

**Expert Group Meeting**

**Good practices in realizing women's rights to productive resources, with a focus on land**

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**Good Practices in Realizing Women's Rights to Productive Resources,  
with a Focus on Land**

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

## **Goals of the Background Paper**

*This document has been prepared as a Background Paper to the United Nations Expert Group Meeting on 'Good Practices in Realizing Women's Rights to Productive Resources, with a Focus on Land.' It is meant to fulfill three inter-related tasks:; first, to present a literature review on women's rights to productive resources, with a focus on land; second, to present an overview of good practice with respect to the realization of these rights; and third, to offer concrete proposals for consideration at the Expert Group Meeting. These tasks will be addressed somewhat simultaneously within the structure of the background paper itself. The paper addresses what are some of the most critical themes which have emerged in the area of women's land and property rights, reviewing challenges, advancements and controversies. Each section will look specifically at what has been learned by actors and researchers in the field, as well as at promising practices developed at the national level for securing these rights. Finally, the paper concludes with specific draft 'model language' which can be further discussed and considered at the Expert Group Meeting.*

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## 1. Introduction

Women's access to and control over productive resources are essential to women's equality and well-being. These resources help to ensure that women are able to provide for the essential needs of themselves and their families. On the global landscape, these issues are also increasingly seen as vital from the point of view of global food security, sustainable economic development, as well as the pressing fight against the HIV/AIDS pandemic.

Yet, throughout the world, gender inequality when it comes to productive resources such as land, housing and property too often lies at the heart of women's poverty and exclusion. The obstacles which prevent women from effectively enjoying these rights are complex, and at times context specific. They range from inadequate legal standards and implementation, to discriminatory attitudes and barriers at the local and community level which prevent women's access to productive resources. Indeed, in many communities, gender disparities with regard to productive resources are linked to notions of men being the sole stakeholders -- including ideas that productive resources given to women are "lost to another family" in the event of marriage or divorce, that men will provide for women's economic security, or that women are simply incapable of managing productive resources such as land effectively.<sup>1</sup> These are the kinds of attitudes which must be challenged in order for women to claim their human right to an equitable share of the Earth's productive resources.

Despite the challenges, in recent years, academics, advocates, policy makers, governments and inter-governmental agencies alike have increasingly made the case for the importance of recognizing women's access to productive resources, including land. The World Bank, for example, recognizes that "[r]ights to land and natural resources increase a woman's bargaining power within the household, which results in increased allocation of household resources to children and women as well as increased household welfare."<sup>2</sup> The Swedish International Development Cooperation Agency (SIDA) has similarly noted that:

*Women's access to land and property is central to women's economic empowerment, as land can serve as a base for food production and income generation, as collateral for credit and as a means of holding savings for the future. Land is also a social asset that is crucial for cultural identity, political power and participation in decision making. Women's equal access to land is a human rights issue. It also has other benefits. Evidence shows that women's land rights reduce domestic violence, that women who own land are more capable of exiting violent relationships and negotiating safe sex. Agricultural production and food security also increase when women are granted tenure security.<sup>3</sup>*

Certainly, as alluded to in the above quote, research consistently shows that when women enjoy equal rights over productive resources, they are better able to cope with life's most difficult challenges. This includes mitigating some of the devastating consequences of HIV/AIDS.<sup>4</sup> The United Nations Development Programme (UNDP) has highlighted that "A key challenge faced by women infected and affected by HIV ... is the denial of their right to inheritance and properties. Reports from networks of women living with HIV, as well as academic research in the region, show that it is a crucial factor in reducing women's vulnerability to

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<sup>1</sup> Canadian HIV/AIDS Legal Network, 'Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS — Vol. Two: Family and Property Issues,' 2009. Available online at: <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1537> [last accessed 4 April 2012].

<sup>2</sup> The World Bank, the Food and Agriculture Organization (FAO) of the United Nations, and International Fund for Agricultural Development (IFAD), The Gender in Agriculture Sourcebook, Module 4, October 2008, pp. 125-171. See also: Monica S. Fong and Anjana Bhushan, 'Toolkit on Gender in Agriculture,' Gender Toolkit Series No. 1, Washington, D.C.: The World Bank, August 1996.

<sup>3</sup> Swedish International Development Cooperation Agency (SIDA), 'Quick Guide to What and How: Increasing Women's Access to Land,' Women's Economic Empowerment Series.

<sup>4</sup> Centre on Housing Rights and Evictions (COHRE), Huairou Commission, Open Society Foundations, UNDP, et al., 'Tools For Change, Applying United Nations Standards to Secure Women's Housing, Land and Property Rights in the Context of HIV,' 2012.

violence and HIV, as well as empowering women to cope with the social and economic impact of the epidemic at the household level.”<sup>5</sup> Similarly positive effects have been reported when it comes to the issue of domestic violence. Scholars Bina Agarwal and Pradeep Panda found, based on a household survey in Kerala (India), women’s ownership of property is significantly and negatively associated with both physical and psychological violence.<sup>6</sup>

What we know and can take away from these discussions is that women’s rights to land and other productive resources impacts not only household welfare, but also women’s equality and empowerment more broadly. As development organizations such as ActionAid International have surmised, this is true because land rights increase women’s power in family, community, economic, and political relationships. Rural women also feel that secure land rights increase their social and political status, and improve their sense of confidence and security. By diminishing the threat of forced eviction or poverty, direct and secure land rights increase women’s “bargaining power in their families and participation in public dialogue and local political institutions.”<sup>7</sup>

At the level of legal protection, important progress is being made. The World Bank, for example, notes that:

*Over the last few decades, many nations have reformed their constitutions and civil codes and have either incorporated gender-neutral language (favoring neither men nor women) or explicitly recognized women’s rights and prohibited discrimination based on gender. Many nations have also modified land and property laws and regulations so as to guarantee women’s equal property and inheritance rights. Thus, most Latin American nations passed legal reforms during the 1980s and 1990s to remove discriminatory clauses in codes applying to family (marriage, divorce, and marital property) and inheritance. They also modified land allocation laws and regulations (for example, for agrarian reform and land titling programs) to recognize and give women equal land rights explicitly. Similar movements to reform legislation occurred in Africa and Asia.*<sup>8</sup>

Nonetheless, such progress has not been uniform. Again, according to the World Bank:

*... all economies in high-income OECD and in Eastern Europe and Central Asia grant equal rights to men and women with regard to property ownership and inheritance. In Latin America and the Caribbean, all economies grant equal rights to inheritance, and in the majority of economies, married men and married women have equal rights to property. In East Asia and the Pacific, only the Philippines restricts the property rights of married women. In Sub-Saharan Africa, four economies do so. World-wide, inheritance rights in 26 economies differentiate between women and*

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<sup>5</sup> UNDP, ‘Voices and Visions: The Asia Pacific Court of Women on HIV, Inheritance and Property Rights,’ 2008. See also: Caroline Sweetman, ‘How Title Deeds Make Sex Safer: Women’s Property Rights in an Era of HIV,’ From Poverty to Power: Background Paper, Oxfam, 2008. See also: Richard S. Strickland, ‘To Have and To Hold: Women’s Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa,’ International Center for Research on Women (ICRW) Working Paper, June 2004. See also: Panda, Pradeep, ‘Rights Based Strategies in the Prevention of Domestic Violence,’ ICRW Working Paper 344, International Center for Research on Women (ICRW), Washington D.C., 2002.

<sup>6</sup> Bina Agarwal and Pradeep Panda, ‘Marital Violence, Human Development and Women’s Property Status in India,’ *World Development*, Vol. 33, No. 5, 2005, pp. 823–850. See also: Kaori Izumi, ‘Gender-based Violence and Property Grabbing in Africa: A Denial of Women’s Liberty and Security,’ *Gender & Development*, Vol. 15, No. 1, March 2007; International Center for Research on Women (ICRW), ‘Property Ownership and Inheritance Rights of Women for Social Protection – The South Asia Experience: Synthesis Report of Three Studies,’ 2006.

<sup>7</sup> ActionAid International, ‘Securing Women’s Right to Land and Livelihoods a Key to Ending Hunger and Fighting AIDS,’ ActionAid International Briefing Paper, June 2008.

<sup>8</sup> The World Bank, the Food and Agriculture Organization (FAO) of the United Nations, and International Fund for Agricultural Development (IFAD), *The Gender in Agriculture Sourcebook*, Module 4, October 2008, pp. 125–171.

*men. This includes all economies covered in the Middle East and North Africa, seven in Sub-Saharan Africa, three in South Asia and two in East Asia and the Pacific.*<sup>9</sup>

Against the backdrop of legal progress, one must recognize that a major part of the remaining challenges revolves around the question of implementation and enforcement. The fact remains that even in countries where good laws exist, women frequently do not enjoy their rights to access and control productive resources. For example, the 2009 World Survey of the United Nations Department of Economic and Social Affairs, Division for the Advancement of Women (DAW) on the ‘Role of Women in Development: Women’s Control over Economic Resources and Access to Financial Resources, including Microfinance,’ found that implementation of these rights is too often hindered by sociocultural norms and women’s lack of knowledge of their entitlements.<sup>10</sup>

There is no one-size-fits-all solution. As also noted in the DAW report: “[s]ocio-economic contexts determine the appropriateness of different types of rights to land and property—including individual rights, joint-titling and group rights. Continued efforts are needed to promote gender sensitive legislation, enforce existing legislation, make judicial systems more accessible and responsive to women, and provide legal aid to women seeking to claim their rights.”<sup>11</sup>

That being said, in order to create effective solutions which work for women, embracing a human rights-based approach as an overarching framework is crucial. This approach to the question of productive resources requires that women’s rights be placed at the center of law, policy and programming. The solutions must thereby reflect international human rights standards, prioritize the needs and rights of women, ensure that women are able to meaningfully participate at all stages (from policy/program design to evaluation), guarantee that women are empowered to know and claim their rights, and provide for accountability and access to just remedies in cases where rights may have been violated.

Each of these themes is addressed within this background paper, and in fact agreement with a human rights-based approach is one way in which ‘best practice’ itself should be defined.<sup>12</sup> For the moment, however, it is also worth noting that while the basic framework of this paper addresses all productive resources (i.e. land, housing and property), land is an issue demanding particular attention. Land – as has been recognized by the Food and Agriculture Organization of the United Nations (FAO) – is key to a life with dignity and a basis for entitlements which can ensure an adequate standard of living and economic independence, and therefore,

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<sup>9</sup> World Bank, ‘Women, Business and the Law: Creating Better Opportunities for Women,’ available online at: <http://wbl.worldbank.org/data/using-property-topic-analysis> [last accessed 3 April 2012].

<sup>10</sup> United Nations Department of Economic and Social Affairs, Division for the Advancement of Women (DAW), 2009 World Survey on the Role of Women in Development: Women’s Control over Economic Resources and Access to Financial Resources, including Microfinance, 2009.

<sup>11</sup> Ibid.

<sup>12</sup> In a 2007 review by major donor agencies like Care International, DFID (the United Kingdom’s Department for International Development), and Save the Children of development projects either incorporating a rights based approach to development, or not, revealed that:

*...working with RBAs [rights based approaches] to development adds value and demonstrates a greater range and depth of positive impacts, which are more likely to be sustained over time, than does working with non-RBAs. Working with RBAs enhances the possibility of achieving improved governance, which includes the voice and concerns of poor people and can reach out to the poorest and most marginalized. The strategies employed promote recognition and fulfillment of obligations by both citizens and states. The ways in which voice and response are beginning to be linked are strengthening the chances that services will be appropriate, adequate and accessible. This also strengthens the chances that investments made into technical improvements in services will be sustained, protected and used over time.*

UK Interagency Group on Human Rights Based Approaches, ‘The Impact of Rights-based Approaches to Development: Evaluation / Learning Process: Bangladesh, Malawi and Peru,’ December 2007. Available online at: [http://www.crin.org/docs/Inter\\_Agency\\_rba.pdf](http://www.crin.org/docs/Inter_Agency_rba.pdf) (last accessed 11 June 2012).

personal empowerment.<sup>13</sup> Land rights also have “major implications” for the achievement and enjoyment of human rights such as the right to food, health, housing, work and education.

Despite the centrality of land, particularly to the lives of poor and marginalized communities throughout the world, land pressures are rapidly increasing: land markets have often proven to be exclusionary and land concentration is on the rise. For example, research shows that over the past ten years alone, at least 80 million hectares of land have been sold in large scale land acquisitions (also called ‘land-grabbing’) – an area 20 times the size of the Netherlands. This trend has dire implications especially for women whose hold on land rights is already tenuous at best, and who are the first to lose their claim on fertile soils.<sup>14</sup> The question of women’s access to productive resources in general, and land in particular, cannot be divorced from the broader context of macro economic policy and the global economic system.

Therefore, here it is important to emphasize the broader global context within which this discussion on women’s land rights is situated. The Food and Agriculture Organization of the United Nations (FAO) has recently highlighted:

*...there are warning signs. Rates of growth in agricultural production have been slowing, and are only half the 3 percent annual rate of growth seen in developing countries in the past. In 2007 and 2008, any complacency was jolted by food price shocks, as grain prices soared. Since then, the growing competition for land and water are now thrown into stark relief as sovereign and commercial investors begin to acquire tracts of farmland in developing countries. Production of feedstock for biofuels competes with food production on significant areas of prime cultivated land. A series of high profile floods, droughts and landslides further threaten the stability of land and water resources.<sup>15</sup>*

And these land pressures are not only a rural phenomenon. Indeed, as has similarly been highlighted:

*Access to, and control over land is ...a central human rights issue in a rapidly urbanising world. Land grabbing has been exacerbated by models of urban development, which have transformed urban lands into capital sinks storing profits accrued from other sectors. This renders them targets of intensive speculation and other activities driven by the financial sector, often resulting in driving up its market value while driving out its low-income residents.<sup>16</sup>*

#### **Useful Definition: Access to Land**

Access to land is governed through land tenure systems. Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. (For convenience, “land” is used here to include other natural resources such as water and trees.) Rules of tenure define how property rights in land are to be distributed within societies, along with associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources, for how long, and under what conditions.

Definition provided in: FAO, ‘Gender and Access to Land,’ Land Tenure Studies, No. 4, 2002.

<sup>13</sup> The Food and Agriculture Organization (FAO) of the United Nations, ‘Land and Property Rights: Junior Farmer Field and Life School, Facilitator’s Guide,’ Rome: 2010. See also: Thea Gelbspan and Vijay K. Nagaraj, ‘Seeding Hope? Land in the International Human Rights Agenda: Challenges and Prospects,’ ESCR-Net Working Paper, 2012.

<sup>14</sup> Oxfam, ‘Land Grabs,’ Available online at: <http://www.oxfam.org/en/grow/issues/land-grabs> [last accessed 7 June 2012].

<sup>15</sup> The Food and Agriculture Organization (FAO) of the United Nations, ‘The State of Land and Water Resources for Food and Agriculture: Managing Systems at Risk (Summary Report),’ Rome: 2011.

<sup>16</sup> Thea Gelbspan and Vijay K. Nagaraj, ‘Seeding Hope? Land in the International Human Rights Agenda Challenges and Prospects,’ The International Network for Economic, Social and Cultural Rights (ESCR-Net), 2012.

Of course, not only is land a critical issue when it comes to the broader question of productive resources, it is also an area in which there remains a stark gender gap. It is reported that just 1 percent of the world's women own land.<sup>17</sup> When researchers compiled an approximation of the distribution of land by gender in five Latin American countries, according to the UN Millennium Project Task Force on Education and Gender Equality, they found it to be “extremely unequal, with women representing one third or less of land owners.”<sup>18</sup> Because of increasing land pressures around the world, the phenomenon of land-grabbing, and the ever increasing commodification of land, as Bina Agarwal has noted “The issue of women’s land rights is not only important today, it is likely to become increasingly so over time.”<sup>19</sup>

In order to help address these converging and troubling realities, on 11 May 2012, the Committee on World Food Security (CFS) officially endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.<sup>20</sup> The FAO Voluntary Guidelines are based on an inclusive consultation process started by FAO in 2009 and then finalized through CFS-led intergovernmental negotiations that included participation of government officials, civil society organizations, private sector representatives, international organizations and academics.<sup>21</sup> Those Guidelines embrace gender equality as one of the main guiding ‘principles of implementation,’ and stress the importance of compliance

<sup>17</sup> International Center for Research on Women (ICRW), ‘The Issue: Women’s Assets and Property,’ Available online at: <http://www.icrw.org/what-we-do/property-rights> [last accessed 28 May 2012]. See also: International Center for Research on Women (ICRW), ‘Learning how to Better Promote, Protect and Fulfill Women’s Property Rights,’ 2007.

<sup>18</sup> UN Millennium Project, *Taking Action: Achieving Gender Equality and Empowering Women*, Task Force on Education and Gender Equality, 2005. The report goes on to note:

*Such disparities are especially noteworthy in light of the relatively small gender disparities in human development indicators in this region and the existence of relatively equal inheritance laws. Gender disparities in land ownership exist in other regions as well. In Cameroon, where women do more than 75 percent of the agricultural work, it is estimated that women hold fewer than 10 percent of land certificates ... There are similar gender disparities in rights to land in Kenya, Nigeria, Tanzania, and elsewhere in Sub-Saharan Africa. A 2001 household survey in Pakistan found that women owned less than 3 percent of the plots, even though 67 percent of the sampled villages reported that women had a right to inherit land.*

<sup>19</sup> Bina Agarwal, ‘Gender and Land Rights Revisited: Exploring New Prospects via the State, Family and Market,’ *Journal of Agrarian Change*, Vol. 3, Issue 1-2, January 2003, pp. 184–224. See also: Dzodzi Tsikata & Pamela Golah (eds.), *Land Tenure, Gender and Globalisation: Research and Analysis from Africa, Asia and Latin America*, International Development Research Centre (IDRC), 2010; Elizabeth Daley, ‘Gender and Commercial Pressures on Land,’ ASA UK Meeting, 16–19 September 2010; Julia Behrman, Ruth Meinzen-Dick and Agnes Quisumbing, ‘The Gender Implications of Large-Scale Land Deals,’ The International Food Policy Research Institute (IFPRI) Discussion Paper 01056, January 2011; Anne Hellum, ‘How Can a Focus on the Rights to Land and Related Economic Resources Make a Difference for Poor Women in Africa? Seven Concerns,’ Institute of Women’s Law, University of Oslo; Elizabeth Daley, ‘Strategies to get Gender onto the Agenda of the “Land Grab” Debate,’ Mokoro Ltd., ILC and CIRAD Policy Brief, March 2011.

