil marriages equal power of guardianship in respect of the children of the marriage, does not address the gender inequalities in customary marriage as regards issues pertaining to their joint estate. The Namibian law in general does to date not require the registration of customary marriages. Customary marriage has traditionally been regarded as a union between the families of the bride and the groom. During 2004, however, the Ministry of Justice spearheaded a change in this regard, by consulting

68 Act No. 6 of 2000.

69 Act No. 1 of 1996.

70 MWACW (2004).

with traditional leaders in the Regions.⁷¹ Since then, a Bill has been drafted on the registration of customary marriages, and will hopefully be tabled before Parliament soon.

According to Article 14 of CEDAW, States Parties should take into account the particular problems faced by rural women and the significant roles that such women play in the economic survival of their families. States parties should also take all appropriate measures to ensure the application of the provisions of CEDAW in rural areas in order to ensure, according to the principle of equality between men and women, that they participate in and benefit from rural development, health care, social security, training and education, financial assistance, and adequate living conditions.

According to Namibia's second and third country reports on CEDAW,⁷² even though there are so many rural women in Namibia, they are severely disadvantaged in terms of access to land, labour, agricultural services and assets, natural resources, and employment. Rural women are also virtually absent from decision-making structures. There are 13 Regional Councils in Namibia, each of which has the general responsibility for allocating resources. Women are extremely under-represented on these Councils. Only 2 out of 13 Regional Governors in 2004 were women, and in 2008, only 6 out of 26 members of the National Council were women. Whereas, according to the most recent University of Namibia annual report, more than 40% of the posts for academic staff at UNAM are filled by women,⁷³ women are still under-represented in positions of traditional leadership.⁷⁴ This is indicative of the attitudes of traditional authorities towards issues relating to the family and to the economic activity of women.

Right to culture versus gender equality

When deciding whether a particular law or practice is discriminatory against women (or men), it is important to consider whether the law or practice makes a distinction, exclusion or restriction on the basis of sex. This would have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms by women (or men). If the law or practice makes such distinction, exclusion or restriction, then the law or practice in question is a form of discrimination and, thus, contravenes the Namibian

71 See the contribution by MO Hinz in this volume.

72 (ibid.).

73 UNAM (2008:13).

74 UNAM (2008:76ff).

Constitution and contradicts the values and aspirations of the Namibian people expressed in it.

The Namibian Constitution is clear in its Preamble about recognising –

... the inherent dignity and ... the equal and inalienable rights of all members of the human family ... [and that] these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid

The intention of the drafters of the Namibian Constitution, namely to restore equality, unity and freedom, is clear from the protection of the right to equality and the abandonment of past evils. Therefore, any law, custom, stereotype or belief that oppresses or deprives women of their inherent right to reach their full potential cannot be binding on any person at all.

Article 19 pertaining to 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*.⁷⁵ The respondents – an association for the preservation of the cultural activities of white Namibians – argued, *inter alia*, that the State Repudiation Act,⁷⁶ 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. Naldi is of the view that 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.⁷⁷

75 1994 (1) SA 407 (NmS).

76 Act No. 32 of 1992.

77 Naldi (1995:96).

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 Middle Eastern and African cultures and countries today, including Namibia. It appears more often in highly patriarchal societies. As cultures differ, so do their customs and practices all over the world.⁷⁸

In terms of the Namibian context, a study carried out by the Centre for Applied Social Sciences (CASS)⁷⁹ in three *Oshiwambo*-speaking traditional communities in 1994 indicated that 62% of female respondents were married under customary law. The report also stated that some of these women were also married to the same partners under civil law. Another study carried out by CASS in Caprivi showed the high rate of polygynous relationships there, where it was reported that up to 95% of couples married according to customary law.⁸⁰

The Namibian government currently does not recognise polygamous marriages, and polygamists find it hard when dealing with some government agencies such as the Department of Civic Affairs, where immigrant polygamists will not be granted legal immigrant status as a married couple. The Government Institutions Pension Fund offices present further difficulties for polygamous couples because no provision is made for all the widows to inherit from the pension funds of their deceased husband. Because Government also does not provide marriage certificates for traditional marriages and does not register them, if a polygamist spouse dies, his/her death certificate indicates marital status as “single”. Thus, one could say that statutory marriage laws discriminate against polygamy.⁸¹ In other words, the Namibian Constitution appears to recognise only those marriages entered into under the common law definition, which is when one man and one woman, who are both adults, consensually enter into matrimony. Thus, even though common law and customary law are recognised as being on the same footing in terms of Article 66, it is with the proviso that neither may contravene the Constitution. It is widely disputed that polygamous marriages contravene

