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# Women and Inheritance in 5 Sub-Saharan African Countries: Opportunities and Challenges for Policy and Practice Change

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# **Women and Inheritance in 5 Sub-Saharan African Countries: Opportunities and Challenges for Policy and Practice Change**

Elizabeth Cooper

**Abstract:** Inheritance is a critical mode of property transfer in Sub-Saharan African countries. Yet, inheritance practices, regulated through both or either statutory and customary laws in African societies, can exclude particular individuals, particularly widowed women and orphaned children, from rights to property that they were able to access during the lives of their husbands or fathers. Gender discrimination in inheritance systems has been described as a violation of human rights, and linked to asset stripping, poverty traps and the intergenerational transmission of poverty. Statutory law reform as well as local practice changes are being targeted by governments and non-governmental organisations in many Sub-Saharan African countries to safeguard the property inheritance of women and children. This paper draws from policy analysis and key informant interviews with governmental and non-governmental actors focused on inheritance policies and practices in Ghana, Kenya, Mozambique, Rwanda and Uganda to discuss several key existing challenges and opportunities for equitable and pro-poor inheritance.

**Key Words:** inheritance, intergenerational transmission of poverty, women, children, Africa

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## **Introduction**

Inheritance is a critical mode of property transfers in many Sub-Saharan African countries (Platteau and Baland, 2000; UN Habitat, 2006; for reviews see Cooper, 2008 and Cooper, 2010a). At significant life course transitions such as death, birth, marriage and retirement, an individual's or group's accumulated physical assets (or rights of access to these assets) are distributed according to social conventions, personal preferences and potentially strategic designs. This redistribution of assets can affect various individuals' economic trajectories in positive or negative ways (McKay, 2009; Carter and Barrett, 2006; Carter and May, 2001). Property heirs gain in economic security, either in their accumulation of new assets or in the affirmation of their rights to assets they had previously accessed. Other people may lose their previously existing rights to assets as a result of inheritance decisions that exclude them.

The existing research literature from various Sub-Saharan African societies highlights how as a result of existing social conventions (including national laws) widowed women and orphaned children are particularly vulnerable and prone to lose rights of access to properties they enjoyed during the lifetime of their husbands or fathers (Rose, 2006; Oleke *et al.*, 2005; Strickland, 2004; Drimie, 2003; Human Rights Watch, 2003; Drimie, 2002). Such alienation from property, including housing, land and other productive resources, has been linked to economic vulnerability, poverty traps, chronic poverty and the intergenerational transmission of poverty (IGT poverty) (Carter and Barrett, 2006; Bird *et al.*, 2004; Bird and Shinyekwa, 2004). Currently, however, there is little in the way of systematic empirical evidence documenting correlations between disinheritance and chronic or IGT poverty (Cooper, 2010a).

Examinations of women's poverty commonly focus on the security of women's access to assets, and especially land in Sub-Saharan African contexts. Agarwal (2001, 1997) has argued that women's ownership of land leads to improvements in women's welfare, productivity, equality, and empowerment, a proposition that has gained resonance in the international development policy arena (Whitehead and Tsikata, 2003). It is theorised that owning assets may give women additional bargaining power not just in the household, but also in their communities and other public arenas which encourages the perpetuation of women's social, economic and political empowerment. Other research has demonstrated that equal access, control and ownership of land has instrumental value in terms of its positive impact on consumption (increasing spending on food, children's welfare and education) and productivity (particularly in areas, such as Sub-Saharan Africa, where women are responsible for the majority of land cultivation) (Bird *et al.*, 2004). A study from Ghana finds that households where women have a higher share of asset ownership have better health and nutritional outcomes (Doss 2005).