<sup>20</sup> FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 11 May 2012. Available online at: [http://www.fao.org/fileadmin/user\\_upload/nr/land\\_tenure/pdf/VG\\_Final\\_May\\_2012.pdf](http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_Final_May_2012.pdf) [last accessed 11 June 2012].

<sup>21</sup> Ibid. The Guidelines address a wide range of issues, including:

- Recognition and protection of legitimate tenure rights, even under informal systems
- Best practices for registration and transfer of tenure rights
- Making sure that tenure administrative systems are accessible and affordable
- Managing expropriations and restitution of land to people who were forcibly evicted in the past
- Rights of indigenous communities
- Ensuring that investment in agricultural lands occurs responsibly and transparently
- Mechanisms for resolving disputes over tenure rights
- Dealing with the expansion of cities into rural areas



between all programs, policies and technical assistance to improve governance of tenure and the international human rights framework.<sup>22</sup> This background paper includes and makes reference to the content of the FAO Voluntary Guidelines where they converge with the gender-specific issues addressed in the following sections, and it will be useful to ensure complementarity between the ‘Model Guidelines for Legislation, Policy and Programming on Women’s Rights to Productive Resources, with a Focus on Land’ emerging from the Expert Group Meeting and the FAO Voluntary Guidelines.

## 2. Overview of Relevant Issues and Emerging Good Practices

As has been noted, when looking at issues of access to and control over productive resources, it is important to understand that these may be subject to a range of provisions which vary country by country – including public, private, communal, collective, indigenous and customary. Regardless of tenure system, the FAO Voluntary Guidelines provide that States should recognize and respect all legitimate tenure right holders and their rights; take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; refrain from infringement of tenure rights of others; and meet the duties associated with tenure rights.<sup>23</sup>

The question may be posed as to whether or not there is a specific tenure system which most benefits women. Caroline Sweetman has observed that:

*Researchers suggest that each of three types of legal land tenure systems [customary, public and private] has advantages and disadvantages. Customary systems facilitate social cohesion. Public systems facilitate equal access to land and ensure that people too poor to consider purchasing land are not marginalised from eking out a livelihood. In contrast, private land ownership is argued to give users a sense of security which promotes investment in land. ... From a gender perspective, all three systems have disadvantages for women.<sup>24</sup>*

While Sweetman ultimately suggests that despite the drawbacks, individual formal ownership and inheritance rights guaranteed in law offer “by far the most convincing way forward to ensure that growing numbers of people – predominantly women and children – are able to guarantee independent control over the property which will enable them to make a dignified and decent living, and to realize their rights,”<sup>25</sup> others take a different view.

Many caution that titling leads to increased land concentration in the hands of a wealthy few. For example, research commissioned by the Norwegian Agency of Development Cooperation (NORAD) found that, in practice, individual titling and ownership is not always the best option for women. Rather:

*In southern and eastern Africa, contemporary formalisation initiatives, understood as increased state engagement through legal regulation and registration of land rights, both build on and seek to reform the legacy from the colonial period. [We emphasize] the need to assess whether and to what extent reforms are equally beneficial for women and men. Statistics from Kenya showing that only 5-7 % of the registered rights-holders are women demonstrate how formal and informal customary laws related to land transactions in family, marriage and inheritance matters often have a spill-over effect on registration of land rights that is detrimental to women.<sup>26</sup>*

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<sup>22</sup> Ibid. See in particular § 3B (4) and §§ 4.6, 5.4, 5.5, 7.4, 9.2, 9.6, 15.3, 15.5, 15.6, 15.10, 17.3, 21.1, and 23.2.

<sup>23</sup> Ibid, at § 3.1 (1).

<sup>24</sup> Caroline Sweetman, ‘How Title Deeds Make Sex Safer: Women’s Property Rights in an Era of HIV,’ From Poverty to Power: Background Paper, Oxfam, 2008.

<sup>25</sup> Ibid.

<sup>26</sup> Ingunn Ikdahl, Anne Hellum, Randi Kaarhus, Tor A. Benjaminsen, and Patricia Kameri-Mbote, ‘Human Rights, Formalisation and Women’s Land Rights in Southern and Eastern Africa,’ Studies in Women’s Law No. 57, Institute of Women’s Law, University of Oslo, July 2005. See also: Elizabeth Daley, ‘Gender and Commercial Pressures on Land,’ ASA UK Meeting, 16–19 September 2010.

In contrast to a one-size-fits-all solution, UN-HABITAT advocates for a ‘continuum’ of land rights, encompassing both informal and formal tenure systems.<sup>27</sup> UN-HABITAT concludes that while no single form of tenure can meet the different needs of all social groups, *a range of land tenure options* enables both women and men from all social groups to meet their changing needs over time. Furthermore, UN-HABITAT notes that legal recognition for different forms of tenure can also strengthen the development of dynamic and inclusive land markets.<sup>28</sup>

Each point along the ‘continuum’ of land rights can, in theory, provide for women’s rights to land, housing and property rights provided that discrimination is prohibited and that women are granted full rights to substantive equality. The point of departure for this analysis of good practices looks at those laws, policies and programs which provide for women’s rights regardless of the configurations of the broader property or economic system.

It is also important to understand the different ways in which women come to access land, housing and property. For most women, land, housing and property is acquired within the context of marriage and the family, within the context of inheritance (for example, as when wealth transfers from generation to generation), through government or other social programs, and to a lesser extent through access to markets.<sup>29</sup> Within this background paper, we will examine some of the good practices relevant to these specific areas, particularly at the level of laws and policies. Many promising steps have been taken to secure these rights for women, and they help point the way toward a better understanding of what more can be done to ensure both effective laws and implementing frameworks at the national and local levels.

#### A. Legal Frameworks

##### *Constitutional Frameworks*<sup>30</sup>

At the national level, Constitutional protections offer the highest form of legal protection and recognition of women’s rights over productive resources. Development organization such as Oxfam have noted that “Experience in a number of countries suggests that broad constitutional protections for women’s rights and in favour of gender equity and equality, as in South Africa, are a key component in the struggle for women’s

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<sup>27</sup> UN-HABITAT, ‘Secure Land Rights for All,’ 2008. UN-HABITAT has also noted:

*In most countries, a range of land rights and tenure types exists, which forms a continuum (from informal to formal). Whether tenure is informal or formal, it is usually understood, recorded and/or registered in the name of men, leaving women’s secure tenure often dependent on their relations with their in-laws. As women’s access to land and housing is often through their husbands or fathers, they may lose such access after widowhood, divorce, desertion, or male migration. While collective forms of tenure also include women, the decision-making processes are often dominated by men, excluding women from the important decisions regarding the land and housing.*

UN-HABITAT, ‘Shared Tenure Options for Women: A Global Overview,’ July 2005.

<sup>28</sup> Ibid.

<sup>29</sup> See: Bina Agarwal, ‘Gender and Land Rights Revisited: Exploring New Prospects via the State, Family and Market,’ *Journal of Agrarian Change*, Vol. 3 Nos. 1 and 2, January and April 2003, pp. 184-224.

<sup>30</sup> Many countries explicitly uphold gender equality within their national Constitutions. For example, the Constitution of Malawi provides a specific article on the rights of women, recognizing that “Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right to be accorded the same rights as men in civil law, including equal capacity to enter into contracts and to acquire and maintain rights in property, independently or in association with others, regardless of their marital status.” See: The Constitution of the Republic of Malawi (1994, reviewed in 2004), Article 24(1)(a)(i & ii). Cambodia’s Constitution provides that “Men and women are equal in all fields, especially in marriage and matters of the family,” and both women and men are equally entitled to have ownership over property.<sup>30</sup> See: FAO Gender and Land Rights Database, Full Country Report for Cambodia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

land rights, on top of which the details of land policies and laws can subsequently be built.”<sup>31</sup> Similarly, FAO has recommended “... constitutional recognition of equal access to property. Such provisions provide a strong basis for subsequent legislative initiatives or court interpretations.”<sup>32</sup> While many countries provide gender equality within their national Constitutions, some countries go further to provide specific recognition of women’s land, housing and property rights within the Constitutional frameworks.

For example, in Paraguay the 1992 Constitution includes among the fundamental principles of the agrarian reform women’s participation in reform plans on the basis of equality with men, and support for rural women.<sup>33</sup> The Constitution of the Republic of Malawi stipulates that in case of dissolution of marriage women have the rights to a fair disposition of property that is held jointly with a husband and to fair maintenance together with the children. In addition, Article 24(2) of the Constitution of Malawi states that, “Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women such as... (c) deprivation of property, including property obtained by inheritance.”<sup>34</sup> Namibia’s Constitution (adopted in February 1990 and amended in 1998) provides that “men and women ... shall be entitled to equal rights as to marriage, during marriage and at its dissolution,” and that “all persons shall have the right to acquire, own and dispose of all forms of property individually or in association with others ... .”<sup>35</sup> Namibia’s Constitution also recognizes that international human rights treaties are self-effecting once ratified, which bringing international human rights standards such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) directly applicable within the national legal system.<sup>36</sup>

Additional examples include Japan, which provides in its Constitution (Article 24) that “... With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.”<sup>37</sup>

Constitution protections however, while important, are not necessarily enough to ensure that women’s land, housing and property rights are properly incorporated more deeply within the domestic legal framework. In many countries, for example, family law addresses multiple issues central to women’s ability to access and control productive resources. These issues include provisions relating to marital property, divorce, inheritance and the recognition of customary marriages. While all of these issues are intertwined, for the purposes of going into detail on each of these issues, the following sub-sections address each topic separately.

Customary law and local practice are also extremely relevant. As was recognized by the former Special Rapporteur on the Right to Adequate Housing, Miloon Kothari, following global consultation on the status of women’s land, housing and property rights worldwide:

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<sup>31</sup> Robin Palmer, ‘Challenges in Asserting Women’s Land Rights in Southern Africa,’ paper presented at the Workshop on ‘Decentralizing Land, Dispossessing Women?: Recovering Gender Voices and Experiences of Decentralized Land Reform in Africa,’ Maputo, Mozambique, 4-7 May 2009.

<sup>32</sup> The Food and Agriculture Organization (FAO) of the United Nations, *‘Gender and Access to Land,’* Land Tenure Studies, No. 4, 2002. See also: FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 11 May 2012, at § 9.6.

<sup>33</sup> Lorenzo Cotula, ‘Gender and Law - Women’s Rights in Agriculture,’ FAO Legislative Study 76, 2007 (revised from 2002).

<sup>34</sup> The Constitution of the Republic of Malawi (1994, reviewed in 2004), Article 24(1)(a)(i & ii).

<sup>35</sup> FAO Gender and Land Rights Database, Full Country Report for Namibia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>36</sup> UN-HABITAT, ‘Policy Makers Guide to Women’s Land, Property and Housing Rights across the World,’ 2007. Available online at: [http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat\\_2007\\_Policy\\_makers\\_guide.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat_2007_Policy_makers_guide.pdf) [last accessed 6 April 2012].

<sup>37</sup> The Constitution of Japan, 3 November 1946.

*Testimonies from the Pacific Regional Consultation, for example, highlighted the dominance of customary laws and practices over constitutional guarantees of equality, within both matrilineal and patrilineal societies. In relation to land and housing, many of the cultural and social norms are applied to decisions made within the family or clan, an arena where women often do not have equal rights to participate. Importantly, many of the customary forums for decision-making and redress are dominated by male leaders and do not provide the space for women to participate equally. This creates a significant obstacle for women seeking redress from the imposition of customary norms, particularly in countries where customary law is also legally recognized.*<sup>38</sup>

Similarly, with respect to HIV/AIDS, UNDP found that “A recent study of the socio-economic impact of HIV and AIDS in India shows that despite constitutional guarantees and legal safeguards, as high as 79 per cent HIV positive widows, most of them in the prime of their youth, were denied a share in their husband’s property. More than 90 per cent of the HIV positive widows had stopped living in their marital homes after the death of their husbands.”<sup>39</sup>

Therefore, it is clear that while Constitutional protections offer an important foundation, they are not alone sufficient to ensure enjoyment of women’s land, housing and property rights. It is important to go beyond Constitutional protections, therefore, and look more deeply into what other protections, policies and practices are enabling women to effectively access and control productive resources.

#### *Marriage and Family Law: Marital Property Regimes and Removal of the Concept of Martial Power*

Martial property is a key issue in understanding the status of women’s land, housing and property rights. It provides for rights within the context of marriage, and is conceptually distinct from the notion of ‘inheritance,’ covered in the next sub-section (this is because if laws on marital property provide for a certain division of the couple’s assets upon dissolution of the marriage, the assets which rightfully belong to the surviving spouse will not form part of the deceased’s estate).<sup>40</sup> Countries may apply very different default approaches to marital property, ranging from “full separation of property,” to “partial or limited community of property,” to “full community of property.”

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<sup>38</sup> Miloon Kothari, ‘Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Women and adequate housing,’ UN Doc. E/CN.4/2005/43, 25 February 2005.

<sup>39</sup> UNDP, ‘Voices and Visions: The Asia Pacific Court of Women on HIV, Inheritance and Property Rights,’ 2008.

<sup>40</sup> Legal Assistance Centre (LAC), ‘Marital Property in Civil and Customary Marriages: Proposals for law Reform,’ Gender Research & Advocacy Project, 2005.

### Useful Definitions: Types of Marital Property Regimes

Full Separation of Property: All property acquired by the spouses prior to and during their marriage remains the separate property of the spouse who acquires it.

Partial or Limited Community of Property: Assets acquired by each spouse prior to the marriage are regarded as separate property, and those acquired after marriage, along with the income earned during marriage by each spouse, are regarded as joint property. Moreover, income earned on separate property assets during the marriage also may be regarded as joint (Note: Many countries recognize gifts and inheritances granted to only one of the spouses after the marriage as separate property. Property received as damages for personal injuries, property that the couple has chosen to exclude by a domestic contract, may also not be considered joint depending on the legal provisions).

Full Community of Property: Assets and income brought into the marriage and acquired during the marriage become joint property of the couple.

Definitions provided in: IRCW (Document prepared by Anna Knox, Noni Milici and Nata Duvvury), 'Connecting Rights to Reality: A Progressive Framework of Core Legal Protections for Women's Property Rights,' 2007.

It is full community of property or partial community of property which are most commonly recognized worldwide as default marital property regimes.<sup>41</sup> This is particularly important because these default property regimes *assume* a joint marital estate, regardless of whether a woman is actually a title holder to property. This is relevant because in many cases bias in favor of males prevents women from becoming listed as household heads or owners of property (see section on titling registration, below). In addition, these default property regimes generally do not depend on a woman proving her financial contribution to the acquisition of marital property, which may be difficult given the non-remunerated nature of much of the work done by women globally. In many countries a marital-property approach reflecting an "equalization of marital property" when a marriage ends has been put in place, recognizing women's non-economic and indirect contributions to marital property (for example, as in Austria, Canada, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden and the United States).<sup>42</sup> The International Center for Research on Women (ICRW) has observed that:

*Because women often enter marriage with few assets, and because they tend to assume the bulk of unpaid domestic labor and thus have limited opportunity to acquire assets during the marriage, the full community of property regime can be the best protection of women's rights. However, the marital property regime must be buttressed by additional legal protections, including provisions for joint administration of marital property and joint titling of major assets, which require spousal consent. In the absence of these provisions, partial separation of property can in some cases provide women with greater protection. A robust legal framework for marital property and inheritance provides for all three marital regimes, with full community of property as the default regime if no alternative is elected.*<sup>43</sup>

In cases where full community of property or partial community of property is the default regime, ante- or prenuptial agreements can also generally be used to provide couples with greater choice, as appropriate, where couples prefer greater separation of property and finances.

<sup>41</sup> See: Canadian HIV/AIDS Legal Network, 'Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS — Vol. Two: Family and Property Issues,' 2009. Available online at: <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1537> [last accessed 6 April 2012].

<sup>42</sup> Canadian HIV/AIDS Legal Network, Women and Law in Southern Africa Research Trust–Malawi (WLSA–Malawi), 'Respecting and Promoting the Realization of Women's Marital Property Rights in Malawi,' Briefing Paper, 2011.

<sup>43</sup> Ibid.

Many countries have in fact adopted partial<sup>44</sup> or full<sup>45</sup> community of property as their default marital property regime for civil marriages. For example, the Revised Family Code (2001) of Ethiopia provides for partial community of property, as well as joint administration of marital property. Consent of both spouses is mandatory for the transfer of common property.<sup>46</sup> The law also provides that, in cases of dissolution, common property will be divided equally between spouses.<sup>47</sup>

The Brazilian Civil Code of 2002 provides for the equality of rights and duties of spouses and for the application, in the absence of prenuptial agreements, of a regime of partial community property, with each spouse having equal rights to administer common property and to administer her or his own separate property.<sup>48</sup>

Cambodia's Marriage and Family Law of 1989 also provides for partial community of property as the default regime, noting that a wife and husband have equal rights to use, obtain benefits and manage joint property.<sup>49</sup> Under this law, each spouse is allowed to use the joint property in accordance to need and joint property may be sold or given as donation only with the consent of both spouses.<sup>50</sup> The law also provides that a woman has equal rights with her husband in divorce and that wives and husbands have equal rights to common property after marriage.<sup>51</sup>

However, progressive legislation in relation to marital property regime will only be effective when it is also coupled with the removal of any 'marital power' provisions which may undermine women's position of equality within the marriage. As the CEDAW Committee has recognized "In many States, including those where there is a community property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or *de facto* relationship is sold or otherwise disposed of. This limits woman's ability to control disposition of the property and the income derived from it."<sup>52</sup>

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<sup>44</sup> Including: Albania, Angola, Argentina, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chad, Chile, China, Colombia, Democratic Republic of Congo, Republic of Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Israel, Italy, Kazakhstan, Republic of Korea, Kosovo, Kyrgyz Republic, Laos, Lesotho, Lithuania, Macedonia, Madagascar, Mauritius, Mexico, Moldova, Montenegro, Mozambique, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Puerto Rico (US), Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (China), Tajikistan, Thailand, Turkey, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, and Vietnam. Data provided by: World Bank, 'Women, Business and the Law: Creating Better Opportunities for Women: Using Property,' available online at: <http://wbl.worldbank.org/data/exploretopics/using-property> [last accessed 3 April 2012].

