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**Law reforms which promote women's rights to land and property:
developments and proposals in Namibia**

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* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

This paper provides an overview of law reforms which promote women's rights to land and property, based on developments and proposals under discussion in Namibia. The paper is structured around principles which could be incorporated into good practice guidelines.

(1) Efforts to secure rights to land and property will be most effective if done consultatively, build around customary norms and accompanied by intensive public education.

Under pre-independence customary law in Namibia, women's access to land was primarily through their husbands, fathers or some other male relative. Widows had no secure rights to remain on communal land allocated to their deceased husbands, although they could apply for re-allocation at a fee.

Shortly after independence, the media reported a series of cases involving widow dispossession. Namibia's President made a public appeal against widow dispossession, and the National Assembly passed a motion calling for fair treatment for widows. A year later, the plight of widows was discussed at a customary law workshop attended by some 79 delegates from traditional authorities in the area where the problem was most common. The workshop resolved that widows should not be evicted or asked to pay a re-allocation fee for the land. A compendium of the customary laws of one group in the area was amended to allow widows to remain on the land without payment, and other traditional authorities agreed to follow suit.

Despite these efforts, there were continuing reports of widow dispossession. Parliament then passed the Communal Land Reform Act 5 of 2002, which came into force in March 2003. In terms of this law, if a husband dies, his widow has a right to remain on the land if she wishes. (The law is worded in gender-neutral fashion, but widowers were not historically forced off the land when their wives died.) If there is no surviving spouse when the holder of the land right dies, or if the surviving spouse does not wish to remain on the land, then the land will be re-allocated to a child of the deceased identified by the relevant traditional leader as being the rightful heir. No fees are supposed to be charged for re-allocation to a surviving spouse, aside from the small prescribed administrative fees which apply to any application for land allocation.

In 2007, four years after the law came into force, an investigation of its effectiveness in four of Namibia's 13 regions found that cases of widow eviction had declined dramatically. Interviews conducted for this study indicated that most village headmen were aware of the rights of widows, and understood that they might lose their positions or status if they failed to respect these rights. The apparent success of the law is quite likely due to the fact that it built on a trend which was already gathering momentum in some communities.

The same law also explicitly protects the right of a widow (or widower) to retain re-allocated land upon remarriage. However, this right seems to contradict established custom too drastically to be much utilised in practice. Widows who remarry generally move to the homesteads of their new husbands, and many persons interviewed for the 2007 study maintained that it was simply unheard of for a man to move to the homestead of his wife. In practice, if a widow leaves her land to live with a new husband, her land rights are sometimes transferred to the adult children born to her and her late husband; if the children are still young, the land is sometimes re-allocated to other relatives who would stay on the land with the children, or it might revert to the

headman for allocation to a new person. It was reported that some widows who remarried left their land to live with their new husbands but retained their existing land rights as a kind of insurance in the event that the new marriage failed – although little is known about the practical feasibility of this tactic. The low utilisation of the legal provisions on remarriage shows that it is difficult for the law to override custom without allowing for some evolution of attitudes.

Even where the law is making an impact, there are still weaknesses in its application. The widow may be pressured by family members to leave, and reluctant or afraid to report the eviction to the headman – in some cases remaining silent out of fear of losing financial support from the family, particularly from the primary heir. In some cases, threats or allegations of witchcraft are used by family members to intimidate widows into leaving their land. The Legal Assistance Centre has suggested strengthening the law with provisions which make it a crime to intimidate another person not to assert a legal right – through the use of threats, including the threat of witchcraft, or through public allegations that witchcraft has been committed by that other person.

Another problem is that widows in some cases are still expected to make steep payments for the right to remain on their land. Practices differed from place to place at the time of the 2007 study. Some traditional leaders who do not charge ‘fees’ still expect a ‘voluntary token of appreciation’, especially where the widows in question do not know their legal rights.¹ The Legal Assistance Centre has suggested that the law should make it a crime to charge any surviving spouse(s) or children a fee for transfer or re-allocation of a land right, since the current prohibition which carries no teeth does not seem to have been effective in practice.

