

Women and law reform in Namibia – Recent developments

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*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood ...*¹

The Universal Declaration of Human Rights sets the standards appropriately – and women should enjoy this status, being equal to their male counterparts in dignity and rights. The African Charter on Human and Peoples' Rights echoes the sentiment of equality between men and women:²

Every individual should be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. [Emphasis added]

Despite the standard-setting international, regional and domestic legal instruments, the position of women in Namibian society remains a challenge. The struggle for the emancipation of women was fought alongside Namibia's liberation struggle. At independence, Namibia adopted a Constitution which recognises the inherent dignity and the equal and inalienable rights of all members of the human family. Article 10 of the Constitution of the Republic of Namibia specifically provides as follows:

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

The specific challenges for the status of Namibian women are embodied in the common, statutory and customary law. The Namibian Constitution provides for the equality of men and women, but all these provisions need to find practical reality, as Kamba puts it:³

1 Article 1, Universal Declaration of Human Rights.

2 Article 2, African Charter on Human and Peoples' Rights.

3 Kamba (1995).

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[T]he constitution is a dry document and what breathes life into it is human interaction, giving rise to issues or disputes concerning human rights. [It] becomes alive through its interpretation by judges and its application in real-life situations.

Moreover, although the Constitution provides for broad equality for men and women, there is no specific provision to uplift women. One might be tempted to compare this with the provision relating to children's rights, which goes into great detail.⁴ The question is whether there is a need for further legal intervention to protect women's rights more effectively. There are some that are for further legislative intervention, and others that are against it. This dilemma is illustrated by Albertyn and Kentridge, as follows:⁵

Formal equality presupposes that all persons are equal bearers of right; it ignores actual social and economic disparities between groups and individuals and constructs standards which appear to be neutral, but which in truth embody a set of particular needs and experiences which derive for socially privileged groups. So a reliance on formal equality may exacerbate inequality. Substantive equality, on the other hand, requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. Such an inquiry reveals a world of systemic and pervasive group-based inequalities which need to be taken into account in the formulation of legal approaches to equality rights.

It is in line with the realisation of a lack of substantive equality that a proactive approach is necessary. The Namibian government has committed itself to the upliftment of women in general, and of black women in particular. This can be seen from various legislative interventions⁶ as well as the illustrated political will, of which the establishment of the Ministry of Gender Equality and Child Welfare alone speaks volumes.⁷

Some specific challenges for women's rights can be seen in the sphere of employment relations, the family set-up, customary law, violence against

4 Article 15 of the Namibian Constitution provides at length for the protection of children, but women's rights are not dealt with in a similar fashion.

5 Albertyn & Kentridge (1994:149).

6 A number of laws have been passed since independence to deal with the position of women. These include the Affirmative Action (Employment) Act, 1998 (No 29 of 1998), the Combating of Rape Act, 2000 (No. 8 of 2000), and the Married Persons Equality Act, 1996 (No 1 of 1996).

7 The Department of Women Affairs in the Office of the President was upgraded into a full-fledged Ministry, in order to take a more proactive approach towards gender-orientated law reform.

women, and access to land.⁸ These particular challenges have been approached systematically by government, including by way of law reform.

Since its inception, the Law Reform and Development Commission has embarked on a number of research projects that have a bearing on the rights of women. As far as the woman's place in the family is concerned, the following are relevant:

- Succession and Estates Project
- Divorce Project
- Customary Law Marriages Project
- Domestic Violence Project, and
- Cohabitation Project.

The Succession and Estates Project tackles serious and complex issues. The issues are complex because they deal with personal law as opposed to public law. Furthermore, special care needs to be taken to avoid imposing alien sets of norms or rules on certain individuals or groups.

The history of this problem can be traced to common law and various statutes. The Native Administration Proclamation⁹ allowed the use of various customary laws in matters pertaining to succession. However, the ascertainability of customary laws remains a problem, and some customs are being abused because the contents of a particular customary law are at times not known.

The Intestate Succession Ordinance¹⁰ amplified and amended the applicable Roman–Dutch common law by declaring the surviving spouse a possible heir. Two conflicting systems have since been in use, but most black women could not inherit due to the specific rules of their customary laws. The abuse of some of the latter laws remains a problem, and property grabbing from widows by their deceased husband's relatives is rampant in some communities. There is a clear need to protect such vulnerable women through law reform.

The other system which is based on common law and the Intestate Succession Ordinance provides for a surviving spouse to inherit alongside the descendants

8 The Agricultural (Commercial) Land Reform Act, 1995 (No. 6 of 1995) deals with land redistribution. The Land Reform Advisory Commission established by the Act has developed criteria for land distribution, which among other things, advance women's access to agricultural land.

9 Proclamation 15 of 1928. Some provisions of the Proclamation have since been repealed as they were found to be in conflict with the Constitution.

10 Ordinance 12 of 1946.

of their deceased husband. This inheritance system affords more protection to a surviving widow, compared with widows who are subject to customary laws which bar women from inheriting.