78 Stone (2006:Ch. 6).

79 See Becker & Hinz (1995:23).

80 Becker & Hinz (1995:91).

81 See contribution by P Anyolo in this volume.

the right, in terms of Article 10(2), not to be discriminated against based on sex, or the right of a wife to have equal rights as her husband, during a marriage and at its dissolution, in terms of Article 14(1). Therefore, the correct way to put it is that polygamous marriages are not expressly protected or abolished. Indeed, they are frowned upon, and are indirectly shunned by the provisions of the Constitution that guarantee equality and freedom from discrimination. In order to reconcile customary practices with constitutional provisions, it has been demanded that Parliament adopts legislation that recognises and promulgates customary law marriages.

The opponents of polygyny argue that it objectifies women, and purport that it is a vehicle for the oppression of women in marriage. However, according to Bekker,⁸² the wife in a customary marriage is in fact oppressed by existing laws: she is regarded as a minor under the guardianship of her husband. 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.

Bennett⁸³ states that a customary law marriage offers few, if any, advantages to women and children. Children gain nothing in the way of legal protection because, according to customary law, they are always afflicted to a family regardless of their legitimacy. Women actually stand to lose legal capacities when they marry, and their claims to maintenance and custody or guardianship of children are not improved. Rather, it would seem that the major benefit of marriage lies in the social prestige associated with it – a benefit that is diminished by the anonymity of the urban environment.

The prime issue here is that a person who has never tested a polygynous lifestyle is usually the one complaining about it, questioning its legality, and trying to show concern about the well-being of women who are in such relationships or those who wish to enter into them. If there actually are no advantages to polygynous relationships, it is important to hear this from the polygynists themselves. If the role players are the ones complaining, then government is more likely to see what can be done to reform the system.

Bennett⁸⁴ further submits that customary marriages in fact permit a husband to take more than one wife, and that this violates gender equality since only men

82 Bekker (1989:141).

83 Bennett (1996a:13). Bennett also gives other illustrations of the negative consequences women suffer under customary marriage.

84 (ibid.).

are permitted to practise it. The issue of polygamy is one of discrimination, social inequality, and injustice to women. Nobody gave men any cultural right to marry more than one woman. Out of selfishness and wanting to satisfy their basal appetite, men arrogated to themselves the right to have access to as many women as possible. In the days when men used brutal force to dominate and suppress women, the latter were afraid to oppose the harm being done to them. Otherwise, what woman in her right senses would allow another woman to share the same man with her, let alone going out of her way to bring a woman to her husband?

Mair⁸⁵ states that African women are in an inferior position and that they suffer from serious legal disabilities. According to the author, this situation has apparently been caused by specific developments such as the introduction of money, information and communications technology, and the possibility of employment. The author describes a state where African women have been reduced to bartering instruments. Another point the author makes is that one of the distinguishing features of an African marriage is that a fundamental inequality exists between the sexes.⁸⁶

Whatever criticism may be generated from an evaluation of the extent to which polygyny actually degrades women and sets them up as men's sexual objects, the reader is cautioned not to lose focus of the fact that polygyny is a tradition of most rural traditional communities in Namibia. After all, *culture* implies all issues of human thinking, feeling and behaviour in one or more than one social or national group. In other words, people may have different perceptions about *culture*, depending on individual experience and societal implications and expectations.

Another concern raised is that HIV/AIDS could wipe out polygynous families because the husband has multiple sexual partners. If he is infected by one of his partners or is himself infected prior to marriage, he will infect all his wives. However, research still needs to verify the extent to which HIV infection really affects polygynous families before making HIV/AIDS the base of arguments against the institution of polygyny.

