
1 Introduction

The colonial policy of apartheid and more especially that of 'bantustanisation'¹ that generally deprived a certain sector of the South-West African/ Namibian community of their basic fundamental rights was legitimised not only by the imposed political and social systems but also by the legal system including legislation and some principles of the Roman-Dutch common law. In terms of property rights the general black population was denied the rights to certain property rights, like for example, freehold titles, as a result of the Bantustan policy. The policies of the financial institutions requiring collaterals as a prerequisite for the granting of loans totally disqualified the generality of the black population from qualifying for the wherewithal and the empowerment necessary for the acquisition of property, more especially immovable property. The situation was even more pathetic in the case of women, who were not only subjected to the application of some of the discriminatory principles of the Roman-Dutch common law relating to matrimonial property rights, in the case of women who were subjected to the general law, but more especially the black women whose property rights were governed by the customary law of their tribal

1 In 1962, the South African government appointed a Commission of Inquiry to make 'recommendations on a comprehensive five-year plan for the accelerated development of the various non-white groups of South-West Africa'. This Commission was commonly known as the Odendaal Commission. The recommendations made by the Commission in its 1964 report had little to do with promoting the welfare of black Namibians. One infamous recommendation in the Report was that Namibia should be fragmented into a series of economically unviable self-governing homelands or Bantustans for Africans, which would of necessity, remain perpetually dependent on the 'white' areas, and, through them, on South Africa. The Odendaal Plan was implemented by two pieces of legislation: the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 and the South-West Africa Affairs Act 25 of 1969. The effect of the implementation of the Plan was to entrench both territorial apartheid in Namibia and the distribution of land along racial lines. See NK Duggal *Namibia: Perspectives for national reconstruction and development* (1986) 37-41. See also SK Amoo & M Conteh 'Women's Property Rights in Namibia and HIV and AIDS: Myth or Reality?' *Namibia Law Journal* vol 3, 1 January 2011, 3-27.

communities as a result of the Bantustan policy. In terms of property rights therefore, it was not only the black women who did not have the full legal rights to property and the means to acquire property but also the white women whose property rights were governed by the general law that recognised better titles of men to property.

In the context of the HIV/AIDS pandemic, gender inequality is a social factor that has significantly contributed to the spread of the virus since unequal power relations between men and women put women at a greater risk of HIV/AIDS infection. Given this reality, the national policy on HIV/AIDS was adopted in 2007. The policy addresses issues of gender inequalities in terms of the burden of care placed on women and girls by the pandemic, the cultural acceptance of intergenerational sex, especially sex of older men with young girls, and gender based violence in general. In recent years, the impact of structural factors such as gender inequalities on the severity and spread of HIV has been noted with increasing alarm. Namibia's Vision 2030 highlights the HIV and AIDS epidemic as one of the most serious threats facing the country. The epidemic is affecting health, livelihoods, economic perspectives, demographic futures as well as many individual lives. HIV has reduced life expectancy in Namibia significantly, and has left many families economically vulnerable.² Women are also diagnosed at a younger age than men, given the median age of HIV diagnosis is 30 years old for women and 35 years old for men. The percentage of young women living with HIV is 29 per cent compared to only 8 per cent for young men.³

2 Background to property rights of women and HIV and AIDS in Namibia

In Namibia there are 13 different ethnic groups, all of which demonstrate gender inequality in the form of patriarchy to a greater or lesser extent. Patriarchy is a dynamic system of male dominance over a woman that manifests itself in, *inter alia*, male dominance over women's economic and social lives. As a system, patriarchy depends upon differential access to power and resources and has different implications for women in each community. In traditional African communities women had *de facto* social power and exerted pressure on men both as mothers and wives.⁴ In some cultures, such as the Nama and in the Kavango, women were traditional leaders and chiefs. Women in many traditional communities had access to property and were highly-valued as agricultural producers. With the Owambo communities, the economy was based on a mixed agricultural-pastoral

2 Vision 2030: Policy Framework for Long-term National Development (2003), Republic of Namibia, Office of the President, Windhoek.

3 National Strategic Plan on HIV/AIDS Medium Term Plan (MTP III), (2004–2009), Ministry of Health and Social Services (MoHSS), Windhoek.

4 D LeBeau *et al* *Women's property and inheritance rights in Namibia* (2004).

system, the value socially attached to men's products such as cattle was high because of its ritual significance.⁵

At the time of independence the Government of the day was confronted with the problem of adopting policies that would address the general policies of discrimination that had affected not only the black population but also disadvantaged groups, and in the case of property rights, the generality of women in Namibia. These institutionalised and legally enforceable discriminatory policies constituted the genesis of gender inequality in pre-independence Namibia. However, there is ample evidence that cultural and customary practices reinforced the state sanctioned gender inequality.

Currently, there is still a confusing web of civil and customary laws, some of which still cause gender-based discrimination.⁶ There are several government initiatives such as the Customary Law Bill, which will, among others, recognise customary marriages and harmonise civil and customary laws. As well as law reform, law enforcement and judicial responses to violations of human rights do not yet guarantee women and men equitable protection in Namibia. At independence, Roman-Dutch law allowed a husband to acquire power over his wife as well as property within the marriage, even if the wife had acquired such property prior to marriage. The Married Persons' Equality Act 1 of 1996 specifies equality of persons within marriage and does away with the legal definition of the man as head of the household. The Act also provides women who are married in community of property equal access to bank loans and stipulates that immovable property should be registered in both spouses' names. However, the act only covers couples married under civil, not customary, law, although one-third of all marriages are under customary law.⁷ The provisions of the Act relating to the abolition of the marital power and the consequences of that abolition and marriages in and out of community of property are not applicable to marriages by customary law.