A fundamental problem with implementation is that the majority of women in rural areas were not consulted about the law and remain ignorant of its protections. Some traditional leaders have made attempts to explain the law to their communities, but these initiatives do not appear to have been adequate to equip women to assert their rights – pointing to a need for more intensive awareness-raising with information on land rights in accessible methods and languages. In addition, in order to combat the weaknesses of the law’s implementation, the Legal Assistance Centre has suggested that it would be better for the communal land right to be *automatically* transferred into the name of the surviving spouse, to avoid the possibility that social pressures, ignorance or the illegal imposition of fees will discourage a surviving spouse from seeking re-allocation.

Another way of preventing undue pressure on widows would be to address “widow inheritance”, more properly known as levirate union. This refers to the custom whereby a widow is required, or expected, to marry a family member of the deceased, usually the brother of the late husband.² The Legal Assistance Centre has proposed making it a criminal offence for any person to coerce

¹ One reason for the persistence of unauthorised fees is that headmen perform important functions at local level, but receive no compensation from the state for carrying out these functions; the law on traditional authorities limits the number and hierarchy of those eligible for state allowances.

² Although this practice appears to be in decline in Namibia, such unions do still take place. See, for example, Debie LeBeau, Eunice Ipinge & Michael Conteh, *Women’s property and inheritance rights in Namibia*, Windhoek: University of Namibia, 2004 and *Makono v Nguvauva* 2003 NR 138 (HC). The practice is reportedly sometimes symbolic rather than literal. Dr M Belsey, “AIDS and the Family: Policy Options for a Crisis in Family Capital”, United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, undated, available at www.un.org/esa/socdev/family/Publications/aidsandfamily.doc.

widows to enter such unions against their will, punishable by a stiff fine or imprisonment for up to two years.³

(2) Incorporate affirmative action, as non-discrimination alone is unlikely to be sufficient to change the status quo.

Namibia's Communal Land Reform Act 5 of 2002 implicitly grants women and men equal rights to apply for an allocation of communal land, although the law does not include an explicit statement of the principle of non-discrimination. The Legal Assistance Centre has suggested that it would be useful to articulate the premise of equality between men and women, regardless of their marital status, with respect to land allocation – including non-discrimination in the quality or quantity of land allocated.⁴ However, as this is unlikely to be sufficient to change entrenched practices, we have also suggested that the law should include an affirmative action provision for women.

In 2007, some traditional leaders interviewed by the Legal Assistance Centre reported a rising trend in applications for land by single women even in the absence of explicit affirmative action provisions – mainly involving women over the age of 50. Similarly, a recent study of 10 villages under the jurisdiction of a single Communal Land Board found that 40% of the applications for land rights originated from single, widowed or divorced women, with the average age of the female applicants being about 60 years. Younger women in the area were aware of their right to register for independent communal land rights, but were discouraged from doing so by cultural and socio-economic barriers. However, the study noted that both the Communal Land Boards and the local Traditional Authority were actively encouraging women to apply for land rights.⁵ Such affirmative action measures should be formalised in legislation to ensure that they take place in all areas.

On the other hand, some traditional leaders have expressed reluctance to allocate communal land to young, single women. Young women do not traditionally have their own households, usually remaining in their parents' homesteads until they marry. Traditional leaders have cited worries that allowing young single women to establish their own homesteads might encourage violence or prostitution as lots of single men would be likely to visit them, and that this would contradict parental responsibilities to care for such women. Some traditional leaders refuse to allocate land to single women on such grounds, despite the Act's gender-neutral provisions. However attitudes on this issue appear to be slowly evolving – particularly as an increasing number of single women are able to find the financial means to 'persuade' the traditional authorities to give them land.⁶ A stronger statement in the law could assist in changing prevailing attitudes about land allocation to young, single women. Support groups or supportive organisations could encourage

³ The government is in the process of consolidating the Agricultural (Commercial) Land Reform Act and the Communal Land Reform Act into a single Land Act, which has provided an opportunity for proposing improvements. The proposals discussed are put forward in Dianne Hubbard & Rachel Coomer, "Gender Issues in the Draft Land Bill, Gender Research & Advocacy Project", Windhoek: Legal Assistance Centre, 12 July 2010.

⁴ Ibid.