Succession

It is a general principle of law applied by different legal systems in the world that, when a person dies, the residue of his/her estate after all liabilities have

85 Mair (1969).

86 (ibid.).

been accounted for is left to his/her heirs. This process is regulated by the law of succession, which determines who inherits, and which benefits are succeeded. The law of succession has been defined as the totality of the legal rules which control the transfer of assets of a deceased person that are subject to distribution among beneficiaries, or those assets of another over which the deceased had the power of disposal.⁸⁷ The law of succession constitutes rules that govern the transfer of proprietary rights from the testator to his/her rightful successors.

In Namibia, succession is governed by both common law and customary law. The position is that the wife or husband, as the case may be, of a deceased and his/her children born in wedlock will inherit the estate, and, failing them, other blood relatives.

Historically, during the colonial period, as far as so-called native Namibians are concerned, a totally different approach was adopted. It was intended that these estates would devolve according to traditional law and customs. Thus, section 18 of Proclamation 15 of 1928 provided as follows:

All movable property belonging to a native and allotted by him or accruing under native law or customs to any women with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.

All other property of whatever kind belonging to a native shall be capable of being devised by a will. Any such property not so devised shall devolve and be administered according to native law and customs.

The Proclamation applied to areas north of the so-called Red Line,⁸⁸ which included the Kaokoland, Kavango, the Eastern Caprivi Strip, and so-called Owamboland. For the purpose of its application, a distinction was made between two categories of people: those who were married in terms of their own traditional laws and customs, and those married in terms of ritual rites solemnised by a person who was legally recognised or appointed as a marriage officer.⁸⁹ The position was that customary law applied in three instances:

- Upon the dissolution of estates belonging to those who had never been married
- Those married according to traditional rites and customs associated with their community, and
- Those married under civil law, but married north of the Red Line.

87 De Waal & Schoeman-Malan (2003:1).

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

89 Bennett (1996b:28).

Conversely, all those who had been married south of the Red Line in terms of civil law, irrespective of whether they were subsequently divorced or widowed, were governed by the common law rule of intestate succession. Therefore, the estate was administered under the supervision of the Native Commissioner of the district or area in which the deceased had resided. In terms of section 3 of the Proclamation, the Native Commissioner was empowered to direct the distribution of the deceased's assets, and was obliged to ensure compliance with the provisions of the Proclamation. This mandate was taken over by district magistrates after Namibia's liberation from the yoke of colonialism.⁹⁰

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 deceased 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. Adult children inherit their father's property in order to sustain their mother.⁹¹

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. Bennett⁹² points out that 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.⁹³

Property grabbing is largely aired by politicians that say that one of the worst disadvantages in customary marriage 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

90 (ibid.).

91 Bennett (1996a:114).

92 (ibid.).

93 (ibid.).

as stripping a woman of her right to property as provided for under Article 16 of the Constitution and Article 5 of CEDAW. Another related disadvantage to be mentioned here is the practice of evicting widows and their children from the late husband's land – and even from the spouses' common house. Such practices should be banned in an independent Namibia.

Position of extramarital children in inheritance

Under common law, an extramarital (i.e. illegitimate⁹⁴) 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 case of *Lotta Frans v Pasche and Others*.⁹⁵ When Mr Eichhorn died intestate in Windhoek on 30 May 1991, the plaintiff claimed that the deceased was his father who was not married to his mother. It is common cause that the plaintiff would not inherit anything from the deceased by virtue of the common law rule, according to which the entire estate would be awarded to the first defendant who, according to the plaintiff, was his sister. The plaintiff alleged that the common law rule was unconstitutional at the time of his father's death, and instituted an enrichment claim against the first defendant, alternatively a claim for an award under Article 25 of the Constitution. In the pleadings, the plaintiff contended that the common law rule had been unlawful and invalid since the inception of the Namibian Constitution, in that it violated, abridged and/or infringed on one or more of the following:

- The right not to be discriminated against on the ground of social status (Article 10(2))
- The right to equality before the law (Article 10(1))
- The right to dignity (Article 8(1))
- The right to know and to be cared for by both parents (Article 15(1)), and
- The right to acquire property (Article 16(1)).