Inheritance has gained profile as a public policy issue in Sub-Saharan African countries for several reasons. Most prominently, inheritance has been tackled as part of the larger problem of property rights regimes that are discriminatory against women. International and domestic campaigns to redress women's unequal property rights in Sub-Saharan African countries have advocated changes to inheritance systems within a broader reform agenda (UN Habitat, 2006; Jütting and Morrisson, 2005; Mutangadura, 2004; FAO and Oxfam, 2003; Human Rights Watch, 2003; USAID, 2003; Benschop, 2002). This larger reform agenda characterises inheritance as a human rights issue as well as an economic concern, and has primarily focused on the content of so-called family laws as well as land rights. Another policy stream addressing inheritance as a combined human rights and economic issue has initiated from the focus on the impacts of HIV/AIDS in Sub-Saharan Africa. Situated within a broad scope of policy concerns related to the pandemic's socio-economic effects, inheritance is conceptualised as a way in which the further vulnerability of HIV-affected households or individuals may be either exacerbated or prevented (Izumi, 2006; Rose, 2006; Aliber and Walker, 2004; Sloth-Nielsen, 2004; Strickland, 2004; UN, 2004; World Bank, 2004; Drimie, 2003 and 2002). HIV/AIDS policy attention to inheritance has primarily focused on securing widowed women's and orphaned children's property rights. Thirdly, interest in inheritance policy has been provoked by reform to land policy and administration (IIED,

2006; Cotula, Toulmin and Hesse, 2004; Deininger, 2003). In particular, initiatives related to land tenure and titling can have consequences for future inheritance claims.

This paper reviews the findings from a study of the ways in which inheritance is being addressed to enhance socio-economic equity and opportunities in five Sub-Saharan African countries: Ghana, Kenya, Mozambique, Rwanda and Uganda. The analysis primarily attends to questions of how inheritance is understood as a public policy issue and what challenges and opportunities exist for achieving gender equitable and pro-poor inheritance. This research builds on two literature reviews concerning inheritance and IGT poverty in Sub-Saharan Africa (Cooper, 2008; Cooper 2010a).

Data for this study was collected in Ghana, Kenya, Mozambique, Rwanda and Mozambique in 2009 through open-ended, semi-structured interviews with key informants for inheritance law and practice in each country. The key informants included representatives of research, legal and advocacy organisations (particularly focused on the rights of women, children, HIV-affected households and poor rural populations), central government officials and local administrators (i.e. chiefs, land bureaus, local prosecutors) and in-country academics. Analysis was also done of domestic policy and programming literature and relevant public media stories. The study generated five individual country briefs which highlight in more detail key themes, lessons learned and policy opportunities (Cooper 2010b, c, d, e and f).

## **Political and Moral Economies of Inheritance**

Inheritance is a complex problem. As a mode of property transfer, inheritance is highly dependent on social conventions and norms. Indeed, inheritance conjures some of the most sensitive political economy questions in many Sub-Saharan African societies, including the status of women, land ownership and control, and the social legitimacy and capacity of statutory and customary systems of governance. This aggregate of divisive issues, as well as the long histories that have infused them, makes inheritance an extremely complicated and contentious public policy issue in many contexts.

The high degree of sensitivity around inheritance as a public policy issue was conspicuous in Kenya's 2005 national referendum campaign concerning a proposed new Constitution. In addition to many other revisions to the existing Constitution, the 2005 draft proposed the removal of a clause which states that customary law (rather than statutory law) applies to cases of adoption, marriage, divorce, burial, devolution of property on death and other matters of personal law. This clause is commonly referred to by human rights organisations as the 'claw back clause' because it establishes exceptions to the principle of non-discrimination and equality under the law. During the national referendum campaigns, public opposition to the removal of this clause was stirred in some constituencies due to the perceived threat that this would allow daughters to inherit land. Some politicians and unelected local leaders who sought to

defeat the proposed Constitution campaigned intensely against this specific issue<sup>1</sup> arguing that allowing women to inherit land would open the way for women to transfer land from their families, clans and tribes to the families, clans and tribes of their husbands, leading to the alienation of people from ancestral land. The fear of alienation from land is prevalent and sensitive for many Kenyans, holding as it does both economic and cultural salience. In the end the 2005 draft Constitution was defeated by a national referendum.

