

Women’s Property Rights In Namibia: An Investigative Report to Determine  
The Potential for Litigation

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## I. Women's Property Rights in Namibia

### a. *Summary of Findings*

Restrictions on Namibian women's inheritance and property rights, both historically and today, pervade the country. The violation of women's rights seems particularly overt in rural regions where geographically insulated traditional communities perpetuate the egregious treatment. The problem is sourced primarily in the culture of traditional customary law, which governs the legal system of tribal communities. In most tribal communities, women are unable to own or inherit property, even after marriage or the death of a spouse. Moreover, because women continue to experience lower rates of education and financial autonomy, customary law promulgates notions of patriarchy and female subordination.

Even though recent legislation has attempted to address the gender imbalance, those efforts have proven largely ineffective. The following report details the history of customary law in Namibia, women's property rights guaranteed by international and domestic law, common law to support a claim for women's property rights, as well as potential litigation strategies. However, despite what appears to be obvious human rights violations, it is unlikely litigation of women's property rights will yield any positive legal advancement at this time. As detailed at the end of this report, a lack of local support from legal advocacy groups and issues of standing impair the ability of a third party organization to successfully litigate this ongoing issue.

### b. *Introduction*

The majority of Namibians live according to traditional indigenous law, also known as customary law.<sup>1</sup> However, the 1990 Constitution of the Republic of Namibia replaced customary law as supreme law of the land within the country. The Constitution contains several articles pertaining to women's rights. Article 10 contains Namibia's equal protection clause and Article 95 promotes policies aimed at enhancing women's rights.<sup>2</sup> Specifically, Article 95(a) requires the State to actively enact "legislation to ensure equality of opportunity for women...[and] ensure the implementation of the principles of non-discrimination in remuneration

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<sup>1</sup> Oliver C. Ruppel, WOMEN'S RIGHTS AND CUSTOMARY LAW IN NAMIBIA: A CONFLICT BETWEEN HUMAN RIGHTS AND CULTURAL RIGHTS?, Namibia Resource Center-Southern Africa Library, 16 (Basler Afrika Bibliographien 2010).

<sup>2</sup> *Id.* at 3.

of men and women”. Within Africa, other countries are using similar provisions found within their own constitutions overturn customary laws that limit women’s property rights. Recently, advocates in Botswana enjoyed litigation success using this method. By pairing international law with the language of the Botswana Constitution, the litigation team demonstrated that the system of inheritance under customary law violates fundamental human rights guarantees.

The Botswana matter, *Mmusi and Others v. Ramantele and Others* (2013), involved an inheritance dispute between four elderly sisters and their nephew.<sup>3</sup> After living in the family home their entire lives and investing in property improvements, the sisters argued they should inherit the home even though the nephew was the heir under customary law.<sup>4</sup> Notably, the nephew had never lived in the home.<sup>5</sup> In a unanimous opinion for the sisters, Justice Isaac Lesetedi reasoned:

The Constitutional values of equality before the law, and the increased leveling of the power structures with more and more women heading households and participating with men as equals in the public sphere and increasingly in the private sphere, demonstrate that there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems.<sup>6</sup>

This precedential win offers optimistic legal footing for similar litigation in Namibia. If a case can highlight the rights guaranteed to women under both the Namibian Constitution and several UN Conventions to which Namibia is a party, a litigation team may prevail on a claim of discrimination under customary law.

### *c. Rural Versus Urban Areas*

The majority of Namibian citizens, particularly those living in traditional communities, reside in rural areas of the country. In 2001, approximately 67% of the population lived in rural

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<sup>3</sup> Richard Lee, *Huge boost for women’s rights in Botswana*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA, Oct. 12, 2012, <http://www.osisa.org/law/botswana/huge-boost-womens-rights-botswana>.

<sup>4</sup> Lisa Anderson, *Botswana women win landmark right to inherit under customary law*, THOMSOM REUTERS FOUNDATION, Sep. 4, 2013, <http://www.trust.org/item/20130904043025-bt15h/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

locales and of the remaining 33%, one-third resided in Windhoek.<sup>7</sup> For women, their location within the country is directly linked to their education level, financial stability, and social autonomy.<sup>8</sup> Conversely, a Namibian woman's level of education directly impacts her likelihood of property ownership and inheritance.<sup>9</sup>

In rural areas, only 7% of married women have completed secondary school, a stark comparison to 25% of urban women.<sup>10</sup> Educated or urban women are more likely to seek a divorce in civil court than rural women "because they feel they will get more of the marital assets than in a customary divorce."<sup>11</sup> Furthermore, because the concentration of women is greatest in rural areas, access to financial services and credit institutions is scarce, preventing women from gaining financial autonomy.<sup>12</sup> Financial independence is also impeded because approximately 51% percent of rural women work in communal farming areas, making it virtually impossible for them to acquire real property.<sup>13</sup> It follows that the highest rates of gender discrimination also occur within these communities. For instance, widow inheritance and property grabbing (discussed below) are largely a rural phenomenon.<sup>14</sup>

*d. Customary Law*

**i. Generally Defined**

Customary law is the indigenous law traditionally practiced by ethnic groups in a particular region.<sup>15</sup> In Africa, prior to colonization, the law in most states was essentially

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<sup>7</sup> Samuel K. Amoo, PROPERTY LAW IN NAMIBIA, University of Pretoria, 25 (Pretoria University Law Press 2014).

<sup>8</sup> Mercedes Ovis, CUSTOMARY LAWS ON INHERITANCE IN NAMIBIA: ISSUES AND QUESTIONS FOR CONSIDERATION IN DEVELOPING NEW LEGISLATION, 4 (Gender Research and Advocacy Project Legal Assistance Center 2005).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See* Amoo, *supra* note 7 at 213.

<sup>12</sup> *Id.* at 218.

<sup>13</sup> *See* Ovis, *supra* note 8 at 4.

<sup>14</sup> *Id.* at 31.

<sup>15</sup> Muna Ndulo, AFRICAN CUSTOMARY LAW, CUSTOMS, AND WOMEN'S RIGHTS, 88 (Cornell Law Faculty Publications Paper 187 2011).

customary in character, meaning it had its sources in the practices and customs of the people.<sup>16</sup> As colonial rule infiltrated the continent, so did new forms of colonial law.<sup>17</sup> As a result, in many African nations, including Namibia, customary law remained in place, while civil law developed alongside it.<sup>18</sup> Both forms of law have continued to develop and function haphazardly alongside side each other in post-independence Africa.<sup>19</sup>

Customary law in Namibia dominates the personal lives of many people because it governs areas such as marriage, divorce, inheritance, and land tenure.<sup>20</sup> Moreover, Namibian customary law is particularly intricate, complex, and dynamic because it has evolved simultaneously with the internal needs of the people and influences from abroad.<sup>21</sup> Customary law is often viewed as discriminatory on the basis race and/or gender and there is significant debate over whether it is compatible with the human rights norms of international conventions and the national constitution.<sup>22</sup>

## **ii. Constitutional Validity of Customary Law**

Providing the customary laws of Namibian traditional communities do not directly conflict with the Constitution, customary law is expressly validated in the Namibian Constitution.<sup>23</sup> However, this provision applies only to customary laws in place at the time of the country's independence in 1990.<sup>24</sup> Laws that conflict with the fundamental rights and

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Lotta Ambunda and Stephanie de Klerk, *Women and Custom in Namibia: A Research Overview*, in *WOMEN AND CUSTOM IN NAMIBIA: CULTURAL PRACTICE VERSUS GENDER EQUALITY?* 43 (Oliver C. Ruppel Ed., Windhoek, MacMillan Education Namibia 2008).

<sup>21</sup> *Id.*

<sup>22</sup> *See* Ndulo, *supra* note 15 at 89.

<sup>23</sup> Diane Hubbard, *MARITAL PROPERTY IN CIVIL AND CUSTOMARY MARRIAGES: PROPOSALS FOR LAW REFORM*, 4 (Gender Research & Advocacy Project Legal Assistance Centre 2005). *SEE* The Constitution of the Republic of Namibia, Article 66 (1990).

<sup>24</sup> *Id.*

freedoms of the Constitution, and international human rights law as a whole, may be declared unconstitutional by a competent court.<sup>25</sup>

Although the Supreme Court of Namibia ruled in *Myburgh v. Commercial Bank of Namibia* that common law conflicting with the Constitution is invalid,<sup>26</sup> Namibian courts have not specifically addressed the topic of conflicting customary laws.<sup>27</sup> However, the case suggests a similar fate for customary law, which could produce sweeping effects.<sup>28</sup> “[S]ince *Myburgh* held that portions of common law which are unconstitutional automatically became invalid at independence...the effective date in respect to the question of retroactivity would appear to be 21 March 1990. The same would presumably apply to customary law.”<sup>29</sup> One obstacle of this seemingly optimistic approach is Article 19 of the Constitution which guarantees the right to culture.<sup>30</sup>

While the Constitution expressly provides the right to culture—synonymous with customary law—other constitutional guarantees can trump customary law in cases of conflict.<sup>31</sup> As demonstrated by the South African Constitutional Court in *Bhe & Others v. Magistrate, Khayelitsha & Others*<sup>32</sup>, “the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights”.<sup>33</sup> Article 66 specifies the right to culture is subject to the condition that it shall not intrude on the rights of others.<sup>34</sup> Chapter 3 of the Constitution protects the fundamental right of inheritance and the prohibition of

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<sup>25</sup> *Id.*

<sup>26</sup> *Myburgh v. Commercial Bank of Namibia* 2000 NR 255 (SC).

<sup>27</sup> See Hubbard, *supra* note 23 at 5.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Id.*

<sup>32</sup> *Bhe & Others v. Magistrate, Khayelitsha & Others*, Constitutional Court, 15 October 2004 (Case CCT 49/03) at paras 126-29 (Langa DCJ, writing for a majority of the Court).

<sup>33</sup> See Hubbard, *supra* note 23 at 10.

<sup>34</sup> See Ovis, *supra* note 8 at 5.

discrimination based on sex.<sup>35</sup> Additionally, the Constitution provides that all Namibian citizens have the right to acquire and own property.<sup>36</sup> Therefore, while proponents of customary law might buttress their position with the guarantee of a right to culture, in order to overrule constitutional practices, it is only necessary to demonstrate women's property rights under customary law contradict constitutional freedoms. Despite this seemingly simple approach, the extent to which the constitution is practically applied among traditional communities varies substantially.

### iii. Variations Throughout the Country

According to Southern African customary law expert Tom Bennett, "because customary law is pervaded by the principles of patriarchy, full-scale application of the fundamental rights in the Namibian Constitution to customary law would have the result of abolishing the personal law of the majority of the population."<sup>37</sup> The *Bhe* case echoed this theory.<sup>38</sup> Experts suggest that reform of customary law should begin by determining who defines the customs and norms of a community and consider whether preserving those norms perpetuates patriarchy or promotes gender equality.<sup>39</sup>

The Married Persons Equality Act of 1996,<sup>40</sup> the Communal Land Reform Act 5 of 2002, and the Maintenance Act 9 of 2003 demonstrate Namibia's legislative attempts to promote gender equality in both common and customary law.<sup>41</sup> Yet, despite these legislative efforts, notions of patriarchy continue to dominate Namibian culture.<sup>42</sup> In response to the Married Persons Equality Act of 1996, one Parliamentarian pointed out that customary law is often called

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 7.