The defendant denied the alleged unconstitutionality of the common law rule and pleaded that, according to Article 66 of the Constitution, the rule did not conflict with the Constitution and, thus, remained part of the law of Namibia. The defendant further stated that Namibia had been governed by the said Constitution for 15 years by that stage, and that the said rule had not, in terms of Article 66(2), been repealed or modified by an Act of Parliament. The first defendant claimed

94 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.

95 P11548/2005 (2007) NAHC 49.

that Article 140 of the Constitution expressly provided for all laws – including common law – in force immediately before the date of independence to remain in force until repealed or amended by an Act of Parliament or until they were declared unconstitutional by a competent court. However, the said rule had not been repealed by such an Act nor thus declared unconstitutional at the time when the distribution of assets was made by the fourth defendant. Thus, the first defendant argued, the said common law rule had been and still was in force and binding on all parties as an existing and enforceable rule of law. If this view were to have been followed, the plaintiff in this matter would have been barred from inheriting from the deceased.

However, another issue to be considered was whether the common law rule in question had indeed survived the advent of the Namibian Constitution. In this regard, Article 10 of the Constitution was invoked, which in its second paragraph reads as follows:

No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

As applied in the case of *Muller v President of the Republic of Namibia*,⁹⁶ Article 10(2) gives no basis to save any legislation which discriminates on one of the enumerated groups from unconstitutionality on the basis of a rational connection or legitimate legislative objective test. This would permit a relevant legislative purpose to override the constitutional protection of non-discrimination. Accordingly, any differentiation based on any of the grounds alluded to amounts to discrimination and is, thus, unconstitutional unless it is covered by the provisions of Article 23 (Affirmative Action) of the Constitution. Applying the test as laid down in the *Muller* case as far as intestate inheritance is concerned, the court found a differentiation had been made between legitimate and illegitimate children, based on the social status of the latter. The court further opined that the common law rule still crucified illegitimate children for the sins of their lustful parents. It was held that the common law rule was discriminatory and had indeed become invalid and unconstitutional upon Namibia's independence.⁹⁷

The Children's Status Act⁹⁸ states the following in section 16(2):

Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage.

96 1999 Nr 190 (SC).

97 See also *Myburg v Commercial Bank of Namibia*, 2000 NR 255(SC).

98 Act No. 6 of 2006.

This clearly means that extramarital children can now inherit from both parents unless there is clear evidence of a contrary intention on the part of the testator. Furthermore, it is evident that the Act specifies the concept of *children* refers equally to children born outside or inside the marriage. With regard to children born as a result of rape, the person who committed the crime has no right to inherit intestate from the person born, but such person born can inherit intestate from the perpetrator and will be deemed to be included in the term *children*.⁹⁹

Law reform

In 2003, the *Berendt* case ruled that several sections of the Native Administration Proclamation 15 of 1928 were unconstitutional violations of the prohibition on racial discrimination set forth by Article 10 of the Constitution.¹⁰⁰ The case also struck down the legal provisions which give magistrates the power to administer what were referred to as *black estates*; all other estates go to the more specialised jurisdiction of the Master of the High Court.¹⁰¹

The Law Reform and Development Commission and the Ministry of Justice have considered a range of options for law reform. Among these are the unconstitutional aspects of the law of inheritance. Where people make wills, their wishes should generally be respected; however, it would be impossible to apply part of the estate to provide maintenance for the deceased's dependants before looking to the will. The laws on inheritance should, therefore, make sure that the deceased's spouse and children are provided for in some way. Where the deceased was a man in a polygamous marriage and he dies intestate, legal provision should be made for all his wives to share in his estate. Property grabbing should also be stopped by means of the law.

Measures also need to be taken in order to protect the interests of the surviving spouse upon the death of another spouse in a polygynous marriage. Government should be given the authority to administer estates, as well as the duty to ensure that the marital property is in fact divided in accordance with the applicable marital property regimes and any applicable nuptial agreement before distribution amongst the heirs takes place. Under the supervision of the administering authority, limited adjustments in terms of the Married Persons Equality Act should be permissible for –

99 Section 16(5), Children's Status Act.

100 Case No. (P) A 105/2003.

101 This latter issue still falls beyond the jurisdiction of a magistrate's court. See rule 46 of the Magistrates' Court Rules.