While registering conspicuously as a complex issue of political economy, in practice inheritance is most often determined through highly localised and subjective interpersonal relations and processes. In Sub-Saharan African societies, inheritance distributions are not commonly done in a formally legalistic way, but rather through immediate and intimate interactions among family members.<sup>2</sup> The personal nature of such distributive practices can easily introduce controversy, in that claims to property rights arise from many different justifications. For example, when a man dies his siblings (brothers in patrilineal societies or sisters in matrilineal societies) may claim his remaining property in the name of their corporate lineage rights, while the deceased's wife or wives may claim this same property due to their marital rights and/or their contribution to the accumulation of this property, and the deceased's children (usually sons in patrilineal societies, or sisters' sons in matrilineal societies) may assert their own claims due to lineal inheritance expectations. Various reports have documented inheritance disputes between sons and mothers, sisters and brothers, co-wives, widows and brothers-in-law, grandchildren and grandparents (Izumi, 2006a and 2006b; Rose, 2006; HRW, 2003; Drimie 2003). Such intimate disputes are most often first addressed through interpersonal negotiations, possibly involving the mediation of heads of families or clans or local customary leaders. This can mean that those least able to satisfy the demands (social, cultural, political or economic) of the terms of negotiations do not have their claims sanctioned. Data collected through this study and other published research reflects that such demands can include payment of bribes to local mediators (Henrysson and Joireman, 2009; Rugadya et al, 2008), satisfying conditions of cultural authenticity such as having been a 'good' wife and kin and community member (Henrysson and Joireman, 2009; Okuru, 2007; Fenschop, 2002) and convincing others of one's innocence in the cause of death (e.g. in some cases widows and orphans have been accused of causing deaths through witchcraft) (Henrysson and Joireman, 2009; Okuru, 2007; Thomas, 2007; Lwanda, 2003). The significance of interpersonal

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<sup>1</sup> Policy analysts reflect that there were many other reasons that politicians and other powerful individuals wanted to defeat the 2005 draft Constitution, but raising alarm over the issue of women's rights to land inheritance was a politically expedient strategy.

<sup>2</sup> This is particularly true among rural and poor populations. A study in Uganda found that between the years 1986 and 2005 only 50,000 succession cases were handled by the Attorney General's Office although this office is mandated to facilitate the management of a deceased person's property. The majority of these cases (63%) were filed in Uganda's Central region (which contains the cities of Kampala and Entebbe and has nearer access to AG offices and higher rates of literacy) and concerned the estates of people who were formally employed or had sizeable land and other property holdings. These findings lead to the conclusion that more rural poor and less literate Ugandans seek more localised arbitration (e.g. family/clan leaders, Local Councils, etc) for their inheritance cases. Only 8% of these 50,000 cases were completed. Between 2002 and 2005, less than 1% of the 92,675 inheritance cases reported for administration oversight were reconciled and brokered. This indicates a very low level of effectiveness in resolving inheritance cases.

relationships and subjective perspectives in negotiating and determining inheritance outcomes highlights how inheritance may also be understood in terms of the moral economy of rights.

### **Key Opportunities and Challenges for Women's Inheritance**

Despite important differences across and within this study's five countries (Ghana, Kenya, Mozambique, Rwanda and Uganda) there are several key commonalities in current approaches to inheritance policy and practice. In framing inheritance as the problem of women's disinheritance from land rights due to patriarchal customary practices policy analysts and policymakers have tended to focus on the substantive issues of women's legal property rights and patriarchal systems of land control and the procedural challenge of affecting change in people's everyday, local settings. While these are often difficult issues to disaggregate, I attempt to do so below so as to identify three key areas that combine challenges with opportunities for safeguarding women's inheritance: marriage, customary land governance and local arbitration.

### **Marriage and Women's Inheritance**

A major vulnerability for inheritance rights experienced among the vast majority of women in the five study countries as well as other Sub-Saharan African countries is their insecure recognition as spouses with rights to marital property, either during or after the period of marriage. This is true under customary as well as statutory systems of governance. Key issues relate to this insecurity:

- Customary marriages may be informally entered or exited and therefore spouse status is contestable during inheritance disputes;
- Customary marriages are rarely legally registered and therefore women cannot claim spouse status under statutory inheritance laws;
- Statutory laws do not recognise a wife's contributions to acquisition of marital property; and
- Statutory inheritance laws do not make adequate provision for wives in polygamous unions.