<sup>45</sup> Including: Burundi, Namibia, Netherlands, Philippines, Rwanda, and South Africa. Data provided by: World Bank, 'Women, Business and the Law: Creating Better Opportunities for Women: Using Property,' available online at: <http://wbl.worldbank.org/data/exploretopics/using-property> [last accessed 3 April 2012].

<sup>46</sup> FAO Gender and Land Rights Database, Full Country Report for Ethiopia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>47</sup> Ibid.

<sup>48</sup> Lorenzo Cotula, 'Gender and Law - Women's Rights in Agriculture,' FAO Legislative Study 76, 2007 (revised from 2002).

<sup>49</sup> FAO Gender and Land Rights Database, Full Country Report for Cambodia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012]. See also: World Bank, 'Women, Business and the Law: Creating Better Opportunities for Women: Cambodia' available online at: <http://wbl.worldbank.org/data/exploreeconomies/cambodia/0?topic=using-property> [last accessed 3 April 2012].

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Committee on the Elimination of Discrimination against Women, "General Comment 21: Equality in Marriage and Family Relations," (13<sup>th</sup> session, 1994).

The granting of marital power to one spouse (generally the husband) over the other spouse (generally the wife), as well as over joint property, is a provision in some civil and customary legal systems which runs deeply counter to the right of gender equality. Marital power assumes that husbands are the ‘heads of the households,’ or legal representatives of households, with the authority to make decisions on behalf of the couple or family without the consent of their spouse/s, including exclusive rights to administration of property. International human rights law is clear on the prohibition of marital power. For example, the UN Human Rights Committee has underscored that: “During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets.”<sup>53</sup>

Botswana’s Abolition of Marital Power Act 34 of 2004 provides for equality of marital powers for couples married within community of property.<sup>54</sup> The Act specifically states that spouses married in community of property have equal powers and capacity to (a) dispose of the assets of the joint estate; (b) contract debts for which the joint estate is liable; and (c) administer the joint estate.<sup>55</sup>

Similar legislation has also been adopted via Mozambique’s New Family Law which established gender equality in all aspects of family law. The Law states that “marriage should not be seen exclusively as a union whereby women serve to produce children, but rather as an equitable union between equal partners.” Through this legislation, husbands are no longer automatically considered the head of the household, and parental authority replaces paternal authority.<sup>56</sup> Namibia took a similar approach through its Married Persons Equality Act of 1996 which abolished the marital powers of the husband and placed spouses on equal footing.<sup>57</sup> Before that Act was passed, marital power gave the husband the right to control and administer the joint estate. In other words, before the Married Persons Equality Act, despite the fact that Namibia recognized community of property, the husband retained the authority to administer the estate on behalf of the couple.<sup>58</sup>

Under Turkey’s Civil Code of 2001, the husband is no longer considered to be the head of the household, and husband and wife have equal status within marriage. The Civil Code of 2001 also introduced a community property regime with equal shares between spouses.<sup>59</sup> In Tunisia, a 1993 amendment to the 1956 Personal Status Code replaced the duty of the wife to obey her husband with the principle of mutual assistance.<sup>60</sup>

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<sup>53</sup> UN Human Rights Committee, “General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23),” at para. 8.

<sup>54</sup> Botswana’s Abolition of Marital Power Act 34 of 2004. This Act entered into force on 1 May 2005. Its full title is ‘An Act to provide for the abolition of marital power, to amend the matrimonial property law of marriages, to provide for the domicile of married women, to provide for the domicile and guardianship of minor children and to provide for matters incidental thereto.’ Available online at: [http://www.chr.up.ac.za/undp/domestic/docs/legislation\\_47.pdf](http://www.chr.up.ac.za/undp/domestic/docs/legislation_47.pdf) [last accessed 3 April 2012].

<sup>55</sup> Ibid.

<sup>56</sup> FAO Gender and Land Rights Database, Full Country Report for Mozambique, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>57</sup> FAO Gender and Land Rights Database, Full Country Report for Namibia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>58</sup> Ibid.

<sup>59</sup> Lorenzo Cotula, ‘Gender and Law - Women’s Rights in Agriculture,’ FAO Legislative Study 76, 2007 (revised from 2002).

<sup>60</sup> Ibid. While in Tunisia the husband remains the household head, both spouses are to cooperate in the management of family affairs. Law 98-91 (1998) allows spouses to opt into a community property regime should they so desire.

Similarly, in the Americas, the past few decades have similarly seen major improvements in women's legal status, particularly with regard to family law. Most countries have repealed norms identifying the husband as the household head and limiting the capacity of women to administer family property.<sup>61</sup>

All of this suggests that the selection of a progressive default marital property system must go hand in hand with the dissolution of the notion of marital power. According to ICRW, few countries have established *the most favorable marital property framework*. This is one in which States: 1) establish full community of property as the default property regime, 2) ensure that joint administration of marital property is mandated and accompanied by strong consent requirements, and 3) recognize unions other than civil marriages, and extend to these unions the same protections when it comes to property.<sup>62</sup>

Still, many States have taken important steps which can be looked to for good practices. ICRW also notes that:

*Ethiopia has gone the furthest, having partial or full community of property as the default regime, presuming joint property unless otherwise documented, requiring joint administration of marital property with spousal consent, and recognizing alternative unions as long as they have been registered and have endured at least three years. Kyrgyzstan, Rwanda and Vietnam also have relatively progressive frameworks, except that they do not presume joint property or recognize alternative unions. Among the Latin American countries examined, only El Salvador specifies full community of property as the default regime. El Salvador also requires joint administration and recognizes alternative unions.*<sup>63</sup>

In addition to abolishing the concept of marital power, as mentioned above, Namibia's Married Persons Equality Act also provided for the following protections and serves as one example of an integrated piece of legislation protecting women's equality rights in marriage. On community of property, the law stipulates that the default matrimonial property regime for civil marriages is in community of property.<sup>64</sup> Couples who want to marry out of community of property must enter into a formal ante-nuptial contract.<sup>65</sup> The law also provides for 'equal power' of spouses married in community of property, particularly with respect to: a) dispose of the assets of the joint estate, b) contract debts for which the joint estate is liable, and c) administer the joint estate.<sup>66</sup> Furthermore, the law states that "a spouse married in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse," and provides women married in community of property with equal access to bank loans and ownership of property *without* the consent of her partner.<sup>67</sup> Lastly, the law provides that immovable property, such as a communal house, must be registered in the names of both spouses' and that the sale of such property has to be approved by both parties.<sup>68</sup> Specifically on land, women farmers married in community of property are entitled to joint, as well as independent, land ownership under Namibia's Agricultural [Commercial] Act.<sup>69</sup>

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<sup>61</sup> Ibid.

<sup>62</sup> IRCW (Document prepared by Anna Knox, Noni Milici and Nata Duvvury), 'Connecting Rights to Reality: A Progressive Framework of Core Legal Protections for Women's Property Rights,' 2007. Available online at: <http://www.icrw.org/files/publications/Connecting-Rights-to-Reality-A-Progressive-Framework-of-Core-Legal-Protections-for-Womens-Property-Rights.pdf> [last accessed 4 April 2012].

<sup>63</sup> Ibid.

<sup>64</sup> FAO Gender and Land Rights Database, Full Country Report for Namibia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.



However, it should be noted that despite these positive protections, rights over marital property in customary marriages were not addressed by the Married Persons Equality Act, an issue to which we return shortly.

### *Marriage and Family Law: Inheritance Rights*

Inheritance is the practice of passing on property, titles, rights and obligations (i.e. debts, etc.) upon the death of an individual. Inheritance has emerged as a key issue in the struggle for women's land, housing and property rights particularly within the context of HIV/AIDS in sub-Saharan Africa where the pandemic was accelerating the practice of property grabbing, or 'disinheritance,' against widows.<sup>70</sup> It is an issue closely related to that of marital property rights, as discussed above, yet is also conceptually distinct from it. Inheritance is an important issue because it is so fundamental to the way in which wealth is transferred within a family, a society, as well as between generations. For many women, however, law and/or custom too often preclude their being able to benefit from inheritance practices on an equal footing – if at all – which make them completely unable to tap into the economic benefits and security that inheritance can bring.

There is an important caveat, however, within the discussion on inheritance which ought to be highlighted here. Increasingly, and in particular for widows, advocacy and legal reform efforts are moving beyond inheritance rights to a focus more directly on women's property rights within and outside of marriage. As has been observed:

*Many women, particularly in sub-Saharan Africa but also in other parts of the world, suffer immensely from property grabbing and the practice of disinheritance. It is important for women to be able to claim ownership of property during marriage, as well as upon the death of a spouse. Therefore, one should pay attention to the language that one uses to advocate on behalf of women. Discussions about women "inheriting" property from a deceased spouse may reinforce the idea that property rights vest primarily in the husband, not the wife. Similarly, language about a woman's "disinheritance" may fail to account for the fact that women are often stripped not just of their inheritance but of their own property.<sup>71</sup>*

For this reason, some have described inheritance as a 'backdoor strategy' to claiming women's rights because they enforce only a secondary right to property.<sup>72</sup> The solution for women, then, is to have both equal rights in terms of marital property, and equal rights in terms of inheritance. Inheritance rights do not and cannot supplant a woman's property rights in marriage.

That being said, spousal inheritance rights do matter. In one of the first attempts to estimate the impact of legislative changes in inheritance rights on women's status, researchers in India found that stronger

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<sup>70</sup> See: Centre on Housing Rights and Evictions (COHRE), *Shelter from the Storm: Women's Housing Rights and the Struggle against HIV/AIDS in Sub-Saharan Africa*, Geneva: 2009; Richard S. Strickland, 'To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa,' International Center for Research on Women (ICRW) Working Paper, June 2004; International Center for Research on Women (ICRW), *Reducing Women's and Girls' Vulnerability to HIV/AIDS by Strengthening their Property and Inheritance Rights*, 2006; United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Population Fund (UNFPA) and the United Nations Development Fund for Women (UNIFEM), "Women and HIV/AIDS: Confronting the Crisis," 2004. The task force identified protection of women and girls' rights to own and inherit land as one of six key actions to reduce girls' and women's prevalence rates of HIV/AIDS; Centre on Housing Rights and Evictions, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa*, 2004.

<sup>71</sup> Centre on Housing Rights and Evictions (COHRE), Huairou Commission, Open Society Foundations, UNDP, et al., *Tools For Change, Applying United Nations Standards to Secure Women's Housing, Land and Property Rights in the Context of HIV*, 2012.

<sup>72</sup> See: Robin Palmer, 'Gendered Land Rights – Process, Struggle or Lose C(l)ause?', Land Policy Adviser, Oxfam GB, 28 November 2002.

inheritance rights for women can indeed bring about a “genuine improvement in women’s socio-economic status.”<sup>73</sup>

Starting with inheritance from a deceased spouses’ estate, most countries in the world now provide for the surviving spouse, regardless of gender, to have equal inheritance rights to the marital home as well as to moveable and immovable property.<sup>74</sup> Some countries, for example Canada, designate a ‘spouse’s share’ of inheritance, which is a portion of the deceased’s estate that will automatically devolve to the surviving partner. In many cases, other family members (for example, children of the deceased) are also provided for, although in some circumstances only if the value of the estate exceeds the spouse’s share.

While some countries do not provide for equal inheritance rights between women and men, there are important advances being made. In Sierra Leone, for example, equality in matters of inheritance is now provided for through the Devolution of Estates Act of 2007.<sup>75</sup> Ghana’s Intestate Succession Law of 1985 also provides for the spouse and children of a person who died intestate (i.e. without a will) to inherit most of the property of their deceased spouse/parent.<sup>76</sup> With respect to Ghana, legal scholars have observed that:

*It has been twenty three years since P.N.D.C.L. 111 [Ghana’s Intestate Succession Law of 1985] was enacted. At that time it was an innovation, hailed as a source of relief for spouses and children who were often victims of ejection and other forms of persecution when the breadwinner of the family, usually the husband, died intestate. The Law was intended to prevent members of the extended family taking over the assets of the deceased for their own use to the detriment of the surviving spouse and children of the deceased.*<sup>77</sup>

However, a new Intestate Succession Bill is currently being considered by the Ghanaian Parliament. If adopted, that Bill would remove the “anomalies in the present law relating to intestate succession” and provide a uniform intestate succession law that would be applied irrespective of inheritance system of the intestate and the type of marriage contracted.<sup>78</sup> That draft legislation provides that “Where the intestate is survived by a spouse or by a child or both a spouse and a child, the spouse or the child is or both of them are entitled absolutely to the household property of the intestate.”<sup>79</sup>

Inheritance of course also applies to daughters inheriting from their parents’ estate. On both counts, several countries have taken important steps to protect the rights of women and girls within the context of inheritance and most countries now also have formal equality in matters of inheritance.<sup>80</sup> In India, the Hindu Succession (Amendment) Act of 2005 removed provisions in the 1956 Hindu Succession Act which discriminated based on gender. In particular, the Act resulted in daughters becoming equal inheritors of coparcenary property (coparcenary is the legal concept wherein two or more people inherit a title equally between them), thereby giving them the same legal rights as sons. The relevant provision reads “...the

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<sup>73</sup> Klaus Deininger, Aparajita Goyal, and Hari Nagarajan, ‘Women’s Inheritance Rights and Intergenerational Transmission of Resources in India.’ Forthcoming: *Journal of Human Resources*, May 2012.

<sup>74</sup> World Bank, ‘Women, Business and the Law: Creating Better Opportunities for Women,’ available online at: <http://wbl.worldbank.org/data/exploretopics/usingproperty#Rights%20over%20moveable%20and%20immoveable%20property> [last accessed 20 May 2012].

<sup>75</sup> The Devolution of Estates Act, 2007 [No. 21. 2007]. The Registration of Customary Marriages and Divorce Act of 2007 (amended in 2009) recognizes the right of women to acquire and dispose of property in their own right, and to enter into contracts. See: The Registration of Customary Marriage and Divorce Act, 2009 [No. 1 of 2009].

<sup>76</sup> Raymond Atuguba, ‘Promoting the Registration of Customary Marriages – Challenges and Strategies,’ 2003.

<sup>77</sup> Betty Mould-Iddrisu (Attorney-General and Minister responsible for Justice), Ghana Intestate Succession Bill [Memorandum], date unspecified.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> World Bank, ‘Women, Business and the Law: Creating Better Opportunities for Women,’ available online at: <http://wbl.worldbank.org/data/exploretopics/usingproperty#Rights%20over%20moveable%20and%20immoveable%20property> [last accessed 20 May 2012].

daughter of a coparcener shall, (a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as she would have had if she had been a son.”<sup>81</sup>

In Nepal, provisions of Nepal’s National Civil Code limiting the inheritance rights of daughters were challenged in court.<sup>82</sup> There the law had entitled daughters to an inheritance share only after they reached the age of 35 and were unmarried. Were they to marry, the law provided for land restitution to the family. The Supreme Court, however, directed the government to amend the law in the light of the equality provision enshrined in the Constitution. In 2002, a Civil Code Amendment Bill was passed by Parliament, recognizing women’s equal right to inherit parental property (but confirming the norm whereby women lose the land they inherit if they subsequently marry).<sup>83</sup>

In the Middle East and North Africa, inheritance laws and practices are governed largely by the application of Sharia law (or Islamic religious law), which determines how inheritance shares are to be distributed within the family. In many ways, Sharia law offers women independence on matters related to property. According to WISE (the Women’s Islamic Initiative in Spirituality and Equality), “The Muslim woman is an independent legal entity that retains her own name and financial independence before and after marriage. Unlike men, in marriage women are entitled to retain all and any of their wealth and earnings for themselves without having to consult their spouse.”<sup>84</sup> However, in matters of inheritance, in general, a woman’s inheritance share will be half of that of a male in her same position.<sup>85</sup>

The application of Sharia law is sometimes seen as a difficult issue within the context of women’s equal rights to land, housing and property, because it is sometimes seen as being immutable to change. However, as the Centre on Housing Rights and Evictions (COHRE) has noted:

*The denial of women’s inheritance rights in law and in practice is not, as many believe, derived exclusively and/or directly from Islam, but has evolved through application of socio-cultural traditions which, for centuries, have denied women their autonomy and rights. Indeed, Islam’s foundational scripture – the Qur’an – clearly grants women property and inheritance; at the very least, at a level equivalent to half the share received by male relatives. In practice, however, many women and girls are denied even this explicit entitlement. A significant number of scholars consider that the*

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<sup>81</sup> The Hindu Succession (Amendment) Act, No 39 of 2005, 5 September 2005. See also: Klaus Deininger, Aparajita Goyal and Hari Nagarajan, ‘Inheritance Law Reform and Women’s Access to Capital Evidence from India’s Hindu Succession Act.’ The World Bank, Development Research Group, Agriculture and Rural Development Team, June 2010.

<sup>82</sup> *Dhungana v Nepal*, Supreme Court of Nepal, Writ No. 3392 of 1993, 2 August 1995. See also: Lorenzo Cotula, ‘Gender and Law - Women’s Rights in Agriculture,’ FAO Legal Office, 2002;

<sup>83</sup> Binda Pandey, ‘Women’s Property Right Movement and Achievement of the 11th Amendment of Civil Code,’ Nepal Democracy.com (launched by the Friedrich-Ebert-Stiftung Nepal Office), 2002. That article states: “Today, women in Nepal can enjoy their right to inherit property from birth. But when they marry any property will be returned to the parent’s family. The new law establishes a wife’s equal right to her husband’s property immediately after marriage, rather than after she reaches 35 years of age or has been married for 15 years as before. A widow’s right to claim her share of property from the joint family after the death of her husband, and to use this property even if she gets re-married, is now also established in law.”