The most important piece of legislation in Namibia promoting gender equality has been the Namibian Constitution 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. Therefore, a discussion now follows taking into consideration the relevant articles of the Namibian Constitution and the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) that were ratified by Namibia on 28 February 1995 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that was ratified on 23 November 1992. In terms of the ICCPR, everyone has the right everywhere to be

5 S La Font & D Hubbard (eds) *Unraveling taboos: Gender and sexuality in Namibia* (2007).

6 Le Beau *et al* (n 4 above).

7 *Guide to the Married Persons Equality Act* (2009) Legal Assistance Centre, Windhoek.

recognised as a person before the law⁸ and all persons are equal before the law and are entitled, without any discrimination, to equal protection of the law. In this respect, the law prohibits any discrimination and guarantees all persons equal and effective protection against discrimination on any ground including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹ 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 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,¹⁰ and that they 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.¹¹

The Government of the Republic of Namibia has further committed itself to the policy of non-discrimination as enshrined in article 10 of the Namibian Constitution and this underlies its National Policy on Land, including property rights. The opening paragraph of the *White Paper* on the National Land Policy reaffirms the Government's commitment as follows:

Access to and tenure of land was among the most important concerns of the Namibian people in their struggle for independence. Since 1990, and following the 1991 National Conference on Land Reform, and the Consultative Conference on Communal Land Administration 1996 Namibia's democratically elected Government has maintained and developed its commitments to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. The wise and fair allocation and administration, and use of the nation's urban and rural land resources are essential if these goals are to be met.

The Government's position postulated in this policy is not only a political commitment but it is also in compliance with a moral and legal (constitutional) obligation.¹² The relevant portion of article 95 of the Constitution, that deals with the principles of State Policy and the Promotion of the Welfare of the People, states as follows:

The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

(a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; the Government shall further seek, through appropriate legislation to provide maternity and related benefits for women ...

8 Art 16.

9 Art 26.

10 Art 2(2).

11 Art 3.

12 Article 95 of the Constitution has been declared to be obligatory on the Government.

- (e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law.

These principles have been upheld in the case of *Government of The Republic of Namibia & Others v Mwilima & Others*¹³ as ‘an expression by the state of its willingness’ to provide those services and that ‘they are not enforceable in any court of law’. In terms of access to property and the provision of the necessary framework, legal or otherwise , for the attainment of these rights by the erstwhile disadvantaged members of the community, especially women, this may not be a justiciable right but the provision does impose a standing obligation on the government to be seen to be measuring up to its commitment. Furthermore, under the Constitutional provisions on Apartheid and Affirmative Action¹⁴ the government is enjoined to pass legislation to empower women, needless to say, to have access to property.

With regard to the rights to property, and more especially the rights of women, the Namibian legislature, since independence, has promulgated pieces of legislation aimed at redressing the injustices of the colonial legacy, including the discriminatory laws and practices relating to property rights, especially the rights of women. Apart from the Constitutions of the former Soviet Union and the other Communist States in the former Eastern Bloc, which made the provision of housing a constitutional obligation of the government, not many constitutions in the world make the provision of housing to its citizens a constitutional obligation of the state and therefore a justiciable right of the individual. The Namibian government may therefore not be under such obligation but it has the duty to provide within available means adequate and affordable housing for members of the society in the lower income group brackets. It is recognised that since the government’s resources are limited and Namibia has a mixed economy the private sector must of necessity play an important role in the provision of the wherewithal, credit facilities, for the acquisition of property. It is however, the function of the government to ensure that the policies of the private sector are not discriminatory; especially against women and that credit facilities are reasonably accessible to them. It is therefore the aim of this chapter to establish the following:

- (a) whether the legislation promulgated by Parliament has adequately redressed the injustices of the past with respect to the rights of women to property;
- (b) related to (a) above, whether the general rule inhibits women from enjoying the same rights as women in terms of rights to property;
- (c) whether the facilities provided by both the public and private sectors are equally accessible to both men and women in their own rights;

13 2002 NR 235 (SC).

14 Art 23 of the Namibian Constitution.

- (d) whether the promulgation of the Communal Land Act 5 of 2002 redresses the inherent inequities of the communal land tenure systems with respect to the rights of women, given the inarticulate premise, patriarchal biases and predispositions of the male dominated traditional leadership;
- (e) whether Proclamation 15 of 1925 should be amended, especially section 18(2), so as to ensure that cognisance be taken of the type of marital regime applicable for the purposes of determining rights of widows in cases of succession to immovable property; and
- (f) possible national and international solutions.

3 Ownership of property and inheritance rights

The issue of women's property and inheritance rights has been at the forefront of many recent discussions and advocacy programmes in Namibia. In some communities the customary norms whereby male relatives take all property upon the death of a husband, as well as the customary practice of demanding all property from a failed marriage are lately increasingly being called into question. In Namibia the disinheritance of widows whose husbands have died from AIDS related causes is a common occurrence.¹⁵ The AIDS pandemic has been brought to the forefront by the realities of gender based inequalities stemming from discriminatory property and inheritance laws and practices. As indicated earlier, in some communities, a married woman enjoys no right of ownership and upon her husband's death she could be left destitute. It is envisaged that the new bill on inheritance issues will address this problem.

Half of the land in Namibia is communal land held under customary tenure. Both men and women retain usufruct to communal land which cannot be transferred in any manner. In reality, however, the right of occupation and use is often transferred to a man who is regarded as the head of the household. This in practice has led to the vulnerability and victimisation of women despite existing legislation that guarantees them inheritance rights, for example the Married Persons Equality Act of 1996 and the Communal Land Reform Act of 2002.¹⁶

A major legislative development for rural women has been brought about by the enactment of the Communal Land Reform Act 5 of 2002. In terms of this Act, men and women are equally eligible for individual rights to communal land and widows and widowers are entitled to equal treatment. The new law has altered practices in certain areas where a widow was previously dispossessed of the communal occupation fee. It is noteworthy that the law, which provides a procedure for official recognition of traditional authorities, requires that they 'promote affirmative action amongst the members of the community ...' particularly '... by promoting women to

¹⁵ LeBeau (n 4 above).