The current statutory laws of Ghana, Kenya, Rwanda and Uganda do not protect the rights of women in cohabitating unions to that union's shared property. This means that if a cohabitating woman's partner dies she is not able to use the law to claim inheritance to the house and other properties they shared, even if she had contributed toward their acquisition. This issue has been targeted by women's rights organisations in each country for policy reform given that the majority of women in each country live in such circumstances, including polygamous arrangements.

Ghana's national government and judiciary have tried in various ways to address each of these critical issues. In Ghana an estimated 80% of marriages are customary (Fenrich 2002) and 22% of women are in polygamous unions (Ghana Multiple Indicator Cluster Survey 2006). The vast majority of these marriages are unregistered. To protect the inheritance rights of women in customary marriages, the Customary Marriage and Divorce (Registration) Law outlines simple procedures for registering customary marriages: only one partner in a customary marriage needs to apply and this can be

done at any time during the marriage. Still most marriages remain unregistered. More significantly, the Customary Marriage Law states that the Intestate Succession Act can be applied to customary marriages that have not been registered, but “where a court or tribunal is satisfied by oral or documentary evidence before it that a customary law marriage had been validly contracted between a deceased and surviving spouse”. In the precedent-setting High Court case of *Esselfie v. Quarcoo* (1992) the judge distinguished between two forms of valid customary marriage: in the first, the necessary customary rites and ceremonies are fully performed; in the second, the customary marital rites have not been performed but the parties have consented to live in public acknowledgment as man and wife, and do so, and their families have consented that they do so. Moreover, the judge reasoned that family consent “need not be actual or express, it could be ‘implied from the conduct, e.g., acknowledging the parties as man and wife or accepting drinks from the man or his family’ (cited in Fenrich 2002: 310). The holding of the case was affirmed by the Court of Appeal and is binding law in Ghana; however it has been applied inconsistently by lower courts. There is not yet, however, legal recognition of cohabitating unions that do not meet the criteria of having earned the partners’ families’ consent and acknowledgment, although this has been proposed. The Ghanaian government has proposed a draft Law on Property Rights in Marriage that recognises a man and woman as married – with marital rights to property – if they have been living together publicly for five years. This proposal is highly contentious in Ghana with religious and customary leaders and organisations publicly organised against it.

Ghana’s Ministry of Justice has also issued a proposed revised Intestate Succession Bill that would address both widows’ rights to property they helped to acquire and the differentiated rights of polygamous widows and orphaned children. The draft legislation defines that “contribution” may include payment of money for acquisition or maintenance of the home, care of household members, and/or performance of household duties. This follows on judicial innovation in previous court cases concerning the distribution of assets upon marriage dissolution or death and provides increased protection for women’s rights to marital property. As for women in polygamous marriages, the draft law proposes that surviving spouses receive equal shares of 50% of an estate while all children receive equal shares of 40% of the estate. Some women’s rights organisations deem that this is still inadequate protection of wives in polygamous marriages and recommend instead that each wife and/or a child inherits the right to the particular house (with its chattels) in which this wife and/or child lived with the deceased. (See Cooper 2010b for more).

Ghana’s experience highlights several important considerations for policy reform. It illustrates how inheritance is affected by intersecting laws, particularly laws governing marital property rights. It also documents how the introduction of statutory laws can be ineffectual in changing practices (e.g. low rates of customary marriage registrations). Ghana’s experience also illustrates the potential importance of the judiciary for interpreting and influencing policy which speaks to the larger public policy issue of the capacity of the judiciary to reflect society’s contemporary circumstances and priorities, as well as a government’s respect for judicial decisions.