<sup>37</sup> See Hubbard, *supra* note 23 at 16.

<sup>38</sup> *Id.* at 19.

<sup>39</sup> *Id.* at 20.

<sup>40</sup> *Id.* "The Married Persons Equality Act of 1996 repeals the common law principle of marital power and replaces it with a new regime of mutual consultation. It also changes both common law and customary law by giving wives a domicile independent of their husbands (as well as giving children a domicile independent of their parents), and by making husband and wife equal guardians of their children."

<sup>41</sup> *Id.* at 20-1.

<sup>42</sup> *Id.* at 15.

upon when it is convenient and advantageous, using a culture rooted in patriarchy to subject women to inequality.<sup>43</sup> This concern is shared by the United Nations in its assessment of the Married Persons Equality Act, stating the law “did not sufficiently address discrimination in the family...and had little impact on customary marriage or polygamy.”<sup>44</sup> The inability of legislative reform to produce wide-sweeping effects demonstrates the need to assess regional customary laws—including the sources and effects—on an individual basis to determine whether those customs promote or suppress gender equality.

*e. Namibian Marital Regimes*

Given the Namibian Constitution allows for, and recognizes, both civil and customary marriage, extensive variations of marital unions exist across the country. Urbanized areas of the country reflect increasingly western ideals whereas a majority of traditional communities exist in rural areas. Notable differences exist in both civil and customary marriages, however.

**i. Civil Marriage**

The Namibian Constitution states that, “men and women of full age, without any limitation due to race, color, ethnicity, origin, nationality, religion, creed or social or economic status shall have the right to marry and found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>45</sup> The Constitution also recognizes that marriage should only be entered into by fully consenting and intending spouses.<sup>46</sup> Civil marriages in Namibia occur when a marriage officer, perhaps a magistrate or church leader, marries a man and a woman.<sup>47</sup> These civil marriages are registered with a local government authority and the married couple receives a marriage certificate.<sup>48</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 27.

<sup>45</sup> The Constitution of the Republic of Namibia, Article 14 (1990).

<sup>46</sup> The Constitution of the Republic of Namibia, Article 14 (1990).

<sup>47</sup> Debie LeBeau, *WOMEN’S PROPERTY AND INHERITANCE RIGHTS IN NAMIBIA*, v (Gudrun Reimers and Grant J. Spence eds., Pollination Publishers 2004).

<sup>48</sup> *Id.*

Recently, laws have been enacted to protect women's rights within civil marriages. The Married Persons' Equality Act of 1996 retired the legal definition of men as heads of household and delineates equality of persons within a civil marriage.<sup>49</sup> This Act and similar legal reforms have been part of an effort to provide women with equitable rights, though efforts for protection in customary marriage have not been as successful.<sup>50</sup>

## **ii. Customary Marriage**

Unlike civil marriage which requires a magistrate or public official, customary marriages are conducted according to the customs of a community without a marriage officer.<sup>51</sup> The customs and norms are often unwritten and vary from community to community.<sup>52</sup> Generally speaking, customary marriages are not legally registered.<sup>53</sup> Both civil and customary marriages are recognized under Namibian law, although most members of rural communities still prefer customary marriages.<sup>54</sup> However, it is not uncommon for a couple to marry under both regimes. Couples may observe certain traditional aspects of a customary marriage, such as lobola, while also conducting a ceremony in a church.<sup>55</sup>

Customary law is seen as an alliance between family groups, not simply two individuals.<sup>56</sup> Prior to the marriage, a negotiation between the spouses and their family takes place.<sup>57</sup> "Most traditional communities undertake to pay a bride price to the women's kinship group. This payment establishes a social relationship between the groups and, in the process, gives the man and his kinship group certain rights of control of the woman."<sup>58</sup> The husband is

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<sup>49</sup> *Id.* at 7.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at v.

<sup>52</sup> *Id.* at vi.

<sup>53</sup> *Id.* at 18.

<sup>54</sup> *Id.* at viii.

<sup>55</sup> *Id.* at 18.

<sup>56</sup> *Id.* at 39.

<sup>57</sup> *See Ruppel, supra note 1 at 17.*

<sup>58</sup> *See Ambunda and de Klerk, supra note 20 at 54.*

almost always considered the head of the household in customary marriages, granting him discretion over most marital, financial, and familial decisions.<sup>59</sup> This position of financial power is reinforced with the payment of lobola to the bride and her extended family.

### iii. Lobola

Lobola is consideration paid by the groom or his family to the bride's family for the ability to marry the wife.<sup>60</sup> In Namibia, whether lobola is required, and the form it takes, varies among the traditional communities.<sup>61</sup> Some communities require payment in the forms of oxen or money while others may require the giving of small gifts or services.<sup>62</sup> Although the amount may vary, it is generally agreed that failure or inability to pay lobola is a mark of shame.<sup>63</sup> Regardless of the lobola form, the exchange serves three objectives. The primary function of lobola is to prevent divorce because it is difficult to return money or cattle, particularly if they have already been used.<sup>64</sup> Second, lobola legalizes a marriage under customary law by "establishing a patrilineal affiliation for any children born of the marriage".<sup>65</sup> Finally, for some communities, the exchange of lobola is the defining action to establish a valid customary marriage because it is a tradition that has been passed down from generation to generation.<sup>66</sup>

There are extensive debates about whether the exchange of lobola secures the marriage or, in effect, "buys" the bride.<sup>67</sup> "The amount of lobola within various communities depends a great deal on the bride's personal attributes such as if she has been raised to be a dutiful wife, if she comes from a good family, and more recently, her level of education."<sup>68</sup> The payment of

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<sup>59</sup> See Ruppel, *supra* note 1 at 18.

<sup>60</sup> See Ambunda and de Klerk, *supra* note 20 at 54.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Hubbard, *supra* note 23 at 237.

<sup>64</sup> See Ambunda and de Klerk, *supra* note 20 at 55.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 56.

<sup>68</sup> See LeBeau, *supra* note 47 at 37.

lobola often entitles the husband or his family to maintain control over the woman's reproductive choices and offspring.<sup>69</sup> In the Owambo, Herero, Lozi, and Kavango communities, if the wife dies and lobola was paid, the widower is entitled to inherit another female relative of the wife's family because he has already paid for one wife.<sup>70</sup>

With respect to divorce, prior payment of lobola may prevent a woman from dissolving the marriage or her family may be required to repay the initial amount. For instance, if a woman is at fault for the divorce, the lobola is refunded to the husband's family.<sup>71</sup> Among the Herero, the person at fault must pay the other family the equivalent of the original price as a divorce fee.<sup>72</sup> Other factors may contribute to the decision to repay lobola, such as if the wife produced any children for her husband or she committed adultery.<sup>73</sup> A marriage solidified by lobola may also secure a father's parental rights in the event of divorce.<sup>74</sup> The practice can perpetuate domestic violence, forcing a woman to remain in an unhappy marriage for fear of relinquishing access to her children.<sup>75</sup> She may also lose the support of her family if they are required to return the lobola paid to them before the marriage.<sup>76</sup> In this respect, the bride price diminishes a woman's autonomy in the marriage and subjects her to the husband's financial and social control. The idea that women are, to some extent, paid for also weakens their claim to property rights.

#### **iv. Polygamy**

Polygamy is practiced in many traditional African communities, including Namibia.<sup>77</sup> Although polygamy is an aspect of customary marriage, it is not legally recognized under

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 42.

<sup>72</sup> *See* Amoo, *supra* note 7 at 213.

<sup>73</sup> *See* LeBeau, *supra* note 47 at 42.

<sup>74</sup> *See* Hubbard, *supra* note 23 at 238.

<sup>75</sup> *Id.* at 248.

<sup>76</sup> *Id.* at 249.

<sup>77</sup> *See* Ruppel, *supra* note 1 at 21.

Namibian law.<sup>78</sup> In fact, the 1997 Committee on the Elimination of Discrimination against Women (hereinafter “CEDAW”) deliberately discussed the need for Namibia to address polygamy within the country and discourage the practice.<sup>79</sup>

Some experts believe polygamous customary marriages violate gender equality because they allow a husband to marry more than one wife whereas women are permitted only one husband.<sup>80</sup> 12.5% of women in Namibia report that their husbands have more than one wife.<sup>81</sup> Polygamous relationships are not currently recognized by the Namibian government, even if they are entered into as customary marriages.<sup>82</sup> As a result, they are not registered with any agency and if a polygamous spouse dies, the non-legal wives are labeled as “single”.<sup>83</sup> This categorization has clear and deleterious effects related to inheritance and governmental benefits afforded to married persons. For instance, under customary law, a man may own land under a customary land right, which he is entitled to for life.<sup>84</sup> When he dies, that right reverts to the local chief, the rightful heir, or the man’s legal spouse.<sup>85</sup> For women in polygamous marriages, however, the inheritance system becomes complicated. There are questions of which wife is entitled to how much of the share as well as how to divide inheritance among the children.<sup>86</sup>

As a basis of comparison, law reform in Kenya has sparked debate about whether or not polygamous marriages should be outlawed or given legal status. In April 2014, Kenyan President Uhuru Kenyatta signed a bill which allows a Kenyan man to marry as many women as he desires.<sup>87</sup> Proponents of the bill point out that the new law abolishes unregistered customary

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 22.

<sup>80</sup> See Ambunda and de Klerk, *supra* note 20 at 70.

<sup>81</sup> See LeBeau, *supra* note 47 at 18.

<sup>82</sup> See Ambunda and de Klerk, *supra* note 20 at 69.