The challenge is how to reconcile the two systems. Following research and consultations over the past few years, it has become evident that more protection needs to be extended to widows, whilst simultaneously giving effect to the following constitutional provision:¹¹

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the 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. [Emphasis added]

Research has shown that a husband who inherits property in terms of a particular custom may be obliged to pass such property on to another male relative, who will have similar obligations. If a widow inherits her deceased husband's entire estate, relatives like parents, and uncles who were dependent on the deceased will become destitute. Thus, a delicate balancing of rights, as provided by the Constitution, is necessary.

Law reform may have the effect of amending some customary laws if the right to culture¹² is weighed against the right to equality and freedom from discrimination.¹³ Through research and consultation, three broad options for law reform have emerged.

The first is to have a Two-path System of inheritance. This system will allow for customary law estates to be dealt with according to the applicable customs. The remaining estates will follow the route of common law and the Intestate Succession Ordinance. The latter system will allow for widows to inherit. The problem with this approach is that it may be discriminatory; however, it would allow for the choice of personal law, i.e. whether customary law or common law and the Intestate Succession Ordinance are to be applied. Nonetheless, the applicable customary laws need to be in line with the Constitution if inheritance based on customary law is allowed.

The second option is the so-called One Path System. In terms of this option, the entire estate will be inherited by the surviving spouse and the deceased's

11 Article 19, Namibian Constitution.

12 Article 19, Namibian Constitution.

13 Article 10, Namibian Constitution.

descendants. This option completely overrules customary law and may seem like a total imposition of the Roman–Dutch common-law-based system; in fact, it does not find favour with traditional authorities. This system may also infringe on the provisions of the Constitution, which guarantees the right to culture.

The third option is termed the Compromise Approach, because it aims to reconcile the first two options. In terms of this third option, a fixed percentage is allocated to the surviving spouse, and another fixed percentage to customary law heirs. This option will offer some protection to widows, while giving effect to the constitutional right to culture.

The Law Reform and Development Commission has now finalised the Succession and Estates Project, and is in the process of compiling an appropriate Bill in this regard before making recommendations to the Minister of Justice. Once such a recommendation has been made, the challenge will be to implement the law reform recommendations.

Marriage is another legal institution which affects women's rights. Women experience problems pertaining to marriage regimes and the dissolution of marriage. In general, marriages are either in community of property or out of community of property. The particular problem is that black couples living north the so-called Police Zone¹⁴ are, by law, regarded to be married out of community of property.¹⁵

The Law Reform and Development Commission has considered this matter at length, and will publish its due recommendations in the first quarter of 2009. Extensive recommendations will be made to deal with the relevant problems.

Divorce is another pressing issue for women across the board. The current legal set-up, in terms of which specific grounds for divorce are required, is problematic for spouses; and the fact that the spouses want to get divorced per se shows the breakdown of marriage. Furthermore, establishing specific grounds for divorce often results in assignments of guilt and in the deterioration of the spouses' relationship, which at the stage of divorce is critical in any event.

14 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).

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

As the requirements for divorce are considered to be problematic by many, spouses live separate lives while continuing to be officially married. The problems surface when one of the spouses passes away and the marriage is terminated by death. Disputes over property will then be inevitable. To address these problems, the Law Reform and Development Commission made specific recommendations to the Minister of Justice in 2004.¹⁶ The recommendations contained in the report are still to be implemented, however. Among them was the recommendation that a new Divorce Act be promulgated. The proposed new Act would eliminate the fault-based grounds and introduce a new system of granting divorce on the grounds of the irretrievable breakdown of a marriage. Further recommendations involve the simplification of the divorce procedure.

The Law Reform and Development Commission has also done in-depth research on customary law marriages. The Commission has now finalised this project as well, and published its findings in 2004¹⁷ after appropriate recommendations had been forwarded to the Minister of Justice. These recommendations have also yet to be implemented, however. The key recommendation made was to give full recognition to all customary law marriages, which should also be registered with the Ministry of Home Affairs.

Past Law Reform and Development Commission Projects have ushered in very positive changes. The discriminatory concept of *marital power*, for example, was abolished by the Married Persons Equality Act.¹⁸ The Domestic Violence Project has been implemented, and the Combating of Rape Act¹⁹ as well as the Combating of Domestic Violence Act²⁰ have been enacted, both aiming at combating violence against women.

In conclusion, it is important to emphasise that law reform will always be needed to deal with aspects pertaining to the status of women in Namibia. The various international, regional and domestic human rights instruments need to be amplified through specific law reform efforts in order to ensure that the rights contained in such instruments are given practical effect. Namibians also deserve the fruits of such law reform efforts. This end will not be served if the recommendations in law reform reports are not implemented. More conscious efforts need to be made to have these recommendations implemented by the relevant government offices, ministries or agencies.

¹⁶ LRDC (2004b).

¹⁷ LRDC (2004a).

¹⁸ Act No. 1 of 1996. It has to be noted, however, that the abolition of marital power is not applicable to customary law marriages. Cf. section 16 of the Act.

¹⁹ Act No. 8 of 2000.

²⁰ Act No. 4 of 2003.