

Customary Law

Customary law is the law that has developed over the years in different communities in Namibia. It changes gradually over time as people change their ways of doing things. Customary law is often not written down, because the people in the community know how things are usually done in that community. Questions about customary law are usually decided by traditional courts, chiefs, headmen or other traditional leaders. Parliament can change a customary law by passing a statute that says something different.

Customary marriage and divorces take place in terms of customary law. Customary law also deals with compensation for various wrongful actions, such as theft or assault.

An example of an area of customary law which has been changed by statute is stock theft. In 1990, Parliament passed a statute on stock theft. Parliament amended this statute in 1991 to say that stock theft could no longer be dealt with under customary law. But then in 1993, Parliament removed the prohibition on dealing with stock theft under customary law. This means that stock theft can be dealt with by traditional authorities or by the general courts.

As another example, Parliament enacted a statute which says that all children born outside marriage have equal rights as children born inside marriage to inherit property from a deceased parent in the absence of a will – even if common law or customary law previously had different rules.

Namibian Constitution, Article 19

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

Traditional Authorities Act 25 of 2000, section 1

“customary law” means the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia

How customary law is made

Article 66 of the Namibian Constitution says that the common law of Namibia which was in force on the date of independence remains in force, as long as it is not in conflict with the Constitution or any statutes. Article 66 also says that customary law can be repealed or changed by Parliament as long as Parliament follows the Constitution.

Customary law is based on the traditions of the community concerned. Like common law, it has developed over the centuries. But it is important to be cautious in relying on historical records to determine what customary law is, because pre-independence accounts of customary law often distorted its meaning.

Customary law changes over time. Flexibility and the ability to change over time is an important feature of customary law. Traditional authorities have the right to make new customary law, and to amend and repeal existing customs. But customary law must be considered in the community context. It is sometimes referred to as “living law” because the current practices of a particular community must be considered in order to understand the community’s customary law properly. ►

How to find out what the customary law says

Customary law may be handed down through oral tradition, or found primarily in the lived practices of the community. Courts which want to know about the customary law on a specific topic may rely on oral or written evidence from traditional leaders or others from the community, or on cases, textbooks and other written sources.

Some aspects of the customary laws of some communities have been written down by the traditional leaders of those communities in a project which took place after independence. However, these statements of customary law do not replace the living customary law, which is still interpreted and applied by traditional authorities and changed over time by traditional authorities or traditional communities.

Community courts

Traditional authorities who are designated in accordance with customary law have the duty to settle disputes between the members of the traditional community in accordance with the customary law of that community.

Traditional courts have been formalised as community courts by the Community Courts Act. This statute gives formal recognition to traditional courts and integrates them with Namibia's other courts. A community court can decide any issue under customary law where the issue in question arose in the community covered by the community court, or where the persons involved are closely connected with the customary law of that community.

After consultation with the relevant traditional authority, the Minister of Justice appoints justices to preside over community courts. These justices must be persons who are familiar with the customary law of the area in question.

People who are supposed to benefit from an order made by a community court can get help from the nearest magistrate's court to enforce the order if necessary.

Community courts are required to keep a record of their proceedings. Parties to a case who are unhappy with the outcome can appeal to a magistrate's court, and then to the High Court.

Advantages and disadvantages of customary law

1 Advantage: Customary law is often the most accessible kind of law for people who live in rural areas. Customary court proceedings are usually conducted in local languages, and the principles involved are often easy for members of the community to understand. There are limited costs to cases in community courts. It is usually not necessary to involve lawyers.

Disadvantage: Customary law has not historically treated men and women equally. Even now, in some communities, women need assistance from a male relative to bring a case to a customary court.

2 Advantage: Customary law usually aims to find a solution which everyone involved can accept and understand so that the community can live together peacefully. The proceedings are often more informal than proceedings in other courts, and they often involve flexibility and negotiation.

Disadvantage: Because the procedures in customary courts are informal, they may not always follow the principles for fair hearings. Also, because of customary law's flexibility, it may be harder to make sure it is applied in a similar way to people who have committed similar wrongs. The details of some customary law rules may differ from community to community, even in the same ethnic group.

3 Advantage: Customary law does not split criminal cases and civil cases. A single customary law proceeding will often result in a payment which is partly a punishment for wrongdoing and partly compensation for the damage done to the person who was wronged.

Disadvantage: The payment of compensation may not be sufficient to protect members of the community from further harm by a person who is reckless or violent. Punishing wrongdoing by means of compensation means that rich people can simply buy their way out of trouble. Also, compensation may go to the family of the wronged person rather than to the individual who actually suffered the harm directly.

Testing customary law against the Constitution

Customary law, like every other kind of law in Namibia, must follow the Constitution. For example, the Constitution says that no person may be tortured or given cruel, inhuman or degrading punishment. This applies to customary law. Customary law is also not allowed to involve sex discrimination. Namibia's High Court or Supreme Court could invalidate a customary law on the grounds that it is unconstitutional in some way. ■



That customary law rule cannot stand. It is unconstitutional to discriminate against women in that way! Parliament has also already acted to address this problem by making a statute which says that both women and men can stay on the land of their deceased spouse if they wish. This statute applies to everyone living on communal land in any part of Namibia.