<sup>83</sup> *Id.*

<sup>84</sup> See Ovis, *supra* note 8 at 99.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> BBC News Africa, *President Uhuru Kenyatta signs Kenya Polygamy Law*, BBC NEWS AFRICA, Apr. 29, 2014, <http://www.bbc.com/news/world-africa-27206590>.

marriages that could be dissolved without legal divorce proceedings and subjects all customary marriages to regulation.<sup>88</sup> Prior to enacting the bill, although women in plural marriages were allowed to *claim* equal shares of the marital property, it was difficult to determine what portion of the property each spouse was entitled to in cases of divorce.<sup>89</sup>

Similar problems arise in the context of Namibian customary marriages where polygamy is involved. The Communal Land Reform Act of 2002 states that when a husband dies, his land right is to be inherited by his spouse.<sup>90</sup> According to the Act, the term “spouse” encompasses customary marriages that have not been registered, but it is silent on whether polygamous spouses are included.<sup>91</sup> It is unclear—and often contested—whether polygamous marriages in Namibia offer women financial security they may not otherwise have or if the practice perpetuates the role of women as subordinate actors in society.<sup>92</sup>

*f. Marital Property Systems*

**i. Property Systems In Civil Marriage**

Two basic marital property arrangements apply to civil marriages in Namibia.<sup>93</sup> The first type of arrangement is known as “in community of property.”<sup>94</sup> In this system, all possessions and debts acquired by a man and a woman become part of a “joint estate” upon marriage.<sup>95</sup> In addition, any money or property acquired throughout the course of the marriage is added to the joint estate.<sup>96</sup> The second arrangement, known as “out of community of property,” separates the

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Mercedes Ovis, POLYGAMY: TO SHARE OR NOT TO SHARE? THAT IS THE QUESTION, 3 (Gender Research and Advocacy Project Legal Assistance Center 2005).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See LeBeau, *supra* note 47 at v.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

belongings and debts of the husband and wife.<sup>97</sup> Everything acquired before a marriage remains that respective spouse's separate property.<sup>98</sup> The husband and wife separate their individual earnings and ownership of property stays with the one who acquired it.<sup>99</sup> However, unless the couple drafts a prenuptial contract specifically adopting the "out of community property" regime, Namibian marriages automatically operate under the "in community of property" model.<sup>100</sup>

Historically, which marital property arrangement applies depended upon where, geographically, the marriage occurred.<sup>101</sup> Part of the Native Administration Proclamation 15 of 1928—which is still in force today—dictates that all civil marriages between natives that occur north of the "Old Police Zone" are automatically "out of community property", unless there was a declaration establishing otherwise that was made prior to the marriage taking place.<sup>102</sup> This difference is the direct result of Namibia's apartheid history and is viewed as blatant racial discrimination under the law.<sup>103</sup>

The Married Persons' Equality Act 1 of 1996 significantly decreased the marital power of the husband and increased the power of the wife in civil marriages.<sup>104</sup> Today, women in civil marriages are allowed to contract, litigate, and register moveable property in their name.<sup>105</sup> However, limitations exist if a married woman desires to confer any real right in any moveable property forming part of a joint estate, as she must obtain consent from her husband.<sup>106</sup>

## **ii. Property Systems In Customary Marriage**

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See Amoo, supra note 7 at 211.*

<sup>103</sup> *See LeBeau, supra note 47 at v.*

<sup>104</sup> *Id.* at 19.

<sup>105</sup> *See Amoo, supra note 7 at 213.*

<sup>106</sup> *Id.*

None of the civil marriage property arrangements above apply to the customary marriage property regimes.<sup>107</sup> Systems of property ownership in customary marriages are determined solely by customary law and women neither own nor inherit property in most customary marriages.<sup>108</sup> Rather, any property interest a woman may possess occurs through vicarious ownership, generally through husbands, fathers, uncles, brothers and sons.<sup>109</sup> In many cases, the husband's control over property and finances applies to property acquired before the marriage as well.<sup>110</sup>

It is impossible to succinctly summarize the customary marriage marital property systems.<sup>111</sup> They are infinitely complicated by whether a community follows matrilineal or patrilineal descent systems, practices of different communities within the same ethnic group, and differing accounts of what constitutes customary practice per se.<sup>112</sup> Moreover, customary property regimes become increasingly convoluted if widow inheritance, polygamy, lobola, or all three factors are present.<sup>113</sup> However, the following sections attempt to generally describe the main frameworks used in customary law across the country.

*g. Inheritance Frameworks*

**i. Regional Customary Inheritance**

Kinship systems in traditional communities dictate methods of inheritance.<sup>114</sup> Kinship is most commonly classified in terms of matrilineal or patrilineal bloodlines, though some traditional communities have adopted a hybrid version of the practice.<sup>115</sup> In matrilineal systems,

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<sup>107</sup> See Hubbard, *supra* note 23 at 39.

<sup>108</sup> See Ruppel, *supra* note 1 at 22.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Hubbard, *supra* note 23 at 39.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 40.

<sup>114</sup> See LeBeau, *supra* note 47 at 23.

<sup>115</sup> *Id.*

the children are considered a part of the mother's bloodline whereas they belong to the father's family in patrilineal systems.<sup>116</sup> Dividing property according to customary law is particularly difficult because it is generally not recorded in written form.<sup>117</sup> Under each system, however, women, younger sons, and children born outside of marriage stand to lose the most under customary inheritance.<sup>118</sup> According to Manfred Hinz, the less powerful but nevertheless legitimate interests of women and children call for special protection.<sup>119</sup>

## **ii. Matrilineal Inheritance**

Customary rules of inheritance differ between communities and depend on whether the tribe follows a matrilineal or patrilineal system of inheritance.<sup>120</sup> The Nama and Damara communities follow a patrilineal system, the Owambo and Kavango follow matrilineal, and the Herero communities follow a hybrid descent system.<sup>121</sup> "In matrilineal communities the deceased husband's family, customarily his male relatives...inherit all matrimonial property regardless of how or who brought the property into the marriage."<sup>122</sup>

Matrilineal customary inheritance is practiced by the Owambo people in the north, where there are between twenty and thirty matrilineal clans.<sup>123</sup> The inheritors include the husband's male relatives, one of which is typically appointed the trustee of the estate.<sup>124</sup> Spouses are not members of each other's matrilineage and because children belong to the mother's lineage, they have no right to inherit from their father's estate.<sup>125</sup> "Among the Owambo, the executor is

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Manfred Hinz, STRENGTHENING WOMEN'S RIGHTS: THE NEED TO ADDRESS GAPS BETWEEN CUSTOMARY AND STATUTORY LAW, 101 (OC Ruppel, ed., Windhoek, Macmillan 2008).

<sup>120</sup> *See Amoo, supra* note 7 at 215.

<sup>121</sup> *See LeBeau, supra* note 47 at 7.

<sup>122</sup> *Id.* at xi.

<sup>123</sup> *See Ovis, supra* note 8 at 70.

<sup>124</sup> Mercedes Ovis, WOMEN'S LAND AND PROPERTY RIGHTS, THE MISSING LINK: PROPOSALS FOR THE REFORM OF INHERITANCE LAWS IN NAMIBIA, 4 (Legal Assistance Center, Windhoek 2005).

<sup>125</sup> *Id.*

generally the principle heir, the deceased's mother's brother, or if no brothers are available, the eldest son of the deceased's eldest sister."<sup>126</sup> Although the executor has an obligation to award some inheritance to each of the immediate uterine relatives, it is assumed he will award himself the majority of the property.<sup>127</sup>

### **iii. Patrilineal Inheritance**

The Nama people are an example of a patrilineal inheritance system in Namibia. The Nama are broken into several different communities, one of which is the Vaalgras.<sup>128</sup> The Vaalgras are then divided into several houses: the Appolises, the Stefanuses, the Hindas, the Katzaos, and the Biwas.<sup>129</sup> In the Vaalgras patrilineal system of inheritance, property, status, and rights are transmitted through the father's line.<sup>130</sup> Generally speaking, the deceased husband's children — usually his first born son — inherit all matrimonial property.<sup>131</sup> “The widow is more likely to inherit small items or maintain control over property inherited by her children if the children are still too young to manage the estate.”<sup>132</sup> However, this approach is often idealistic at best.

After the funeral of a male relative, the eldest son becomes the executor of the estate.<sup>133</sup> The brother of the deceased assumes the role if a capable son is unavailable. Absent a brother, the headman of the local council will assume the responsibility.<sup>134</sup> Few Vaalgras men execute wills prior to their death which leads to frequent property disputes and land theft.<sup>135</sup> “Death can degenerate into a race to collect the death certificate, because the person who then presents this

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<sup>126</sup> See Ovis, *supra* note 8 at 78.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 32.

<sup>129</sup> *Id.* at 35.

<sup>130</sup> *Id.* at 33.

<sup>131</sup> See LeBeau, *supra* note 47 at xi.

<sup>132</sup> *Id.*

<sup>133</sup> See Ovis, *supra* note 8 at 41-2.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 42.

to the local magistrate can be appointed executor and then has the power to withdraw the deceased's money from the bank."<sup>136</sup> All children, legitimate, illegitimate, foster and adopted are eligible to inherit property. Daughters, however, generally have weaker claims based on the reasoning they are eligible to receive financial benefits through marriage.<sup>137</sup>

#### **iv. Among Heirs**

Before any property can be distributed among heirs, all debts from the deceased's estate must be paid.<sup>138</sup> In civil marriages, the division and distribution of property after death depends on whether a civil marriage is in or out of community of property.<sup>139</sup> Upon the death of a spouse in an "in community of property" marriage, the joint marital estate is divided and the surviving spouse given their equal share before anyone else inherits anything from the deceased.<sup>140</sup> In the event of death of the husband or wife in an "out of community property" marriage, the surviving spouse maintains their separate property and the property of the deceased within the estate can be distributed accordingly.<sup>141</sup>

In the event the deceased has left a will, after debts have been paid and after dividing joint property, the estate will be distributed by the terms of the testamentary instrument.<sup>142</sup> However, the Native Administration Proclamation 15 of 1928 creates racial and gender discriminations that restrict the power of some to make wills.<sup>143</sup> Most black men in Namibia have extremely limited testamentary freedom and have relied on the property distributions under customary law instead.<sup>144</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See LeBeau, supra* note 47 at vi.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 55.

<sup>143</sup> *Id.* at vii.

<sup>144</sup> *Id.* at vi-vii.

If the deceased dies intestate, their estate will be governed by either intestate statutes or customary laws of intestacy, dependent upon whether or not the deceased belonged to a community that lives under the precepts of customary law.<sup>145</sup> The Succession Ordinance 12 of 1946 generally sets the order of inheritance to relatives.<sup>146</sup> However, race has traditionally determined the course of intestate succession and many native Namibians are subjected the customary law on the distribution of property to their heirs rather than to the civil law set by statutes.<sup>147</sup>

How customary law applies to an estate varies among communities and inheritance frameworks. As described above, distribution of property upon death depends on whether the community follows a matrilineal system or a patrilineal system.<sup>148</sup> Under both frameworks, customary laws that regulate property distribution among heirs discriminates against women, younger siblings, and children.<sup>149</sup>

#### **v. Widow Inheritance**

Widow inheritance, or levirate marriage, is still practiced among many traditional communities including the Owambo, Herero, and Lozi.<sup>150</sup> While some argue the practice shields women from poverty, the act of “passing down” a widow suggests another motive. Specifically, the widows are prevented from inheriting and owning their husband’s property outright and therefore are incapable of achieving social liberty.<sup>151</sup>

[W]hen a man dies one of his male relatives—usually the deceased husband's brother, nephew or uncle—will 'inherit' his widow. The husband's extended family decides who will inherit the widow and sends the man 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

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<sup>145</sup> *Id.* at vii.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 43.

<sup>151</sup> *Id.*

relations with the man who inherits her, unless she is elderly in which case the couple will simply live together.<sup>152</sup>

This system of inheritance also leaves widows vulnerable to domestic violence and dispossession.<sup>153</sup> If a widow does not want to be inherited, she is generally allowed to leave and return to her family, though doing so renounces her claim to her children and her husband's property.<sup>154</sup> In cases where the wife is inherited by a brother who is already married, she becomes subservient to his first wife, regardless of the first wife's age.<sup>155</sup>

The man who inherits the widow does not own the deceased's property outright. Ideally, he becomes the trustee of the property and distributes it to the dead man's children.<sup>156</sup> However, it appears the common trend is for the new husband to sell off the property.<sup>157</sup> Any children that result from that union of the widow and her new husband are considered heirs of the deceased.<sup>158</sup> "Property grabbing" is another way Namibian women are disenfranchised after the death of their husband.