⁵ *Women's Access to Land: A case study of the area under the jurisdiction of the Ondonga Traditional Authority, Oshikoto Region*, Windhoek: GTZ Namibia, 2008.

⁶ Wolfgang Werner, *Protection for Women in Namibia's Communal Land Reform Act: Is It Working?*, Windhoek: Legal Assistance Centre, 2008.

women to exercise their option of registering for individual land rights, even where this constitutes a break with tradition.

(3) Challenge the concept that there must be a single “head of household” or rights-holder and allow for joint registration of land rights by spouses or groups of family members.

The concept of “head of household” continues to constrain developments on the ground towards joint decision-making. For example, Namibia’s 2011 National Census required persons interviewed to name a single individual as the “head of household”, with no possibility of recording an answer reflecting joint decision-making. Yet, at the same time, social norms are slowly changing; the 2006-07 Namibian Demographic and Health Survey found that 50% of married women said that decisions about the use of *their own* earnings are made jointly with their husbands, and 57% said that decisions about the use of *their husbands’* earnings are made jointly.⁷ Another study found that some married couples view their fields and land as joint assets, with spouses sharing the related decision-making responsibilities and noted that the notion of a single decision-maker on land and livestock issues is “*a serious oversimplification*”.⁸

But although community norms are slowly evolving to embrace joint decision-making, official laws and policies are not keeping pace. One example is the Flexible Land Tenure Act 2012, just passed by Parliament. The purpose of this law is to improve access to secure tenure in informal urban areas, by providing starter titles for persons living in blocks of up to 100 households. The starter title protects certain basic property rights, and can be upgraded to a “land hold title” (similar to a regular freehold title, but supposedly cheaper and simpler to obtain), or directly to a freehold title which gives full ownership rights. Some have questioned whether the new law will serve its intended purposes,⁹ but putting that question aside, the law is weak in gender terms because it is predicated on the concept of a single “head of household” who will be registered as the holder of the starter title. Furthermore, the Act states that only persons who are married in community of property may hold a starter title jointly.

The term “head of household” is on its face gender-neutral, but women are generally identified as heads of household only where no adult male is present. In other situations, the focus on “head of household” is likely to mean that women are prejudiced and men privileged in their ability to secure land rights. It may result in particular disadvantage to women who divorce their husbands or women in informal cohabitation relationships. The Legal Assistance Centre advocated that the law should explicitly allow households to decide for themselves if they wish the starter title to be registered to a female head of household, a male head of household or a male and female jointly – regardless of any applicable marital property regime, and including cohabiting couples.¹⁰ But these proposals were not adopted in the final law.

⁷ Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008.

⁸ Wolfgang Werner, *Protection for Women in Namibia’s Communal Land Reform Act: Is It Working?*, Windhoek: Legal Assistance Centre, 2008 at 6, 19.

⁹ See, for example, Charl-Thom Bayer, “Namibia: The Failure of Institutions”, *The Namibian*, 3 April 2012.

¹⁰ Submissions to National Council on Flexible Land Tenure Bill, Gender Research & Advocacy Project, Legal Assistance Centre, 5 December 2011.

The allocation of communal land in Namibia is also predicated on the idea of registration in one name. The Legal Assistance Centre has suggested that, where the land will be occupied or used by married persons, the registration should automatically be in the name of both spouses (or all the spouses if the marriage is polygamous) unless the spouses request a different arrangement and provide information demonstrating the fairness of registering the land in the name of a single individual.¹¹ This could help protect the rights of divorced and single women living with their natal families.

Overall, joint registration would have several advantages. It would acknowledge wives' contributions to the household economy (which are often in the form of productive labour rather than cash inputs). It would also protect women when the marital relationship breaks down. For example, if the names of both spouses are registered, one spouse would not be able to evict the other unilaterally if the marriage ends in divorce – the spouses could rather approach the traditional authority to seek an appropriate re-allocation. Failure to recognise women in their own right could leave them trapped in a violent or unhappy relationship because of fears that leaving a husband could render them landless if their parents do not 'take them back'. Joint registration would also provide for automatic continuity when one spouse dies. The name of the surviving spouse or spouses would already be part of the land registration, eliminating the need for re-allocation of the land and thus making it easier to enforce the prohibition on high re-allocation fees.