<sup>84</sup> WISE, ‘Current Issues: Economic Equality and Inheritance Rights, available online at: <http://www.wisemuslimwomen.org/currentissues/economicequality/> [last accessed 14 April 2012].

<sup>85</sup> UN Millennium Project, *Taking Action: Achieving Gender Equality and Empowering Women*, Task Force on Education and Gender Equality, 2005. This report also notes:

*... [T]here is a difference between Sunni and Shi’a inheritance rules; in Shi’a tradition, the wife (or wives) and daughters share the inheritance when there are no male heirs ... Religious law does not prevent women from owning assets, which may be given to them by a father or brother during their lifetimes. However, in some areas women who are widowed or abandoned by their husbands may cede their one-third share of family land to their brothers in exchange for economic support. Thus both laws and the economic realities faced by women in many parts of the Muslim world reduce the likelihood that women own real property.*

*Qur'an and other sources of the Shari'a, correctly interpreted, provide for women's right to inherit on an equal basis with male relatives.*<sup>86</sup>

Traditionally, the Sharia system of males inheriting twice as much as females has been seen as justified because men are duty-bound (also under Sharia law) to maintain their families, whereas women have no such obligation. Still, in the modern day, many Islamic women's rights advocates see the practice of unequal inheritance as fundamentally inadequate to meeting women's needs, and reinforcing of women's subordination within the family and the society.<sup>87</sup>

Some countries have made alterations in the classic application of Islamic religious law when it comes to matters of inheritance. For example, Tunisia, modified the rules on inheritance by favoring the spouse and female descendants over male cousins in some specific kinship configurations.<sup>88</sup>

Beyond this, it should also be mentioned that not all predominantly Muslim countries apply Sharia law. Turkey stands out in this regard. Under the Turkish Civil Code, male and female children inherit equal shares of their parents' estate without discrimination.<sup>89</sup> Similarly, "As Article 649 of the Civil Code establishes equality between heirs, women enjoy the same rights of inheritance as their brothers. Even the will of the deceased cannot change the obligatory legal share of the woman in any way. In the event of any infringement of this right, the woman has access to the courts."<sup>90</sup> However, in Turkey, inheritance of agricultural land was previously subject to discrimination, wherein first sons were able to inherit. However, after a change to Article 661 of the Civil Code, the new article has removed all reference to sons and daughters. Priority is given to the heir who wants to run the holding him- or herself and is capable of doing so. In assessing competence, the capabilities of the spouse of the contending heir are also taken into account.<sup>91</sup>

On addressing the discriminatory application of Sharia law, the CEDAW Committee has held that States should "give high priority" to the completion of the necessary legislative reforms and to modify, or repeal, without delay and within a clear time frame, discriminatory legislation, including discriminatory provisions which may originate in Sharia Law.<sup>92</sup> The Committee has also called on States to sensitize the parliament and public opinion regarding the importance of accelerating legal reform aimed at achieving formal equality for women and compliance with the Convention.<sup>93</sup> To do so, the Committee has recommended partnership and collaboration with religious and community leaders, lawyers, judges, unions, civil society organizations and women's non-governmental organizations. Women should be fully and equally involved in these law reform processes.<sup>94</sup>

Beyond Sharia's legal dimensions, customary practices and traditional structures can also force women to renounce their already reduced inheritance, and to hand over their already reduced share to a male member of the family. Again, as highlighted by COHRE:

*One of the strongest and most 'effective' obstacles to women receiving their fair share, or even an adequate share, of the inheritance is the combination of social stigma and family pressure. Many women are coerced by family members to give*

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<sup>86</sup> Centre on Housing Rights and Evictions (COHRE), 'In Search of Equality: A Survey of Law and Practice related to Women's Inheritance Rights in the Middle East and North Africa (MENA) Region,' Geneva, 2006.

<sup>87</sup> Ibid.

<sup>88</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women on Tunisia, UN Doc. CEDAW/C/TUN/CO/6, 5 November 2010.

<sup>89</sup> Ela Anıl, Canan Arın, Ayşe Berktaş Hacımiraçoğlu, Mehveş Bingöllü, Pınar İlkkaracan, 'The New Legal Status of Women in Turkey,' Women for Women's Human Rights (WWHR), April 2002.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

*up most, if not all, of their inheritance in favour of male relatives. Women are often threatened with the prospect of being ostracised or disowned by the family if they do not sign an agreement waiving their right to a share of the inheritance.*<sup>95</sup>

The 2012 report of the UN Special Rapporteur on the Right to Adequate Housing, Raquel Rolnik, also highlighted the issue of inheritance discrimination under Sharia law, and the efforts by some authorities to change the common practice of renunciation of inheritance. The report notes:

*In order to discourage this practice [of inheritance renunciation], in the occupied Palestinian territory, the Deputy Supreme Judge of Palestine of the Head of the Upper Council of Sharia Jurisdictions issued a notice in 2011 in which he instructed relevant authorities to apply certain conditions before legalising a woman's renunciation of her inheritance share, including that at least four months pass after the deceased person's death before a renunciation of inheritance can be registered. The notice also instructs the relevant authorities to verify the real value of the inheritance share, relying on an official report by three experts authorised by the municipality or local council. This new protocol is aimed at helping women to retain their inheritance shares and protecting women from losses as a result of reduced valuations of those shares.*<sup>96</sup>

Similarly, in Saudi Arabia, the Justice Ministry also launched a “Mawarith” (inheritance) program on its website, intended to help people find out how inheritance is distributed according to Islamic law. According to news accounts, most inheritance disputes in the Saudi courts are related to men depriving their female relatives of their legal share, a crime for which violators could face imprisonment and other punishments.<sup>97</sup>

#### *Marriage and Family Law: Polygamous and Customary Marriages*

In some countries, women married under polygamous or customary arrangements are often left in a legal ‘black hole’ without the protections afforded by civil law marriage, and are subject to the application of discriminatory practices. On polygamy, while many countries do legally prohibit polygamous marriages, the reality is that it may still be widely practiced. The UN Committee on the Elimination of Discrimination against Women has said in its General Comment 21 on Equality in Marriage and Family Relations, that:

*Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.*<sup>98</sup>

Dealing with polygamous marriage is one of the more difficult issues when it comes to addressing women's land, housing and property rights. When considering how to address the issue of polygamous marriage within the context of developing model legislative provisions protecting women's rights within the context of

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<sup>95</sup> Centre on Housing Rights and Evictions (COHRE), ‘In Search of Equality: A Survey of Law and Practice related to Women's Inheritance Rights in the Middle East and North Africa (MENA) Region,’ Geneva, 2006.

<sup>96</sup> Raquel Rolnik, ‘The Right to Adequate Housing, Report by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context,’ UN Human Rights Council, Nineteenth Session, Agenda item 3, UN Doc. A/HRC/19/53, (26 Dec. 2011).

<sup>97</sup> Galal Fakkar, ‘Ministry moves to ensure women's inheritance rights,’ Arab News, 18 July 2011.

<sup>98</sup> Committee on the Elimination of Discrimination Against Women, “General Comment 21: Equality in Marriage and Family Relations,” (13<sup>th</sup> session 1994). Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women provides that “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women ... .” Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981.

the HIV/AIDS pandemic, the Canadian HIV/AIDS Legal Network suggested options to either prohibit polygamy outright, or to regulate polygamy so that women in polygamous marriages are not denied legal protection within marriage and upon divorce.<sup>99</sup> On polygamy specifically, the Network observed that:

*... outlawing polygamy may leave women in existing polygamous marriages in a legal vacuum, and also have the unwanted effect of encouraging informal 'second house' relationships, which give less protection to women and children within marriage and upon separation. Rather than banning polygamy, a number of countries have launched awareness-raising campaigns to promote monogamous marriage and to discourage the practice of polygamy.*<sup>100</sup>

Similarly, the World Bank, FAO, and International Fund for Agricultural Development (IFAD) highlight that:

*Polygamous households present another set of issues in relation to marital property. Not all societies outlaw polygamy, and even if they do, the law is generally ineffective if polygamy is customary or traditional. Polygamy seriously affects women's rights to property, however, and generates much tension and anxiety over land rights in many countries. Polygamy complicates legislation requiring written consent of spouses to dispose of property; it also complicates provisions on inheritance and co-ownership of land. Legislating around polygamy is difficult, but to ignore formal or informal polygamy is to protect women's property rights inadequately. The situation is made even more difficult by the fact that many men refuse to acknowledge or discuss polygamy, and women are often hesitant to raise the issue.*<sup>101</sup>

In Kenya, the Law of Succession provides that “a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife ... and her children are accordingly children within the meaning of this Act.”<sup>102</sup> Accordingly, the law makes no distinction between wives in polygamous marriages and wives in monogamous marriages. Similarly, in 2009, the South African Constitutional Court upheld a lower court decision that all the widows from a polygamous Muslim marriage would be entitled to claim from the estate of a husband who dies intestate (i.e. without leaving a will).<sup>103</sup> Research also suggests that in addition to legal protection, wives in polygamous marriages must also benefit from awareness raising programs so that they are know of their rights and are able to claim them.<sup>104</sup>

On customary marriages more generally, Mozambique's New Family Law stipulates the obligation to register customary or religious marriages with civil authorities and recognizes *de facto* marriages, or common-law marriages.<sup>105</sup> It also recognizes customary law marriages and non-formal unions and women married under

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<sup>99</sup> Canadian HIV/AIDS Legal Network, 'Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS — Vol. Two: Family and Property Issues,' 2009. Available online at: <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1537> [last accessed 6 April 2012]. According to the Canadian HIV/AIDS Legal Network that project drew together “international human rights law and illustrative examples from various jurisdictions as the basis for a legal framework to respect, protect and promote women's rights in the context of HIV/AIDS. *Respect, Protect and Fulfill* is intended as a tool to assist advocates and policy-makers as they approach the task of reforming or developing laws to meet the legal challenges posed by the HIV epidemic. It is not intended for any one country or set of countries. The project focuses on sub-Saharan Africa but it is designed to be adaptable to the needs of countries in other regions.”

<sup>100</sup> Ibid, at footnote 25.

<sup>101</sup> The World Bank, the Food and Agriculture Organization (FAO) of the United Nations, and International Fund for Agricultural Development (IFAD), 'Gender in Agriculture Sourcebook,' 2009.

<sup>102</sup> The Law of Succession Act (Kenya), Revised edition 2008 (1984), Published by the National Council for Law Reporting, Nairobi.

<sup>103</sup> Constitutional Court of South Africa, *Hassam v Jacobs NO and Others*, CCT83/08 [2009] ZACC 19, 15 July 2009.

<sup>104</sup> Tewodros Tefera and Stein Holden, 'Ethiopian Recent Land Certification: Polygamy and Property Right' [document on file with author].

<sup>105</sup> Article 2 of the Act defines “spouse” as an otherwise single person who has cohabited with a partner of the opposite-sex as though they were husband and wife for a period of at least five years, thereby recognizing the rights of

custom can claim marital property.<sup>106</sup> Ethiopia's Revised Family Law of 2001 also recognizes equality between women and men, and rules over customary law in the regulation of marriages.<sup>107</sup> These types of provisions help to ensure that all women are able to benefit from legal protections benefiting their equal land, housing and property rights regardless of whether their marriage is formally recognized or registered.

In the Caribbean, Jamaica, the 2003 Family Property Rights of Spouses Act (which entered into force in 2006) recognizes the rights of common-law wives, defined as women living in a co-habitation arrangement for a period of at least five years.<sup>108</sup> Trinidad and Tobago's Cohabitation Relationships Act No. 30 of 1998 also provides for the jurisdiction of Courts to make orders in respect of interests in property and maintenance for a man or woman who are or have lived together as husband and wife on a *bona fide* domestic basis, even though they were not married to each other.<sup>109</sup> Cohabitation spouses have similar rights to property as married spouses (although the right to maintenance is not provided).<sup>110</sup>

### *Marriage and Family Law: Divorce*

Division of property in cases of divorce is closely related to the issue of marital property regime, discussed above, and is generally subject to marriage and family law. ICRW has noted:

*With few exceptions, divorce laws in the countries studied dictate that women are entitled to keep their separate property plus half the joint marital property. The separation of property regime thus can make divorce or separation economically devastating for women if they earn less income and have fewer assets. If their husbands purchased land or housing as their separate property and titled it as such, women have no claim to even the most fundamental of livelihood assets. Countries where separation of property is the default regime sometimes make special provisions to protect women who possess few assets. Laws in Morocco, Tunisia and Zimbabwe, for example, allow women to claim maintenance (but not property) in the event of divorce.<sup>111</sup>*

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unmarried women. FAO Gender and Land Rights Database, Full Country Report for Mozambique, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012]. Similarly:

*In the Philippines, the Family Code states that property acquired in unions with or without marriage is covered under the national co-ownership and joint ownership laws, and the presumption is that if two people live together their land is jointly owned. The written consent of both partners for transactions is required regardless of whether the land is registered in the name of both partners or was obtained by only one of them, if the land was obtained during the marriage or cohabitation.*

UN-HABITAT, 'Shared Tenure Options for Women: A Global Overview,' July 2005.

<sup>106</sup> According to UN-HABITAT "Although it is a progressive piece of legislation, it defines a household, which is the basis for the allocation of land, as a 'set of people living in the same home under the authority of the head of the household, married or in *de facto* union.' It has been argued that this leaves room for the land to be allocated to the man, who under the patriarchal system is considered to be the head of the household." UN-HABITAT, 'Policy Makers Guide to Women's Land, Property and Housing Rights Across the World,' 2007. Available online at: [http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat\\_2007\\_Policy\\_makers\\_guide.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat_2007_Policy_makers_guide.pdf) [last accessed 6 April 2012].

<sup>107</sup> FAO Gender and Land Rights Database, Full Country Report for Ethiopia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 9 April 2012].

<sup>108</sup> FAO Gender and Land Rights Database, Full Country Report for Jamaica, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>109</sup> FAO Gender and Land Rights Database, Full Country Report for Trinidad and Tobago, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>110</sup> Ibid.

<sup>111</sup> IRCW (Document prepared by Anna Knox, Noni Milici and Nata Duvvury), 'Connecting Rights to Reality: A Progressive Framework of Core Legal Protections for Women's Property Rights,' 2007. Available online at: <http://www.icrw.org/files/publications/Connecting-Rights-to-Reality-A-Progressive-Framework-of-Core-Legal-Protections-for-Womens-Property-Rights.pdf> [last accessed 4 April 2012].

Women's property rights in divorce situations are a critical issue for women because divorce is often a precursor to deepened poverty for women, and unequal rights in cases of divorce also present a very real barrier to women leaving abusive relationships. This reality has caused some human rights organizations to observe that in some countries, divorce can be tantamount to destitution for women.<sup>112</sup>

Many countries provide for fault-based as well as no-fault civil divorces. However, while some countries do not require a spouse to claim fault of their partner to file for divorce, Courts may still take into account the behavior of the parties when dividing property. For example, in Laos, the Family Law (Article 28) provides that initial assets remain the property of their owner and that "matrimonial property is to be equally divided, unless the husband or the wife is responsible for the break of the marriage, for damage to the property, has made secret use of it in a wrongful way or displayed dishonest intentions [i.e. fault-based divorce]. The wrongdoer will only receive one third of the property. In the event that minor children remain with one parent, that parent may receive a bigger share according to the court's decision."<sup>113</sup>

What is important is that gender equality to be recognized within the divorce context, with the same standards applied to the conduct of both women and men. This approach is consistent with international human rights standards; on the distribution of property within the context of divorce, the UN Human Rights Committee has specifically stated:

*States parties must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children.*<sup>114</sup>

In an interesting precedent, in Brazil the President has recently issued a decree stipulating that women who earn as much as 1,866 reais (approx. USD 1,060) a month and are enrolled under the government's homebuilding program will be entitled to ownership of the house in divorce settlements.<sup>115</sup> Brazil recognizes partial community of property, but under the new decree, men will only have the right to keep the family home after divorce if they retain custody of the couple's children.<sup>116</sup> In India, the Marriage Laws (Amendment) Bill, 2010 (adopted in 2012) also "marks the first attempt to legally recognize a wife's right to property acquired by her spouse during their marriage."<sup>117</sup>

### *Legal Pluralism*

Many countries have situations of dual or multiple legal systems, which include both statutory and customary legal systems. The relationship between statutory and customary law is determined by the legal status of customary law within the legal system.<sup>118</sup> This varies across countries, ranging between full recognition to partial recognition to non-recognition of customary law. For countries with different ethnic or religious groups, they may stipulate a range of personal laws, therefore changing women's legal status depending on her ethnic origin (for example, as in Sri Lanka).

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<sup>112</sup> See: Human Rights Watch, 'Divorced from Justice: Women's Unequal Access to Divorce in Egypt,' December 2004.

<sup>113</sup> FAO Gender and Land Rights Database, Full Country Report for Laos, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 9 April 2012].

<sup>114</sup> United Nations Human Rights Committee, 'Equality of Rights between Men and Women,' General Comment 28, adopted by the Committee at its sixty-eighth session, on 29 March 2000.

<sup>115</sup> Carla Simoes and Andre Soliani, 'Rousseff Increases Brazilian Women's Property Rights in Divorces,' *Bloomberg.com*, 8 March 2012.

<sup>116</sup> Ibid.

<sup>117</sup> The Times of India, 'Cabinet Gives Nod to Quick Divorces,' 24 March 2012.

<sup>118</sup> International Council on Human Rights Policy, 'When Legal Worlds Overlap: Human Rights, State and Non-State Law,' Versoix, Switzerland, 2009.