#### **vi. Property Grabbing**

Widespread property grabbing is also detrimental to surviving female relatives throughout Namibia. Property grabbing is the unlawful appropriation of property by relatives of the deceased male relative.<sup>159</sup> The practice is often cited as one of the most discriminatory aspects of the customary law system.<sup>160</sup> Most commonly, matrilineal family members will strip a woman of her property rights, leaving her financially destitute.<sup>161</sup> The relatives then overtly

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<sup>152</sup> *Id.*

<sup>153</sup> *See Ovis, supra* note 8 at 60.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 59.

<sup>157</sup> *Id.* at 60.

<sup>158</sup> *Id.* at 61.

<sup>159</sup> N.M. Ali, HIDDEN IN THE MEALIE MEAL: GENDER-BASED ABUSES AND WOMEN'S HIV TREATMENT IN ZAMBIA, 34 (Human Rights Watch Volume 19, No. 18(A), ed. 2007).

<sup>160</sup> *See Ambunda and de Klerk, supra* note 20 at 73.

<sup>161</sup> *Id.*

evict the widow and her children from the home.<sup>162</sup> However, property grabbing in Namibia can also be subtle. For instance, a surviving spouse may be pressured by her husband's family to withdraw large amounts of money and deliver it to the family under the pretext of paying for funeral expenses.<sup>163</sup> Namibia's attempts to outlaw property grabbing through legislation have proved generally ineffective.<sup>164</sup>

Property grabbing affects the decedent's children as well. Left without any property or means, children must be cared for by other family members.<sup>165</sup> In the case of orphans, many children never see their share of the inheritance, even if custom dictates they are heirs to the property.<sup>166</sup> In an effort to provide women and children with more property upon the husband's death, legal reform should differentiate between "modern" and "traditional" property.<sup>167</sup>

Traditional forms of real and personal property include homesteads, ancestral lands, and cattle.<sup>168</sup> Modern property also includes items such as cars and houses.<sup>169</sup> It is often the case that the husband's family will have deep-rooted emotional connections to traditional property, especially if it has been in the family for generations.<sup>170</sup> Modern property generally does not possess the component of sentimentality, allowing women more success in securing these items upon the husband's death.<sup>171</sup> While this proposed method may secure women's ownership to property in the short-term, it is unlikely such distribution would be equitable, particularly in the agrarian communities where most traditional communities reside.<sup>172</sup>

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<sup>162</sup> See Ruppel, *supra* note 1 at 24.

<sup>163</sup> See Ovis, *supra* note 8 at 166.

<sup>164</sup> *Id.* at 130.

<sup>165</sup> *Id.* at 37.

<sup>166</sup> *Id.*

<sup>167</sup> See Hubbard, *supra* note 23 at 125.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Southern Africa scholar Manfred Hinz suggests that attempts to implement western ideas of inheritance and succession will be met with resistance. “The need to respect family expectation...will not allow the unlimited introduction of the general law of testate succession; nor will it allow for the estate to be divided in accordance with mathematically calculated shares to the closest members of kin, as defined by the Western monogamous family concept.”<sup>173</sup> Among traditional communities, there are certainly inheritance expectations under customary law.<sup>174</sup> Therefore, legislative reform designed to address property grabbing will likely need to grant accommodations for these expectations, rather than outlaw customary norms altogether.

#### *h. Property Division Upon Divorce*

Grounds for divorce in Namibia may be best described as fault-based. Grounds for divorce include adultery by the wife, taking a second wife without the consent of the first, barrenness, drunkenness, and child neglect.<sup>175</sup> It should be noted that most grounds for divorce apply exclusively to women, thus alluding to the inherent discrimination within customary marriages.<sup>176</sup> Because the requirements for divorce are quite stringent, many spouses decide to live separately while continuing to be married.<sup>177</sup> This arrangement, however, leads to disputes when one of the spouses passes away and the marriage is legally terminated by death.<sup>178</sup>

During customary divorce, distribution of property occurs independent of any court.<sup>179</sup> “Common law principles which guide maintenance, the distribution of the matrimonial estate, and custody of children of the marriage play no role in customary law. Customs regarding property division upon divorce may vary greatly among communities and, therefore, reflect

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<sup>173</sup> See Hinz, *supra* note 119 at 101.

<sup>174</sup> *Id.*

<sup>175</sup> See Ambunda and de Klerk, *supra* note 20 at 58.

<sup>176</sup> See LeBeau, *supra* note 47 at 24.

<sup>177</sup> Tousy Namiseb, WOMEN AND LAW REFORM IN NAMIBIA—RECENT DEVELOPMENTS; *in* WOMEN AND CUSTOM IN NAMIBIA: CULTURAL PRACTICE VERSUS GENDER EQUALITY? 112 (Oliver C. Ruppel Ed., Windhoek, MacMillan Education Namibia 2008).

<sup>178</sup> *Id.*

<sup>179</sup> See Ambunda and de Klerk, *supra* note 20 at 58.

different realities in this respect.”<sup>180</sup> Another potentially sex-based form of discrimination arises when some communities require the return of the lobola paid by the husband prior to marriage.<sup>181</sup>

In most communities, livestock, the homestead, and large moveable property such as cars are awarded to the men.<sup>182</sup> Household property is generally awarded to the wife.<sup>183</sup> In most customary divorces, the wife received little or none of the marital property, even if the husband is the at-fault party.<sup>184</sup> Customary divorces are heard in customary courts, headed by men and in which women may not be allowed to attend or speak.<sup>185</sup> It is also common for the head of court to be related to the husband.<sup>186</sup> Although the Communal Land Reform Act (discussed below) allows women to remain on communal land if they are widowed, the law does not address the rights of a wife in the event of divorce.<sup>187</sup>

## II. Namibian Constitution

The Namibian Constitution was adopted in 1990, just a month before the country gained its independence from South Africa.<sup>188</sup> Today, the Constitution is the primary source of civil law for the country and is the supreme law of the land.<sup>189</sup> Below is a brief synopsis of key provisions related to women’s constitutional protections which will be examined in further detail later in this report.

### a. Article 10: Equal Protection

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<sup>180</sup> *Id.*

<sup>181</sup> *See* LeBeau, *supra* note 47 at 24.

<sup>182</sup> *Id.* at 40-1.

<sup>183</sup> *Id.* at 41.

<sup>184</sup> *Id.* at 40.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 41.

<sup>188</sup> *See* Ruppel, *supra* note 1 at 22.

<sup>189</sup> *Id.*

The Namibian Constitution creates an equal protection clause guaranteeing equality among the sexes.<sup>190</sup> Article 10 explicitly states that, “[a]ll persons shall be equal before the law” and that “[n]o persons shall be discriminated against on the grounds of race, sex, colour, ethnic origin, religion, creed or social economic status.”<sup>191</sup> This Article is particularly relevant to women’s property rights because customary law is still influenced by cultural values that promote traditional patriarchy.<sup>192</sup>

*b. Article 66*

Article 66 of the Namibian Constitution establishes the legitimacy of customary and common law in the country.<sup>193</sup> The Constitution states that, “both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.”<sup>194</sup> It is important to note that even though customary and common laws are given recognition, Article 66 also ensures that any part of the common or customary law may be repealed or modified by the Namibian Parliament at any time if it conflicts with the Constitution.<sup>195</sup>

*c. Article 25*

Article 25 of the Constitution provides for the enforcement of established fundamental rights and freedom. It mandates that no government actor shall make any law or take any action that abridges the fundamental rights and freedom provided within the Constitution.<sup>196</sup> Such law or action will be deemed invalid, though the Constitution states that it is within the discretion of

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<sup>190</sup> *Id.* at 3.

<sup>191</sup> The Constitution of the Republic of Namibia, Article 10 (1990).

<sup>192</sup> *See Ovis, supra* note 8 at 5-6.

<sup>193</sup> *See Ruppel, supra* note 1 at 16.

<sup>194</sup> The Constitution of the Republic of Namibia, Article 66, (1990).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

a court to allow the offending government actor to correct any defect in the law or action within a specific period of time.<sup>197</sup>

Article 25 also provides a remedial path for Namibians who believe their fundamental rights and freedoms have been infringed upon or threatened.<sup>198</sup> Aggrieved persons may approach the court to enforce protection and may also approach an ombudsman to provide them with legal assistance or advice.<sup>199</sup> The court is given authority to make orders necessary to provide for the fundamental rights and freedoms of aggrieved persons, including monetary compensation.<sup>200</sup>

*d. Article 14*

Civil family law and equal protection within a marriage is set out in Article 14 of the Namibian Constitution. Namibian constitutional law limits marriage to a unity between a man and a woman of full age and mandates that both parties must be fully consenting and intending spouses.<sup>201</sup> The Constitution also instructs that marriage should occur without any limitations due to race, color, ethnic origin, nationality, religion, creed or social or economic status. The Constitution provides that, men and women “shall be entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>202</sup>

III. Relevant Laws

*a. Communal Land Reform Act of 2002*

In Namibia, communal land which previously belonged to indigenous communities is now vested in the state.<sup>203</sup> The Communal Land Reform Act of 2002 allocates rights in respect of communal land, provides for the establishment of communal land boards, and sets out the

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<sup>197</sup> The Constitution of the Republic of Namibia, Article 25 (1990).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> The Constitution of the Republic of Namibia, Article 14 (1990).

<sup>202</sup> *Id.*

<sup>203</sup> *See Ovis, supra* note 8 at 68.

powers and functions of traditional authorities and chiefs.<sup>204</sup> The Act governs land rights in communal areas and therefore, takes precedence over customary law.<sup>205</sup> As written, the Act functions as legislation to improve the inheritance rights of women.

The communal land boards established by the Act control the allocation and cancellation of customary land rights as well as consider applications for rights of leasehold.<sup>206</sup> The boards may be composed of varying numbers of people.<sup>207</sup> However the Communal Land Reform Act of 2002 mandates that each board must have at least four female members who are engaged in farming activities and have expertise in the functions of the board.<sup>208</sup> The chief of traditional communities is in charge of allocating and canceling customary land rights.<sup>209</sup> However, allocations of customary land rights by the chief have no legal effect until ratified by a communal land board certifying the allocations are in line with the Act and a certificate of registration is given to holder of the customary land right.<sup>210</sup>

Once someone is granted a customary land right, he or she is entitled to it for the duration of his or her life.<sup>211</sup> Upon death, the right reverts to the chief or local traditional authority to be re-allocated to the surviving spouse or rightful heir.<sup>212</sup> Under the Act, a spouse is defined as a partner in a customary union, even if the union is not registered.<sup>213</sup> However, the Act is unclear regarding how it should be applied to polygamous marriages and any adopted children from previous marriages.<sup>214</sup> These blurred lines complicate the inheritance of land rights under

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<sup>204</sup> *Id.*

<sup>205</sup> *See Amoo, supra* note 7 at 8.