In the same vein, the Legal Assistance Centre has also recommended that the law should include a procedure whereby a spouse (or other family member) who has acquired a valid interest in a customary land right by virtue of his or her contribution of cash or labour can apply to have his or her name added to the registration.¹²

It is useful to allow for some flexibility. In some instances, joint registration could hamper women's ability to make autonomous decisions, particularly in cases of marital conflict. Women may also have different land use priorities than men, which they might find harder to exercise with joint title.

Official recognition of women's rights to land in their own names is crucial to ensuring that women's land rights are not perceived as existing only through a relationship with a man. Otherwise, women remain invisible and permanently dependent on their fathers, brothers, uncles or husbands.

¹¹ Examples might be where one spouse is seeking registration of an existing allocation of land which has been held and utilised for a long period prior to that person's marriage, or where the land in question is to be used primarily for the benefit of children who are not born of the marriage.

¹² These proposals are based on the section 161 of the Tanzanian Land Act 1999, which provides a presumption of co-occupation for spouses and for the recognition of a spousal interest in land allocated to one spouse, where another spouse has contributed to the productivity, upkeep or improvement of the land in question.

(4) Where communal land is allocated to one or more individuals, provide built-in protection for other family members.

While customary norms may provide some protection for other members of the family unit, the basic rights and duties of a communal land rights holder should be prescribed in the legislation. The Legal Assistance Centre has proposed giving land rights holders a duty to exercise such rights in trust for other family members occupying the land or deriving benefits from the land in terms of the relevant customary law. This would mean that the rights holder could not dispose of such rights in any way without the consent of such persons – even if their interests were not formally registered.

(5) Securing rights to land without corresponding rights to moveable property is not sufficient.

In Namibia, the focus on land rights has deflected attention from the wider property rights of widows. Even though fewer widows are now evicted from communal land after the death of their spouses, there is still a widespread problem with the removal of *moveable* assets that belonged to the husband. This is locally referred to as ‘property-grabbing’. It is a serious problem, as women who lose moveable assets to extended families may be left without the necessary resources to use their land productively.

Study after study has shown that it is not very useful to secure land rights for widows if they have no assets left with which to make productive use of the land.¹³ Since relatives of a deceased husband legitimise their actions by reference to custom, traditional authorities and law enforcement officials find it difficult to provide protection to widows in these circumstances. The Legal Assistance Centre has proposed that it should be a criminal offence, with stiff penalties, to remove, destroy, sell or otherwise interfere with the property of a deceased person before a competent authority has made or ratified a decision regarding the rights to that property. Upon conviction, it should be possible for the court to order the culprit to restore the property or to provide compensation to the victim.¹⁴ Such a safeguard would complete the protection for widows begun by the Communal Land Reform Act, as well as assisting women in urban areas.

¹³ For example, a study conducted by the Food and Agricultural Organisation (FAO) in 2003 on the impact of HIV/AIDS in northern Namibia found that in one northern region, 52% of households in which the husband or father had died had lost cattle, 31% had lost small stock and 38% had lost other farm assets. The study reported that in some cases households lost *all* of their productive assets in this way. *The impact of HIV/AIDS on the agricultural sector and rural livelihoods in northern Namibia*, Food and Agricultural Organisation & Africa Institutional Management Services, 2003 at 10. More recent studies have similarly found that the loss of moveable assets by widows in matrilineal descent systems leaves many widows without sufficient means to sustain themselves. See *Millennium Challenge Account Namibia Compact: Volume 3: Thematic Analysis Report – Livestock*, Windhoek: Millennium Challenge Corporation, 2008 at 19; Wolfgang Werner, *Protection for Women in Namibia’s Communal Land Reform Act: Is It Working?*, Windhoek: Legal Assistance Centre, 2008, at 14, 27.

¹⁴ The provision proposed by the Legal Assistance Centre on property-grabbing is based on legislation in Zambia, Zimbabwe and Ghana. The proposed provision reads as follows:

- (1) Notwithstanding any law, including customary law, to the contrary, when any person dies, any surviving spouse or child of such person shall have the following interim rights until such time as the administration and distribution of the estate is finalized —
 - (a) the right to occupy any immovable property which the deceased had the right to occupy and which such surviving spouse or child was ordinarily occupying immediately before the death of the deceased;

(6) Law reform must incorporate effective practical enforcement mechanisms, to minimise the need to approach courts to enforce rights via litigation.