¹⁶ As above.

positions of leadership'. Even though the Act contains no specific monitoring or enforcement mechanism, it provides a basis for encouraging greater participation by women in traditional leadership roles.

There was a complex background to this law. Parliament passed a resolution requesting traditional leaders to allow widows to remain on their land in 1992 and in 1993 traditional authorities in the north-central regions revised customary laws to help secure the land tenure of widows. The Act gives women further protection by ensuring that, after a husband's death, his widow has a right to remain on communal land allocated to him even if she remarries. One recent study concluded that customary land rights of widows appear to be much more secure now than at the time of independence.¹⁷ The infrequent eviction of widows which still occurs could, however, leave many widows without the necessary means to cultivate their land, and sometimes even without adequate shelter. This is a problem which must still be solved.¹⁸

Currently there has been government intervention on behalf of widows who find themselves evicted from marital property, based on the arguments that such practices violate a woman's constitutional rights of property ownership and gender discrimination as enshrined in article 10 of the Namibian Constitution. The government is currently drafting a Succession Bill that will harmonise methods of inheritance and property regimes for all Namibians.

4 The links between gender inequality and HIV and AIDS

The biannual serosurvey conducted amongst pregnant women gives an indication of the extent of the sexual activity of the population. The survey is done anonymously during routine antenatal care visits, which means that the results cannot be linked to any particular individual. Monitoring the HIV infections in Namibia is particularly important in informing policy makers on the challenges and needs facing a large proportion of the Namibian population. Results from the 2008 sero-prevalence data has determined the overall HIV prevalence in the country to be 17.8 per cent, a slight decline from the 2006 prevalence of 19.9 per cent. The prevalence rate is the same in rural and urban areas. The prevalence increased from 1992 (4.2 per cent) to 2002 (22 per cent) and then stabilised at 22 per cent before the decline to the current prevalence rate. The highest age specific prevalence rate is observed among those aged between 30-34 years.¹⁹

17 W Werner *Protection for women in Namibia's Communal Land Reform Act: Is it working?* (2008).

18 As above.

19 Report of the 2008 National HIV Sentinel Survey (2009), Ministry of Health and Social Services (MoHSS), Windhoek.

In a bid to attack the spread of the virus, government launched a series of plans, namely the National AIDS Control Programme (1990); the First Medium Term Plan (1992-1998) initiated in 1992; the Second Medium Term Plan (1999-2004) launched in 1999; and the Third Medium Term Plan (2004-2009), launched in 2004.

It is estimated that about 200 000 people are living with HIV in Namibia. 60 per cent of these are women.²⁰ Women are more prone to become infected with HIV than men, which is in part due to the fact that women have larger mucosal surface area than men and on account of the pooling of semen during sexual intercourse. However, this does not fully explain why there are more HIV-infected women than men. Some of the most significant factors that shape the spread of HIV and AIDS in Namibia include high mobility, cross border travel, the high prevalence of sexually transmitted infections, widespread alcohol and substance abuse, poverty, gender inequalities, disintegration of families and ignorance

More than 25 years into the AIDS pandemic, gender inequality and unequal power relations between women and men continue to be the major drivers of HIV transmission. An array of societal beliefs, norms, customs and practices that define masculine and feminine attributes and behaviour, play an integral part in determining an individual's vulnerability to infection, his or her ability to access care, support or treatment and the ability to cope when affected or infected. Gender inequality and harmful gender norms are not only associated with the spread of HIV but also with its consequences.

Women and girls bear a disproportionate burden of responsibility for families affected by AIDS and women who disclose their HIV-positive status have often faced greater stigma and suffered more extreme negative reactions than men. Gender norms and expectations also influence male sexuality, risk taking and vulnerability to HIV.

5 Property rights in Namibia and the enabling legal regime

5.1 Land classification and land tenure in independent Namibia

In order to fully appreciate the nature of problems connected with property rights of women in Namibia, it might be necessary to trace the genesis of property rights in Namibia and the enabling legal regime. This is important because the historical classification of land, together with the enabling legal regime that legitimised the land tenure systems and titles attached to a particular classification, is the genesis of the imbalances in land distribution

20 Report on estimates and projections of the impact of HIV/AIDS in Namibia (June 2008) Ministry of Health and Social Services.

and ownership in present-day Namibia. As stated in chapter 2, before the Independence Constitution came into force, land in Namibia was classified as state or crown land, communal land and private land. This classification by and large has been maintained under the Constitution.²¹ Article 100²² and Schedule 5(1)²³ of the Constitution maintain the status of crown land; article 16(1) affirms the fundamental right to acquire, own and dispose of all forms of immovable and movable property, more specifically it maintains the status of private property; and by virtue of section 11(2)(c) of the Interpretation of Laws Proclamation 38 of 1920, article 102(5) of the Constitution and the promulgation of the Communal Land Reform Act 5 of 2002, it can be authoritatively concluded that the status of communal land has also been maintained.²⁴ Consequently, land in Namibia may be classified as state land, private land and communal land. The applicable law governing the first two categories is the general law of Namibia, while the provisions of the Communal Land Reform Act 5 of 2002 and customary law govern land tenure systems in the communal areas subject to the internal conflict rules.

5.2 Private land/commercial farms

The primary legal regime governing property rights in Namibia is article 16 of the Constitution that provides for the right to property as one of the fundamental rights of the individual under the enshrined provisions of the Constitution. It provides that:

All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

This provision comes under the entrenched provisions of the Constitution and can only be derogated from under a state of emergency.²⁵ The

21 See also SK Amoo 'Towards comprehensive land tenure systems in Namibia' (2001) 17 *SAJHR* 87.

22 Art 100 provides that 'land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned'.

23 Schedule 5(1) provides that: 'all property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South-West Africa, or in any of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia'.

24 See also Amoo (n 21 above) and para 5 of chapter 11.

25 Arts 24(1) and (3) of the Constitution of Namibia.

commercial farms of Namibia are held under private titles acquired and legitimised under the provisions of article 16 of the Namibian Constitution.