Certainly cultures and customs are not static, and research shows considerable variations not only between customary legal systems, but also within them.<sup>119</sup> Even in countries where statutory law supposedly trumps customary law, the reality is that custom continues to play a pivotal role in the lives of women and men, even where formal laws seek to restrict its powers.<sup>120</sup> Still, international human rights law, including CEDAW, obliges States to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” (Article 2 of CEDAW).<sup>121</sup>

This does not mean abolishing customary law, per se, only ensuring that its discriminatory aspects are addressed. While customary law is not necessarily discriminatory against women, on issues of land, equal access and control for women have been of special concern. As FAO has recognized:

*Customary land tenure remains widespread in Africa and Asia. While these elements are extremely diverse, in most cases rights in arable land are allocated by the lineage authority to the (male) household head; women have ‘secondary’ rights, i.e., cultivation rights, obtained through the relationship with male family members (husbands and male relatives). With population pressures, cultural change and agricultural intensification and commercialization, many customary systems have evolved towards greater individualization, extending the rights vested in (male) household heads and eroding women’s secondary rights.*<sup>122</sup>

The application of discriminatory customary (including religious) law is also a frequent rationale for violations of women’s land, housing and property rights, which makes it a vital issue to address within the context of policy intervention aimed at making progressive legislation effective and meaningful. ICRW has noted:

*Despite considerable progress on the legal front, many women remain unable to practice their property and inheritance rights. This system failure is partly due to the prevalence in many countries of customary and religious law, which often constrain women’s rights. Nevertheless, the national and international formal legal framework can override these other realms of law. For example Ethiopia, Mozambique and Uganda recognize customary law and local government authorities, but declare such law invalid to the extent it violates provisions in the constitution or civil law. Algeria, Bolivia, Guatemala and Peru have declared international human rights treaties equivalent to or superior to domestic*

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<sup>119</sup> Ibid, at p. 19. See also: Debbie Budlender, Sibongile Mgweba, Ketleetsi Motsepe and Leilanie Williams, ‘Women, Land and Customary Law,’ Community Agency for Social Enquiry (CASE), February 2011.

<sup>120</sup> Debbie Budlender and Eileen Alma, ‘Women and Land: Securing Rights for Better Lives,’ International Development Research Centre, 2011. Available online at: <http://web.idrc.ca/openbooks/525-0/> [last accessed 3 April 2012].

<sup>121</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.

<sup>122</sup> The Food and Agriculture Organization (FAO) of the United Nations, ‘Law and Sustainable Development since Rio - Legal Trends in Agriculture and Natural Resource Management,’ FAO Legal Office, Rome: 2002. It is also useful to note that this reality also seems to hold regardless of whether a customary society is matrilineal or patrilineal. In Vanuatu, for example:

*In matrilineal societies children claim their land rights through their mother. In some instances, for example North Pentecost, land rights are passed on through the mothers but the maternal uncles decide what rights a person may exercise. The sisters’ children will claim their land rights through their uncles. In this system no child goes without land; even illegitimate children have land rights. As in patrilineal systems, women do not have a public decision-making role in the matrilineal system.*

Anna Naupa and Joel Simo, ‘Matrilineal Land Tenure in Vanuatu: “Hu i kakae long basket?”: Case Studies of Raga and Mele,’ in Elise Huffer (ed.), *Land and Women: The Matrilineal Factor: The cases of the Republic of the Marshall Islands, Solomon Islands and Vanuatu*, Pacific Islands Forum Secretariat, 2008. See also: Ann Whitehead and Dzodzi Tsikata, ‘Policy Discourses On Women’s Land Rights In Sub-Saharan Africa: The Implications Of The Re-Turn To The Customary,’ *the Journal of Agrarian Change*, Vol. 3, Nos. 1 & 2, January and April, 2003, pp. 67-112; Leila Chirayath, Caroline Sage and Michael Woolcock, ‘Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems,’ July 2005.

*law, thereby providing a clear invitation for judges to render decisions based on international law provisions. Cambodia specifically commits itself to recognizing international law governing women's and children's rights.*<sup>123</sup>

The conflict between statutory law and customary law can be addressed at the highest level, namely within Constitutional protections. This has been done, for example, in Uganda where the Constitution provides that “Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life.”<sup>124</sup> However, it also provides that “Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.”<sup>125</sup>

So too can these issues be addressed at the level of national policy. For example, Namibia's National Gender Policy of 1997 recognized the value of traditional practices, but strongly urges changes to aspects of culture which have the effect of discriminating against women. Specifically, it noted that “it is critical that all the discriminatory laws including customary law” as well as legal practices in the areas of family, civil, labour and commercial law are “reviewed, amended and/or removed ....”<sup>126</sup>

The Courts have been another vehicle for addressing conflict of legal systems. In Kenya, for example, recent judicial decisions referencing CEDAW have addressed the conflict between statutory law and customary law when it comes to discrimination against women. In the *Ntutu* case (2008) the Kenyan High Court heard arguments by the sons of the deceased that Masai customary law of succession does not recognize the rights of the daughters to inherit the estate of their fathers.<sup>127</sup> However, in rendering its decision, the Court applied international human rights law, international covenants and treaties which have been ratified by Kenya, as well as previous case law.<sup>128</sup> The Court found “the customary law which shall abrogate the right of daughters to inherit the estate of a father cannot be applicable as it shall be repugnant to justice and morality,”<sup>129</sup> and upheld the right of the daughters to inherit equally from the assets of the estate.<sup>130</sup>

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<sup>123</sup> IRCW (Document prepared by Anna Knox, Noni Milici and Nata Duvvury), ‘Connecting Rights to Reality: A Progressive Framework of Core Legal Protections for Women's Property Rights,’ 2007. Available online at: <http://www.icrw.org/files/publications/Connecting-Rights-to-Reality-A-Progressive-Framework-of-Core-Legal-Protections-for-Womens-Property-Rights.pdf> [last accessed 4 April 2012].

<sup>124</sup> Constitution of the Republic of Uganda, 1995 (Preamble at § XXIV. Cultural objectives).

<sup>125</sup> Constitution of the Republic of Uganda, 1995 (Chapter Four: Protection and promotion of fundamental and other human rights and freedoms, at §33 Rights of women).

<sup>126</sup> IRCW (Document prepared by Anna Knox, Noni Milici and Nata Duvvury), ‘Connecting Rights to Reality: A Progressive Framework of Core Legal Protections for Women's Property Rights,’ 2007. Available online at: <http://www.icrw.org/files/publications/Connecting-Rights-to-Reality-A-Progressive-Framework-of-Core-Legal-Protections-for-Womens-Property-Rights.pdf> [last accessed 4 April 2012].

<sup>127</sup> In Re The Estate Of Lerionka Ole Ntutu (deceased) [2008] eKLR, High Court of Kenya at Nairobi, Succession Cause 1263 of 2000, decided 19 November 2008.

<sup>128</sup> In 2005, Kenya's Court of Appeal also made a landmark decision in the case of *Rono vs. Rono*. In that case, sons of the deceased father claimed that they had a right to a greater share of their deceased father's property than did their sisters. They argued that “according to Keiyo traditions, girls have no right to inheritance of their father's estate.” The Court awarded equal shares of inheritance to all children regardless of sex, thereby upholding the principle that it is human rights standards which must prevail. See: *Rono v Rono & another*, Kenyan Civil Appeal No. 66 of 2002, decided 29 April 2005.

<sup>129</sup> In Re The Estate Of Lerionka Ole Ntutu (deceased) [2008] eKLR, High Court of Kenya at Nairobi, Succession Cause 1263 of 2000, decided 19 November 2008.

<sup>130</sup> Similar examples exist. In Uganda, the Constitutional Court in the case of *Law Advocacy for Women in Uganda v Attorney General* (2007), struck down sections of the national Succession Act as unconstitutional because of preference given to male heirs over female heirs, as well as other provisions which discriminated on the basis of sex. See: *Law Advocacy for Women in Uganda v Attorney General*, Uganda Constitutional Court, Constitutional Petitions Nos. 13/05/ & 05/06 [2007] UGCC 1, decided 5 April 2007. Most recently in Swaziland, in the case of *Aphane v Registrar of Deeds & Others* (2010), the High Court ruled that married women have a right to register property in their own name, rather than

Similarly, in South Africa, the *Bhe case* found that the practice of male primogeniture (the custom of the firstborn male inheriting the entire estate) as provided for under customary law is discriminatory, and classified as unconstitutional all legislation that allows such discriminatory laws to be applied. After the Constitutional Court's decision in *Bhe*, South Africa enacted the Reform of Customary Law of Succession and Regulation of Related Matters Act, which gave customary widows and daughters the equal inheritance rights with widowers and sons.<sup>131</sup> In Nigeria, in the case of *Mojekwu v Mojekwu* the Nigerian Court of Appeal similarly held that the Nnewi custom of *Oli-ekpe* (prohibiting the inheritance rights of females and provides that the eldest male in the family will inherit) was discriminatory and any form of societal discrimination on grounds of sex was held unconstitutional and against the principles of an egalitarian society.<sup>132</sup>

Other similar examples include the case of *Epharabim v Pastory & another*, in which the Tanzanian High Court invalidated customary norms preventing women from selling land, stating that:

*Discrimination against women on no ground of sex had been prohibited by the Bill of rights and by the Universal Declaration of Human Rights, both of which had been incorporated into the Constitution, and by the Convention on the Elimination of All Forms of Discrimination against Women, by the African Charter on Human and People's Rights and by the International Convention on Civil and Political Rights all three of which had been ratified by Tanzania. It is clear that the customary law under discussion flew in the face of the Bill of Rights as well as the international conventions to which Tanzania was a signatory.*<sup>133</sup>

There are also alternative ways of trying to ensure co-existence between statutory laws and customary law and practice. For example, Namibia's Communal Land Reform Act of 2002 provides that both widows and widowers have a right to remain on their land after the death of their spouse. This right to remain continues to be held by a surviving spouse (regardless of gender) even if they subsequently remarry. If a surviving spouse who stays on the land later remarries and dies, the new surviving spouse will also have a right to remain on the land. However, if the second surviving spouse dies, the land reverts to the appropriate traditional authority to determine who has the right to stay on the land. This decision must be made in consultation with the members of the concerned family or families identified by the traditional authority with reference to the relevant customary law.<sup>134</sup>

## B. Titling and Registration Policies and Programming

### *Provision of Security of Tenure and Protection against Forced Evictions*

Titling and registration of land, housing and property can be somewhat controversial topics, because they are often seen to be synonymous with private property systems. As noted above, some feminist scholars and advocates have noted that individual property rights cannot be seen as a panacea for women: "I do not assume that 'security' is equivalent to individualisation and land registration. Much criticism of land titling exists, especially in the African context ... privatization and individualisation have led in Africa to polarization: ie increased land concentration and landlessness."<sup>135</sup>

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solely in their husband's name. See: *Aphane v Registrar of Deeds & Others*, High Court of Swaziland, Civil Case No. 383/2009, decided on 23 February 2010.

<sup>131</sup> Centre on Housing Rights and Evictions (COHRE), Huairou Commission, Open Society Foundations, UNDP, et al., 'Tools For Change, Applying United Nations Standards to Secure Women's Housing, Land and Property Rights in the Context of HIV,' 2012.

<sup>132</sup> *Mojekwu v Mojekwu* [1997] 7 NWLR 283.

<sup>133</sup> *Epharabim v Pastory & another*, 22 February 1990, LLR 83 (HCT).

<sup>134</sup> FAO Gender and Land Rights Database, Full Country Report for Namibia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 9 April 2012].

<sup>135</sup> Susie Jacobs, 'Land Reform: Still a Goal Worth Pursuing for Rural Women?,' *Journal of International Development*, Vol. 14, 2002, pp. 887-898.

As discussed above, however, UN-HABITAT suggests viewing land, housing and property rights on a continuum, with ‘security of tenure’ as a useful conceptual and legal foundation.<sup>136</sup> Security of tenure applies to the full continuum of rights, not only private property rights.

#### **Useful Definition: Security of Tenure**

Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States ... should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.

Definition provided in: UN Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), UN Doc. E/1992/23, annex III at 114, 1991. Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18, 2003.

Security of tenure is a vital concept because it protects – again, regardless of tenure type – against forced evictions. Forced evictions have been defined as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”<sup>137</sup> Forced evictions can take place at the hands of public actors, as well as at the hand of private ones, and they take place in both the rural and the urban context. The former United Nations Commission on Human Rights also affirmed “that the practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing.”<sup>138</sup>

Under international human rights law, evictions while can take place under “the most exceptional circumstances,”<sup>139</sup> the following procedural protections must be guaranteed:

*a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly*

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<sup>136</sup> On women and forced evictions, see also: Kaori Izumi, ‘Gender-based Violence and Property Grabbing in Africa: A Denial of Women’s Liberty and Security,’ *Gender & Development*, Vol. 15, No. 1, March 2007; Centre on Housing Rights and Evictions (COHRE), ‘Guidelines on Gender Sensitive Approaches and Alternatives to Eviction,’ 2010.

<sup>137</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), UN Doc. E/1998/22, annex IV at 113, 1997. Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 45, 2003.

<sup>138</sup> UN Commission on Human Rights, “Forced evictions,” Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/RES/1993/77, 10 March 1993.

<sup>139</sup> UN Commission on Human Rights, “Forced evictions,” Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/RES/1993/77, 10 March 1993

*bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.*<sup>140</sup>

Each of these procedural protections also applies to women and should be seen in a gender-sensitive manner.<sup>141</sup> From a gender perspective, it has been well documented that forced evictions have dire implications for women. For example, over the years, both the United Nations Special Rapporteur on Violence against Women and the United Nations Special Rapporteur on the Right to Adequate Housing have specifically addressed women's experiences violence within the context of forced eviction.<sup>142</sup> The United Nations Committee on Economic, Social and Cultural Rights has also recognized that women deserve special consideration and assistance in cases of evictions: "Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced evictions. Women in all groups are especially vulnerable."<sup>143</sup> Regardless of tenure type, and regardless of whether she lives in a rural or urban setting, it is vital that a woman's security of tenure be respected and protected.

FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security specify that States should safeguard legitimate tenure rights against threats and infringements; namely that they should protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions.<sup>144</sup>

In terms of forced evictions at the hands of private actors, it is important to understand that property-grabbing, or disinheritance, may also be considered as a form of forced eviction perpetrated against women.<sup>145</sup> Some countries do offer specific protections against property grabbing, although problems with implementation and enforcement are common. Zambia's Intestate Succession Act of 1989, for example, imposes criminal penalties on those who wrongfully deprive a rightful heir of their property.<sup>146</sup> In Malawi, Deceased Estates Act No. 14/2011 declares any property grabbing by a deceased spouse's relatives to be a criminal act, and subject to criminal prosecution.<sup>147</sup> In Zimbabwe, the Wills and Administration of Testate

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<sup>140</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), UN Doc. E/1998/22, annex IV at 113, 1997. Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 45. 2003.

<sup>141</sup> Centre on Housing Rights and Evictions (COHRE), 'Guidelines on Gender-Sensitive Approaches and Alternatives to Evictions,' 2010.

<sup>142</sup> See: Radhika Coomaraswamy, "Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Economic and social policy and its impact on violence against women," UN DocE/CN.4/2000/68/Add.5, 24 February 2000; Yakin Ertürk, "Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Political economy and violence against women," UN Doc. A/HRC/11/6/Add.6, 23 June 2009; Women's Right to Adequate Housing and Land: Middle East/North Africa Proceedings of the Alexandria Consultation, Miloon Kothari (UN Special Rapporteur on Adequate Housing) with collaboration and support from the United Nations Office of the High Commissioner for Human Rights, 23–26 July 2004.

<sup>143</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), UN Doc. E/1998/22, annex IV at 113, 1997. Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 45. 2003.

<sup>144</sup> FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 11 May 2012, at § 3.1 (2).

<sup>145</sup> See: Centre on Housing Rights and Evictions (COHRE), Shelter from the Storm: Women's Housing Rights and the Struggle against HIV/AIDS in Sub-Saharan Africa, Geneva: 2009.

<sup>146</sup> Republic of Zambia, Intestate Succession Act of 1989 Article 35(1) of Part IV, Act No. 5 of 1989.

<sup>147</sup> Republic of Malawi, Deceased Estates Act No. 14/2011; see also 1999 amendment to Wills and Inheritance Act of 1967.

Estates Act, No. 6 of 1989 prohibits “intermeddling” with the property of rightful heirs. Any person who wrongfully deprives a rightful heir of her or his property is liable to criminal sanction.<sup>148</sup>

### *Abolishing the ‘Head of the Household’ Concept*

Regardless of whether or not it entails formal ownership, titling and/or registration policies and programs must recognize women’s equal rights over land, housing and property. As noted above in the discussion on marital power, in practice the application of ‘head of the household’ provisions undermine women’s equal rights to land, housing and property, as titling programs have tended to prefer recognition of men’s rights exclusively. As FAO has recognized “... while land reform programmes adopting the household as the beneficiary unit and issuing land titles to the (male) household head may still provide female household members with access to land, they may undermine their bargaining power – and thus their social position.”<sup>149</sup> Scholars have similarly found that “[o]nly people deemed to be household heads - nearly always men - are granted land. In effect, male household heads may be confirmed as a new class of small landowning farmers. In some schemes, for instance in Honduras, Tanzania and Zimbabwe, ‘female household heads’, always defined as women without adult males present, are allowed to hold land, but in practice few benefit.”<sup>150</sup>

Recently, the CEDAW Committee in its Concluding Observations on Sri Lanka illuminated this issue when they noted “that discriminatory practices prevent women from acquiring ownership of land since only the ‘head of household’ is authorised to sign official documentation such as land ownership certificates and receive pieces of land from Government.”<sup>151</sup> There, the Committee urged the Government to abolish the concept of “head of household” in all of its administrative practices and recognize joint or co-ownership of land, as well as to amend its national legislation to ensure joint or co-ownership.<sup>152</sup>

Around the world, States have been doing away with the head of the household concept. In the Republic of Korea in 2005, the Constitutional Court abolished the family headship system, whereby inheritance moved from male head of the household to his son, on the account of unconformity to the Constitution. This amendment to the Civil Law went into effect in January 2008.<sup>153</sup>

In Latin America, UN-HABITAT notes:

*The constitutions of Brazil, Colombia, Cuba, Mexico and Nicaragua further guarantee full equality between men and women with respect to individual, civil and political rights. While the constitutions recognise these rights, most property, family and inheritance rights are regulated in civil codes. The majority of these civil codes have been reformed to recognise the role of both men and women as household heads, and in a majority of countries cohabitation (de facto unions) and civil divorce have also been recognised. As a greater percentage of women became heads of household, some countries have started modifying their laws regarding the elements required to be considered a head of household. This is the case in Bolivia, Colombia, Honduras, Peru, and Venezuela.*<sup>154</sup>

<sup>148</sup> Republic of Zimbabwe, Wills and Administration of Testate Estates Act, No. 6 of 1989.