Mindful of the fact that it is often difficult for women to litigate rights against family members, practical enforcement mechanisms are crucial.

Namibia's Married Persons Equality Act 1 of 1996 provides an example of ineffectual enforcement mechanisms. This law requires that spouses married in community of property must have each other's consent for major financial transactions – but requires written consent for only a few transactions, such as land transfers. Oral consent is sufficient for most transactions, and may be given by way of ratification after the transaction takes place. On advice from the Legal Assistance Centre, Namibia's Law Reform and Development Commission has recommended strengthening this law by requiring advance written consent, with two witnesses, for all major transactions – with ratification after the fact permissible only in matters of urgency.¹⁵

Another Namibian example pertains to inheritance disputes. The Legal Assistance Centre has suggested that forthcoming amendments to the Administration of Estates Act should provide for a simple and accessible procedure whereby potential beneficiaries or other interested parties can file complaints about the administration of an estate, regardless of whether or not it is subject to a will. This would give people with disputes a viable option to assert their rights short of bringing formal legal action.¹⁶

(b) the right to use any household effects which immediately before the death of the deceased were associated with that property;

(c) the right to use and employ any animals which immediately before the death of the deceased were pastured or kept on such immovable property;

(d) to an extent that is reasonable for the support of such surviving spouse or child, the right to any crops which immediately before the death of the deceased were growing or being produced on such immovable property.

(2) Any person who-

(a) acts with the intention of depriving any other person of any right under subsection (1), or interferes in any way with such right;

(b) removes, destroys, alienates or otherwise unlawfully interferes with the property of the deceased person before the administration and distribution of the estate is finalized; or

(c) removes any child of the deceased from the care and control of the surviving parent without proper state authority;

shall be guilty of an offence and liable to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) A court convicting a person of an offence in terms of subsection (2) may order the convicted person or any other person to restore any property or the monetary value of such property, or to pay any money which he has unlawfully acquired, to the person entitled thereto in terms of subsection (1), or to any other person specified by the court, and any such order shall have the same effect and may be executed in the same manner as if the order had been made in a civil action instituted in the court.

(4) The rights conferred by subsection (1) shall—

(a) not derogate from or prejudice in any way the rights of any mortgagor, landlord, creditor or any other person whomsoever which existed prior to the date of death of the deceased person; and

(b) be subject to the requirement that the surviving spouse or child concerned shall occupy or use the property in question without detriment or neglect, reasonable wear and tear being excepted.

¹⁵ The idea comes from South Africa's Matrimonial Property Act 88 of 1984 which requires advance written consent, with two witnesses, for most major transactions.

Another way to aid practical enforcement is to encourage women to assemble evidence of their contributions to house payments or purchases of major assets. It may be useful to explore the possibility of using the branding of livestock to help secure women's rights to them; it has been reported in one study that women and children in at least one of Namibia's ethnic groups have begun to utilise this technique to strengthen their claim to cattle, although not without objections from their relatives.¹⁷

In terms of practical ability to assert rights, it is also useful to consider local rules of residence. Where it is customary for a woman to live in close physical proximity to her husband's natal family rather than her own, this may affect her ability to assert her rights – particularly in rural areas – meaning that there may be a need for special efforts to support such women.

(7) Family law reforms which address women's general legal powers and entitlements within the family must accompany protections aimed specifically at land and property.

More than any other area of law, family law has a crucial impact on individual rights – including property rights.