6 Accessibility of commercial farms to Namibian women

The Namibian courts have upheld the principles of article 10 of the Constitution²⁶ as one of the binding principles in the judicial and legislative processes of the country. In view of the injustices of the colonial past of the country and as a matter of principle and in the spirit of the strict application and implementation of the law and Government policies relating to property rights of, especially, the previously disadvantaged members of the community, these rights must be accessible to all members of the society, including women. It is one of the objectives of this chapter therefore, to ascertain the myths and realities of this desired position.

Before independence land set aside for private ownership was for the most part owned by white settlers. At the time of independence it was recorded that this constituted about 75 per cent of the commercially viable farming land, whilst a paltry 25 per cent of such land was held by the indigenous people in the communal areas.²⁷ Since independence some indigenous people, comprising mainly civil servants and members of the private sector, have moved to the urban centres but the majority of the indigenous African Namibians continue to reside in the communal areas. In the context of the ownership of commercial farms the position of inequitable distribution of land and imbalances in land distribution remains and most Africans and particularly women, remain disadvantaged. This is compounded by the fact that most commercial farmers are men. Historically, women did not have direct access and control over the commercial farms. Most women who interact with the dynamics of commercial farming are either housewives or workers. According to the FAO National sectoral report for Namibia dew women mostly widows own commercial farms in Namibia.²⁸

The Namibian Government in its attempt to correct these imbalances and empower the previously disadvantaged Africans, including women, promulgated the Agricultural (Commercial) Land Reform Act 6 of 1995. Under the authority of this Act the government has used the policy of willing buyer, willing seller to purchase some commercial farms for resettlement and farming purposes. At the time of the study, the government has settled about

26 Art 10 of the Constitution states that: '(1) All persons shall be 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'.

27 See Amoo (n 21 above) 96.

28 Food and Agriculture Organization of the United Nations (FAO) (1995). *National sectoral report for Namibia - Women, agriculture and rural development*, Rome: FAO. Also available at: https://www.fao.org/3/X0174E/x0174e03.htm#P166_23879 (accessed 13 July 2023).

1512 families on commercial farms at an average of 6 people per family giving a grand total of 9072 resettled persons. A total of 4617 people have been resettled on communal farms, at an average of 6 people per family giving a grand total of 28 380 persons resettled on communal farms. Of the total of both categories of resettled persons, 48 per cent are women.

6.1 Rights of women to commercial farms before marriage

In terms of the general law, all single or unmarried women in Namibia have the right to own any property including commercial land, subject to the laws relating to capacity. This is in terms of the law but the questions of accessibility to credit facilities and other wherewithal of empowerment provided by both the public and private sectors will have to be addressed separately.

6.2 Rights of women to commercial farms during marriage

There are two types of marriages in Namibia, civil law marriages and customary law marriages and to a great extent marriage as an institution in Namibia is one of the factors that govern the proprietary rights of women and have contributed to some of the discriminatory laws and practices that prevent women from getting access to property.

6.2.1 Civil law marriages

Until 1996 the proprietary consequences of marriage in Namibia were governed by the Roman-Dutch common law which provided that all marriages were automatically in community of property unless, before entering into the marriage, the parties had concluded an ante nuptial contract, creating a property regime that was out of community of property. Under the Roman-Dutch common law principles relating to marriages in community of property, the property of the spouses, wherever situated, present and future, movable and immovable, including debts is merged into a joint estate in which the spouses hold equal and indivisible shares regardless of their contributions.²⁹ The joint estate automatically falls under the administration of the husband by virtue of his marital power. As administrator of the estate the husband has the power to alienate, encumber or otherwise deal with the property as he sees fit. More importantly, in terms of proprietary rights, the wife may not enter into any contract to obtain property or have property registered in her name without the consent of the husband.³⁰

29 Voet 32.2.85.

30 See generally WJ Hosten *et al Introduction to South African law and legal theory 2nd ed* (1997) 590-596.

These two types of marital property regimes are still recognised in Namibia but the common law principles relating to the marital power of the husband were substantially modified by the Married Persons Equality Act 1 of 1996. Section 2 of the Act abolishes the marital power of the husband acquired under the common law and removes the restrictions which the marital power places on the legal capacity of a wife to contract and litigate, including, but not limited to, the restrictions on her capacity to register immovable property in her name.³¹ It follows that during marriage a married woman has the capacity to register any immovable property in her name. However, if the property forms part of a joint estate, she will need the consent of her husband if she wants to alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate.³²

With regard to marital proprietary rights of Black Namibians, the applicability of the Roman-Dutch common law rules relating to marriages in and out of community of property depended on the geographical location of the place that the marriage was contracted. The Native Administration Proclamation 15 of 1928, part of which is still in force in Namibia, provides that all civil marriages between natives north of the old 'Police Zone' concluded on or after 1 August 1950 are automatically out of community of property, unless a declaration establishing another property regime was made to the marriage officer one month before the marriage took place.

Marriages contracted under customary law are regulated by the customary law of a particular tribal community. The proprietary rights of women married under customary law are governed solely by a particular customary law. Women can be allotted land in some communities but in practice communal land is usually allocated to the husband. This has led to the problem of widows in some communities being stripped of land and household goods by the husband's extended family members after his death. This exacerbates women's vulnerability to HIV and AIDS and creates an overdependence on men.