The question of property rights for women in cohabitating unions remains unresolved in Ghana, Kenya, Uganda and Rwanda. As in Ghana, the courts in Kenya and Uganda have set precedents for recognition of cohabitating spouses and their shared property rights,<sup>3</sup> but judicial rulings have been inconsistent. In Rwanda, pilot initiatives of land titling by the National Land Centre (NLC) encountered the challenge of how to account for the land rights of cohabitating couples. When the legal advice they received was inconclusive, the NLC had to make their own determinations on a case-by-case basis. In some cases, this meant using the existence of children to register cohabitating spouses as individuals with joint interest rights in land. In other situations, children's land rights have been registered, but not the rights of the children's unmarried, cohabitating mothers. Such *de facto* policy making has reportedly proven efficient and well received at local levels, but is so far without basis in any legislation.

While Ghana, Kenya and Uganda have drafted laws that will extend property rights to cohabitating partners, these face significant opposition. In Uganda, for instance, the influential Catholic Church (42% of Ugandans identify as Catholic and the Catholic Church is a major landowner in Uganda) has been particularly public in its opposition to draft legislation that would extend the legal recognition of marriage to cohabitating (unmarried) unions. Similarly, the provision in Kenya's recent draft Marriage Bill to recognise a couple as husband and wife after two years of public cohabitation is opposed by Christian and Muslim organisations. Opposition to legal reform affecting women's property and marriage regimes has also been led by customary leaders in Ghana, Kenya and Uganda.

Yet, the process of policy debate on such sensitive issues can be extremely influential in raising public consideration of how women experience discrimination, disinheritance and poverty. In Ghana, the government's drafting and debate of the Domestic Violence Bill provided opportunities for governmental and non-governmental sectors to raise public awareness on issues like women's access to justice and to question what constitutes economic violation. Such mobilisation of public awareness has been identified as crucial to the successful implementation of practical changes. For example, several key informants believe that this public attention raised awareness of the availability of the newly established Women and Juvenile Units in local police stations as well as the receptivity of police officers to gender sensitivity training. Similarly, in Uganda, the issue of whether land transactions require spousal consent was debated in public as a result of media coverage of both a parliamentary review and NGO campaigns. It is speculated that more women have been asked for their consent prior to land transactions as a result of this public attention, including women in cohabitating relationships, even though their consent is not required by law. When policy is developed without public scrutiny and discussion opportunities for raising awareness and affecting practice change are missed.

## **Customary Land Governance and Women's Inheritance**

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<sup>3</sup> Some of these legal challenges have been instigated or supported by women's rights NGOs seeking to influence public policy.



As described above, questions of who can rightfully own or control – and therefore inherit - land are often highly gendered in various Sub-Saharan African societies. Customary systems of land governance are enshrined by the Constitution of Ghana, Mozambique and Uganda. In these cases, the ideal is that traditional tracts of tribal, clan or kin groups' land is managed in corporate (shared) trust, ensuring access to all members of the group. In Ghana, such principles are explicitly enshrined in law: the Head of Family Accountability Law (1985) states that family property cannot be sold without others being informed, giving consent or benefiting from the proceeds, and if a family member who has a beneficial right to such property deems the family head to be mismanaging this property, after first seeking redress at the family level, that family member may file a claim against the family head in Ghana's High Court. This law is a potential avenue for family members, including women married into and widowed among families, to safeguard their inheritance rights to family land, although it can be presumed to require significant social fissures.

According to many different societies' patrilineal customary systems, it is popularly understood that upon marriage women sever their affiliation with their natal family and are henceforth affiliated with their husband's family and access land through this affiliation. Yet in many such contexts wives never become recognised as full members of their husband's lineage and therefore never able to own or directly control land. The implication for inheritance is the temporal and interpersonal conditionality of widowed women's access to land. Widows may be allowed continued use of the home and other household assets, however in many cases widows are not allowed to sell this land nor retain this land if they remarry.<sup>4</sup> (Widowers are also not supposed to be allowed to sell lineage land but they can keep the land if they remarry.) Describing such precarious situations, the Government of Kenya 2006 report to the Committee on Economic, Social and Cultural Rights states that, "Under the customary law of most ethnic groups in Kenya a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage." (GOK 2006: supra note 3).