<sup>206</sup> *See Ovis, supra* note 8 at 98.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 98-9.

<sup>211</sup> *Id.* at 99.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

customary law. The Act indicates that if she wishes, a widow or a widower has a right to remain on customary land allocated to her deceased spouse.<sup>215</sup> Community land boards, therefore, are designed to ensure that widows are not pressured by their in-laws to give up their late husband's land rights.<sup>216</sup>

*b. Gender Based Legislation*

Despite protections for gender equality provided for in international and Namibian domestic law, inequality between men and women remains a pervasive issue in the country.<sup>217</sup> Due to the ineffectiveness of existing laws, Namibia enacted additional legislation to improve gender equality.<sup>218</sup> Specifically, the country adopted Namibia's Gender policy as well as the National Gender Plan of Action.

**i. Namibia's Gender Policy**

In 1997, Namibia adopted the National Gender Policy in an effort to close the gender gap caused by socio-economic, political, and cultural inequalities between men and women.<sup>219</sup> In 2010, a review of the policy was conducted and revealed some progress had been made, but inequalities remained widespread.<sup>220</sup> As a result, a new policy, the Namibian National Gender Policy 2010-2020 was developed to continue the quest towards gender equality.<sup>221</sup>

The National Gender Policy 2010-2020 is based on existing domestic and international law precluding discrimination based on gender.<sup>222</sup> The overarching goal is to, "achieve gender

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<sup>215</sup> *Id.* at 100.

<sup>216</sup> *Id.*

<sup>217</sup> *See Ruppel, supra* note 1 at 21-2.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> The Namibian Ministry of Gender Equality and Child Welfare, NATIONAL GENDER POLICY (2010-2020), 9 (2010).

<sup>221</sup> *Id.* at 4.

<sup>222</sup> *Id.* at 10-11.

equality and the empowerment of both female and male persons in Namibia.”<sup>223</sup> The process integrates and mainstreams gender perspectives in the broad development framework and in line with National Development Plans.<sup>224</sup> This process depends on the effective implementation of the Policy and the efficient utilization of allocated resources, resulting in a “society in which women and men enjoy equal rights and equal access to basic services, as well as opportunities to participate in and contribute towards the political, social, economic and cultural development of Namibia.”<sup>225</sup> The Policy is divided into twelve main concerns and identifies those responsible for policy implementation and those held accountable for results.<sup>226</sup>

## **ii. National Gender Plan of Action**

Accompanying the Namibian National Gender Policy is a National Gender Plan of Action for the implementation of the Policy. The Plan is designed to function alongside National Development Plans, the SADC Protocol on Gender and Development, and the Millennium Development Goals in order to fully implement the Gender Policy.<sup>227</sup> It is divided into seven “clusters” covering areas such as gender and human rights, gender and education, and gender and health.<sup>228</sup> The Plan identifies key issues within each topic and key priority actions, along with strategies, targets, and costs for each action. The initial focus of the plan is on actions to be completed by 2015.<sup>229</sup>

One of the key priorities of the plan is to “ensure gender equality and respect for the important role of women in all aspects of family life, including steps to protect women’s rights in respect of marriage, divorce, maintenance, inheritance, and cohabitation.”<sup>230</sup> By 2015, the Ministry of Gender Equality and Child Welfare plans to conduct a gender assessment of

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<sup>223</sup> *Id.* at 20.

<sup>224</sup> *Id.* at 3.

<sup>225</sup> *Id.* at 10.

<sup>226</sup> *Id.* at 3.

<sup>227</sup> National Gender Action Plan, 3 (Namibia Ministry of Gender Equality and Child Welfare, November 2011).

<sup>228</sup> *Id.* at 7-8.

<sup>229</sup> *Id.* at 2.

<sup>230</sup> *Id.* at 11.

Namibian laws and policies to analyze women’s ability to inherit, own, and access property.<sup>231</sup> The ministry also hopes to analyze the issue of polygamy in hopes of requiring “equitable distribution of marital property between all interested parties”.<sup>232</sup> Lastly, and perhaps most significantly, the Ministry plans to campaign and lobby for a new bill and take steps to prohibit the practice of “property grabbing” and to “abolish discrimination against women linked to inheritance”.<sup>233</sup> A litigation team should focus on each of these national standards as they align perfectly with the goals of women’s right to inherit property under systems of customary law.

#### IV. International Law

Namibia is a party to several international and regional legal instruments that prohibit sexual discrimination and guarantee the right to property ownership.<sup>234</sup> In particular, Namibia is party to the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and People’s Rights, as well as the Convention on the Elimination of All Forms of Discrimination against Women.<sup>235</sup> Additionally, Namibia has ratified the Universal Declaration of Human Rights.<sup>236</sup>

##### *a. Right to Own and Enjoy Property*

##### **i. International Covenant on Economic, Social and Cultural Rights (ICESCR)**

Although Namibia is not a signatory, it acceded to the ICESCR in November 1994.<sup>237</sup> Particularly relevant to women’s property rights is Article 11, which addresses the right to

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 13.

<sup>233</sup> *Id.*

<sup>234</sup> *See* Hubbard, *supra* note 23 at 24.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 10.

<sup>237</sup> The United Nations Treaty Collection , INTERNATIONAL CONVENTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, available at [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty).

housing.<sup>238</sup> Article 11 guarantees “the right of everyone to an adequate standard of living for himself and his family”.<sup>239</sup> The Committee on Economic, Social and Cultural Rights (CESCR) is quick to delineate the difference between shelter and housing. It reports in the CESCR general recommendations that Article 11 guarantees people the right to “live somewhere in security, peace and dignity.”<sup>240</sup> Similar to the Universal Declaration of Human Rights, the ICESCR bars all forms of discrimination.<sup>241</sup> Article 3 ensures the equality of men and women concerning the right to enjoy all economic, social, and cultural rights.<sup>242</sup>

Academics speculate that ICESCR rights are treated merely as political programs rather than fundamental human rights.<sup>243</sup> However, ICESCR rights are imbedded into the Namibian Bill of Rights which allows individuals and groups to seek judicial relief if those rights are violated.<sup>244</sup> Furthermore, Article 144 of the Constitution incorporates the general rules of public international law into the Namibian body of law.<sup>245</sup> Therefore, the rights afforded in the Covenant are enforceable on a domestic level by Namibian courts.

## **ii. International Covenant on Civil and Political Rights (ICCPR)**

Both the ICESCR and the ICCPR are referred to as the International Bill of Rights, containing nearly all fundamental human rights found in international law.<sup>246</sup> As with the

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<sup>238</sup> See Ovis, *supra* note 8 at 11. “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions...”. International Covenant on Economic, Social and Cultural Rights Art. 11(1) (1976).

<sup>239</sup> INTERNATIONAL CONVENTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Art. 11.

<sup>240</sup> See Ovis, *supra* note 8 at 12.

<sup>241</sup> See Ruppel, *supra* note 1 at 13.

<sup>242</sup> *Id.*

<sup>243</sup> John Nakuta, THE JUSTICIABILITY OF SOCIAL, ECONOMIC AND CULTURAL RIGHTS IN NAMIBIA AND THE ROLE OF THE NON-GOVERNMENTAL ORGANIZATIONS, *IN HUMAN RIGHTS AND THE RULE OF LAW IN NAMIBIA*, 94 (Nico Horn and Anton Bosl, eds., Konrad-Adenauer-Stiftung 2009).

<sup>244</sup> *Id.* at 97.

<sup>245</sup> *Id.*

<sup>246</sup> Francois-Xavier Bangamwabo, THE IMPLEMENTATION OF DOMESTIC AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS IN NAMIBIAN LEGAL FRAMEWORK, *IN HUMAN RIGHTS AND THE RULE OF LAW IN NAMIBIA*, 174 (Nico Horn and Anton Bosl, eds., Macmillan Education Namibia 2009).

ICESCR, the ICCPR was entered into force in Namibia via article 144 of the Constitution.<sup>247</sup> Thus, the rights included in the document are enforceable in Namibian judicial bodies.<sup>248</sup>

Chapter 3 of Namibia's Constitution incorporates many of the ICCPR's fundamental rights, two of which are the right against discrimination based on sex and the right to private property.<sup>249</sup> In the case *Chairperson of the Immigration Selection Board v. Frank & Another*, the Court used the ICCPR right against discrimination, integrated into Article 10 of the Constitution, to prohibit discrimination on any ground, including sex.<sup>250</sup> Naturally, this prohibition based on discrimination also applies to property rights and inheritance.

*b. Right to Non-discrimination and Equality*

**i. CEDAW**

The Convention on the Elimination of All Form of Discrimination against Women (CEDAW) is an international bill of rights for the protection of women's fundamental liberties.<sup>251</sup> Primarily, the document defines what constitutes discrimination against women.<sup>252</sup> Every four years, countries that have ratified the Convention must submit national reports detailing their efforts to comply with their treaty obligations.<sup>253</sup> After Namibia acceded to CEDAW in 1992, the provisions became binding on the State.<sup>254</sup>

Article 16 of CEDAW directly addresses the rights of women in marriage, particularly in relation to property rights. It requires state parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" and provides women the same rights "in respect of the ownership, acquisition, management,

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 175.

<sup>250</sup> *The Chairperson of the Immigration Selection Board v. Frank & Another*, 1999 NR 57 (SC).

<sup>251</sup> See Hubbard, *supra* note 23 at 24.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

administration, enjoyment and disposition of property”.<sup>255</sup> Also notable is Article 5, which states that cultural heritage is not a valid defense to practices of gender inequality.<sup>256</sup>

General Recommendation 21 targets the issue of polygamy and deems it a discriminatory practice against women.<sup>257</sup> This Recommendation also emphasizes the right of women to exercise equal control over marital property.<sup>258</sup> Although CEDAW does not directly address inheritance, the Recommendation requests State Parties “to include information on inheritance, including inheritance under customary laws, in their report.”<sup>259</sup> For this reason, it is vital Namibia move towards the registration of all marriages, civil and customary. If customary marriages are registered, it will be easier to assess property rights in traditional communities and create necessary legislative reform within the country.

## **ii. African Charter on Human and People’s Rights**

The African Charter on Human and People’s Rights is the foundation for the protection and promotion of human rights in Africa.<sup>260</sup> Unlike other international instruments, it provides for “third-generation” or collective rights, such as the right to a satisfactory environment and the right to peace.<sup>261</sup> However, the document contains claw back clauses that limit certain civil and political rights.<sup>262</sup> Nonetheless, Articles 20, 21 and 22 state that “all peoples have right to existence, the right to their natural resources and property, and the right to their economic, social, and cultural development.”<sup>263</sup> Additionally, Articles 2 and 3 present the Charter’s clear goal of confronting discrimination. The rights and freedoms apply equally “without distinction of any

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 25.

<sup>257</sup> *Id.* at 26.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 27.

<sup>260</sup> Sheila B. Keetharuth, MAJOR AFRICAN LEGAL INSTRUMENTS AND HUMAN RIGHTS, *in* HUMAN RIGHTS IN AFRICA, 166 (Bosl and Diescho, eds., Macmillan Education Namibia 2009).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 169.