- damages for delicts paid by one spouse, or receiving by one spouse for non patrimonial damages;
- damages in respect of delicts committed by one spouse against the other and
- any similar items involving matters which were concluded prior to the death of the one spouse.

Furthermore, civil and customary marriage officers should be involved in public education in order to explicate concepts such as *division of marital property* and *inheritance*.

According to the LAC report on law reform,¹⁰² the estate of a deceased person should first be bequeathed to the surviving spouse. If there is no spouse, the children of the deceased should inherit the deceased's property. Other groups eligible to inherit could include the parents of the deceased, his/her siblings and half-siblings, and then other blood relatives.¹⁰³

The constitutional principle of equality enables all the aggrieved parties to seek redress from a competent court,¹⁰⁴ and through the Community Courts Act,¹⁰⁵ any person aggrieved by any customary law or traditional practice can appeal to a magistrate's court to challenge the constitutionality of such law or practice. It is surprising, however, that the Community Courts Act – the result of some ten years of work¹⁰⁶ and a comprehensive framework for the uniform operation of traditional courts in Namibia – has still not been implemented. One can only speculate as to the reasons for this.

Women's rights and family matters

According to a study completed by the Gender Training and Research Programme (GTRP) and the University of Namibia, many of the challenges women face in the country today have been influenced by the historical imbalance of power between women and men; social structural factors such as poverty and unemployment; and social problems that relate to these issues.¹⁰⁷

Namibia has 11 different ethnic groups, all of whom exhibit some degree of gender inequality in the form of patriarchy. Patriarchy is deeply entrenched in

102 LAC (2005b).

103 (ibid.).

104 Article 25, Namibian Constitution.

105 Section 26, Act No. 10 of 2003.

106 Cf. Hinz (2008a:70ff).

107 UNDP (2001:67).

family law and its evolution; thus, it forms part and parcel of the Namibian common law system of marriage, and largely dictates the treatment that married women receive in their households. The evolution of family law is of importance to the Namibian spectrum because its laws govern marriages that were entered into under civil law. However, Namibian law also recognises customary marriages.¹⁰⁸

In terms of Namibian law, gay and lesbian couples are not allowed to contract civil marriages.

A customary marriage takes place when a man and a woman are married according to the traditions of their communities, and without a marriage officer. Customary marriages are not registered. According to the 2001 census,¹⁰⁹ customary marriages were particularly prevalent in the Caprivi and Kavango Regions, followed by Omaheke and Otjozondjupa. Such marriages are potentially polygamous in most Namibian communities, but were most common in the same four Regions mentioned here.¹¹⁰

For a variety of purposes, both civil and customary marriages are recognised under the definition of *marriage* in Namibia. According to Article 4 of the Constitution, which deals with the acquisition of citizenship by marriage,¹¹¹ for the purposes of citizenship a marriage by customary law is deemed a valid marriage. Also, workers' compensation that is paid to surviving spouses in cases where an employee is killed in a work-related accident can be obtained by spouses in both customary and civil marriages. Thus, the two forms of marriage are not always kept separate.

A couple may choose to get married in terms of the customs of their community, such as the payment of lobola, and follow some of the traditional ceremonies. Such couples may also have a marriage ceremony in a church. In addition, a customary marriage can be registered in a magistrate's court.¹¹² These types of marriages are often referred to as *dual* or *hybrid* marriages because the civil and customary formalities are carried out simultaneously or are intertwined. Couples who marry in terms of both customary and civil law simply choose to conduct their marriages according to the norms which are familiar to them. For example, in the *Oshiwambo*-speaking communities and in Kavango, couples who have

108 (ibid.).

109 NPC (2001).

110 UNDP (2001:7).

111 Article 4(3)(b), Namibian Constitution.

112 Sinclair (1996:235–236).

a civil marriage often continue to follow community customs when it comes to their married lives. Research in three *Oshiwambo*-speaking communities indicated that the marital property regime which officially applies to couples married under civil law has little impact on ownership and control of property during the marriage, or on the distribution of property upon divorce or death. In fact, people who were interviewed on this issue did not even understand the difference between the concepts *in community of property* and *out of community of property*.¹¹³

Namibia has made tremendous strides in terms of law reform regarding family law. The passing of the Married Persons Equality Act,¹¹⁴ the Combating of Domestic Violence Act,¹¹⁵ and the Combating of Rape Act¹¹⁶ has broadened the sphere of reasons for which perpetrators can be arrested, and now also offers a suitable solution to victims of domestic violence. However, even though law reform has offered a legal solution, the cycle of violence in Namibia has not decreased a great deal, mostly due to sociological reasons. Many victims of violence are reluctant to seek help because they fear the man's reaction or because they want to avoid appearing in court and incurring legal costs.

