

Immigration and Refugee Board of Canada

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Responses to Information Requests

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14 August 2012

NAM104143.E

Namibia: Customary and common law including matters of inheritance; how conflicts between the two systems of law are resolved

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1. Legal Pluralism in Namibia

Namibia operates under a system of legal pluralism that consists of both common law and customary law, functioning simultaneously (Ruppel and Ambunda 26 May 2011, 4; LAC 2005, 14).

1.1 Common Law

Common law, formalized in the 1990 Constitution of Namibia, incorporates elements of the Roman-Dutch law inherited from South Africa (Hinz 2010, 149; Ruppel and Ambunda 26 May 2011, 3) as well as public international law and any binding international agreements to which Namibia is a party (*ibid.*, 54; Namibia 1990, Art. 144). The third chapter of the Constitution recognizes and outlines fundamental rights and freedoms, which include equality before the law, and freedom from discrimination on the basis of sex, race, colour, ethnic origin, religion, creed, or social or economic status (*ibid.*, Art. 10). The Constitution has supremacy over all other sources or systems of law in the country (*ibid.*, Art. 1.6), including customary law (*ibid.*, Art. 66.1).

The common law system includes the Supreme Court, the High Court, the Labour Court, as well as regional Lower Courts and district and sub-district level Magistrate's Courts (Ruppel and Ambunda 26 May 2011, 4-13; Amoo 2008).

1.2 Customary Law

According to the 2000 *Traditional Authorities Act*, customary law is defined as "norms, rules of procedure, traditions and usages of a traditional community" (Namibia 2000, Art. 1). Customary laws in place at the time of independence in 1990 are considered legitimate (*ibid.* 1990, Art. 66.1). Both the Act and the Constitution stipulate, however, that customary laws are only valid if they do not conflict with the Constitution or other statutory laws (*ibid.*).

Academic sources indicate that most Namibians live according to customary law and its norms and beliefs (Ruppel and Ambunda 26 May 2011, 76; Ambunda and de Klerk 2008, 43). According to the US Department of State's *Country Reports on Human Rights Practices for 2011*, customary courts are the primary point of access to the legal system in rural areas (24 May 2012, Sec. 1e). Sources note, however, that customary law is not a consistent or static body of regulations (Hinz 2008, 150; Ruppel and Ambunda 26 May 2011, 76). In a report on the justice sector and rule of law in Namibia, University of Namibia academics

describe customary law as a "complex, dynamic system which has constantly evolved in response to a variety of internal needs and external influences" (ibid.). In a 2008 article on the traditional court system, a specialist in Namibian customary law from the University of Namibia explains that there is variance between communities in terms of their traditional governance structures (Hinz 2008, 150).

Customary law primarily regulates marriage, divorce, and land rights (Hinz 2008, 154; Ruppel and Ambunda 26 May 2011, 76). According to *Country Reports 2011*, customary courts also deal with "most civil and petty crime cases in rural parts of the country" (US 24 May 2012, Sec. 1e). Hinz notes that customary law has jurisdiction over matters relating to compensation, restitution for wrongs committed, or other claims, without making a distinction between civil and criminal offences (2008, 159). A representative of the Vita Royal House traditional authority in the Kunene region, interviewed by the Windhoek-based newspaper the *Namibian*, said that types of cases heard by the local customary court include property rights and HIV-AIDS discrimination cases (7 Apr. 2011). According to the legislation regulating customary courts, compensation is payable "in money or an equivalent amount in kind" (Namibia 2003, Art. 22.1).

1.2.1 Community Courts Act

The traditional justice system is formally recognized and incorporated into the Namibian legal system in the *Community Courts Act* of 2003 (Ruppel and Ambunda 26 May 2011, 16; Hinz 2008, 160). According to Hinz, the Act is intended to provide "some structural uniformity" to the implementation of customary law (ibid.). For example, the Act outlines conditions for the appointment of traditional authorities as court justices by the Minister of Justice, requires courts to keep written records of proceedings, and grants the right to have legal representation in court (Namibia 2003, Art. 8, 16, 18). The Act also outlines procedures for appealing the verdict of a customary court in the common law system (ibid., Art. 26). Ruppel and Ambunda note that formalizing traditional courts also allows them to be reviewed and evaluated by superior courts (26 May 2011, 16).

According to Hinz, the number of customary courts in operation is unknown but there are 46 recognized traditional authorities, most of whom adjudicate a traditional court (Hinz 2008, 149).

2. Relationship between Customary and Common Law

Various sources suggest that despite the legislative supremacy of the Constitution, the application of customary law continues to enforce discriminatory practices (Ruppel and Ambunda 26 May 2011, 77; LAC 2005, 14; US 24 May 2012, Sec. 6). For example, Ambunda and de Klerk point out the continuing tension between the concept of human rights and the "patriarchal traditional African values that underpin customary law" (2008, 48). Additionally, Freedom House notes that traditional courts in rural areas often disregard procedures mandated by the Constitution (2012). A 2011 article in the *Namibian* states that across the country, there is "a growing conflict between customary and civil law" and observes that "fairness and socio-economic justice have taken on different and sometimes relative meanings as interpreted by customary courts and laws" (7 Apr. 2011).

Article 24 of the *Community Courts Act* indicates that a complainant who has received compensation from a state court cannot also claim compensation from a customary court (Namibia 2003). In addition, according to Hinz, some communities have specifically integrated rule of law principles in their own customary law and practices (2008, 156). He adds that, for example, Kwangali traditional courts are required to consider a sentence imposed by the state court, before imposing its own, and that the amount of customary compensation could be reduced if the convicted person had served time in prison (Hinz 2008, 157).