<sup>263</sup> *Id.* at 172.

kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.”<sup>264</sup>

The African Court on Human and People’s Rights serves as the enforcement mechanism for the Charter.<sup>265</sup> It was established by the Protocol to the African Charter on Human and People’s Rights, however, Namibia has not ratified the Protocol.<sup>266</sup> The Court has jurisdiction of all disputes related to the interpretation of the Charter.<sup>267</sup> The Court may receive complaints from the African Commission on Human and People’s Rights or state parties to the Protocol.<sup>268</sup> Non-governmental organizations with observer status before the Commission can also initiate cases.<sup>269</sup> Unfortunately, Namibia is not one of the five countries who have elected to grant observer status to NGOs.<sup>270</sup> Although Namibia is not a signatory to the Convention, it ratified the Charter on July 30, 1992.<sup>271</sup>

### **iii. Protocol on the Rights of Women in Africa**

A supplementary protocol to the African Charter on Human and Peoples’ Rights, the Protocol advances the protection and the promotion of the rights of women in Africa.<sup>272</sup> It was adopted by the African Union in July 2003 and entered into force in 2005.<sup>273</sup> The Protocol defines discrimination in the preamble as “any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy recognition, enjoyment, or the exercise by the women, regardless of their marital status, of

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<sup>264</sup> *Id.* at 173.

<sup>265</sup> African Union, THE AFRICAN COURT ON HUMAN AND PEOPLE’S RIGHTS, available at <http://www.au.int/en/organs/cj>.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *A Guide to Using the Protocol on the Rights of Women in Africa for Legal Action.* (viii)

<sup>273</sup> *Id.*

human rights and fundamental freedoms in all spheres.”<sup>274</sup> State parties are explicitly required to confront and combat discrimination against women.<sup>275</sup> Namibia signed the Protocol in 2003 and ratified it in 2004.<sup>276</sup>

Articles 7 and 21 provide fundamental freedoms directly related to women’s property rights. In marriage and divorce, women are entitled to an equitable share of the marital property.<sup>277</sup> Concerning inheritance, a widow has a right to an equitable share of the husband’s property and women have the right to inherit equitable portions of their parent’s property.<sup>278</sup> Perhaps most interesting to the topic of customary law, Article 17 requires the participation of women in determining cultural policies and practices.<sup>279</sup> Given customary law is created by the social norms and practices of the people in a community, educating women on potential property law reforms could lead to increased rights from the inside of communities outward.

#### V. Using Namibian Jurisprudence to Affect Women’s Right to Property

In Namibia, customary law and common law function simultaneously.<sup>280</sup> The courts of Namibia include the Supreme Court, the High Court, the Labour Court, regional lower courts, and district, and sub-district level magistrate courts.<sup>281</sup> Given common law is an officially incorporated piece of the Namibian legal system, court decisions are considered legally binding precedent.<sup>282</sup>

##### a. *Mwellie v. Minister of Works, Transport and Communication and Another (1995)*

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<sup>274</sup> See Keetharuth, *supra* note 60 at 181.

<sup>275</sup> *Id.* at 182.

<sup>276</sup> African Commission on Human and People’s Rights, RATIFICATION TABLE: PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA, available at <http://www.achpr.org/instruments/women-protocol/ratification/>.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> See Keetharuth, *supra* note 60 at 183.

<sup>280</sup> See Ndulo, *supra* note 15 at 88.

<sup>281</sup> *Namibia: Customary and common law including matters of inheritance; how conflicts between the two systems of law are resolved*, IMMIGRATION AND REFUGEE BOARD OF CANADA, Aug. 14, 2012, <http://www.refworld.org/docid/5053390d2.html>.

<sup>282</sup> *Id.*

*Mwellie v. Minister of Works, Transport, and Communication and Another* demonstrates that fundamental rights to gender equality in Namibia are not absolute and are subject to limitation.<sup>283</sup> This case involved a claim of an unlawful dismissal of a state employee and challenged the Constitutionality of the Public Service Act.<sup>284</sup> The court affirmed that, “the constitutional right of equality before the law is not an absolute right but its meaning and content permit the [g]overnment to make statutes in which reasonable classifications which are rationally connected to a legitimate object, are permissible.”<sup>285</sup> This case was the first judicial consideration of Article 10(1) of the Namibian Constitution and in its decision the court established a test similar to the rational basis test used in American jurisprudence.<sup>286</sup> In applying Article 10(1), “reasonable classifications” which are “rationally connected to a legitimate object” are permitted under the Namibian Constitution.<sup>287</sup> The court explained why it felt its approach was necessary given Namibia’s history:

In countries such as ours where discrimination was the rule rather than the exception an absolute application of equality will in all probability have the opposite effect from what it was intended for. To treat people as equal who are not equal may lead to the abrogation of rights instead of the protection thereof.<sup>288</sup>

*Mwellie* is an adverse piece for women’s property rights in Namibia. It limits Namibians’ access to fundamental rights and demonstrates the right to equality is not absolute. Invoking Article 10(1) has only been successful in proving unconstitutionality when it has been applied in conjunction with other laws.<sup>289</sup>

For instance, in *Detmold & Another v. Minister of Health and Social Services & Others*, 2004 NR 174 (HC), two German citizens argued the Children’s Act was unconstitutional under

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<sup>283</sup> See Ovis, *supra* note 8 at 9.

<sup>284</sup> Diane Hubbard, THE PARADIGM OF EQUALITY IN THE NAMIBIAN CONSTITUTION: CONCEPT, CONTOURS, AND CONCERNS, 215, 221 (2010).

<sup>285</sup> *Mwellie v. Minister of Works, Transport and Communication and Another*, 1995 (9) BCLR 1118 (NmH).

<sup>286</sup> See Hubbard, *supra* note 284 at 215, 221.

<sup>287</sup> *Id.* at 221.

<sup>288</sup> *Mwellie*, *supra* note 217, at 1132D-E.

<sup>289</sup> See Hubbard, *supra* note 284 at 225-6.

Article 10(1).<sup>290</sup> The Act prohibited the adoption of Namibian children to people lacking Namibian citizenship.<sup>291</sup> In addition to Article 10(1), the applicants also alleged the Act was unconstitutional under Article 14, which protects family matters.<sup>292</sup> Pairing these claims, the court found the Act unconstitutional because the different categories of potential parents “had no rational connection to a legitimate government purpose, since they had the effect of excluding children born to Namibian parents from adoption by persons who might provide them with the best possibility of a secure family life.”<sup>293</sup> For this reason, if a litigation team wants to challenge the unconstitutionality of women’s property rights under Article 10(1), the claim should include additional constitutional provisions as well.

*b. Muller v. President of Namibia and Another (1999)*

*Muller v. President of Namibia and Another (1999)* alleged that different name change rules for husbands and wives upon marriage violated Article 10 of the Constitution.<sup>294</sup> Muller was a husband who wished to take his wife’s surname for purposes of operating their joint business under her more distinct and recognized name.<sup>295</sup> In Namibia, a wife can easily change her name upon marriage, but it is a very difficult process for a husband to take his wife’s name.<sup>296</sup> Mr. Mueller petitioned the High Court arguing the additional requirements “infringed his rights to equality before the law and freedom from discrimination on the grounds of sex” pursuant to Article 10 of the Namibian Constitution.<sup>297</sup>

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<sup>290</sup> *Id.* at 223.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 233-4.

<sup>294</sup> Legal Assistance Centre, KEY JUDGEMENTS IN NAMIBIA 1990-2000, available at <http://www.lac.org.na/cases/keyjudgments.html>.

<sup>295</sup> See Hubbard, *supra* note 284 at 227.

<sup>296</sup> *Id.*

<sup>297</sup> See Legal Assistance Centre, *supra* note 294.

In addition to the rational basis test established in *Mwellie* for applying Article 10(1) of the Namibian Constitution, the *Muller* court established a procedure for Article 10(2).<sup>298</sup> The Muller Court found that Article 10(2) prohibits the creation of any legislation which discriminates based on sex, race, color, ethnic origin, religion, creed, or social or economic status, even if there is a legitimate legislative purpose.<sup>299</sup> In other words, the Court held that a stricter test should be applied for discriminatory differentiation on the grounds enumerated in Article 10(2), including gender,<sup>300</sup> than the “rational connection test” established in *Mwellie* for Article 10(1).<sup>301302</sup>

The court explained that the grounds enumerated in Article 10(2) “are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics;”<sup>303</sup> and that any guarantee of non-discrimination would be negated if the rational connection to a legitimate legislative objective could justify discrimination based on sex, race, color, ethnic origin, religion, creed, or social or economic status.<sup>304</sup> *Muller* also held that to determine presence of unfair discrimination, a court should look at the purpose of the discrimination and whether its effect led to the impairment of human dignity.<sup>305</sup> Whereas discrimination based on sex and gender is specifically banned in Article 10(2), a fight women’s property rights should rely heavily on this case. *Muller* could also be used to support an argument that women’s unequal rights to own property are an impairment of their human dignity.

c. *Frank and Another v. Chairperson of the Immigration Selection Board (2001)*

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<sup>298</sup> *Id.*

<sup>299</sup> See Ambunda and de Klerk, *supra* note 20 at 75.

<sup>300</sup> Article 10(2) states, “No persons may be discriminated against on the ground of sex, race, colour, ethnic origin, religion, creed or social or economic status.”

<sup>301</sup> See Hubbard, *supra* note 284 at 227.

<sup>302</sup> Article 10(1) states, “All persons shall be equal before the law.”

<sup>303</sup> Muller v. President of the Republic of Namibia & Another 1999 NR 190 (SC), 199H-1.

<sup>304</sup> See Hubbard, *supra* note 284 at 228.

<sup>305</sup> *Id.*

*Frank and Another v. Chairperson of the Immigration Selection* is an example of a failed attempt to make a claim based on Article 10 of the Constitution. The litigants claimed discrimination based on sexual orientation when a lesbian partners, one a Namibian citizen and the other a foreigner, were not granted similar immigration benefits as heterosexual couples.<sup>306</sup> The court held there was no constitutional discrimination because Article 10(2) does not explicitly prohibit discrimination on the grounds of sexual orientation.<sup>307</sup> The court also held the claim failed under 10(1) for unfair discrimination because “equality before the law for each person does not mean equality before the law for each person’s sexual relationships.”<sup>308</sup> The court relied on the human dignity test from *Muller* and held that in the case of Frank, differentiation based on sexual preference was not discrimination because it did not impair human dignity.<sup>309</sup>

In the court’s *meru moto* consideration, it noted that “the state’s failure to afford the same treatment in respect of permanent residence to an...unrecognized lesbian relationship with obligations different from...marriage as compared to a recognized marital relationship amounts to differentiation, but not discrimination.”<sup>310</sup> This statement produces a double-edged sword in regard to cases involving Namibian women’s property rights. As a positive, this statement clearly states that marriage is a recognized relationship that warrants protection and prohibits discrimination based on gender. Unfortunately, the statement pointedly draws attention to the notion of “validity”. This may create problems for women who are wives in polygamous marriages under property law because they are not conferred legal married status under common law. Therefore, as a matter of litigation strategy, it would best to select a petitioner that is either divorced or widowed from a monogamous relationship.