Protecting women's property interests during the course of **civil and customary marriage** is crucial to their empowerment within the family. Namibia's Law Reform and Development Commission has developed legislation which would formalise customary marriage, providing for its registration and giving wives equal status with their husbands in terms of legal powers and property rights. The proposed law on customary marriage would not outlaw bridewealth, which is still commonly exchanged in many Namibian communities,¹⁸ but another proposed law on marital property would prevent making the return of bridewealth (or any other gift to the family of either spouse) a condition of divorce.¹⁹ In both civil and customary marriages, reform proposals on the table in Namibia would provide a choice of four 'pre-packaged' marital property regimes which couples could choose without having to involve lawyers. The proposed

¹⁶ Section 21(12)-(14) of Namibia's Children's Status Act 6 of 2006 provides a simple complaint mechanism in situations where a person has reason to believe that the new guardian of a child whose parent or guardian has died is utilising the child's property without regard to the child's best interests. Any person who has a genuine interest in the welfare of a child may lodge a complaint with the clerk of the children's court, to alert the court to the fact that a guardian is not acting in the best interests of the child. The children's court must then order an investigation to be carried out by a social worker and, after reviewing the social worker's report, may alter the appointment of guardianship as it sees fit. This is an example of a simple mechanism which could be adapted to assist women in safeguarding their property rights.

¹⁷ *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation*, Windhoek: Legal Assistance Centre, 2005 at 65.

¹⁸ A 2004 study in Namibia found that bridewealth, or *lobola*, was a custom in use in Kavango, Herero, Lozi, Nama and some Owambo communities. Far from dying out, it appears that *lobola* prices have steadily increased. Many people interviewed in a range of communities feel that some families have made the paying of *lobola* a 'business' venture. The payment of *lobola* is perceived by many as giving the husband and the husband's extended family rights of control over the wife and children. Some see the payment of *lobola* as a purchase of rights of control over a woman's domestic production, fertility and offspring. Debie LeBeau, Eunice Ipinge and Michael Conteh, *Women's Property and Inheritance Rights in Namibia*, Windhoek: Multi-Disciplinary Research and Consultancy Centre, Gender Research and Training Programme and Department of Sociology, University of Namibia, 2004.

¹⁹ Law Reform and Development Commission (LRDC), *Report on Divorce* (LRDC 13), Windhoek: LRDC, 2004, Annex at 29; Law Reform and Development Commission (LRDC), *Report on Customary Law Marriages* (LRDC 12), Windhoek: LRDC, 2004, Annex at 13-16.

law would also require marriage officers to provide a simple explanation of these four regimes, to alleviate the current situation where intending spouses seldom understand the property implications of the marriage. The proposals would also give couples more flexibility in their marital property arrangements by providing for post-nuptial changes to pre-marital contracts - with the safeguard that both spouses must demonstrate their understanding and consent to the proposed changes in separate consultations with the requisite government official. The proposed marital property law would also prevent a spouse from buying, selling, donating or encumbering the matrimonial home or its essential contents without the prior written consent of the other spouse, regardless of the couple's marital property regime.²⁰

Draft legislation on **divorce** would make irretrievable breakdown the sole basis for divorce in civil and customary marriage, thus removing gender discrimination in the grounds for customary divorce. The proposed law would simplify divorce procedures to make them more accessible, and give courts increased discretion for equitable property division to eliminate injustices that can arise from strict application of the relevant marital property regime. The proposed law would preserve the accessible informal divorce procedures which apply to customary marriages, while incorporating added protection for the property rights of the vulnerable spouse, with a right of appeal to a general court of law.

With respect to **inheritance**, the Legal Assistance Centre has recommended that Namibia should retain a dual system which incorporates the positive aspects of customary law whilst at the same time protecting the surviving spouse and children. Customary rules on inheritance are often part of a complex set of mutual obligations which operate long before death, and it is likely that a law which attempted to overrule customary law completely would not be observed in practice. A draft law on intestate succession currently under discussion provides that, where a deceased was party to a customary marriage at the time of death or is otherwise shown to be closely connected to customary law, twenty percent of the estate would be distributed amongst the customary law heirs and the remainder would go to the surviving spouse and children. The draft law also provides that a surviving spouse would have a right to inhabit a matrimonial home which was owned by the deceased, along with the use of essential household effects, until death or remarriage.

The Legal Assistance Centre has proposed transforming some inheritance issues into issues of **maintenance**. Currently, minor children may request maintenance from a deceased estate before it is distributed to the heirs, regardless of whether or not there was a will. We have suggested that such maintenance should be available to a surviving spouse and any other dependents of the deceased who are not adequately provided for by a will or in terms of the rules of intestate succession. This would ensure that the neediest family members are provided for, and would probably avert many disputes about inheritance.