In an interview with the *Namibian*, the coordinator of the AIDS Law Unit of the Legal Assistance Centre (LAC), a Windhoek-based human rights organization that performs litigation, research, public education, and advocacy (n.d.), indicated that there is a need to increase harmonization of customary and common laws, and to improve monitoring of traditional authorities to ensure greater transparency and accountability and to prevent discrimination, especially in cases involving HIV-AIDS (7 Apr. 2011).

2.1 Inheritance Laws

According to the 2002 *Communal Land Reform Act*, customary land rights are allocated for life and, upon death, are re-allocated to the surviving spouse or child of the deceased (Namibia 2002, Art. 26). The Act is gender-neutral regarding the laws of inheritance (ibid.). Under customary law, however, widows do not inherit the land rights of their deceased husband, which pass instead to the deceased's male relatives (Ambunda and de Klerk 2008, 57; *The Namibian* 7 Apr. 2011). Several sources indicate that widows continue to be dispossessed by their late husband's relatives (ibid.; Freedom House 2012; Ruppel 2010, 24). For example, the *Namibian* mentions the case of an ethnic Himba woman who was accused of witchcraft by her husband's relatives and forced to leave her home after her husband died of AIDS (7 Apr. 2011). The article indicates that

when the case was brought to the Opuwo customary court, the court upheld the tradition of allocating the property to the late husband's male relatives (*The Namibian* 7 Apr. 2011). The representative of the traditional authority interviewed by the *Namibian* indicated that it would be "a problem" for the widow to claim her property rights under the *Communal Land Reform Act* because many traditional authorities "disdain" civil law as a remnant of the colonial era that was developed without reference to traditional leaders (*ibid.*). For further information on women's access to land, please see Response to Information Request NAM104142 of 30 July 2012.

The *Children's Status Act* of 2006 stipulates that children born outside of marriage have the same inheritance rights as children born inside a marriage, regardless of gender (Namibia 2006, Art. 16). The Act specifies that this provision applies "[d]espite anything to the contrary contained in any statute, common law or customary law" (*ibid.*).

2.2 Marriage

Marriages in Namibia take place under either the civil or customary system (LAC 2009, 3; Ruppel and Ambunda 26 May 2011, 77). Under the 1996 *Married Persons Equality Act*, the concept of marital power, a husband's legal power over his wife and her property, has been abolished in civil marriages (Namibia 1996, Art. 2). The Act also provides for the equal sharing of a joint estate created upon entering a civil marriage (*ibid.*, Art. 4), unless a pre-nuptial arrangement has been made, with the exception of civil marriages between blacks in the area north of the former "Police Zone" [southern and central Namibia, where white settlements were concentrated under colonial rule (Namiseb 2008, 111)] (LAC 2009, 6-7). The Act does not abolish marital power in customary marriages and does not regulate the sharing or division of property (Namibia 1996, Art. 16). Ruppel and Ambunda note that many people continue to be married under customary law, according to which the husband is considered the head of the household (26 May 2011, 78).

One academic source indicates that in many traditional communities, the payment of a bride price (*lobola*) from the groom's parents to the bride's parents is the "principal criterion" that validates and secures a customary marriage, but that it varies between communities in form, function, and value (Ambunda and de Klerk 2008, 54). The same source states that conditions attached to the *lobola* determine whether or not it must be repaid in the case of divorce (*ibid.*, 56).

2.3 Appeals

Under the *Community Courts Act*, appeals on decisions made by traditional courts are made to Magistrates' Courts (Namibia 2003, Art. 26). Any party to the proceedings of a customary court case, after exhausting his or her rights to appeal within the community court, has the right to appeal to a Magistrate's Court, which also temporarily suspends the execution of the customary court's decision until the matter is resolved (*ibid.*). The legislation also states that appeals on decisions made by a Magistrate's Court are referred to the High Court and treated in the same manner as civil cases referred from the Lower Courts (*ibid.*, Art. 29). Information on the procedures for making an appeal, and on the appeal process in practice, could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

Traditional courts can also transfer cases to a Magistrate's Court, at their own discretion (*ibid.*, Art. 21). Hinz notes, however, that the Act does not provide for the referral of cases from Magistrates' Courts to traditional courts (2008, 166).

According to *Country Reports 2011*, there have been some cases in which customary court decisions were re-tried in the regular judicial system, and at least one rape case in which the offender paid a settlement to the victim under customary law and also faced criminal charges from the state court (US 24 May 2012, Sec. 1e). According to Hinz, there have been "only a few" cases of appeal from traditional courts to state courts (2008, 168).

This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection. Please find below the list of sources consulted in researching this Information Request.

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Additional Sources Consulted

Oral sources: Attempts to contact representatives of the following organizations were unsuccessful:

International Women's Association Namibia, Human Rights and Documentation Centre at the University of Namibia, Stellenbosch University, Women's Leadership Centre.

Internet sites, including: *Africa Review*; Amnesty International; Development Africa; *Fennia International Journal of Geography*; Human Rights Watch; Namibia – Central Bureau of Statistics, Ministry of Regional and Local Government, Housing and Rural Development, National Housing Enterprise; Namibia Institute for Democracy; *New Era*; Shack/Slum Dwellers International; United Nations Development Programme Namibia; United States Department of State; World Habitat Awards.

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