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Exploring the Rights of the Dead in Namibia: A Comparative Legal Analysis

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ABSTRACT

The aim of this paper is to explore the rights of the dead. To adequately assess whether the dead can be described as possessing rights and what those rights are and furthermore, how they can be enforced. Enforcement of rights if any will be looked at from the constitutional, common law and customary law perspectives with the aim to provide a brief analysis and understanding as well as the application of these rights. In part 1 the authors gives synopsis on the constitutional rights of a natural person and whether such rights can equally be enjoyed by the dead. Part 2 discusses aspects relating to legal rights whereas Part 3 examines the rights, if any that can be enforced on behalf of the dead. In Part 4, the authors outlines issues surrounding the conflict of law as far as customary and common law is concerned, to the extent where these affects the 'rights' of the dead. Part 5 draws comparative analysis from New Zealand and France, providing possible lessons learned and Part 6 provides concluding remarks and recommendations regarding the future of the rights of the dead in Namibia.

Keywords: Deceased, death, died, rights, culture, Namibia.

I. INTRODUCTION

Namibia a country located at the west coast of Africa has a population size of 2.5 million people, with at least 11 ethnic groups. Each ethnic group has a unique of way doing things and what is legally acceptable in one ethnic group may be a taboo in the other. Hence the cultural norms, values and practices may differ from one ethic group to another. Article 19 of the Namibian Constitution provides for the right to culture and allows all persons in Namibia to practice and profess any culture of their choice provided that this is done in the ambit of the Constitution. Furthermore, Article 66 (1) of the Constitution makes which makes provision for the application of customary law in Namibia. Customary law is defined as the norms and values followed within a specific community and such laws are not written down as they are passed down orally from generation to generation. Bennett, builds on this definition providing that “customary rules are generated by a community’s acceptance of certain standards of

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behaviour”.³

As alluded earlier, In Namibia customary law is recognised by virtue of Article 19 which provides for the practice of culture, Article 66 and Article 140 which provides for the recognition of laws that were in force immediately before Namibia gained its independence.⁴ Hence, customary law shall be recognised for as long as such laws are not conflict with any other laws within the country.⁵ In addition, The Traditional Authorities Act, 2000 defines customary law to “to mean a set of norms, rules of procedure, traditions and usages of a traditional community”⁶ without reservation, this definition rings true to the sediment that customary laws are unique to a particular community and are only applicable within that specific community. Customary laws are unwritten, undocumented and are likely to weather away as time changes and the information is lost, this is why such a research reports are important, as it would ensure that the laws are not completely lost or non-existent.

There are certain powers bestowed on the different traditional authorities by virtue of Section 3 of the Traditional Authorities Act, 2000⁷ providing that the traditional authority should administer the customary laws for the community as well as preserve the cultural sites and perform traditional ceremonies and functions which are held within their community.

The customary laws of all ethnic groups and traditional authorities are applicable and enforceable in Namibia to the extent that such laws do not conflict with the Constitution or Statute law.⁸ The practices relating to death and burial are mostly conducted through the unwritten systems of groups and communities. Some communities may view the dead as having rights while other communities believes that the dead has no rights as rights terminate upon death. The COVID-19 era has brought so many conflicts with regards to the burial of dead persons. In terms of Article 26(1) of the Constitution, the President of Namibia, has declared a state of emergency and because of this, regulations were published under Proclamation No. 9 of 28 March 2020. Consequent to these Regulations, the Health Minister under the chairmanship of the Minister of Health, issued directives influencing the manner in which people who succumbed to COVID-19 related complications could be buried. According to this directives “all deaths and funerals related to COVID-9 will be handled by the government.” This development brought a cultural shock to most mourners as some

³ Bennett, 1985:17

⁴ Article 140.

⁵ Article 66.

⁶ No 25 of 2000.

⁷ No 25 of 2000.

⁸ Article 66 (2) of the Constitution.

maintained that they are now denied to pay their last respects to those who departed as a result of COVID-19 virus. The question that is worth exploring is whether the dead has rights within a Namibian context and the extent, if any, these rights can be enforced. Put, it differently are the rights of the dead adequately integrated in our justice system.

II. RIGHTS OF LEGAL PERSONS

This part of the paper provides a brief understanding of what constitutes a legal person or a person in the legal sense. In layperson terms a legal person can be described as a “body of persons or an entity”⁹ considered to be having rights and responsibilities. A legal person consists of natural persons and juristic persons. The scope of discussion in this paper is limited to natural persons as legal subjects. All human beings are natural persons and as such are the bearer of rights and duties. For example natural persons have the right to life¹⁰, liberty¹¹, privacy¹², property¹³ and family¹⁴.