6.2.1.1 Property rights of women after divorce

The property rights of spouses at divorce will be determined by Roman-Dutch law. This means that if they were married in community of property, they share their property equally and if they were married out of community of property, each takes the share that belongs to him or her. This is, however, subject to the facts of each case with regard to the conduct of the parties because under current Namibian law, the property rights of spouses, after dissolution of marriage by divorce, are governed by the fault principle. It is worthwhile mentioning that in the case of a marriage contracted by African

31 Sec 3(a)(i).

32 Sec 7(1)(a).

persons, the proprietary rights of the spouses will be governed by the relevant provisions of the Native Administration Proclamation 15 of 1928, which *inter alia* states that:

such marriage shall not produce the legal consequences of marriage in community of property between the spouses. There is a proviso to the extent that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife, it shall be competent for the intending spouses, at any time within one month previous to the celebration of such marriage, to declare jointly before any magistrate or marriage officer that it is their intention and desire that community of property and of profit and loss result from their marriage, and thereupon, such community shall result from their marriage.³³

In *Mofuka v Mofuka*³⁴ the respondent sued the appellant for a divorce and alleged in her particulars of claim that the parties had been married on 1 September 1995 at Onawa, Ovamboland,³⁵ and that the marriage was in community of property. The Supreme Court *inter alia* affirmed the finding of the Judge *a quo* that section 17(6) of Proclamation 15 of 1928 applied to the marriage and that it was out of community of property, unless declared or agreed otherwise.

The common law principles which govern maintenance, the distribution of the matrimonial estate and custody of children have very scant parallels in customary law.³⁶ The husband in most cases obtains the majority of the marital assets and because of the application of the consequences of *lobola* he has custody of the children.

LeBeau³⁷ observes that with most communities in Namibia the law is such that, even if the husband is at fault with regard to the divorce, the customary court, where divorce proceedings take place, will grant the wife little or none of the marital property, with the possible exception of cooking pans or small household items. In other communities, such as Lozi, a wife may receive a small amount of communal property if she can prove that her husband was at fault for the break-up of the marriage. In the Kavango the person found at fault for the divorce, whether the husband or the wife has to pay a 'divorce fine'. However, given the fact that customary courts are only held by men, that in many customary courts women may not be allowed to attend or may not be allowed to speak, and that the men who are members of the customary court are frequently related to the husband who is accused of wrong-doing, women often do not get a fair hearing before a customary court. In Nama, division of property in the event of a divorce is probably the most equitable because all divorces are done in a civil court. The Nama say

33 Sec 17(6).

34 2003 NR 1 (SC).

35 Ohangwena Region.

36 TW Bennett *A sourcebook of African customary law for Southern Africa* (1996).

37 LeBeau *et al* (n 4 above).

that in the past the husband got all of the livestock but now livestock are shared between the couple. In most Namibian communities it is not a requirement that *lobola* be returned, unless the wife is found to be at fault for the divorce and in certain other circumstances, for instance, if she has not yet had a child by her husband. In most Namibian communities, if *lobola* was paid, it is not returned. However, in Herero society, when *lobola* was paid, the extended family of the person at fault for causing the divorce has to pay the other extended family a gift for getting divorced which is not considered as a repayment of *lobola* but rather as a divorce fee.

Many people recognise that the manner in which property division takes place upon civil divorce depends upon whether the couple is married in or out of community of property. In the Khomas Region and with the Nama, there is general consensus that civil law makes provision for property to be shared equally and that civil law is more likely than other legal systems to protect women's rights to property during a divorce. In the Kavango and Omusati, people say that under customary law property is divided according to who owns the property, and as previously mentioned, the husband is considered the owner of most marital property but under civil law, if the couple is married in community of property, then the property is divided equally. In all of the regions the vast majority of those interviewed say that people with higher education and those that are urbanised are less likely to follow customary rules for the division of property upon divorce. Several people specifically mention that educated and/or urban women are more likely than uneducated or rural women to want to divorce in civil courts because these women feel they will get more of the marital assets than in a customary divorce. However, urban and rural people are interlinked, with most urban and educated people having their roots in the rural areas but primarily accessing the legal system that gives them the greatest advantage in the event of a divorce.³⁸

6.2.1.2 Spousal inheritance

According to Le Beau,³⁹ the practices of widow inheritance (levirate) and widower inheritance (sororate) are still common among the Owambo, Herero, Lozi and, to a lesser extent, the Kavango. Under these customary laws, when a man dies one of his male relatives – usually the deceased husband's brother, nephew or uncle – 'inherit' his widow. The husband's extended family must decide who will inherit the widow and will send the man decided upon to take over the household of the deceased man. If the widow does not want to be inherited, she has to leave the household and all of its property and return to her natal extended family. In most cases the widow is expected to have sexual relations with the man who inherits her, unless she is elderly in which case the couple will simply live together. Also in

38 As above.

39 As above.

Owambo, Herero, Lozi and, to a lesser extent, Kavango custom a widower is inherited by one of his deceased wife's female relatives – usually the deceased wife's younger sister, cousin or niece. Again, the widower is expected to have sexual relations with his new wife. Of interest is the fact that widowers are said to have more latitude in deciding whether or not they want to be inherited. In most of the communities under consideration, people say that the practice of spousal inheritance has only changed slightly due to the advent of AIDS. However, people in the Kavango report that the practice of widow inheritance has all but disappeared while the practice of widower inheritance has been greatly reduced.⁴⁰

6.2.1.3 Rights of women to property upon death of spouse

The proprietary rights of a surviving spouse depend on whether the deceased spouse died testate or intestate. If the spouse died testate, the provisions of Wills Act 7 of 1953 will apply. In the case of intestate succession there is no uniform legislation applying to both whites and Africans. The Intestate Succession Ordinance 12 of 1946, as amended by the Intestate Succession Amendment Act 15 of 1982, applies to whites and the provisions of Proclamation 15 of 1928 apply to Africans.⁴¹

In terms of the Intestate Succession Ordinance 12 of 1946 the surviving spouse of every person who dies either wholly or partly intestate, is declared to be an intestate heir of the deceased spouse according to the following rules:

- (a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as together with the surviving spouse's share in the joint estate, does not exceed fifty thousand rand in value (whichever is the greater).
- (b) If the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed fifty thousand rand in value (whichever is the greater).
- (c) If the spouses were married either in or out of community of property, and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato* but leaves a parent or a brother or a sister (whether of the full or half blood) who is entitled to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed fifty thousand rand in value (whichever is the greater).
- (d) In any case not covered by paragraphs (a), (b), or (c) the surviving spouse shall be the sole intestate heir.