*d. Mmusi and Others v. Ramantele and Others*

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<sup>306</sup> *Id.* at 230.

<sup>307</sup> *Id.* at 231.

<sup>308</sup> *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC), 155E-F.

<sup>309</sup> *See* Hubbard, *supra* note 284 at 231.

<sup>310</sup> *Id.*

*Mmusi and Others v. Ramantele and Others* was a 2013 case successful in establishing women's rights to property in Botswana. The case involved an inheritance dispute between four elderly sisters and their nephew.<sup>311</sup> After living in the family home and investing in improvements, the sisters argued they should inherit the home even though the nephew was the heir under customary law.<sup>312</sup> The nephew had never lived in the home.<sup>313</sup> The Court found unanimously for the sisters.<sup>314</sup>

The precedent created by this victory offers optimistic legal footing for similar litigation in Namibia. Similarities between the judicial and customary law systems of Botswana and Namibia could be highlighted in order to sway a Namibian court in the same direction as the *Mmusi* court. With respect to potential litigation in Namibia, it could also be helpful to find sympathetic plaintiffs similar to the sisters in *Mmusi* and to demonstrate how women in Botswana have been benefitted in the year since the decision.

## VI. Litigation

### a. *Objectives*

The primary objective of litigation should be to counteract the discriminatory aspects of customary law regarding women's property rights. While this goal may seem broadly ambitious, the foundational legal framework has already been laid. For instance, the Namibian Constitution, though it validates customary law, explicitly prohibits discrimination based on sex.<sup>315</sup> As discussed above, Namibia has ratified several regional and international conventions that also guarantee a woman's right to property and protection from discriminatory marital practices.<sup>316</sup> The first objective a litigation team should focus on is prohibiting the ongoing

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<sup>311</sup> Richard Lee, *Huge boost for women's rights in Botswana*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA, Oct. 12, 2012, <http://www.osisa.org/law/botswana/huge-boost-womens-rights-botswana>.

<sup>311</sup> Lisa Anderson, *Botswana women win landmark right to inherit under customary law*, THOMSON REUTERS FOUNDATION, Sep. 4, 2013, <http://www.trust.org/item/20130904043025-bt15h/>.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> Constitution of Republic of Namibia Art. 10(2) (2009)

<sup>316</sup> *See* above Section IV: International Law.

practices of lobola, widow inheritance, and property grabbing. These practices contravene the express fundamental rights granted to Namibian women in the Constitution and protected under international law and international human rights.<sup>317</sup> Banning these customary practices may begin to counter the traditional view of women as property that can be bought and traded, shifting the focus to human dignity and equality under the law.

The second focus of litigation should be the inability of women and girls to inherit forms of real and personal property under customary law. Regardless of whether a traditional community observes matrilineal, patrilineal, or hybrid systems of kinship, women and girls are entitled under domestic and international law to inherit or serve as the trustee of property.<sup>318</sup> Additionally, this portion of the litigation should attack the discriminatory practices regarding what forms—real or personal—of property women are entitled to upon either dissolution of marriage or the death of their husband. Specifically, women should not be relegated to inheriting only the relatively inconsequential property of the household.<sup>319</sup> Rather, they should be equally entitled to an equitable share in homes, land rights, and livestock.

A third potential objective may be to address polygamy in light of prohibitions of the practice. However, this issue faces many challenges making it potentially impractical for litigation at this time. Many polygamous marriages are not registered and are able to exist in customary law only.<sup>320</sup> Moreover, polygamy is a deep-rooted practice in many traditional communities. As a result, litigating this issue alongside the two previous objectives may muddy the waters of the first and second goals, creating a lack of credibility of legitimacy. While there is substantial research that suggests polygamy promulgates discriminatory practices and domestic violence, it is wise to leave the subject for a separate litigation campaign or, potentially, legislative reform.

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<sup>317</sup> See above Section IV: International Law.

<sup>318</sup> Constitution of the Republic of Namibia, Art. 10: “(1) All persons shall be equal before the law; 2) No persons may be discriminated against on the grounds of sex, race, colour [sic], ethnic origin, religion, creed or social or economic status.”

<sup>319</sup> See LeBeau, *supra* note 47 at 41.

<sup>320</sup> See Ambunda and de Klerk, *supra* note 20 at 69.

*b. General Litigation Strategy*

The most difficult aspect of formulating a general litigation strategy is that Namibian customary law does not easily lend itself to generalities. Formulating a strategy requires the consideration of many aspects including: 1) which rural tribe to target; 2) whether the target tribe follows a matrilineal or patrilineal kinship system; 3) whether to focus on divorced women, widows, or female children; 4) what enforcement mechanisms are in place to enact new legislation, and, perhaps most significantly, 5) what local legal team SALC should align with. It will also be necessary to critically analyze the risk-reward benefit before choosing a plaintiff.

A high risk plaintiff that offers the greatest return will come from a community with entrenched ties to customary law. She will possess the following characteristics: 1) she will be in a community that practices patrilineal kinship; 2) she will be young with daughters, 3) her husband will have paid lobola before marrying her; 4) the husband will have a land claim right; 5) they will live in a polygamous community; 6) and her goal will be to divorce her husband, keep custody of her children, and earn an equitable portion of the marital home. The chances of success are lowest with this client but success would achieve the greatest returns. If she is in a patrilineal kinship, she customarily has no rights to the nuptial property or to her children.<sup>321</sup> If her husband paid lobola, she will have an incentive to remain in the marriage and her husband will have command over her property rights.<sup>322</sup> If the husband has a land claim right, that right is eligible for distribution unlike communal land rights. If she lives in a polygamous community, customary law will collide with her fundamental right of anti-discrimination.<sup>323</sup> There is a certainly an argument to be made for each of the client's legal characteristics, but each will be an uphill battle pitting customary law against the Constitution and international obligations. Victory for this client would, however, create substantial changes in existing precedent and practice and open numerous doors for other litigants.

A lower risk client with less benefits would have the following characteristics: 1) she will live in a community that is more moderate in its views of customary law; 2) she will be elderly with either sons or married daughters; 3) the deceased husband will have several male relatives; 4) she and her husband will have owned moderate to substantial amounts of land and real

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<sup>321</sup> See Ovis, *supra* note 124 at 4.

<sup>322</sup> See LeBeau, *supra* note 47 at 42.

<sup>323</sup> See Ruppel, *supra* note 1 at 21.

property; 5) and she will live in a community that may elect to practice widow inheritance. Her husband will have recently died and she will desire to remain in the marital household, to inherit the marital estate outright, and to avoid widow inheritance. Litigating this case could establish basic principles of equality while overturning few customary practices. This case would focus on a married woman's right to inherit her husband's property without interference from male relatives or her sons.

Like the elderly sisters in *Mmusi*, she would be a sympathetic client, one most courts would feel unconscionable evicting. If there are several male relatives and or sons, a victory in this case could prevent future men from exercising patriarchy and domination vis-à-vis property dispossession based solely on gender, particularly real property. In sum, such a decision would empower women, legally declaring them capable of inheriting and maintaining property after the death of a husband.

*c. Standing*

**i. Article 18**

Article 18 of the Namibian constitution provides the standing guidelines when the petitioner is wronged by a state administrative body:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.<sup>324</sup>

Although a woman's property right claim would be primarily constitutional in nature, this provision may apply if an administrative agency tasked with handling transfers of title of property under customary law acts in conflict with constitutional guarantees of a woman's fundamental freedoms. However, it is far more likely that grounds for bringing a claim will be rooted in Article 25 instead.

**ii. Article 25**

The Namibian Constitution states in Article 25(2) that an "aggrieved person" who believes they have experienced unlawful infringement on their fundamental rights is entitled to approach

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<sup>324</sup> The Constitution of the Republic of Namibian, Article 18 (1990).

a competent court and may also approach an ombudsman to obtain legal assistance and advice.<sup>325</sup> The ombudsman may then provide legal assistance in a manner they believe to be expedient.<sup>326</sup> One of the uncertainties that results from a reading of Article 25(2) is that the term “aggrieved person” is vague and undefined.<sup>327</sup>

To assert standing, one must have a “direct and substantial interest in the subject matter and the outcome of the case”, a restrictive standard.<sup>328</sup> The “interest must be current and actual and cannot be abstract, academic, or hypothetical”.<sup>329</sup> However, Namibian courts have granted standing exceptions in some cases, such as when the petitioner is vulnerable to reprisals or where the petitioner is a member of a group the law was designed to protect.<sup>330</sup> In recent history, the Namibian courts have liberalized standing guidelines, particularly for constitutional claims.<sup>331</sup> However, it should be noted that class action lawsuits are not permitted in Namibia; the Constitution only provides a method for joinder.<sup>332</sup>

#### *d. Legal Obstacles in Litigation*

Strictly speaking, there should be relatively few legal obstacles to challenging discriminatory property regimes in Namibia. The Namibian Constitution is the supreme law of the land and expressly prohibits discrimination based on sex.<sup>333</sup> Furthermore, the Constitution incorporates several international conventions—which the country has ratified—ensuring women’s rights to property and freedom from sexual discrimination.<sup>334</sup> Moreover, Namibia has

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<sup>325</sup> The Constitution of the Republic of Namibia, Article 25(2) (1990).

<sup>326</sup> *Id.*

<sup>327</sup> *Locus Standi: Standing to Bring a Legal Action, Paper No. 2*, Zoila Hinson and Dianne Hubbard, Legal Assistance Center, 2012

[http://www.lac.org.na/projects/grap/Pdf/access2justice2\\_locus\\_standi.pdf](http://www.lac.org.na/projects/grap/Pdf/access2justice2_locus_standi.pdf)

<sup>328</sup> *Uffindell v. Government of Namibia* 2009 (2) NR 670 (HC) at para 12.

<sup>329</sup> *Id.*

<sup>330</sup> *See* Hinson and Hubbard, *supra* note 327.

<sup>331</sup> *See* Hinson and Hubbard, *supra* note 327.

<sup>332</sup> *Id.*

<sup>333</sup> *See* Ruppel, *supra* note 1 at 22.

<sup>334</sup> *See* above Section IV: International Law.

adopted regional legislation for the African Charter on Human and People’s Rights as well as the Protocol for Women’s Rights.<sup>335</sup>

From a jurisprudential standpoint, a mounting body of case law offers solid legal footing to pursue litigation. Case law highlighted in previous sections demonstrates a regional shift in attitudes towards women’s property rights. Most notably, the countries of South Africa and Botswana which border Namibia have witnessed recent and substantial progress in this area of the law, away from the restrictive application in the *Mwellie* case.