Heaton maintains that a natural person’s legal personality begins at birth.¹⁵ However in order for such legal personality has to have been commenced through birth it is essential for two requirements to be met. Firstly, the birth must be fully completed, and secondly, the child must live after the separation even if only for a short period.¹⁶ A child is regarded as having born, as soon as it has been completely separated from the body of the mother.¹⁷

According to Kruger,¹⁸ a natural person is a human being granted with rights, duties and capacities however these may vary depending on certain factors. However, legal personality ends once a person dies¹⁹ and this is where the main issue comes in when dealing with rights that can be attributed to the dead. The natural thing to do after a person has died is dispose of the body. There are two acceptable and lawful ways in which one can dispose of the deceased body. One can dispose of the deceased body either through conducting a burial or through cremation. The manner in which one can dispose of the deceased body can be informed by the last will and testimony of the deceased or by the cultural beliefs and norms of a certain ethnic group. For instance in black culture and traditions, cremation is still not commonly used as an

⁹ <https://www.merriam-webster.com/legal/legal%20person>

¹⁰ Article 6 of the Constitution of Namibia

¹¹ Article 7 of the Constitution of Namibia

¹² Article 13 of the Constitution of Namibia

¹³ Article 16 of the Constitution of Namibia

¹⁴ Article 15 of the Constitution of Namibia

¹⁵ Heaton, 2017:7

¹⁶ Ibid.

¹⁷ Du Bois, 2007:145.

¹⁸ Kruger, 2010:16.

¹⁹ Jacobs, J. 2013. *Burial Rights And The Law*. Available at <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2013/trusts-and-estates/burial-rights-and-the-law.html> ;last accessed on 2 March 2019

acceptable manner of disposing a body of a loved one. This is influenced by people's cultural and religious beliefs.

The logical question that one can ask when a person dies is whether a dead person has rights and are these rights enforceable. The author argues that the dead people have rights and these rights should be enforced. There must be a clear distinction between the dead person and the one who is still alive. This is because, the dead person is not able to act and enforce his or her rights personally. The dead person thus needs a human vehicle to aid with the enforcement of his or her rights. On the other hand, a person that is alive, is able to enforce his or rights personally. The enforcement of one's rights may as a natural person be limited by various factors such as age, being declared and insolvent or prodigal.

Although rights can be extended to the dead, not all rights enjoyed by natural persons can be enjoyed by those that are dead. It is common cause that rights such as the right to life, liberty, ownership of property and family cannot be enjoyed by the dead as the enjoyment of such rights requires the party concerned to be alive to be able to enjoy such rights. This does not negate the net understanding that several other rights can be enjoyed on behalf of the deceased.

III. RIGHTS OF THE DEAD

There has always been a constant debate regarding the rights of the dead. Some legal systems and authors are of the view that the dead do not have rights. It is argued that the dead cannot vote, enter into a contract of marriage, or exercise the right to liberty. However, other legal systems are of the view that the dead have rights.²⁰ One of the arguments that may be advanced in support of this is that a dead person has a right to be buried in a dignified manner.

There are two theories of thought when assessing whether or not the dead can in fact be bestowed with certain rights. According to Smalensky,²¹ there are two types of theories namely the Interest theory and the Will theory. The Interest theory allows for the recognition of rights for those who are "incapable of making choices"²² for themselves and are right holders whereas on the other hand the Will theory argues that those who are incapable of making choices and decisions cannot be regarded as right holders.²³ The dead person prior to his passing will normally write a will setting out how his or her estate will be divided. In addition to this, the last will and testament of the deceased may set out the facts relating to the manner and place

²⁰ Smolensky, K "Rights of the Dead" available at https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v37n03_cc4_smolensky_final.pdf

²¹ Smalensky:764

²² Smalensky:764

²³ Smalensky:766

where he or she will be buried. Ensuring that the last wishes of the deceased is adhered to calls for the protection of the rights of the dead to continually ensure that his or her survivors are well taken care of.²⁴ This therefore grants de facto rights to the dead, enforceable against the living.²⁵