40 As above.

41 See also *Mofuka* (n 34 above).

With regard to marriages contracted between two Africans, the proprietary rights of the surviving spouse are governed by section 18(1) and (2) which provide as follows:

- (1) All movable property belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he or she lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.
- (2) All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.

The customary rules on intestate inheritance are different in different communities and inheritance depends on whether the tribal community follows a matrilineal or patrilineal system of inheritance. It follows therefore that with regard to immovable property, the rights of a widow of such marriage will be determined by the relevant customary law. The provisions of this Proclamation have been challenged as unconstitutional and discriminatory.

6.2.1.4 Private land freehold titles

As mentioned earlier, article 16 of the Constitution guarantees everyone the right to private ownership of land. This provision means that black Namibians, including women, are constitutionally entitled to own properties with freehold titles. Freehold titles over land in urban centres may be acquired through alienation of land hitherto vested in local authorities under the Local Authorities Act 23 of 1992,⁴² or through private treaties between individuals.

The rights of women discussed under the various scenarios above apply *mutatis mutandis*.

6.2.2 The property rights of women under customary law

6.2.2.1 Communal Lands

Article 66 of the Constitution recognises the general application of customary law as source of law in Namibia subject to the proviso that it shall remain valid to the extent to which such customary law does not conflict with the Constitution or any other statutory law. The proprietary rights of women governed by customary law will be discussed within the general context of customary land tenure systems that operate within the communal areas. The relevant legal regime consists of the particular customary law of a tribal community and the provisions of the Communal Land Reform Act 5 of 2002.⁴³

42 See Secs 3(3)(a), 3(5)(b) and 30(1)(t) of the Local Authorities Act.

43 See generally Amoo (n 21 above) 103-108.

The primary purpose of the Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights. It vests ownership of the communal lands in the state and creates two rights that may be allocated in respect of communal land: customary land rights and rights of leasehold. The Act thus reaffirms customary rights of usufruct granted to occupiers of communal land and confers statutory recognition on this tenure system. It does not grant full rights of ownership to holders of customary rights of usufruct but it does specify the duration of the customary land rights and makes provision for registration. The Act has one provision relating to the allocation of land to a surviving spouse in the event of the death of the holder of the right.⁴⁴

In terms of the provisions of the Act, the proprietary rights of a woman to a communal land under the various statutory titles are guaranteed by legislation. But the Act fails to recognise the realities of the patriarchal nature of the traditional society and how this will influence the allocation of land by the traditional authorities and the Land Boards. It also fails to recognise the leadership role that a boy/man plays in the family and therefore the preferential, legitimate choice that is accorded him rather than the girl in family relations, including land allocation.

In most communal areas in Namibia, traditional leaders such as headmen, chiefs, *indunas* and kings, control land although communal land is owned by the state.⁴⁵ With the possible exception of the Nama, these traditional leaders are mostly men. Land in the communal areas is distributed by traditional leaders, who are generally male, to the males in the community. Thus, those who use land are not necessarily the same as those who control land. The Nama communities are an exception; the general perception is that women use land, although men control land. Le Beau⁴⁶ noted that there used to be the perception in the Khomas Region that due to private land ownership, the person who controls, uses and owns land is one-and-the-same. However, people in Kavango, Owambo, Herero and Lozi noted that traditional leaders and heads of households – identified as men – control land, while women are the primary users of it.

The study also acknowledges that several customary practices in Namibia discriminate against women in that they are denied access to property accumulated during marriage. This lack of access to property, including lack of access to land, serves to reinforce women's subordination to men. Women are caught in a cycle of poverty due to a lack of control over property, which leads to a lack of economic independence. Most interviewees⁴⁷ noted that women are entitled to use most types of property. However, it was also said

44 See sec 26 of the Communal Land Reform Act.

45 LeBeau *et al* (n 4 above); sec 17 of the Communal Land Reform Act.

46 LeBeau *et al* (n 4 above).

47 As above.

that married women required the permission of their husbands to use property. Property that women are most often said to be able to use with impunity includes their own personal items such as clothes and shoes, as well as household and kitchen items such as cooking pots and dishes. In most communities under study,⁴⁸ unmarried women have more rights to use property than married women because the latter have to ask their husbands' permission first. Unmarried women in the study often had their own homes and could do as they pleased with their own property.⁴⁹ Although it was pointed out that in traditional societies unmarried women were not allowed to live alone, the respondents felt that contemporary women in most Namibian communities were better off if they did not marry because they had greater freedom in the use of property. In most traditional households in Namibia, once a woman marries, her husband takes over control of the marital property, sometimes even including her own separate property contribution. However, most people hold the 'traditional' attitude that land, homesteads, livestock and large moveable property, such as cars and tractors, should remain in the hands of men, and that men should, in general, continue to dominate property ownership.

As regards property women are permitted to use without restriction, unmarried women were said to be able to own more types of property than married women.⁵⁰ As with property use and ownership, women are limited in types of property they can dispose of and married women cannot dispose of any communal property without their husbands' consent.

There are significantly differing opinions within and between communities as to whether or not children born outside of marriage should inherit from their father. In the Khomas Region respondents felt it was the mother's responsibility to find out if her children had inherited any property.⁵¹ Others believed children had no right to inherit any property at all. In general, respondents in Nama communities said that children born out of wedlock have a right to inherit from their father's estate. In Owambo and Herero, interviewees felt that children born out of wedlock had no right to their father's estate – although in Herero communities, the father's family could 'purchase' the right for his children to inherit by paying the mother's extended family one head of cattle. In Kavango and Lozi communities, children born outside marriage could inherit from their father if they had already been recognised as being the children.⁵² However, it should be noted that in the case of *Frans v Pasche & Others*,⁵³ the High Court of the Republic of Namibia ruled that the principle that illegitimate children could not inherit was unconstitutional.