While most customary systems of governance recognise the right of widows and orphaned children to continue to possess and occupy their marital properties, studies among different customary groups in Ghana, Kenya, Mozambique and Uganda as well as other Sub-Saharan African countries, have presented evidence that the property of widows and orphaned children has been 'grabbed' or 'stripped' (Okuru, 2007; Izumi, 2006; Rose, 2006; Sloth-Nielsen, 2004; Strickland, 2004; HRW, 2003). Property grabbing is an often characterised as a manipulation of customary law. A study among the Langi of northern Uganda, for example, contrasts traditional and contemporary norms and practices concerning the support of widowed women's claims upon their families and communities (Oleke *et al.*, 2005). Traditionally, among the Langi, it was expected that a woman's natal kin would discontinue their role as providers to her at the time of her marriage. The transfer of bridewealth would mean the transfer of

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<sup>4</sup> In some societies, widows are expected to 'marry' into a deceased husband's lineage. This practice, known as leverite or 'widow inheritance', is meant to secure the woman's affiliation within her husband's family. This practice is not necessarily similar to marriage in that it doesn't require the same degree of cooperation (Potash 1986).

responsibility for the woman and her future children to her husband's kin. Patrilocal marriage (the wife moves to the husband's village) also physically removed the woman and her children from the woman's natal family, making the continuance of claims upon a woman's natal kin more difficult. Investigating the cases of widowed women and orphaned children among the Langi in recent years, this study finds that 63% of the households caring for orphans in the study area were no longer headed by paternal kin in a manner deemed culturally appropriate by the patrilineal Langi society, but rather were headed by widows, grandmothers or other single women receiving little support from the paternal clan. The authors reflect that the rapid discontinuation of practices of widow inheritance (and care for the widow's children) is a consequence of local impoverishment and deaths of adults as a result of political violence or HIV/AIDS, which has drastically limited the availability of any potential inheritors (e.g. husband's brothers) to support widowed women and their children. Oleke *et al.* (2005: 2636) judge that the disinheritance of widows and orphaned children reflects 'the breakdown of fundamental organising principles in Langi society' and demonstrates that Langi society has been overwhelmed by the magnitude of the disease burden and its economic implications.

There is much debate over whether customary systems of governance provide adequate protection of property rights of women and children. While it is quite widely acknowledged that local customary law adjudication is often male-dominated in contemporary Kenyan contexts, for example, some women have been found to prefer seeking adjudication of their inheritance claims to this local leaders who draw from customary, uncodified systems of law because these are more flexible and may take extra-legal, personal matters into consideration (Kameri-Mbote, 2002). Nevertheless, it seems that consideration of extra-legal personal matters can cut either way for Kenyan women, depending on their particular local circumstances. A study about land rights in western Kenya (Henrysson & Joireman 2009) reveals that women perceive that individual women's specific qualities are significant to their vulnerability to land expropriation. A childless widow, and more specifically a widow who does not have a son or sons, is locally perceived as particularly vulnerable in retaining a claim to family land under customary law. As well, given the personal nature of arbitration, so is a woman of 'bad character' which might include accusations of practicing witchcraft, being sexually promiscuous, drinking alcohol or being rude or stubborn, particularly toward in-laws. A different community study in western Kenya (Aliber *et al* 2004) did not find any evidence of land being 'grabbed' from orphaned children by their adult relatives, but did find young widows more vulnerable in terms of land tenure security than older widows which the authors theorise is likely because young widows had less time to secure their relationships among their husband's family. Findings like these point to the need to closely examine local contexts of customary governance and community dynamics, including specific local leaders, to understand the kinds of opportunities and challenges individuals face in securing their inheritance.