Smolensky argues that recognising posthumous legal rights gives the dead moral standing in the legal system and this would require a call to afford a right to dignity to the dead. The issue that surrounds the rights of the dead is the question of who enforces the right. One could argue that the rights of the dead person such as the question as to where the dead should be buried and how the burial must be conducted, is taken care of in one's will. Therefore, a person can give clear instructions of how and where he or she should be buried in his or her last will and testament. One's last will and testament is a document drawn up by a person during his or her life-time and includes aspects such as the division of the deceased estate, custody and guardianship of the deceased minor children as well as factors relating to disposal of the deceased body. In the western culture it is very common for people to give directive as how their bodies will be disposed of after their death. In the African culture it is very uncommon for people to include a provision in one's will relating to what will happen to your body after your death. In the African culture a person is regarded as forming part of a clan, and a community. The understanding therefore is that the clan and the family of the deceased person will direct issues relating to the burial. This will normally happen if there is no will or the will is silent on the aspects of burial. The provisions of a will are enforced and implemented by the executor of the deceased estate nominated in the will. If a person is allowed to make a will to direct how his body will be handled after his or her death, it is correct to state that an executor to the deceased estate is the right person to enforced the rights of the dead person.

At this point the paper will assess the rights that are bestowed on living persons and whether such rights can be attributed to the dead, particularly from a constitutional and statutory perspective respectively. Firstly, looking at the right to privacy, this is a constitutional right as guaranteed by Article 13 of the Namibian Constitution. This article provides that "no person shall"²⁶ be subjected to any interference that affects such a persons' privacy in any way that the law deems necessary or unlawful.

Can this right to privacy be attributed to the dead? In order to answer this question one first needs to understand what exactly the right to privacy includes. According to some writers this

²⁴ Smalensky:766

²⁵ Smolensky:766

²⁶ Article 13.

right regulates how information is communicated and how such information is controlled.²⁷ Furthermore, the writers provides examples of privacy, the list is exhaustive however, it includes among others the “right to be left alone, freedom from intrusion, control of the disclosure of personal information and protection of independence”. The right to human dignity is another. The Constitution provides that the right to human dignity is “inviolable”²⁸ which in layperson terms means that this right cannot and will not be violated. In addition, the article adds that no one shall be subjected to inhuman treatments. Dignity can be termed as the instinctive worth and value human beings are both with.²⁹ The notion of inhuman can be extended to the dead especially when the French example is taken into consideration. In essence, this means that taking pictures of a deceased in such a manner and posting them would be considered inhuman therefore a violation of the deceased dignity.

Lastly, the right to equality and freedom from discrimination is worth considering.³⁰ The Constitution provides that everyone is equal before the law and will not be discriminated against on any of the grounds provided therein, this includes but is not limited to, race or sex.

This right can be attributed to the dead, in particular when looked at in conjunction with the right to a burial which is a common law right and in line with good personhood. Therefore, a deceased should not a denied burial at a specific cemetery on the basis of the race or ethnic origin however, this is a practice that is evident in some customary and traditional groups within Namibia. The practice will be discussed within the paper however, the take away is that this practice is discriminatory and violates the deceased right to Article 10 of the Namibian Constitution.

IV. CONFLICT EXPERIENCE

Currently as a result of COVID-19 pandemic families are affected adversely with regards to the burial of their loved ones. In order to curb the spread of COVID-19, most governments worldwide including Namibia has introduce measures and procedures to be adhered to during social gatherings including funerals. One of such measures relates to a minimum number of persons allowed at a funeral and/or burial. In most cultures funerals are attended by a large number of people. It is believed that people attend funerals in large numbers to show their last respects to the deceased and also to support the close family and friends of the deceased during the time of bereavement. Namibia has 14 regions and the COVID-19 pandemic has mostly

²⁷ The right to privacy:2018.

²⁸ Article 8.

²⁹ The cornerstone of democracy:2019.

³⁰ Article 10.

affected the Khomas and Erongo regions with the two regions recording high numbers of COVID-19 infections. It is because of this state of events that the President in consultations with key government officials locked down this two regions, prohibiting entry into or exist from this two regions. In the event of time it made it difficult to carry the remains of a loved one to any other part of the country to conduct the burial. In certain instances the, it has been allowed to take the remains to another region of the country for burial, especially where the person's death was not related to COVID-19. However, even where it was allowed to transport the body of the deceased, the number of family members allowed to leave the regions under locked for the purposes of attending the burial was limited. COVID-19 regulations have also reduced the number of people that could attend the burial of a deceased person. The security personnel at various graveyards have been instructed to allow only a certain number of people as approved by the state to enter into the graveyard to perform the burial. Where a person dies as a result of COVID-19 virus, the state bears the responsibility to conduct the physical act of burying the deceased. This was meant to curb the possible spread of COVID-19 virus. Unless such a body was cremated, it was to be buried at the place closets to the where the death occurred. This has been traumatising for most families as they not only have to deal with the loss of their loved one but also have to adjust their practices in burying the loved one.