48 As above.

49 As above.

50 As above.

51 As above.

52 As above.

53 2007 2 NR 520 (HC) at 528-529. See also sec 16(2) of the Children's Status Act 6 of 2006.

7 Access to credit

As indicated earlier, a mere provision of legal rights to property is not enough. For one to fully realise the right to property one must be empowered or must have access to the wherewithal that will make the realisation of the legal rights possible. In other words, the individual or in this context women, must have access to credit. NDP1 describes Namibia's financial sector as small and dualistic. It states that 'as is the case in many developing countries, there is on the one hand, a well-developed financial system, mainly serving the urban centers, while on the other hand, large portions of rural areas are left with little or no access to financial services'. It has been observed that due to women's concentration in the rural areas, the distribution credit institutions are a major barrier to rural women's access to credit.

Formal sources of credit in Namibia include five commercial banks, two building societies, seven parastatals, including the Namibian Development Cooperation (NDC), National Housing Enterprise (NHE), and the Agricultural Bank of Namibia (ABN). There is also the Build Together Programme (BTP) administered by the Ministry of Regional and Local Government and Housing, as well as NGOs and a number of credit unions and rural saving schemes. Women's Action for Development (WAD), although not a source of credit, does provide financial support to a few female owned and operated income-generating projects.

Although there is, in theory, no discrimination against women by commercial banks and all customers are supposed to be treated equally, women tend to have more difficulty to acquire loans due to a lack of collateral and credit record. There are no statistics on loans by these institutions which distinguish between customers on the grounds of gender, so loan prevalence rates cannot be determined. However, in the past women married in community of property were required to have the consent of their husbands to enter into contracts and obtain loans due to the husband's 'marital power' over his wife. This situation has changed as from 21 May 1996 when the Married Persons Equality Act 1 of 1996 was passed which abolished marital power.

Commercial institutions such as banks do not have any programmes directed specifically at women and they do not have any significant programmes or activities in the field of micro-economic enterprise development. Interviews with bank officials reveal they do not feel that they discriminate against women when extending credit. However, Standard Bank officials say that women can get loans if they have repaid previous loans on time. The Commercial Bank only gives loans to invest in the formal sector. All of these various criteria, although not specifically directed at women, form an

effective barrier to women's access to credit, although women tend to have better repayment records on home mortgage loans than men.⁵⁴

The figures released by the Agribank to The Parliamentary Standing Committee on Economics, Natural Resources and Public Administration indicate that during the 2003/2004 financial year a total number of 553 farmers were granted loans.

The Agri-Bank has a special loan scheme for women and youth (the Women and Youth Scheme), the purpose of the scheme is to promote financial inclusion economic empowerment, employment creation as well as to stimulate Namibia's economic growth. Eligible candidates that are set to benefit from this scheme are women and young Namibians or permanent residents aged between 18 and 35 years. The entry age is capped at 18 years and in case of partnerships, 80 per cent of partners should be between the age of 18 to 35 years in order to qualify. In the case of limited companies, 80 per cent of the directors are required to be between the same age threshold, while the age limit for women as well as professionals in the Agriculture and related fields is not limited.

The statistics on Gender Housing Occupancy from the NHE taken from a sample of six of their German Development Funded Projects in Windhoek and other towns in 2003/4 are as follows:

- 123 houses in Goreangab, Windhoek, $51/123 = 41.46$ per cent females
- 95 houses in Freedom Square, Windhoek, $51/95 = 53.68$ per cent females
- 99 core houses in Twahaagana, Walvis Bay, $23/99 = 23.23$ per cent females
- 203 houses in Kuisebmond, Walvis Bay, $63/203 = 31.03$ per cent females
- 80 houses in Swakopmund, $30/80 = 37.5$ per cent females

Namibia has inherited a history of several forms of social and economic structural inequalities resulting from colonialism and South African apartheid. This historical imbalance had a gender dimension which impacted negatively on the rights of women to property and related social problems. The HIV/AIDS pandemic has added its toll to the impact of discrimination that women in Namibia face with regard to especially property rights, access to credit facilities, unemployment and certain customary practices.

As a matter of general legal principle, the respect for human dignity and equality and freedom from discrimination clauses in the Namibian Constitution extend to all persons, including both persons living with AIDS and those who are HIV positive. However, there are still some legal and cultural norms and practices that do not accord with the letter and spirit of the noble ideals of the Constitution.

54 EM Ipinge & D LeBeau *Beyond inequalities, women in Namibia* (2005).

In the area of property rights it has been mentioned earlier that the mere provision of the right to the acquisition of property without the requisite workable and enforceable empowerment strategies and policies by government and the private sector will reduce the ideals of the Constitution to a mere charade or façade. It will therefore be worthwhile to look at the practices of the financial sector in relation to HIV/AIDS.

The financial sector comprises mainly the insurance companies and the commercial banks. In the context of property rights of women living with AIDS and those who are HIV/AIDS positive, the policies and practice of the financial sector play a very crucial role in determining the realisation of the rights of women to property.

Insurance provides financial security against unforeseen and unpredictable events such as death and disability. Therefore, it is regarded as the key long-term investment made by working individuals. More importantly, it is also used as collateral in obtaining mortgage bonds for the purchase of property, in particularly a home.

There are essentially the following four types of insurance cover that present difficulties for people living with HIV/AIDS:

- (a) *Life insurance* is obtained when the insurer, in exchange for the periodical payments of premiums, agrees to pay an amount of money to a beneficiary indicated by the insured person on the occurrence of the death of the latter. Funeral insurance for more than \$10 000 falls in this category.
- (b) *Assistance insurance* is similar to life insurance except that the benefits payable are valued at less than \$10 000.
- (c) *Disability insurance* usually forms part of life insurance. The benefit payable is two-fold. Should the insured person be unable to pay insurance premiums for a certain period of time because of ill health (period of temporary disability), the company waives payment of premiums for that period. Should the insured person become permanently disabled, the insurer would pay the insured person a large single amount of money or periodic smaller amounts.
- (d) *Health insurance* covers payment for hospitalisation, major surgery, and emergency transportation to hospital.. Health insurance is not the same as medical aid.