A 2008 policy brief by the Land and Equity Movement in Uganda (LEMU) entitled *Are We Fighting the Wrong Battles?* proposes what they call "a new paradigm in the struggle for women's land rights in Uganda" based on "a gender analysis rooted in the local culture, with protection enforced from within the village" (2008: 3). LEMU's position

is that recent initiatives by the Ugandan government and non-governmental actors have identified customary practices as the obstacles to overcome in realising women's land rights. LEMU argues that this is both a false starting point and counterproductive. Their alternative promotes the recognition that customary systems do provide for women's land rights, however in many present circumstances these rights are being violated. LEMU advocates an approach that focuses on harmonising commonalities of norms and complementarities of practice between statutory and customary systems. With an estimated 80% of land in Uganda under customary (or 'indigenous' as LEMU prefer) governance, and the administrative challenges rampant in the state's current legalistic approach, appreciation of the influence of customary systems on people's access to land seems sensible and necessary. LEMU's approach is pragmatic:

The struggle will be as much for small practical steps as for changes in law: supporting cultural leaders in fighting the myths about women's land rights<sup>5</sup>; making sure that customary and State courts uphold customary land rights in practice; helping couples to have their land boundaries marked, mapped and registered, so that all family members in future would have evidence of who owned which land.'

LEMU's on-the-ground work seems to demonstrate that "small practical steps" can yield binding results. For example, a recent project that has focused on walking the land with inhabitants to determine agreed boundaries and planting trees to mark these boundaries has reportedly been successful in meeting people's interests in providing opportunities to discuss rights and expectations and to mark these clearly. Another project has hosted public episodes (e.g. radio broadcasts) of 'shaming' particular individuals who have violated customary principles of ensuring shared access to land and property. In this way, LEMU representatives describe, individual actions are differentiated from cultural systems. Such innovation and adaptation to local circumstances may be fruitful. Measurements of success in such approaches require complex monitoring of situations of experiences on the ground.

Concerns over the fairness of customary land governance (in terms of gender equity as well as general transparency and predictability) have often sparked policy initiatives encouraging land titling and sanctions against land transactions that proceed without the consent of all interested parties. Two different approaches to land titling can have very different effects for women's inheritance. The case of land registration in Kenya is often used to exemplify the potential harm that individualised registration can have on women and others (like children) holding secondary land rights. Since the 1950s, there have been various efforts to encourage land title registration. These have led to the registration of plots of land in the name of the male head of a household without acknowledging other family members' property or usufruct rights. Such an approach to land titling has been criticised for excluding women's property rights from being considered or protected in land transactions since there is no requirement to consult or gain consent. Such exclusionary titling is another factor undermining women's land

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<sup>5</sup> LEMU argues in its public documents that it is a myth that women do not have land rights under customary systems of land governance. Commonly, women have rights of use, just as men have rights of use, while the head of a family was often expected to oversee management of the land to ensure equitable access. LEMU argues that the equating of household heads with ownership of land is wrong. Household heads and clan elders (often men) are more appropriately regarded as trustees or stewards than owners of land.

inheritance. Rwanda's recent piloting exercise in land registration has taken a different approach. This process has involved locally recruited young people walking the land with occupants to confirm land boundaries and to register the identities of all individuals, including children, with an interest in the land. Such inclusive titling (in process and content) sets precedents for who can make inheritance claims and due to the Land Law's requirement that all land sales or other exchanges require the consent of all interested parties, this form of registration also protects land for future inheritance.

This research seems to indicate that participatory processes can be much more effective than the more passive approach of including provisions for land co-registration through statutory laws. Even when provisions exist for the co-registration of land, uptake has been very low: in Kenya, for example, only approximately 5% of land is jointly registered by married spouses and only 1% is registered solely by women; in Uganda in 2002 less than 4% of spouses had jointly registered their land holdings. Other studies concerning these low levels of uptake indicate that there are many social and economic concerns that discourage people from formalising their rights (including property and marriage rights). Key challenges and opportunities related to proactive safeguarding of inheritance claims are addressed in the next section.

### **Localised Arbitration of Inheritance**

As described above, in many Sub-Saharan contexts, inheritance is not administered in a formal and legalistic way, but rather adjudicated in a highly interpersonal manner. Inheritance claims consequently rest on their social legitimacy.