Furthermore, apart from the rights pertaining to burial, the deceased also has rights when it comes to his/her property and the manner in which it can be disposed of. There are different circumstances dictating ways in which the deceased property can be disposed of, these are depended on the way the deceased lived his or her life.

For instance if the deceased was married he a married man, if yes, what was the marital property regime, if the deceased was married in community of property and did not have a will, his property will be given to his wife and children and if there were any discussions of giving something from the estate to a relative this wish should be fulfilled.

In 2015 the Namibian Newspaper, reported that a family was demanding the exhumation of a woman's body mistakenly buried in a grave reserved for their father.³¹ The family maintain that they had already paid for the grave through a funeral undertaker.³² Recently, in 2020 there was another newspaper report of a legal battle between the family of the deceased and the surviving spouse over the place of burial of the deceased. The family desired the deceased to be buried

³¹ Ndanki Kahiurika "The Nambian Newspaper "A grave fight over cemetery space" available at <https://www.namibian.com.na/index.php?id=134466&page=archive-read>

³² Ibid.

in one town whilst the surviving spouse desired the deceased to be buried in another town.³³ These are just two of the recurring instances regarding the issues relating to burials and rights of deceased persons.

In most Namibian cultures, the parents or in some instances the family members of the deceased is vested with the right to decide where the deceased is to be buried. Under common law, it is however, understood that, the surviving spouse has the power to decide over the affairs of the deceased such as the place at which and the manner in which the deceased is to be buried. For instance, in the Ovaherero culture, if the female spouse dies, the surviving spouse has the full right to take decisions in terms of all aspects regarding the burial of the deceased. Conversely, in the same community, if the male spouse dies, the surviving spouse has little say and the parents of the deceased to a larger extent has the right to decide on the burial of their deceased descendant. The question that arises is that when there is a dispute between the surviving spouse and the family of the deceased regarding the burial rights, who has the final say. Legislation and or regulations will provide certainty as to who has the final say over the burial of the deceased, especially where the deceased was married and did not leave behind a will where he or she indicated how and where he or she wishes to be buried.

V. COMPARATIVE STUDY

In this part the paper provides a comparative analysis on the way different jurisdictions look at the concept of rights of the dead, is it something they outwardly recognise or is it something that is left to exist in the background or it is not recognised at all.

(A) France

It is worth noting that in France the right to privacy does extend to the dead as well because it prohibits the publication of pictures without the person's permission, irrespective of whether such a person is dead or alive.³⁴ This right to privacy is regulated by the *Penal Code* Section 1 Article 226-1 regulates the "taking, recording or transmitting of pictures of a person without their consent".³⁵ Therefore in instances where the deceased's privacy is being violated in the sense that members of the public are blatantly taking pictures of the deceased at the scene of an accident and posting them on social media platforms.

The *Penal Code* used by the French also protects the integrity of a corpse from any violation,

³³ Roland Routh NEW ERA LIVE "Grieving families clash over burial site" available at <https://neweralive.na/posts/grieving-families-clash-over-burial-site>

³⁴ Rights of Privacy of Dead Persons: 2019.

³⁵ Penal Code.

as any such violation is punishable with imprisonment and a fine.³⁶

Upon conducting adequate research there is one right that keeps reoccurring and it is what writers refer to as the burial right. According to Nasim,³⁷ burial rights encompass the duty with regard to the burial and a right to disinterment, being an Indian writer he looks at the rights of the dead from his perspective and their way of addressing and dealing with this concept.

The writer emphasises that there is a strong societal interest when it comes to burial rights and adds that disinterment provides that after a body is buried it should not be disturbed. The Muslims believe that it is obligatory for the deceased to be buried in the ground.³⁸ Furthermore, the Indian penal code specifically prohibits any violations or disturbances that pertain to a place where a funeral is being conducted or disturbing the dignity of a human corpse, such a violation shall be punishable with imprisonment.³⁹

In addition, Jacobs⁴⁰ makes mention of three other religious beliefs and how each of them briefly affect the concept of rights of the dead namely the Islamic faith, the Jewish faith and the Christian faith. The writer provides in brief that the Islamic faith have their burials at sunset, the Jewish on the other hand do not believe in cremation as the body is a gift to God and lastly the Christian faith can be described as flexible as they can conduct a burial or a cremation.