A common factor with all these types of insurance is that the life expectancy and health is the basis for cover. More especially, in the context of a woman living with HIV/AIDS, wishing to obtain a home loan current policies and practice of the insurance industry and commercial banks are closely interrelated. Policy and practice in terms of profit-making may make good business sense and be justifiable but in terms of protecting the interests of women infected and affected with HIV/AIDS, there is much to be desired. The current situation is in need of legislative intervention or review by the insurance industry itself.

To obtain a home loan from a bank, one needs to provide the bank with some sort of security or collateral. Usually this is done by ceding a life insurance policy to the bank. For people living with HIV this is not an option as they are denied life insurance cover because of their HIV status.

Furthermore, insurance contracts usually contain exemptions or exclusion clauses which exclude the liability of the insurance company if the insured person was infected with HIV at the time of death or where, in the opinion of the company, the claim is occasioned by infection with HIV. The injustices inherent in these policies are evident in the subjectivity of the absolute discretion given to the insurance industry in determining the cause of death, irrespective of the actual cause of death. Women living with HIV/AIDS are disadvantaged by this practice. In the first place, it is common knowledge that Namibia is a patriarchal society and most households in Namibia are headed by men. The Census Indicators for 2001 and 1991 show that 55 per cent of households are headed by males and 45 per cent by females. A widow cannot claim under the policy of a deceased husband in such instances and, furthermore, the property which is not covered by a life policy is subject to foreclosure irrespective of the widow's wish to continue with payment of instalments under the bond entered into between the husband and the insurance company. In the case of a single mother living with HIV/AIDS she is denied access to obtaining credit facilities or has to pay a higher premium.

Some insurance companies have, under pressure from activists, revised their policies to include coverage for people living with HIV/AIDS. However, there is no indication that similar policy changes with respect to access to mortgage bonds or house loans are in the offing.

Documented evidence of research conducted on information obtained from various sources shows that lack of accessibility to property resulting from acceptable commercial practices, not directly prohibited by the law, or from customary practices impacts on lowering the social status of women *vis-à-vis* men. Hence, women find themselves at risk of being exploited by men. According to Le Beau,⁵⁵ consequences of gender inequality and patriarchy, such as gender-based violence, women in poverty and women's lack of access to social and economic resources, place them at particular risk of HIV infection.⁵⁶ Barcelona is not the only forum on HIV/AIDS where gender inequality and patriarchy have been linked to women's risk of HIV infection. At the *Durban National Treatment Conference on HIV/AIDS*, COSATU General Secretary, Zwelinzima Vavi, said the following: 'Quite clearly as long as we still have a patriarchal society that undermines gender equality we are far from defeating HIV/AIDS. Statistics bear testimony to this unequal relationship between men and women. Indeed the Namibia UNDP report (2001:35)

55 LeBeau *et al* (n 4 above).

56 LeBeau *et al* *Structural conditions for the progression of the HIV/AIDS pandemic in Namibia* (2004).

concludes that in Namibia, the major area where differences between women and men come to the fore is that of access to resources and decision-making'.⁵⁷

8 Conclusion

This chapter is an attempt to highlight some of the salient aspects of property rights in Namibia, the impact of the gender inequality on women's vulnerability to HIV infection and to ascertain on the preponderance of the current enabling laws and practices whether the issue of proprietary rights of women in Namibia is a myth or reality.

The Government of the Republic of Namibia inherited a land tenure system that was discriminatory. It was discriminatory against Africans in general and women in particular. Property rights of women were governed by both the general law and in the case of African women, customary law. One of the challenges faced by women in contemporary Namibian society is women's unequal access *vis-à-vis* men to property and inheritance rights, which in turn limits women's ability to strive for gender equality within both their personal and social spheres of life. The lack of ability to manipulate property through use, ownership and disposition limits women's economic choices and causes them to be economically dependent on men, which in turn makes women more vulnerable to HIV and AIDS.

In the rural areas, women's lack of access to communal land in their own right is a significant cultural impediment to greater gender equality because women are dependent on men to access their main means of production. The practice of widow inheritance is degrading to women and makes them vulnerable to physical abuse at the hands of the inheriting husband, exposes both men and women to the risk of HIV infection, and no longer serves the purpose of protecting young widows and children. A similar problem can be seen in widower inheritance whereby the new spouse, often younger than the widower, is exposed to violence and HIV infection. Spousal inheritance should be discouraged through information campaigns and possibly addressed through legislative reform.

Any reforms in property regimes should also encourage greater accumulation of property which women can customarily own. Of concern is that, if civil law were changed to provide for the equal division of joint property, it would preclude extended family members from inheriting all joint assets, although they could, theoretically, inherit the deceased's spouse's portion of the joint assets. There is also scope for adapting the accrual concept of sharing the gain from the marriage. Law reform should progress towards a more equitable distribution of property during divorce or upon

57 As above.

death. These laws should specifically protect vulnerable groups such as rural women and orphans.

The constitutional principle of equality needs to be applied to customary law on inheritance. Customary inheritance rules need to be reformed so as to ensure, for example, that a woman born in a Herero community should not have fewer rights to property than a man or a woman born in a Nama community. Law reform should insist that boys and girls should be treated equally as children for purposes of their intestate inheritance under customary law. The principle of primogeniture (inheritance by the oldest male child) was once the norm in Western civil law around the world but over the years this principle has been discarded in favour of equality between the sexes. A similar evolution is needed in the African customary law context. Law reforms on inheritance, which could remove sex discrimination, need to be officially formulated and then widely discussed and debated so that changes in this highly personal and traditional area can be acceptable and workable in practice. Much groundwork will be needed before rights given in theory can be asserted in practice in this area.