Law reform must also consider **informal cohabitation relationships**. Even though cohabiting relationships are common in Namibia,²¹ few such couples know that the law provides virtually

²⁰ This would codify and expand upon little-known common law provisions.

²¹ Recent national surveys indicate that 7-15% of Namibian adults are in cohabitation relationships. This is likely to be an under-estimate of the true figures as many people may not report that they are cohabiting due to the stigma that is sometimes attached to these relationships. To put this into context, the 2001 Census found that only 19% of

no protection for their property rights. For example, there is no legal duty of support between cohabitants either during the relationship or when it ends, and cohabiting partners have no clear right to share individually-owned assets when the relationship comes to an end, even if both made contributions towards them – a situation which usually works against women, as valuable assets like cars or houses are often put in the name of the male partner while the female partner is more likely to take responsibility for consumable goods. The cohabiting partner also has no right to occupy a common home which is individually owned or leased by the other partner. The Legal Assistance Centre has recommended a basic level of automatic protection for cohabiting couples who have lived together for at least two years (and for couples who have lived together for a shorter time period if they satisfy specified criteria²²). This automatic protection would include a mutual duty of support (which would enable cohabiting partners to claim loss of support if one partner died) and a right to equitable division of property if the relationship ends. We have proposed that increases in the couple's assets during the relationship should be divided on the basis of each partner's contributions (including household labour or childcare), or divided equally if the respective contributions cannot be proved. Where the partnership is terminated by death, the cohabiting partner should have a right to apply for a fair share of the deceased's estate, in light of the nature and duration of the relationship and the interests of any other heirs, including a surviving spouse or spouses. These automatic protections could be supplemented with an administrative procedure whereby couples can register their cohabitation relationship and agreements about matters such as maintenance and assets if they wish.

Another area of family law which must be considered in conjunction with women's property rights is **child maintenance**. In Namibia, women's fear of losing child support gives men a powerful source of leverage to discourage women from asserting various rights, including property rights. Procedures for obtaining and enforcing child maintenance orders should be accessible and effective.²³

(8) Innovative approaches to property rights must incorporate mechanisms to ensure that women are fairly represented and compensated.

One Namibian example of this principle concerns communal conservancies, which aim to promote sustainable natural resource management by giving local communities rights to wildlife and tourism. Prior to independence, residents of communal areas had no rights to wildlife, with even subsistence hunting being considered illegal. The result was widespread poaching. Groundbreaking legislation laid the foundation for a new approach by allowing local

the population aged 15 and over were in a civil marriage and only 9% in a customary marriage, compared to 7% cohabiting, 4% widowed and 3% divorced or separated. Central Statistics Bureau, *2001 Population and Housing Census*, Windhoek: National Planning Commission, 2003. The *Namibia Demographic and Health Survey 2006-2007*, which is based on a national sample, found that about 15% percent of women and 13% of men between the ages of 15 and 49 were "living together" with a partner, without being formally married. Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008.

²² A court would be expected to consider the duration and nature of the relationship; the nature and extent of common residence; the degree of financial dependence or interdependence between the parties; the degree of mutual commitment to a shared life; the arrangements for care and support of any children in the household; the performance of household duties; and the reputation and public aspects of the relationship.

²³ The Legal Assistance Centre is currently finalising an assessment of the operation of Namibia's Maintenance Act 9 of 2003 which will be published during 2012.

communities to create conservancies so that they could benefit from wildlife on communal land and work with private companies to promote tourism in communal areas. The first four communal conservancies were registered in 1998, and there are now 72 registered communal conservancies covering 20% of Namibia's total land area and involving one in four rural Namibians.²⁴ Conservancy members elect a representative committee to manage natural resources and the income derived from tourism and hunting, which is sometimes distributed directly to conservancy members and sometimes ploughed into projects which benefit the entire community. The initiative has also created jobs, including positions such as game guards and conservancy resource monitors employed by the conservancy, and jobs in tourism initiatives run as joint ventures between the community and the private sector. Because wildlife now results in direct economic benefits to the community, poaching is discouraged and the resulting increase in wildlife numbers has been remarkable.