Research shows that competing inheritance or property claims are most often first addressed through interpersonal negotiations, possibly involving the mediation of heads of families or clans or local customary leaders. For instance, a study in an agricultural area of western Kenya where patrilineal inheritance is customary found that all respondents' reported their land dispute cases first to local leaders, i.e. elders or chiefs. Although chiefs and elders do not have any legal authority to resolve disputes, they have both local social legitimacy and can act more quickly and cheaply than the official legal system (Henrysson and Joireman 2009). A small study of poor urban Mozambicans found that 95% of the people, when faced with a problem, chose to turn first to the heads of their neighbourhoods or districts and other traditional leaders to mediate or resolve their conflicts (Alfai 2007). A survey of 3,574 Ugandan households found a dominant preference for disputes to be resolved at the most local level possible: 58% of people involved in land disputes first sought the arbitration of Local Councils (LCs) which are the district access points of a decentralisation of state judiciary services; 27% of respondents first sought the involvement of clan and other community leaders; while 20% of land conflicts were not reported to any dispute resolution option (Rugadya et al 2008). These choices were attributed to the factors of physical proximity (23%), understanding that it is a "legal requirement to go there" (21%) and familiarity with how that particular option actually works (19%). This study also found that people rated the existing land justice system (whichever dispute resolution option they used) as fair. Only 13% of respondents reported being dissatisfied. This is despite corruption:

88% of those surveyed who sought land justice were asked to pay un-receipted payments (ibid).

These findings make apparent how critical engagement with local leaders and systems of justice is in the effort to achieve equitable inheritance outcomes for women in many different Sub-Saharan African contexts. There are various initiatives that are seeking to do just this. The Mozambican Constitution (2004) makes provision for the legal recognition of community tribunals to resolve conflicts. The community courts currently operate as informal fora to resolve minor civil and criminal disputes, including disputes relating to family, housing and land issues. However, there is currently wide diversity in the composition and functioning of these community tribunals, and they often reach their resolutions by applying “common sense”, which does not necessarily coincide with laws or with the principle of equality between women and men (Arthur & Mejia, 2006). In fact, the present day community courts have originated from past popular courts so in each instance they have developed differently according to local histories, politics and actors. Further, community court members are elected as result of local influences so their members may not be primarily interested in upholding laws, but rather in upholding their community’s good and popular opinion of them. An NGO-led approach to improving the capacity of these community courts has been to target community court members for paralegal training and to place trained paralegals with these tribunals as ‘consultants’. As well, the Mozambican government is considering legislation that would bring Community Courts within the formal legal framework and to provide for appeals from the Community Courts to the district and provincial courts, which would require the regular courts to reconcile inconsistencies between customary law and statutory law.

Consensus- and constituency-building among local leaders requires investments of time, resources and collegial commitment yet may yield the most effective and long-lasting solutions. This type of approach involves working with customary leaders and larger cultural groups to publicly discuss and determine principles and practices that are equitable, accountable and can be broadly endorsed and practiced. This kind of initiative has been pursued in Kenya among the Njuri Njeke elders for the Meru tribe and is ongoing with the Luo Council of Elders for the Luo tribe. Such consensus-building approaches may just build bridges across the current gaps between law and social legitimacy.

## **Conclusion**

Women’s vulnerability in inheritance reflects systemic gender discrimination. Statutory and customary laws combine, overlap and sometimes contradict each other in problematic ways.

It is important to assess how legislation and its administration work in terms of women’s inheritance rights. It is also necessary to assess how changes in social practice might protect or endanger people’s livelihoods.

This paper has discussed how change to inheritance practices requires initiatives at two levels: the substantial level of policy content as well as the procedural level of policy

implementation. To date, most concerted efforts have focused on the former, but it is clear that if inheritance practices are to change, a systematic approach to implementation is necessary. Given the interpersonal and local character of most inheritance cases, especially those worked out among poor and rural people, it is not reasonable to expect national laws to automatically influence practices or outcomes. Local-level engagement does not necessarily have to focus on straightforward enforcement of the law, but rather building consensus and constituencies in favour of upholding particular principles of equity.

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