(B) New Zealand

Coupled with the look at the various religious beliefs and their understanding of and ways of protecting the rights of the dead, this part will also shed light on the common law jurisdiction of New Zealand. In New Zealand they have legislation in place that regulates the rights of the dead, the *Burial and Cremation Act 1964*. The Act addresses issues such as the establishment and maintenance of cemeteries, the offences and the fines that will be attributed to such an offender as well as the concept of cremation just to name a few. In particular section 34 of the Act makes provision for trustees of private burial grounds and states that:

The Minister may appoint as many trustees, being not less than 3 in numbers holding office at any one time, as he thinks fit, to have the care and maintenance of a private burial ground, and may at his discretion remove any trustee whether such trustee was appointed before or after the commencement of this Act.

Trustees are appointed normally to administer and manage the trust property, regardless of the

³⁶ Article 225.

³⁷ Nasim, 2015:299.

³⁸ Ibid 300.

³⁹ Ibid .298.

⁴⁰ Jacobs, 2013

form of trust created. The mere fact that the government of New Zealand deem it necessary to have a burial ground administered by a trustee, speaks volume in respect of affording rights to the dead.

The Act further provides for the burial in a private place, provided that the requirements set out in the said section are met.⁴¹ Firstly, that no burial shall be made without the previous sanction of a District Court Judge.⁴² Secondly, every sanction so given must be in writing and, shall disclose the particulars of the deceased, such as the name, the cause of death and the place of proposed burial.⁴³

When it comes to the actual function of burying the body of the deceased the New Zealand law provides that the deceased body must be disposed of within a reasonable time.⁴⁴ This provision ensures that the dignity of deceased person is still upheld and respected as it serves a control measure ensuring that bodies of deceased persons are not left unattended to. Leaving a dead body unattended to may cause the body to decay and can also pose health risk to persons exposed to the dead body. Although disposing the body of a deceased person in a reasonable manner may be a common practice in most jurisdictions, the New Zealand's example is worth exploring as it not only places the next of kin under a moral obligation but also a legal obligation to dispose of the deceased body in a reasonable time.

There is one right that be described as a reoccurring theme and that is burial rights. This right is recognised in a number of jurisdictions including Namibia by virtue of the *Local Authorities Act, 1992*⁴⁵ which regulates the cemeteries within the country in terms of Section 45, 46 and 47. This Act deals with a fraction of the rights of the dead especially when comparing to other jurisdictions such as New Zealand that has an entire statute dedicated to the regulation and protection of the rights of the dead.

Regardless of whether you look at it from the Namibian customary law perspective or the common law perspective or even from the perspective of different religious groups the same tune is sung coupled with right to dispose of property because in common law it recognised as a last will and testament. When dealing with burial rights there is issue that affects Windhoek cemeteries and that issue is that the cemeteries are full and as a result people have to be buried 12 feet under instead of the standard 6 feet. This is to enable another person to be buried on top of the deceased. The practice is not ideal because this affects the right to a proper burial because

⁴¹ Section 47 of Burial and Cremation Act 75 of 1964.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Section 46E of the Burial and Cremation Act 75 of 1964.

⁴⁵ No. 23 of 1992.

this may mean that two different bodies from two different families will be buried in the same hole.

Dealing with this same issue the Muslims believe that a grave should not be dug up for the purpose of burying another dead body in it.⁴⁶

Furthermore, it is also worth noting that there are other rights that can be attributed to the dead such as the right to privacy, right to human dignity or the right to equality. Does this mean that legal personality does not actually come to end once a person dies? The answer to this cannot be a straight yes nor can it be straight no, however, it can be said without hesitation that there are some rights which do not end or cease once a person is dead and in those circumstances legal personality does continue to exist after a person has died.

VI. CONCLUSION

An enactment of the law and subsequent regulations dealing with the rights of the dead will create legal certainty and avoid conflicts when it comes to the affairs of the dead person. It will furthermore reduce legal battles and court cases regarding the disposal of deceased bodies and other related issues. Although legal personality ends at death, it is important that some rights be attributed to the dead person. This would ensure that burials take place in a reasonable time, in a dignified manner and assist the deceased's next of kin to ensure that the wishes of the deceased is carried out and complied with. Customary practices of various ethnic groups inform the way in which burials are to be conducted. However, a law should be enacted to set general requirements with regards to the actual function of conducting a burial.

The proposed legislation will make reference to the manner in which the deceased person will be buried. Despite the fact, the manner of disposing of the deceased person's body can be guided by the municipal laws and further be tailored in one's last will and testament, it assist the family of the deceased person if there is an enacted legislation to deal with all issues relating the burial rights and property related issues of the deceased person. Although the proposed legislation will create certainty regarding the rights of the dead, it will not take away the norms, values and beliefs inculcated in people from different ethnic groups.

⁴⁶ Nasim, 2015:300

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