Initially, the conservancy movement was male-dominated, with male members of the community taking responsibility for managing natural resources – even those which were traditionally utilised by women. For example, in one area management of palm trees was placed under the control of local men by conservationists who were concerned that women were not using them sustainably, with the result that the trees died at an accelerated rate and gender relations in the community were altered. The palms were then 'returned' to the women, who agreed to take full responsibility for monitoring the sustainable use of the trees.²⁵

Since community game guards were virtually all male, women initially received few direct benefits from the project, with their role in natural resource utilisation being neglected at first. But the Namibian non-governmental organisations behind the conservancy movement consciously increased their efforts to involve women, introducing an initiative of employing women as community resource monitors. This gave women an increased role and a forum for influencing decision-making.²⁶ Communal conservancies are now having a major impact on women's empowerment and well-being. By 2004, half of all conservancy members were women.²⁷ Women now hold about one-third of conservancy management positions.²⁸ Women have also captured the majority of the thousands of new jobs created in conservancy areas, particularly in tourism ventures, boosting both their income and social status.²⁹

²⁴ Information from Integrated Rural Development and Nature Conservation (IRDNC), Namibia; see also *Living with Wildlife: The Story of Namibia's Communal Conservancies*, Windhoek: Namibian Association of Community-Based Natural Resource Management Support Organisations (NACSO), 2011.

²⁵ Fiona Flintan, "Women and CBNRM in Namibia: A Case Study of the IRDNC Community Resource Monitor Project", Working Paper No 2 for the Engendering Eden Project, 2001.

²⁶ Ibid; see also "Community Based Natural Resource Management (CBNRM) Enhancing Conservation, Development & Democracy in Namibia's Rural Areas?", undated, www.met.gov.na/Documents/.

²⁷ "Nature in Local Hands: The Case for Namibia's Conservancies", Chapter 5, *World Resources 2005 – The Wealth of the Poor: Managing ecosystems to fight poverty*, Washington: World Resources Institute, 2005.

²⁸ *Namibia's Communal Conservancies: A review of progress – 2010*, Windhoek: Namibian Association of Community-Based Natural Resource Management Support Organisations (NACSO), 2012.

²⁹ As of the time of writing, conservancies had produced 619 conservancy management jobs plus 717 full-time and 3044 part-time jobs in registered conservancy areas. *Namibia's Communal Conservancies: A review of progress – 2011*, Windhoek: Namibian Association of Community-Based Natural Resource Management Support Organisations (NACSO), 2012.

Another area to consider involves control over genetic resources. The Legal Assistance Centre, recently reviewed Namibia's draft Access to Genetic Resources and Associated Traditional Knowledge Bill and registered concerns that a formal application process for resource exploitation may have the effect of giving men control over genetic resources traditionally utilised by women as these resources begin to generate cash income. We have recommended further discussions of mechanisms to prevent such outcomes, such as giving preference to persons who have traditionally utilised the resource. The Bill suggests that protocols be signed with communities on the use of traditional knowledge and natural resources, and these protocols could be used to ensure that women in the community derive appropriate benefits.

(9) Meaningful action against gender-based violence is necessary to secure women's rights to land and property.

Women cannot assert their rights to land and property without meaningful state protection against family and community violence. In addition to effective legal remedies – such as a responsive criminal justice system and accessible mechanisms for protection orders in the case of domestic violence – women need support to act against gender-based violence. In Namibia, case withdrawals are very common in both civil and criminal contexts, and traditional compensation often replaces criminal action, regardless of the wishes of the victim of the crime. Support mechanisms are needed to encourage victims to proceed with criminal cases. There is also a need to place more emphasis on preventative measures, such as inculcating the principle of gender equality in children from the earliest ages.

(10) Traditional leaders should be mobilised to support women's land and property rights.

Traditional leaders may be more accessible than other dispute resolution forums in rural areas in particular, and can be mobilised to play a positive role in protecting women's property rights – particularly where this role is backed up with general legislation. For example, in Namibia, traditional authorities in some areas have supported widows in asserting their rights to remain on their deceased husbands' communal land and resisting efforts by relatives to remove them.

In conclusion, the guidelines on securing women's rights to land and property should promote a holistic legal approach which strengthens women's rights in the family and community as well as providing concrete, effective, practical mechanisms for enforcement.