<sup>149</sup> Lorenzo Cotula, ‘Gender and Law - Women’s Rights in Agriculture,’ FAO Legal Office, 2002.

<sup>150</sup> Susie Jacobs, ‘Land Reform: Still a Goal Worth Pursuing for Rural Women?’, *Journal of International Development*, Vol. 14, 2002, pp. 887-898.

<sup>151</sup> UN Committee on the Elimination of Discrimination against Women, ‘Concluding Observations on Sri Lanka,’ Forty-eighth session, 17 January – 4 February 2011, UN Doc. CEDAW/C/LKA/CO/7, at paras. 38-39 (4 February 2011).

<sup>152</sup> Ibid.

<sup>153</sup> FAO Gender and Land Rights Database, Full Country Report for the Republic of Korea, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>154</sup> UN-HABITAT, ‘Land Tenure, Housing Rights and Gender in Brazil,’ 2005.

### *Joint Titling and Co-Ownership*

Due to their typical bias in favor of males, titling programs have historically neither targeted nor benefited women.<sup>155</sup> However, as the UN Millennium Project's Task Force on Education and Gender Equality has observed "Joint titling helps to guard against capricious actions by one spouse; protects against the dispossession of women through abandonment, separation, or divorce; and increases women's bargaining power in household and farm decision-making. ... Mandatory joint titling provides the most secure land rights for women."<sup>156</sup>

While joint titling is not always the norm, during 1988–1995, five countries in Latin America (Brazil, Colombia, Costa Rica, Honduras, and Nicaragua) passed agrarian legislation for joint adjudication or titling of land to couples, thereby overturning prior practice.<sup>157</sup> Continuing on from the previous section, we can take Nicaragua as an example of where the application of the head of the household concept once led to negative outcomes for women. However, Nicaragua also illustrates a case where the government changed its approach to one of joint titling:

*The Nicaraguan Agrarian Reform Act of 1981 does not apply the household head criterion for land allocation, and specifically recognises women as direct beneficiaries of the land reform regardless of their family status. .... Joint titling for couples (whether married or not) was made compulsory by article 49 of Law 278 (1997), whereby titles issued in the name of the household head are considered as issued to both spouses/partners. This titling programme has led to a considerable increase of women landowners.*<sup>158</sup>

In Panama, reforms to the Agrarian Law also include joint titling as a requirement for the allocation of State lands.<sup>159</sup> Similarly, Vietnam revised its marriage and family law in 2001 to require joint titling for land and other family assets.<sup>160</sup> In Peru, researches found that "Women have gained rights both individually and together with their partners as joint titles [*sic*]."<sup>161</sup> In India, the Government has been issuing Joint Pattas or title deeds, in the names of both husband and wife, thereby making women joint-owners of land.<sup>162</sup>

Several lessons have been drawn from titling programs which have recognized (or failed to recognize) co-ownership between spouses via joint titling. Researchers looking into these questions have surmised that titling legislation, regulations, and guidelines should include the option of joint titling and the mandate that marital property be jointly titled.<sup>163</sup> They also recommend that the titling process and forms should facilitate

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<sup>155</sup> Carmen Diana Deere, 'Rural Women and State Policy: The Latin American Agrarian Reform Experience,' *World Development*, Volume 13, Issue 9, September 1985, pp. 1037–1053. See also: Lorenzo Cotula, 'Gender and Law - Women's Rights in Agriculture,' FAO Legal Office, 2002.

<sup>156</sup> UN Millennium Project, *Taking Action: Achieving Gender Equality and Empowering Women*. Task Force on Education and Gender Equality, 2005.

<sup>157</sup> Ibid.

<sup>158</sup> See Laws 209 of 1995 and 278 of 1997. Lorenzo Cotula, 'Gender and Law - Women's Rights in Agriculture,' FAO Legislative Study 76, 2007 (revised from 2002). See also: UN-HABITAT, 'Land Tenure, Housing Rights and Gender in Nicaragua,' 2005.

<sup>159</sup> UN-HABITAT, 'Land Tenure, Housing Rights and Gender in Mexico,' 2005.

<sup>160</sup> UN Millennium Project, *Taking Action: Achieving Gender Equality and Empowering Women*. Task Force on Education and Gender Equality, 2005.

<sup>161</sup> Daniela Fuentes, 'Closing the Gender Gap? Women's Land Rights in Peru and the Effects of the Rural Land Titling Project,' Norwegian University of Life Sciences, Department of Economics and Resource Management, Master Thesis, 2008.

<sup>162</sup> FAO Gender and Land Rights Database, Full Country Report for India, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>163</sup> Susana Lastarria-Cornhiel, Sonia Agurto, Jennifer Brown and Sara Elisa Rosales, 'Joint Titling in Nicaragua, Indonesia, and Honduras: Rapid Appraisal Synthesis,' Land Tenure Center, University of Wisconsin-Madison, January 2003.

the inclusion of more than one owner; that titling officials should receive training regarding marital property rights, co-ownership, and joint titling; and that information campaigns on the ground should explicitly inform both women and men about co-ownership and joint titling.<sup>164</sup>

These kinds of recommendations are also generally supported in the broader literature. For example, ActionAid has recommended “support [for] co-titling initiatives to ensure that women are not marginalized in decision-making and property distribution.”<sup>165</sup> As emphasized above, titling programs should be accompanied by other actions designed at ensuring that titles and registration have an empowering effect. As UN-HABITAT has underscored “Titling property in the name of women is very important. However, there is no automatic link. Women who are given titles are not automatically empowered. When the titling process is accompanied by other initiatives of empowerment, impressive results in the lives of women can be achieved.”<sup>166</sup>

### C. Land and Agricultural Policies and Programming

#### *Gender-Sensitive Land Tools*

##### **Useful Definitions: Land Tools**

Land tools are means to realize the land governance principles of a nation, community or group. Examples of land tools are laws, policies, plans, guidelines, operational manuals, training modules, land tenure instruments, land records databases, monitoring and evaluation instruments, and all others that influence the state and management of land tenure, land use and land values. These tools can be large scale (global or regional or national in scope) or local (community in scope). They can be formal, informal or customary.

Definition provided in: United Nations Human Settlements Programme (UN-HABITAT), ‘Designing and Evaluating Land Tools with a Gender Perspective: A Training Package for Land Professionals,’ 2011.

Land and agricultural policies and programs can either facilitate the enjoyment of women’s access to, and control over productive resources, or they can hinder it. A recent study from the UN Human Rights Council Advisory Committee on discrimination in the context of the right to food found that:

*Despite representing the majority of the agricultural workforce and production, women are estimated to have access to or control 5 per cent of land globally. ... The right to control, have access to and manage land is tied to a woman’s right to exercise financial independence, earn a livelihood and subsequently provide a livelihood for herself and her household. Agrarian reform policies that are “gender-blind” continue to exclude women from entitlements to land. States undergoing agrarian reform or land redistribution schemes must uphold the equal right of women to land, regardless of marital status.*<sup>167</sup>

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<sup>164</sup> Ibid.

<sup>165</sup> ActionAid International, ‘Cultivating Women’s Rights for Access to Land: Country analysis and recommendations for Afghanistan, Bangladesh, Burkina Faso, Ethiopia, Ghana, Guatemala, Malawi, Mozambique, Uganda, and Vietnam,’ 2005.

<sup>166</sup> UN-HABITAT, ‘Land Tenure, Housing Rights and Gender in Nicaragua,’ 2005. See also: Namita Datta, ‘Joint Titling – A Win-Win Policy? Gender and Property Rights in Urban Informal Settlements in India,’ *Feminist Economics*, Vol. 12, Nos. 1&2, 2005, pp. 271–298.

<sup>167</sup> Study of the Human Rights Council Advisory Committee on discrimination in the context of the right to food, UN Doc. A/HRC/16/40, 16 Feb. 2011.



In its most recent report on the State of Food and Agriculture, FAO has highlighted that virtually any agricultural policy will affect women and men differently.<sup>168</sup> Good agricultural policy, FAO underscores, requires an understanding of the gender dimensions at stake and should include the collection of baseline data.<sup>169</sup> Further, making women's voices heard at all levels in decision-making is crucial.<sup>170</sup> Others have similarly argues that in order for land and agricultural policies and programs to benefit women, they must be designed with women in mind from the outset.<sup>171</sup>

In Africa, a region where the issue of women's access to and control over land has emerged as a key theme, the recent 'Framework and Guidelines for Land Policy in Africa' also represents a positive new development from the standpoint of women's equal right to access and control land.<sup>172</sup> The Framework and Guidelines contain specific sections on strengthening the land rights of women, and recognize that:<sup>173</sup>

*Better and more productive use of land requires that the land rights of women be strengthened through a variety of mechanisms including the enactment of legislation that allows women to enforce documented claims to land within and outside marriage. This should come hand in hand with equal rights for women to inherit and bequeath land, co-ownership of registered land by spouses and the promotion of women's participation in land administration structures. To ensure full enjoyment of land rights, these measures must be part of an ideology which removes issues regarding the land rights of women from the private sphere of marriage and family, and places them in the public domain of human rights.*<sup>174</sup>

At the national level, while many countries have implanted land reform policies and programs aimed at more equitable distribution of land, few of these policies have taken a gender-sensitive approach. There are however some exceptions and some countries provide additional promising and innovative approaches.

In Botswana, for example, the Ministry of Agriculture initiated the development of the Agricultural Sector Gender Policy Framework in 2003 to address the needs of women so that they could more effectively participate in agriculture. The goal of the Framework was to "promote gender equality and equity in all agricultural development processes to ensure the creation of employment, reduction of poverty and achievement of household and national food security."<sup>175</sup> This Framework was approved at the ministerial level in July 2007 as a guiding document for all processes and procedures in the agricultural sector.<sup>176</sup>

The Eritrean Land Proclamation of 1994 explicitly states the principle of non-discrimination in land rights.<sup>177</sup> In Burkina Faso, the law provides for the allocation of state-owned land without distinction based on sex or

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<sup>168</sup> The Food and Agriculture Organization (FAO) of the United Nations, 'The State of Food and Agriculture: 2010-2011,' Rome, 2011.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Robin Palmer, 'A Guide to Gender Issues and Best Practices in Land Administration Projects: A Synthesis Report,' World Bank: Agriculture and Rural Development Department, 2005

<sup>172</sup> The Framework and Guidelines on Land Policy is a joint product of the partnership and collaborative effort of the African Union Commission (AUC), the UN Economic Commission for Africa (ECA) and the African Development Bank (AfDB).

<sup>173</sup> AUC-ECA-AfDB Consortium, 'Framework and Guidelines on Land Policy in Africa: Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods,' Addis Ababa, Ethiopia, September 2010.

<sup>174</sup> Ibid.

<sup>175</sup> FAO Gender and Land Rights Database, Full Country Report for Botswana, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>176</sup> Ibid.

<sup>177</sup> Lorenzo Cotula, 'Gender and Law - Women's Rights in Agriculture,' FAO Legislative Study 76, 2007 (revised from 2002).

marital status.<sup>178</sup> The Mozambique, the Land Act of 1997 ensures that both men and women have rights in state-owned land.<sup>179</sup> In Tanzania, the Land Act of 1999 explicitly affirms the equality of men's and women's land rights.<sup>180</sup>

In Malawi, the National Land Policy of 2002 recognizes that the rights of women are denied on the basis of customs and traditions, or that they are totally disregarded due to prejudice and lack of effective representation. The Land Policy also stipulates that in view of the effects of increasing land pressure due to population as well as the devastating effects of HIV/AIDS pandemic, a clear policy on gender access should always be considered in policy planning and implementation strategies.<sup>181</sup>

In Brazil, the 1988 Constitution and Law 8629 of 1993 state that both women and men, regardless of their marital status, can be allocated property rights or concessions under the agrarian reform, either individually or jointly.<sup>182</sup> Furthermore, Ordinance 33 of 2001, adopted by the Minister for Agrarian Development, institutionalizes an affirmative action program to facilitate rural women's access to land.<sup>183</sup>

In Tajikistan, a joint effort of UN-WOMEN with the Government of Tajikistan, non-governmental organizations and other partners resulted in the establishment of the Coordination Council dealing with women's ownership issues. A key task of the Council was to mainstream gender in Tajik land reform.<sup>184</sup> In 2004, seven substantive changes were made to the clauses of the national Land Code which previously discriminated against women.<sup>185</sup> These changes made it mandatory that all family members, including women, are now listed on land use certificates when families receive pieces of land from former collective farms.<sup>186</sup> The land reform was further strengthened by media campaigns, the provision of free legal advice, and the collection of sex disaggregated data. Within a few years time, women's land ownership grew from 2 to 14 percent.<sup>187</sup> A similarly successful strategy was also implemented in Kyrgyzstan.<sup>188</sup>

In Nepal, in 2006 a 10% tax exemption was made available if land is transferred to women and the same policy increased the exemption to 20 % in 2007 and 25% in 2009. The High Level Commission for Scientific Land Reform including other organizations and activists advocating for women's land rights have proposed the government to increase this tax exemption up to 50%.<sup>189</sup> Reportedly the credit is currently up to 40%.<sup>190</sup>

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<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Government of the Republic of Malawi, Ministry of Lands, Physical Planning & Surveys. 2002. Malawi National Land Policy. However, in practice the policy allows for the name of the head of a family to be registered as the proprietor of family land, resulting in men's names generally only being recorded. See also: Peters, P. E. & Kambewa, D. 2007. 'Whose Security? Deepening Social Conflict over "Customary" Land in the Shadow of Land Tenure Reform in Malawi,' Center for International Development (CID) Working Paper No. 142, Harvard, MA, USA.

<sup>182</sup> Lorenzo Cotula, 'Gender and Law - Women's Rights in Agriculture,' FAO Legislative Study 76, 2007 (revised from 2002).

<sup>183</sup> Ibid.

<sup>184</sup> Mirzoeva, Viloyat, 'Gender Issues in Land Reform in Tajikistan,' in *Economics and Rural Development*, Vol. 5, No. 2, 2009, p. 23.

<sup>185</sup> Articles 15(a), 37(c), 47, 66(4), 68(1), 68(7) and 71 of the Law of the Republic of Tajikistan on Amending the Land Code of the Republic of Tajikistan, 2004.

<sup>186</sup> Article 15(a) of the Law of the Republic of Tajikistan on Amending the Land Code of the Republic of Tajikistan, 2004.

<sup>187</sup> UN-WOMEN, 'Land in the Right Hands: Promoting Women's Rights to Land,' 2012.

<sup>188</sup> Ibid.

<sup>189</sup> Shristee Singh Shrestha, 'Land Entitlement and Women's Empowerment,' Consortium for Land Research and Policy Dialogue (COLARP), Kathmandu, Nepal.

<sup>190</sup> Global Forum on Food Security and Nutrition, 'How can women's land rights be secured? Collection of contributions received,' Discussion No. 75 from 23 January to 5 February 2012, An online discussion leading up to an

In the Philippines, Republic Act No. 6657 of 1988 (instituting the Comprehensive Agrarian Reform) recognized that women must be guaranteed and assured equal right to ownership of the land, equal shares of the farm's produce, and representation in advisory or appropriate decision-making bodies.<sup>191</sup>

#### *Agricultural Extension Services*

Agricultural extension services which respond to women's needs are also important, as these services typically provide farmer education, access to information, and technology and resource transfer. ActionAid has observed:

*Ministries of Agriculture should be lobbied to incorporate gender equality and gender analysis in the curriculum for extension workers, where this is missing. This would ensure that on the ground, extension service providers are working towards meeting both the practical and strategic needs of women in land rights and agricultural activities. And since most countries do not seem to have women farmer-centred extension programmes, advocacy could be undertaken to ensure that these are put into place.*<sup>192</sup>

In Botswana, "all agricultural extension regions have received assistance to establish Regional Gender Committees, which include representatives from all departments and parastatal organizations available in the regions. The purpose of these committees is to assist in cascading the gender mainstreaming concept and to facilitate information flow from the headquarters to the regional/district offices and the farming communities and vice versa."<sup>193</sup>

In India, the National Policy for the Empowerment of Women of 2001 also provided that efforts be made to ensure that benefits of training, extension and various programs reach women engaged in agriculture in proportion to their numbers.<sup>194</sup> The policy also sought to encourage changes in personal laws (such as those

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FAO-IFAD-ILC side event at the Commission on the Status of Women (CSW), 27 February – 9 March 2012, New York, 2012.

<sup>191</sup> Republic of the Philippines, Republic Act No. 6657, 10 June 1988. Furthermore, in the Philippines:

*Women's right to "equal treatment in agrarian reform and land resettlement programmes" is confirmed by the Women in Development and Nation Building Act of 1992. The implementation of these provisions has been improved by administrative guidelines adopted by the Department of Agrarian Reform, namely Memorandum Circular 18 of 1996 and Administrative Order 1 of 2001. Under these guidelines, no sex discrimination can be made in beneficiary selection, and land titles are to be issued in the name of both spouses (whether legally married or not) "when both spouses are jointly working and cultivating common tillage". Moreover, the consent of both spouses is required for land sales, mortgages and "all other transactions involving waiver of rights."*

Lorenzo Cotula, 'Gender and Law - Women's Rights in Agriculture,' FAO Legislative Study 76, 2007 (revised from 2002).