Michael Kaufman, Co-founder and International Director of the White Ribbon Campaign that aims to raise awareness about men's violence against women, gave what he felt were the real reasons for this type of violence:¹¹⁷

*The first and root cause of men's violence against women is the unequal power between the sexes. When you have **inequality** between people, ultimately it takes violence to maintain that inequality. Men's privilege and the sense of **entitlement** to privileges is a reason for violence. The most common form of rape or sexual assault is not carried out by a stranger, but by a woman's husband or boyfriend. He feels that he is entitled to sex with this woman whenever he wants. The third cause of violence against women is **social permission**. We allow it to happen. Our **socialization** into real men is the fourth cause of violence. Another cause of men's violence is that men are told **never to show emotion**. The final cause of men's violence is the **past experience** of men and boys.* [Emphasis added]

113 Becker & Hinz (1995:85).

114 Act No. 1 of 1996.

115 Act No. 4 of 2003.

116 Act No. 8 of 2000.

117 At the National Conference on Namibian Men and Violence against Women, held in Windhoek on 23 February 2003.

Recommendations

The promotion of gender equality has been a guiding principle in policy development since the advent of independence. Article 95(a) of the Namibian Constitution commits the state to –

... enactment of legislation that will ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society;

Article 23 recognises the fact that women in Namibia have traditionally suffered special discrimination and need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation. In accordance with these constitutional principles, a number of policies and laws have been passed since independence to promote gender equality.

According to research conducted by the Human Rights and Documentation Centre at the University of Namibia,¹¹⁸ women nonetheless continue to experience discrimination, mostly depending on the kinship system to which an individual belongs. Women still do not share the same privileges with regard to, *inter alia*, decision-making powers, inheritance, proprietary rights, and custody and guardianship over children.

Proper law reform may include aspects which concern the allocation of communal land rights and the protection of women's rights under the Communal Land Reform Act. It was quite evident that the majority of people in communal areas were unaware of the Act and its provisions. While traditional authorities knew of the provisions, this knowledge decreased as one descended through the hierarchy of traditional leaders. Focus group discussions with women revealed that most did not know the specific rights accorded to them in the Act, and they requested more information about this. However, women in rural areas are not sufficiently educated to understand the provisions of the Act; moreover, they have no access to such information in their indigenous languages, which would make the concepts easier to understand.

In order to protect women under matrimonial unions, customary marriages need to be clothed with the same legal recognition attached to civil law marriages. Not only are customary marriages not generally 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.

¹¹⁸ See Section IX in this volume for a discussion on the implications of violence against women by OC Ruppel, K Mchombu and I Kandjii-Murangi.

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.

In areas such as inheritance and succession, which also discriminate against women, more law reform is needed to enforce the concept of gender equality and to protect widows from inhuman practices such as property grabbing – which still exists in various parts of the country.

Many of the customary laws have not been codified. Yet these laws form the modus operandi for the various social contracts that are formed every day in traditional communities. If Article 66 of the Constitution only guarantees the existence of both customary law and common law in so far as these two systems do not conflict with the Constitution or any other statutory law, does it render customary laws that infringe on the constitutionally guaranteed rights of women invalid and, therefore, null and void? There is the *prima facie* assumption that customary laws that conflict with the Constitution are null and void.

In conclusion, it can be said that the laws of the indigenous communities need to be written down. A distinct feature of customary law is that it changes constantly. This characteristic has also made it difficult to ascertain what the law really is, and which parts of it have been distorted by colonialism or apartheid. Writing these laws down would mean that a set document comes into existence that governs the relationships among members of traditional communities. This would eventually but inevitably bring the laws and practices in line with the Constitution.

The younger generation also 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, 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.