At first glance, *Mwellie v. Minister of Works, Transport, and Communication and Another* appears to be harmful case law because under rational basis review, laws rarely fail.<sup>336</sup> However, as demonstrated in *Detmold*, if an Article 10(1) claim is brought in conjunction with another constitutional challenge, there is a better chance for success.<sup>337</sup> When bringing a women’s property rights claim in Namibia, the petition could easily include an Article 95 argument as well, which requires the State to actively enact “legislation to ensure equality of opportunity for women...[and] ensure the implementation of the principles of non-discrimination in remuneration of men and women”. As a result, it is possible to overcome the narrow application of Article 10(1) demonstrated in *Mwellie*.

Moreover, *Mueller*, which was decided after *Mwellie* provides a strict scrutiny test to use in cases of gender discrimination.<sup>338</sup> Whereas *Mwellie* established a rational basis test for claims under Article 10(1)—covering all people—Article 10(2) specifically addresses gender.<sup>339</sup> The *Muller* Court found that Article 10(2) prohibits the creation of any legislation which discriminates based on sex, race, color, ethnic origin, religion, creed, or social or economic status, even if there is a legitimate legislative purpose.<sup>340</sup> It is reasonably certain that if presented with an issue of women’s property rights, a Namibian court would elect the stricter *Muller* test to evaluate the constitutionality of customary law practices.

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<sup>335</sup> See above Section IV: International Law.

<sup>336</sup> See Hubbard, *supra* note 284 at 225-6.

<sup>337</sup> *Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 174 (HC).

<sup>338</sup> See Hubbard, *supra* note 284 at 227.

<sup>339</sup> *Id.*

<sup>340</sup> See Ambunda and de Klerk, *supra* note 20 at 75.

The biggest legal obstacle, however, will likely result if the petitioner is involved in a customary marital regime that is unrecognized by Namibian common law, namely, polygamy. As stated in the *Frank* case above, “the state’s failure to afford the same treatment in respect of permanent residence to an...unrecognized lesbian relationship with obligations different from...marriage as compared to a *recognized marital relationship* amounts to differentiation, but not discrimination (emphasis added).”<sup>341</sup> Because polygamy is illegal under Namibian common law, it is unclear how a court would evaluate a claim brought by, say, a third wife of the deceased. For this reason, because Namibian women’s property rights under customary law are essentially a matter of first impression, a successful litigation team will look for a plaintiff in a monogamous marital relationship.

Overall, any hurdles posed by international and domestic law are relatively small and can likely be overcome through careful selection of an ideal plaintiff. The practical obstacles, however, are significantly more difficult to surmount.

*e. Practical Obstacles in Litigation*

As emphasized in several preceding sections, the observance and structure of customary law varies throughout the country. Because customary law is largely unwritten, the implementation of customary laws is subject to the memory and interpretation of each community leader.<sup>342</sup> To be sure, there is substantial research suggesting that even within the same tribe, customary laws are implemented differently.<sup>343</sup> Therefore, one of the primary challenges will be determining which traditional customary law is being challenged and, if successful in litigation, what portion of the population it will benefit.

As is common with legislative reform in developing nations, enforcement may also prove difficult. Although a portion of the population lives in urban areas, the majority of people live in rural areas within Namibia, which is where a majority of discriminatory property systems are in force.<sup>344</sup> Women in rural areas are less educated and have reduced access to the justice

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<sup>341</sup> See Hubbard, *supra* note 284 at 231.

<sup>342</sup> See LeBeau, *supra* note 47 at vi.

<sup>343</sup> *Id.*

<sup>344</sup> See Amoo, *supra* note 7 at 25.

system.<sup>345</sup> As such, even if litigation is successful generally, the question of which agency or legal body will enforce the ruling remains unclear.

Another potential obstacle may be cultural indoctrination. Particularly in rural areas, there may be the entrenched loyalty to the customs of a particular tribe. Opposition to new property regimes is likely to come from women as well as men. While all potential plaintiffs probably identify as Namibians, there is a strong likelihood that their devotion to cultural norms and customary law prevail. Along with cultural barriers is also the potential harm reform may initially cause to women in the community. If women attempt to inherit land or claim property rights based on legislative reform, they may be ostracized within their traditional communities where customary law is given primacy. Such negative treatment may have a chilling effect on other women in the community, causing them to avoid claiming the fundamental rights awarded to them in the community and cling more tightly to the ideals of customary law.

However, despite these significant obstacles, perhaps the greatest barrier preventing litigation of this issue is a lack of desire among non-profit Namibian organizations to participate in a lawsuit. After meeting with the Legal Assistance Centre (LAC) in Windhoek, the organization reported that litigation efforts are better served focusing on different property right issues. This assertion is based largely on the beliefs that many traditional authorities have already adjusted customary law to comport the Constitution, that property grabbing is less of a problem than it used to be, that because most people die intestate the issue would be too convoluted, and that efforts are better spent looking at ancestral land rights on behalf of tribal communities.

LAC believes the topic of women's inheritance rights is further complicated by the political and legal systems in the country. When litigating issues of customary law in Namibia, the claim is based largely on oral evidence. Advocates must go beyond what is codified law and look at concepts of customary law, which often fail to stand up in court. Third party standing has also proven difficult in Namibia, particularly because there is significant interplay between Namibian, tribal, and administrative courts. LAC reports that many cases concerning inheritance begin at the tribal level and eventually work their way up through appeal. By and large, these are cases against local, communal land boards where procedural errors have been made. If a widow

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<sup>345</sup> See Ruppel, *supra* note 1 at 27.

were dispossessed of her property, the communal land board is the first place she would go seeking relief. However, there is no law in Namibia requiring a petitioner to exhaust their administrative remedies before pursuing action in civil court. If the aggrieved party would rather file action in civil court rather than with the local communal land board, she may do that. However, given the geography of the country, it is more practical for her to file with local tribal or administrative authorities. This procedural aspect is how organizations like LAC usually get their foot in the door.

Enforcement of legal reform, according to LAC, also appears to be a potential problem. Tribal leaders are generally aware of what is expected from them legally. Whether those leaders do anything about it is another matter. Access to justice remains a pervasive issue in all rural areas of Namibia. Organizations like LAC are few and far between, resulting in limited legal advocacy. Consequently, many gender issues in the country surround the issue of domestic violence. LAC contends domestic violence, not property inheritance, is the central issue Namibian women face. LAC reports the Ministry of Gender Affairs is dealing with women's property issues quite well and that more frequently, property dispossession is considered theft and dealt with in the criminal justice system and by police. In summary, LAC affirms that a "grand piece of impact litigation" is not the appropriate method of addressing women's property rights at this time.<sup>346</sup>

*f. The Ideal Plaintiff*

The beginning of this section discusses the risks and rewards associated with two types of Plaintiffs. While it may be counterintuitive, the wisest course of action will include a lower risk client. Given the recent success in Botswana, as well as the pervasive issues of widow inheritance and property grabbing, the ideal Plaintiff should resemble the Plaintiff in *Mmusi and Others v. Ramantele and Others*. However, it is possible that some minor changes might allow for advancement and extend the principles of the case.

The ideal plaintiff will be an elderly woman whose husband has recently passed away. She should not be a spouse in a polygamous relationship as the laws of division in polygamous marriages are unclear even in civil law. Her deceased husband's male relatives should be the

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<sup>346</sup> The preceding statements are based on a transcription of an interview between students and a professor from the University of Wyoming College of Law and Willem Odendall, Director of the Legal Assistance Centre in Windhoek, Namibia.

individuals trying to assert a claim to the estate. Ideally, this will be a society that practices widow inheritance and where property grabbing—permissive or not—occurs. Finally, her marital community should be moderate in its observance of customary law.

Choosing a widow will eliminate many of the legal complications that come along with divorce and division of property. If the plaintiff is widowed, a litigation strategy could target her claim based on marital property and her fundamental right to property in marriage. Widow inheritance and property grabbing are clearly violations of fundamental rights. Therefore, litigation should easily demonstrate the need to outlaw the practice which provides legal footing for future cases. Choosing one widow rather than a group of women as in *Mmusi* is a small difference with the potential of large effects. Targeting one woman's right to marital property—rather than a group pursuing family property—opens possibilities for pursuing other marital discrimination issues regarding property.

*g. Alternatives to litigation*

In a quest to improve women's rights to property in Namibia, there are potential alternatives to litigation. One alternative is to improve the function of customary justice systems by developing institutional linkages between state and customary justice systems.<sup>347</sup> The goal of the creating connections between the two systems should be to incorporate human rights into customary norms, dispute resolution, and administration.<sup>348</sup> Another potential method to improve customary justice systems would be to target activities directly towards marginalized community members.<sup>349</sup> Intervening at the community level would hopefully spark demand for human rights awareness within the community itself and create more internal pressure.<sup>350</sup> In addition, demands for equality would be contextualized and, possibly, more legitimate.

In addition to having the basic right and freedom to own property, women must be able to take exercise that right. To own property, a woman must often have access to credit.<sup>351</sup> Many

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<sup>347</sup> TOWARDS CUSTOMARY LEGAL EMPOWERMENT IN NAMIBIA-CONCEPT NOTE, 3 (International Development Law Organization 2010).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *See Amoo, supra* note 7 at 218.

rural areas of Namibia do not have access to financial institutions and women therefore are unable to obtain credit due to geographic limitations.<sup>352</sup> Life insurance policies are also used as collateral in obtaining mortgage bonds for the purchase of property.<sup>353</sup> Many women in Namibia currently live with HIV/AIDS, many more than the percentage of infected men, and it is difficult for these women to obtain insurance coverage.<sup>354</sup> In turn, it is more difficult for women than men to obtain credit for property purchase since they have to security or collateral to offer.<sup>355</sup> Any effort to increase women's rights to own property should be accompanied by an effort to increase women's health and women's access to financial credit

## VII. Conclusion

Based on the preceding research of experts in the field, women's inheritance and property rights are a continuing issue throughout the country of Namibia. Statistically, Namibian women continue to experience lower rates of education, income, access to justice, and social autonomy. Even though legislative attempts have attempted to address the gender imbalance, those efforts have proven largely ineffective. The subjugation of women seems particularly overt in rural regions of the country where traditional communities, geographically insulated, continue to implement traditional customary law. However, despite what appears to be glaringly obvious human rights violations, it is unlikely litigation of women's property rights will yield any positive legal advancement at this time.

SALC faces two practical obstacles prohibitive to pursuing a claim. First, and perhaps most significantly, there do not appear to be any Namibian organizations willing to partner in the suit. Despite the University of Wyoming College of Law's multiple attempts to coordinate with local non-governmental organizations and advocacy groups, such as the LAC, time and financial resources appear to be invested in other legal issues. Moreover, it was the general consensus among local attorneys and scholars that the problems of widow dispossession, property grabbing, and bars to inheritance were, by and large, non-issues among tribal groups today. As a result, it is unlikely the issues of women's property and inheritance rights will be resolved through judicial action in the foreseeable future.

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<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 220.

<sup>354</sup> *Id.* at 218.

<sup>355</sup> *Id.* at 220.

Taking these and other practical considerations into account, it is currently the recommendation of the University of Wyoming College of Law International Human Rights Clinic that SALC redirect its time and efforts towards a different country experiencing similar human rights violations. Although not unfounded, to pursue litigation—and perhaps even legislative reform—for Namibian women’s property rights in the current client would be an imprudent use of time and resources.