<sup>192</sup> ActionAid International, 'Women's Land Rights in Southern Africa: Consolidated baseline findings from Malawi, Mozambique, South Africa, Zambia and Zimbabwe,' 2009. See also: ActionAid International, Care, CARE, Christian Aid, Concern Worldwide, Find Your Feet, Oxfam, Practical Action, Save the Children, and Self Help Africa, 'What Works for Women: Proven Approaches for Empowering Women Smallholders and Achieving Food Security,' March 2012.

<sup>193</sup> FAO Gender and Land Rights Database, Full Country Report for Botswana, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>194</sup> FAO Gender and Land Rights Database, Full Country Report for India, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012]. Also in India, the 2007-2012 Eleventh Five Year Plan agenda for women in agriculture aims at ensuring effective and independent land rights for women and strengthening women's agricultural capacities. The Plan ensures direct transfers of land to women through land reforms, anti-poverty programmes, and resettlement schemes. It includes individual or group titles to women in all government land transfers, credit support to vulnerable women to purchase or lease land, records and legal support for women's inheritance rights, incentives and subsidies on women owned land.

related to marriage, divorce, maintenance and guardianship) so as to eliminate discrimination against women, with the initiative of and with the full participation of all stake holders, including the community and religious leaders.<sup>195</sup>

In Laos, the 2004 National Growth and Poverty Eradication Strategy (NGPES) addressed the concerns of rural women, envisaging the following actions: i. producing gender-related data and needs assessments; ii. including women in project activities; iii. applying gender equity in extension and training services; iv. using gender-related indicators to monitor projects; v. applying affirmative action concerning staffing of provincial and district staff, including extension workers; vi. designating gender focal points in villages to promote improved agricultural practices; vii. taking account of women's traditional rights in land reallocation, land titling and resolution of land disputes; and, viii. assisting women in accessing rural savings and credit schemes.<sup>196</sup>

In addition, as the International Fund for Agricultural Development (IFAD) has recognized “[i]n all instances, training women on their rights has proved extremely useful as it increases their awareness of the claims they can make and provides opportunities for enhancing their political capital and their participation in the policy process.”<sup>197</sup>

#### *Women's Participation and Representation in Decision-Making*

The right of women to participation is a crucial piece of any rights-based law, policy or program. In Namibia, the National Agricultural Policy of 1995 highlights the need to secure the participation of women in agricultural development and provides for women to be recognized as farmers in their own right.<sup>198</sup> Specifically, the policy acknowledges:

*...the constraints and discriminatory practices facing many female-headed households and the youth in rural areas throughout Namibia. The crucial role of women and the youth in agricultural development needs to be reemphasized, and their participation in agricultural organisations and related institutions ensured. Existing social norms and values relating to women and gender discrimination must be changed. Women will be assisted in overcoming constraints to their participation in development efforts related to their lack of knowledge, limited access to land, lack of security of tenure, discriminatory laws, shortages of labour and poor access to services and finance. ... As most communal farmers are women, the specific issue of access of rural women to land will be given priority consideration. Recognising the variable systems of inheritance practiced in Namibia, the Government will review and amend inheritance systems which currently discriminate against women. The aim will be to increase women's tenurial security in their won right and to enable them to have control over land and other resources.*<sup>199</sup>

On women's role in decision making, Mexico's 1971 Agrarian Law granted women the same land rights as men, and consequently they were granted a voice and vote in domestic decision-making bodies.<sup>200</sup>

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<sup>195</sup> Ibid.

<sup>196</sup> FAO Gender and Land Rights Database, Full Country Report for Laos, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012].

<sup>197</sup> International Fund for Agricultural Development (IFAD), 'Enhancing the Role of Indigenous Women in Sustainable Development: IFAD Experience with Indigenous Women in Latin America and Asia,' Third Session of the Permanent Forum on Indigenous Issues, 2004.

<sup>198</sup> FAO Gender and Land Rights Database, Full Country Report for Namibia, available online at: <http://www.fao.org/gender/landrights/report/en/> [last accessed 3 April 2012]. See also: Republic of Namibia, National Agricultural Policy of 1995, available online at: [http://www.mawf.gov.na/Documents/National%20Agricultural%20Policy\\_NAMIBIA\\_1995.pdf](http://www.mawf.gov.na/Documents/National%20Agricultural%20Policy_NAMIBIA_1995.pdf) [last accessed 12 April 2012]

<sup>199</sup> Ibid.

<sup>200</sup> UN-HABITAT, 'Land Tenure, Housing Rights and Gender in Mexico,' 2005.

In Tanzania, the Land Act of 1999 requires a “fair balance” of men and women is to be ensured in the appointment of the National Land Advisory Council.<sup>201</sup> In Zambia, the (draft) National Land Policy reserves 30 percent of new leasehold lands for women and persons with special needs.<sup>202</sup> Namibia’s Communal Land Reform Act of 2002 also guarantees minimum representation for women on district level land management bodies and is applicable to areas under customary law.<sup>203</sup> Similarly, under the Ugandan Land Act of 1998, specific provisions ensure women’s representation in the Uganda Land Commission, in Land District Boards and in parish-level Land Committees.<sup>204</sup>

### *Access to Loans and Credits*

As alluded to above, loans and credits provide another avenue for women to access land, housing and property, yet women often find it difficult to access formal financial systems. There are, however, some positive examples of women accessing microloans and credits through informal means. According to UN-HABITAT:

*Good models of women obtaining access to credit can be found in Nicaragua – the experience of the Women’s Centre of Xochilt-Acalt – and in Mexico with the Modelo Tanda Préstamo. These savings and credit schemes are beneficial to women’s associations and they strengthen women’s local management capabilities. However, the schemes are constrained by limited operating capital and a low level of security and they remain outside the formal financial system.*<sup>205</sup>

Other State-led initiatives exist. In Nicaragua, for example, Law 209 of 1995 grants priority for women in access to credit. In Brazil, Ordinance 121 of 2001, issued by the Ministry for Agrarian Development, reserves 30 percent of credit granted under national assistance programs specifically for women.<sup>206</sup>

In the Philippines, the 1992 Women in Development Act guarantees women equal access to government and private sector agricultural credit programs, and the 1997 Social Reform and Poverty Alleviation Act also provides for credit programs benefiting rural women.<sup>207</sup>

Further, according to the Organization for Economic Co-operation and Development’s (OECD) Social Institutions and Gender Index, in Morocco “... tradition prevents women from having access to bank loans. In response, the government has launched numerous micro-credit initiatives targeted at women, especially skilled craftswomen and those with small shops. Morocco has become a pioneer in this area, and hundreds of thousands of women have benefited from these programmes.”<sup>208</sup>

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<sup>201</sup> Lorenzo Cotula, ‘Gender and Law - Women’s Rights in Agriculture,’ FAO Legislative Study 76, 2007 (revised from 2002).

<sup>202</sup> UN-HABITAT, ‘Land Tenure, Housing Rights and Gender in Zambia,’ 2005.

<sup>203</sup> UN-HABITAT, ‘Policy Makers Guide to Women’s Land, Property and Housing Rights Across the World,’ 2007. Available online at: [http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat\\_2007\\_Policy\\_makers\\_guide.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat_2007_Policy_makers_guide.pdf) [last accessed 6 April 2012].

<sup>204</sup> FAO, ‘Law and Sustainable Development since Rio - Legal Trends in Agriculture and Natural Resource Management,’ FAO Legal Office, Rome: 2002.

<sup>205</sup> UN-HABITAT, ‘Policy Makers Guide to Women’s Land, Property and Housing Rights Across the World,’ 2007. Available online at: [http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat\\_2007\\_Policy\\_makers\\_guide.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat_2007_Policy_makers_guide.pdf) [last accessed 6 April 2012].

<sup>206</sup> Lorenzo Cotula, ‘Gender and Law - Women’s Rights in Agriculture,’ FAO Legislative Study 76, 2007 (revised from 2002).

<sup>207</sup> Ibid.

<sup>208</sup> OECD SIGI, Morocco, available online at: <http://genderindex.org/country/morocco> [last accessed 15 April 2012].

### *Access to Seeds and Tools*

FAO has noted that “Today, if men and women had equal access to productive resources in agriculture, food output in developing countries would increase by between 2.5 and four percent – enough to pull 100-150 million people out of hunger and help achieve Millennium Development Goal One on hunger and poverty reduction. Tomorrow, it would make it possible to feed a larger world.”<sup>209</sup> Nonetheless, according to the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee’s Network on Gender Equality (GENDERNET) “Very little aid (5%) targets gender equality and women’s empowerment in the sub-sector of agricultural inputs – machinery, equipment and seeds.”<sup>210</sup> While many international aid and humanitarian organizations distribute seeds and tools to farmers, women farmers continue to lag behind men in terms of access to these resources.<sup>211</sup>

### *Gender-Sensitive Monitoring and Evaluation*

Not only should law, policy and programs related to productive resources and land incorporate women’s rights in their design and implementation, they must also incorporate this perspective throughout all phases, including vis-à-vis monitoring and evaluation. In order to accomplish this task, gender disaggregated data is a very useful diagnostic tool.<sup>212</sup> In particular, FAO recommends that “[a]gricultural censuses should focus more attention on areas in which women are relatively more active and collect sex-disaggregated data on ownership of, access to and control over productive resources such as land, water, equipment, inputs, information and credit.”<sup>213</sup> The Nairobi Action Plan on Large Scale Land-Based Investments in Africa provides for the establishment of a “monitoring and reporting mechanism for tracking large-scale land based investments with a view to ensuring that these ventures are beneficial to national economic development and local communities, including women ...”<sup>214</sup>

In Italy, a 1997 decree of the Minister responsible for agriculture established a unit to monitor women’s economic activities and to collect data in order to formulate gender-sensitive policies and strategies.<sup>215</sup>

## D. Enabling Environments

### *Access to Justice and Remedies*

While many countries have progressive legal protections recognizing gender equality, often there is a stark gap between the intent of the law and its effective implementation. This may take place for several reasons, such

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<sup>209</sup> The Food and Agriculture Organization (FAO) of the United Nations, ‘FAO at Work 2010-2011: Women – Key to Food Security,’ Rome, 2011.

<sup>210</sup> Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC) Network on Gender Equality (GENDERNET), ‘Women’s Economic Empowerment: Issues Paper,’ April 2011.

<sup>211</sup> Ibid.

<sup>212</sup> The International Federation of Surveyors (FIG), adopted Guidelines on Women’s Access to Land in 2001. Establishing gender disaggregated land data and collecting gender sensitive indicators was seen as a key area for follow up to the Guidelines. See: Agneta Ericsson, ‘Women’s Access to Land,’ FIG XXII International Congress, Washington, D.C. USA, 19-26 April 2002; Karin Haldrup, ‘Mainstreaming Gender Issues in Land Administration: Awareness, Attention and Action,’ FIG XXII International Congress, Washington, D.C. USA, 19-26 April 2002.

<sup>213</sup> The Food and Agriculture Organization (FAO) of the United Nations, ‘The State of Food and Agriculture: 2010-2011,’ Rome, 2011.

<sup>214</sup> Nairobi Action Plan on Large Scale Land-Based Investments in Africa, as adopted by participants of the High Level Forum on Foreign Direct Investments in Land in Africa, Nairobi, Kenya, 4-5 October 2011.

<sup>215</sup> Lorenzo Cotula, ‘Gender and Law - Women’s Rights in Agriculture,’ FAO Legislative Study 76, 2007 (revised from 2002).

as inadequate budgetary supports provided to make the legislation effective, inadequate legal literacy or access to justice for women, inadequate training of legal and other professionals charges with protecting women's land, housing and property rights, etc. These are all areas which also demand attention at the level of policy and programming. As the International Development Research Center (IDRC) has recently observed "Merely passing legislation is of little effect without the necessary resources for implementation, without informing and educating all relevant actors on the provisions of the legislation, without monitoring the reforms, and without effective sanctions on failure to implement."<sup>216</sup>

The International Land Coalition (ILC) has also underscored this concern, and in Rwanda found that despite some progressive legal protections "The most common challenge faced by women [in seeking justice] was lack of necessary assistance. This challenge is noteworthy given that women represent themselves in court where proceedings are highly formal yet their literacy levels are low. Given their many responsibilities, women were also challenged for time when pursuing land arbitration, and many abandoned their cases as a result."<sup>217</sup>

In an effort to bridge the gap, some countries have tried to make the legal system and law enforcement work more effectively for women by locating them closer to the ground. Zambia has also established a special Victim Support Unit within its police force to protect women from property grabbing after the death of a spouse, and enforce their rights. This unit has been described as "an innovation that has helped to curb incidences of property grabbing. The dissemination of its activities through women's NGOs ... and the media, is enabling women to realise that they are not completely helpless when confronted with such situations."<sup>218</sup>

Uganda has also tried to address this challenge by granting judicial capacity to local councils at the village level in an attempt to encourage inexpensive, expedient, and culturally appropriate justice. However, UN-HABITAT has noted that women often choose to go to magistrates rather than the local councils, because they want officials from the formal legal system to be involved.<sup>219</sup> Scholars investigating the local councils in Uganda from a women's rights perspective also found that in many ways, popular justice has failed women in Uganda.<sup>220</sup> Indeed, while customary systems are defended by some, many do not see them as having women's interests at heart: "The women's movement is articulating a vision of land tenure and gender relations that challenge the fantasy that customary arrangements can adequately protect the welfare of women in the way that they are once said to have done. This is no longer the reality for many women, who are trying to find more secure and less arbitrary means of building their lives."<sup>221</sup>

The situation highlights the importance of ensuring that local justice systems, where relevant, incorporate, reflect and protect women's rights. A study by the Danish Institute for Human Rights (commissioned by

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<sup>216</sup> Debbie Budlender and Eileen Alma, 'Women and Land: Securing Rights for Better Lives,' International Development Research Centre, 2011. Available online at: <http://web.idrc.ca/openbooks/525-0/> [last accessed 3 April 2012].

<sup>217</sup> Rwanda Women's Network, 'Experiences of Women in Asserting their Land Rights: The Case of Bugesera District, Rwanda,' International Land Coalition, March 2011. Available on-line at: [http://www.landcoalition.org/sites/default/files/publication/956/WLR\\_5\\_RWN.pdf](http://www.landcoalition.org/sites/default/files/publication/956/WLR_5_RWN.pdf) [last accessed 3 April 2012].

<sup>218</sup> UN-HABITAT, 'Land Tenure, Housing Rights and Gender in Zambia,' 2005.

<sup>219</sup> UN-HABITAT, 'Policy Makers Guide to Women's Land, Property and Housing Rights Across the World,' 2007. Available online at: [http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat\\_2007\\_Policy\\_makers\\_guide.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/UNHabitat_2007_Policy_makers_guide.pdf) [last accessed 6 April 2012].

<sup>220</sup> Lynn Khadiagala, 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights,' *Development and Change*, Vol. 32, Issue 1, January 2001, pp. 55–76. See also: Aili Tripp, 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda,' *African Studies Quarterly*, *African Studies Quarterly*, Vol. 7, No. 4., 2004, pp. 1-19.

<sup>221</sup> Aili Tripp, 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda,' *African Studies Quarterly*, *African Studies Quarterly*, Vol. 7, No. 4., 2004, pp. 1-19.

UN-WOMEN, UNICEF and UNDP; hereinafter ‘Informal Justice Systems Study’) has recently observed that the obligations to respect, protect and fulfill human rights, including through the provision of justice and legal remedies, extends to formal and informal justice systems alike.<sup>222</sup> On women’s access to property, the study highlights:

*Women’s access to land – often the most important economic resource – is in many contexts through marriage or a woman’s father. Traditional mechanisms of land allocation may involve a purely male hierarchy and a traditional legal system that reinforces this arrangement. In some contexts inequalities arise out of the failure of the formal justice system to protect women’s property rights where jurisdiction over land is not under customary laws. In many contexts, both formal justice systems and IJS [informal justice systems] fail to protect women from discrimination in regard to property rights. While custom may not be in favour of practices such as property-grabbing (often committed against widows), IJS in many contexts have not been able to protect vulnerable women against such practices.*<sup>223</sup>

ActionAid and others support a rights-based approach to customary justice delivery. In many parts of Africa, where local Chiefs are the primary custodians of customary law, they are also the most accessible in resolving land related conflicts. Experts have maintained that these leaders should be sensitized and taught about rights based approaches that could improve the quality of the justice they deliver to women, including when it comes to issues of women’s access to and control over land.<sup>224</sup>

#### *Promising Grassroots-Led Initiatives*

In addition to what has already been discussed, it deserves mention that some women’s rights organizations advocate for establishing entirely new structures at the community level which can protect women’s rights in practice. Several strategies have also been used by grassroots women and their advocates at the local level to effect positive change. For example, some organizations are training community watchdogs and paralegals to protect women’s rights at the local level; while still others are intervening proactively with traditional leaders within their communities to push for progressive change to discriminatory customs. Huairou Commission highlights that:

*In response to the lack of effective and affordable judicial systems, women have relied on, and in some cases been at the forefront of developing informal justice systems in their own communities. These systems are better able to respond to women’s realities in real time. Community-based systems provide alternatives to the formal justice institutions that affirm women’s position and leadership, and support women’s rights. Grassroots women’s groups have developed a*

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<sup>222</sup> Danish Institute for Human Rights, ‘Informal Justice Systems: Charting a Course for Human Rights-Based Engagement: A Summary,’ a study commissioned by UN-WOMEN, UNICEF and UNDP, 2012. The study notes (p. 9):

*Human rights standards offer the possibility of fairness in three dimensions of justice: structural, procedural and normative. The structural dimension consists of participation and accountability. Particular attention must be paid to the rights of groups not strongly represented in IJS, which include women, minorities and children. Procedural justice consists of guidance for adjudication processes that ensure that the parties to a dispute are treated equally, that their case is decided by a person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide verifiable evidence to support it. Finally, normative justice consists of substantive rules that protect the vulnerable. Examples include the prohibition against marrying off children for the economic benefit of parents or guardians or the guarantee of the right of widows to inherit.*

<sup>223</sup> Ibid, at p. 11.

