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**CUSTOMARY LAW v 'STATE' LAWS: INTERROGATING THE NOTION OF EQUALITY OF LAWS**

Customary law is the unwritten portion of the law that is applied orally by traditional communities and passed down through generations. It is dynamic and unique to each traditional community that practices it. Customary law is defined by Section 1 of the Traditional Authorities Act 25 of 2000 as the norms, rules of procedure, customs, and usages of a traditional community insofar as they are not in conflict with the Namibian Constitution or any other written law valid in Namibia. The Namibian Constitution is the supreme law of the country, and 'any other written valid law' are the Acts of Parliament passed from time to time (this is what I term 'state laws').

Article 66 of the Constitution provides that the *(1)* customary law in force on the date of independence shall remain valid to the extent to which such customary law does not conflict with the Constitution or any other statutory law; and *(2)* subject to the terms of the Constitution, any part of such customary law may be repealed or modified by an Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods. Article 19 further provides that every person shall be entitled to enjoy, practice, 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.

I do not doubt that the Constitution, by virtue of Article 66, elevated the existence of customary law on par with common law. I also do not doubt that Article 19, a fundamental right, gives premium cultural rights to people. It is also true that the caveat placed in both Article 66 and 19 is of general application. Thus, in *Myburgh v Commercial Bank of Namibia* (2) (SA 2 of 2000) 2000 NASC 3 (8 December 2000), the Supreme Court stated the following, on page 7, in relation to the coming into effect and survivability of customary law and common law.

"…The language of the Article means what it says namely that the customary law and common law in force on the date of Independence only survive in so far as they are not in conflict with the Constitution. The words, "or any other statutory law" contained in the Article, seem to me to refer to the future." this occurred when the Constitution took effect.

And, on page 12 that:

"…this occurred when the Constitution took effect. The Article does not require a competent Court to declare the common law unconstitutional and any declaratory issued by a competent Court would be to determine the rights of parties where there may be uncertainty as to what extent the common law was still in existence and not to declare any part of the common law invalid. That has already occurred by operation of the Constitution itself where there is conflict."

On paper, there is equality of laws as customary law and cultural rights are enacted in the same way as other laws and rights.

The problem is, however, here. Whereas people are entitled to their customary law, for example, enter into customary marriages, they do not enjoy the same rights and protection afforded to civil marriages by civil law. A typical consequence of this is that spouses in customary marriages are considered 'single' for purposes of official applications for financial assistance, jobs, estate administration, or other state law-sanctioned activities. Simply put, customary law is not systematically and institutionally on the same level with other laws, and this places it in a weaker, lower position and renders it susceptible to being discarded for more favourable state laws as it happened in *M v M* (A 22-2013) [2015] NAHCMD 181 (05 August 2015).

In *M v M*, the parties were married under their customary law. Their marriage was annulled by the traditional court and the husband was ordered to compensate his wife by paying her 80 heads of cattle. When the defendant failed to comply with the order of the traditional court, the wife (complainant/applicant) brought an application before the High Court seeking, among other things, an order declaring the customary marriage/union between applicant and respondent a tacit universal partnership entitling parties thereto equal shares of the customary marriage estate on dissolution of the marriage/union. The court found that the applicant failed to adduce evidence that the marriage was a partnership, essentially upholding the customary marriage.

The point here is that the applicant sought to resort to a more favourable marital regime than the customary one in which she had been for more than 40 years. My contention is that this should not be the case. Customary marriages (and customary law in general) should be a self-sufficient marital regime of choice just like any other legally recognized regime.

The High Court stated the following:

> '[8] Our Namibian law recognizes two types of Marriage, i.e., the civil law marriages and the customary law marriages. The former is solemnized under state law and the consequences flowing therefrom are enforceable before a court of law and the parties' duties and obligations are codified by the Married Person's Equality Act 1 of 1996 (MPEA). Customary marriages, on the other hand, are conducted according to the customary laws of various communities and the consequences flowing therefrom relate to the specific community and thus different from the next community. The obligations of the parties are in terms of the relative customary laws and such marriages are not enforceable before a court of law.

Many acts conducted under customary law, although allowed as fundamental rights within a constitutionally recognized law or disallowed as offenses, may not be enforceable before state courts of law, or recognized as having legally binding consequences. However, a dispute settled by a community court in terms of the Community Courts Act, 10 of 2003 may be enforced through the Magistrates court or appealed. But again, the point is that the situation described above leaves customary law the weaker option, lacking in systematic and institutional support, whereas systems and institutions are built around state laws.

Should this be the case? I submit not, because equal enforcement of all laws is important for the integrity and sovereignty of the state, save where there is conflict. It is also important for people to be treated equally not only on paper but in reality, as well, through the systems and institutions that run the day-to-day activities of people, based on the laws of the country. No law must be left behind, as doing so may lead to litigations such as the one we witnessed in *Digashu v GRN,* and *Seiler-Lilles v GRN* where parties challenged the lack of coverage by certain pieces of legislation.

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