<sup>224</sup> ActionAid International, ‘Women’s Land Rights in Southern Africa: Consolidated baseline findings from Malawi, Mozambique, South Africa, Zambia and Zimbabwe,’ 2009; See also: Danish Institute for Human Rights, ‘Informal Justice Systems: Charting a Course for Human Rights-Based Engagement: A Summary,’ a study commissioned by UN-WOMEN, UNICEF and UNDP, 2012.



*number of strategies within their community-based justice systems, including community-led paralegals, watch dog groups, land tribunals and test cases.*<sup>225</sup>

In Kenya, grassroots women's groups such as GROOTS Kenya have organized community paralegal training to strengthen the capacity of community watchdogs. The Informal Justice Systems Study noted that programming that fosters closer relations between informal justice systems and local legal aid providers, such as paralegals, has had some positive results.<sup>226</sup>

Similar initiatives have been spearheaded by other grassroots women's groups within the region, such as Seke Rural Home Based Care (Zimbabwe), Ntengwe for Community Development (Zimbabwe), Ntankah Village Women Common Initiative Group (NVWCIG – Cameroon), Rwanda Women's Network (RWN – Rwanda), International Women Communication Centre (IWCC – Nigeria), and Grassroots Sisterhood Foundation (Ghana). In Zambia, the Justice for Widows and Orphans Project (JWOP) has conducted mock land tribunals on inheritance rights issues in order to raise awareness within communities and amongst local leaders.

All of these practices are promising, and could be directly supported by governments and other actors seeking to better promote and protect women's land and property rights and contribute to shifting popular attitudes in a more positive direction.

#### *Awareness Raising*

Awareness raising campaigns should also form a critical part of the implementation strategy around any legal reform or legal literacy process, as it is vital to ensuring that rights-holders know about and are able to claim their rights. Human rights groups such as Human Rights Watch, for example, have recommended that States launch broad awareness raising campaigns to inform the public about women's land and property rights, distributing such information in local languages through various means.<sup>227</sup>

Such steps are also important in situations where people are accessing informal justice systems to make rights claims. Again, as the Informal Justice Systems Study observed:

*In some contexts, the use of media, radio and television campaigns are effective. Among the other means of educating people are street theatre, information kits or flyers on how to initiate legal action or bring a dispute to IJS [informal justice systems]. Legal information kiosks or mobile legal clinics can also travel particularly to remote areas to conduct community education initiatives on legal rights. Trusted and familiar social networks, such as teachers, religious leaders, community groups or others with non-legal specialty skills, can substantially contribute to public awareness of the law and legal rights. In summary, a legally aware community translates into increased demand and higher expectation that IJS will deliver justice and be more accountable.*<sup>228</sup>

This step is also crucial in countries where formal legislation is progressive and protects women's rights. Here too, lack of knowledge of legal protection is a formidable barrier to claiming rights. For example, in

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<sup>225</sup> Huairou Commission, 'Tools for Securing Land and Property,' 2011.

<sup>226</sup> Danish Institute for Human Rights, 'Informal Justice Systems: Charting a Course for Human Rights-Based Engagement: A Summary,' a study commissioned by UN-WOMEN, UNICEF and UNDP, 2012.

<sup>227</sup> Human Rights Watch, 'Double Standards: Women's Property Rights Violations in Kenya,' Vol. 15, No. 5 (A), March 2003.

<sup>228</sup> Danish Institute for Human Rights, 'Informal Justice Systems: Charting a Course for Human Rights-Based Engagement: A Summary,' a study commissioned by UN-WOMEN, UNICEF and UNDP, 2012, p. 22.

Ghana, few women living in the Upper Volta region of the country were aware of the protections offered by the 1985 Intestate Succession Law.<sup>229</sup>

Through a UN-WOMEN program in sub-Saharan Africa to reduce women's vulnerability to HIV and to mitigate its impact through improved access to property and inheritance rights, grantees have increased the knowledge and awareness of approximately 1,200 women living with and/or affected by HIV/AIDS regarding their property and inheritance rights and the available legal services in the community, both formal and informal.<sup>230</sup>

### *International Enabling Environment*

The international community also has an important role to play in fostering an international environment which promotes women's equal access to and control over productive resources, including land. We began this paper with some observations on the broader context affecting women's land rights in particular, including the phenomenon of land grabbing in particular and the commodification and privatization of productive and natural resources (what some have called 'the commons') more generally. As the International Network for Economic, Social and Cultural Rights (ESCR-Net) has noted "... the prevailing discourse around land rights has assumed the form of individuating and commoditising entitlements to land, where access and ownership are conceived in liberal market terms and land is narrowly understood as property."<sup>231</sup>

In order to ensure that women enjoy their rights in practice, it is vital that the international community work to encourage a broad conceptualization of land rights and access to productive resources which is pro-poor and gender-inclusive. This would be consistent with the human rights-based approach to development. In addition, governments should be encouraged to include protection of women's land rights into their national action plans with respect to gender equality (as well as with respect to HIV/AIDS, below), and to provide resources for the realization of these rights. Austerity measures which are currently being adopted in many countries should not roll back progress made on the advancement of these rights for women. To the contrary, governments should invest more aggressively in women and in these rights in order to see the greatest impact on sustainable development, both in terms of national expenditure and contributions to international aid.

There are some hopeful signs of which to take note. In addition to the recent FAO Voluntary Guidelines which have been referenced previously, through the African Union Declaration on Land Issues and Challenges in Africa, African States have resolved to "strengthen security of land tenure for women which require special attention."<sup>232</sup> The Nairobi Action Plan on Large Scale Land-Based Investments in Africa also embraces "to promote alternative land based investment models" and underscores the importance of "maximiz[ing] opportunities for Africa's farmers, with special attention to smallholders [n.b. the majority of whom are women] and minimize the potential negative impacts of large-scale land acquisitions, such as land dispossession and environmental degradation, in order to achieve an equitable and sustainable agricultural and economic transformation that will ensure food security and development."<sup>233</sup>

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<sup>229</sup> Mary Kimani, 'Women Struggle to Secure Land Rights: Hard Fight for Access and Decision-Making Power,' *Africa Renewal*, April 2008, pp. 10-13.

<sup>230</sup> UN-WOMEN, 'Fact Sheet: Promoting the Legal Empowerment of Women in the Context of HIV/AIDS: Access to Justice: Securing Women's Property and Inheritance Rights in sub-Saharan Africa,' December 2011.

<sup>231</sup> Thea Gelbspan and Vijay K. Nagaraj, 'Seeding Hope? Land in the International Human Rights Agenda: Challenges and Prospects,' ESCR-Net Working Paper, 2012.

<sup>232</sup> African Union Declaration on Land Issues and Challenges in Africa, Assembly/AU/Decl.1(XIII) Rev.1, 2009.

<sup>233</sup> Nairobi Action Plan on Large Scale Land-Based Investments in Africa, as adopted by participants of the High Level Forum on Foreign Direct Investments in Land in Africa, Nairobi, Kenya, 4-5 October 2011.

## E. Additional Relevant Issues and Focus on Particular Groups of Women

### *Intersectional Discrimination*

It is important for effective law, policy and programming in the area of women's access to productive resources and land rights to reflect the notion that women are not a monolithic group, but rather are differentially impacted by intersectional discrimination. As the Montreal Principles on Women's Economic, Social and Cultural Rights observe:

*Many women encounter distinct forms of discrimination due to the intersection of sex with such factors as: race, language, ethnicity, culture, religion, disability, or socioeconomic class. Indigenous women, migrant women, displaced women, and non-national or refugee women experience distinct forms of discrimination because of the intersection of their sex and race, or their sex and citizenship status. Women may also confront particular forms of discrimination due to their age or occupation; family status, as single mothers or widows; health status, such as living with HIV/AIDS; sexuality, such as being lesbian; or because they are engaged in prostitution. Intersecting discrimination can determine the form or nature that discrimination takes, the circumstances in which it occurs, the consequences of the discrimination, and the availability of appropriate remedies. To ensure that all women enjoy the benefits of their economic, social, and cultural rights, specific measures are needed to address the ways in which women are differently affected in their enjoyment of a right as a result of the intersection of discrimination based on sex with discrimination based on other characteristics.*<sup>234</sup>

While by no means exhaustive, the following sections, therefore, address some specific groups of women who should have special consideration in law, policy and programming affecting women's access to productive resources and land rights.

### *HIV/AIDS*

The impact of women's access to, and control over, productive assets within the context of HIV/AIDS deserves special consideration. UN-AIDS has recognized that effective HIV responses require action to address gender inequality, including through the promotion and protection of women's rights. Evidence shows that protecting women's and girls' property and inheritance rights increases their economic security, which in turn reduces their vulnerability to HIV infection and strengthens their ability to manage the impact of AIDS.<sup>235</sup> In fact, some have suggested that the way to make sex safer for women is by ensuring that they have access, not only to condoms, but to title deeds.<sup>236</sup> UNDP has summarized:

*Access to inheritance and property rights critically impacts a woman's ability to both help prevent and cope with the impact of HIV and AIDS. Property rights can play a crucial role in reducing the HIV-vulnerability of women because it strengthens the socio-economic status of women in communities and society. Women who own property or other assets are in a better position to resist violence and exploitation, negotiate safe sex and even cope with crises which in turn help to reduce their vulnerability to HIV.*<sup>237</sup>

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<sup>234</sup> Montreal Principles on Women's Economic, Social and Cultural Rights, *Human Rights Quarterly*, Volume 26, Number 3, August 2004, pp. 760-780.

<sup>235</sup> Bertil Lindblad, Director, UNAIDS New York Office, 'Statement to the Fifty-sixth session of the Commission on the Status of Women,' 5 March 2012.

<sup>236</sup> Caroline Sweetman, 'How Title Deeds Make Sex Safer: Women's Property Rights in an Era of HIV,' From Poverty to Power: Background Paper, Oxfam, 2008.

<sup>237</sup> UNDP, 'Voices and Visions: The Asia Pacific Court of Women on HIV, Inheritance and Property Rights,' 2008. See also: The Food and Agriculture Organization (FAO) of the United Nations, 'Reclaiming Our Lives: HIV and AIDS, Women's Land and Property Rights and Livelihoods in Southern and East Africa - Narratives and Responses,' 2006; FAO, 'Gender, Property Rights and Livelihoods in the Era of AIDS,' FAO Technical Consultation Proceedings Report, Rome, 28-30 November 2007.

ActionAid has similarly argued that “Guaranteeing women’s land and property rights is one of the most powerful but most neglected weapons to stem the feminisation of the HIV and AIDS epidemic.”<sup>238</sup>

However, women affected by HIV/AIDS face unique challenges. UN-WOMEN has noted, for example, that the stigma associated with HIV positive status is a significant deterrent for women in terms of reporting or pursuing property and inheritance rights violations.<sup>239</sup>

In Asia, in order to mitigate the impact of unequal property and inheritance rights, the UNDP regional Programme on HIV in Asia and the Pacific, in partnership with UN-WOMEN and UNAIDS initiated a program to increase women’s access to land and property in the context of HIV. A jury comprising of two Supreme Court judges from Sri Lanka and Nepal and five expert witnesses heard testimony from 22 women representing 11 countries across the Asia-Pacific region. Those women shared their stories of disinheritance and property grabbing, and how it affected their being able to mitigate their HIV status.<sup>240</sup> Ultimately, the Court called for:

*... a simultaneous process of legal reform, as well as a process of social transformation necessary for society, men and women alike, to understand that property rights are essential for women and in addressing and mitigating the impact of HIV. This began a process spearheaded by UNDP together with the International Commission of Women’s Judges, to train judges on issues related to property and HIV/AIDS, to raise their sensitivity of the issues related to and their awareness of pertinent laws related to this intersection that may be used in judgments.*<sup>241</sup>

Many national HIV plans and strategies do incorporate elements of gender equality. Some also include specific reference to women’s land, housing and property rights. In Rwanda, for example, the National Accelerated Plan for Women, Girls, Gender Equality and HIV 2010-2014 raised as one of its key recommendations the need to “[r]aise awareness on women and girls’ property and inheritance rights among the community and law enforcement, to promote respect for and enforcement of women and girls’ rights.”<sup>242</sup>

### *Conflict, Disaster and Displacement*

Conflict and disaster are frequent precursors to mass displacement and to loss of land and other productive resources, in particular for women whose tenure rights are insecure to begin with. In times of conflict, UN-HABITAT has observed: “If women’s enjoyment of their rights to land, housing and property is obstructed during times of relative peace, their enjoyment of these rights during conflict situations is nearly prohibited.”<sup>243</sup>

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<sup>238</sup> ActionAid International, ‘Securing Women’s Right to Land and Livelihoods a Key to Ending Hunger and Fighting AIDS,’ ActionAid International Briefing Paper, June 2008.

<sup>239</sup> UN-WOMEN, ‘Fact Sheet: Promoting the Legal Empowerment of Women in the Context of HIV/AIDS: Access to Justice: Securing Women’s Property and Inheritance Rights in sub-Saharan Africa,’ December 2011. See also: Joint United Nations Programme on HIV/AIDS (UNAIDS) and World Health Organization (WHO), ‘Women and AIDS: An Extract from the AIDS Epidemic Update,’ December 2004.

<sup>240</sup> Centre on Housing Rights and Evictions (COHRE), Huairou Commission, Open Society Foundations, UNDP, et al., ‘Tools For Change, Applying United Nations Standards to Secure Women’s Housing, Land and Property Rights in the Context of HIV,’ 2012.

<sup>241</sup> Ibid.

<sup>242</sup> Republic of Rwanda, National Accelerated Plan for Women, Girls, Gender Equality & HIV 2010-2014, available online at: <http://sgdatabase.unwomen.org/uploads/National%20Accerelated%20Plan%20for%20Women%20Girls%20Gender%20Equality%20and%20HIV%20-%202010%20to%202014.pdf> [last accessed 13 April 2012].

<sup>243</sup> UN-HABITAT, ‘Women’s Rights to Land, Housing and Property in Post-conflict Situations and During Reconstruction: A Global Overview,’ 1999.

While disaster and conflict tend to have similar ramifications for women in terms of alienation from restitution processes that tend to benefit men, nonetheless, post-conflict post-disaster situations must be seen as a crucial moment to assert women's rights.<sup>244</sup> The 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (aka The Pinheiro Principles), provide that States must ensure the equal right of men and women to land, housing and property restitution and ensure the equal right of men and women to voluntary return in safety and dignity, legal security of tenure, property ownership, equal access to inheritance, as well as the use, control of and access to land, housing and property.<sup>245</sup> They also provide that States should ensure that land, housing and property restitution programs, policies and practices recognize the joint ownership rights of both male and female heads of the household as an explicit component of the restitution process, and that restitution programs, policies and practices reflect a gender-sensitive approach.<sup>246</sup>

In 1998, the Kigali Plan of Action (which emerged from the Inter-Regional Consultation on Women's Rights to Land and Property during Conflict and Reconstruction which took place in Kigali, Rwanda) indicated that "women should have adequate and secure rights to property. These rights must be equal to those of men, and a woman should not be dependent upon a man in order to secure or enjoy those rights."<sup>247</sup>

In Colombia, where research has indicated that displaced women have been more vulnerable to violent land seizures and face greater security risks than men when attempting to reclaim their land,<sup>248</sup> the Constitutional Court has played an important role in guaranteeing women's land rights. For example, Court Order (auto) T-092 of 2008 noted that displacement has had a disproportionate impact on women and recognized that: "women often only had their land rights protected via their male partners. Informal marriages, lack of knowledge about how their partners acquired the land and the variety of types of land tenure mean that female heads of households are extremely vulnerable to losing their right to their land."<sup>249</sup> T-092 also ordered the government of Colombia to establish new programs to assist displaced women, including a specific program on access to land.<sup>250</sup> Colombia's Victims and Land Restitution Law (2011) contains specific provisions addressing women's rights within the context of land restitution, and provides for special protection and attention for displaced women.<sup>251</sup>

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<sup>244</sup> Ibid.

<sup>245</sup> The United Nations Principles on Housing and Property Restitution, contained in UN Doc. E/CN.4/Sub.2/2005/17 (2005) at §4 on The right to equality between men and women. See also: OCHA/IDD, UN HABITAT, UNHCR, FAO, OHCHR, the Norwegian Refugee Council (NRC) and the Internal Displacement Monitoring Centre (IDMC), 'Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles,' March 2007.

<sup>246</sup> Ibid.

<sup>247</sup> The Inter-regional Consultation was hosted by the Government of Rwanda and sponsored by UNCHS (UN-HABITAT), UNDP, UNIFEM, and UNHCR. UN-HABITAT, 'Women's Rights to Land, Housing and Property in Post-conflict Situations and During Reconstruction: A Global Overview,' 1999. See also: Diana Lee-Smith & Minu Hemmati, 'Women's Land Ownership and Globalisation,' *The Network Newsletter*, British Council: Manchester, No. 20, May 2000; UNIFEM, 'Women's Land and Property Rights in Situations of Conflict and Reconstruction,' A Reader Based on the February, 1998 Inter-Regional Consultation in Kigali, Rwanda, 2001.

<sup>248</sup> Donny Meertens and Margarita Zambrano, 'Citizenship Deferred: The Politics of Victimhood, Land Restitution and Gender Justice in the Colombian (Post?) Conflict,' *The International Journal of Transitional Justice*, Volume 4, Issue 2, pp. 189-206, 2010.

<sup>249</sup> ABColombia, 'Returning Land to Colombia's Victims,' May 2011. ABColombia is the advocacy project of a group of five leading UK and Irish organizations with programs in Colombia: CAFOD, Christian Aid UKI, Oxfam GB, SCIAF and Trócaire. Amnesty International and PBI are observers.

<sup>250</sup> Constitutional Court of Colombia, Order 092 of 2008, V.B.7.

<sup>251</sup> 'Ley de Víctimas y de Restitución de Tierras,' Law 1448 signed into law by President Juan Manuel Santos on 10 June 2011.

Similarly, the 2010 Action Plan for National Recovery and Development of Haiti, adopted in the aftermath of the January 2010 earthquake which devastated much of the country, contains specific language around secure land tenure and embraces gender equality as a cross-cutting theme.<sup>252</sup>

### *Indigenous Women*

On the one hand, indigenous women are often alienated from their land rights simply because they are indigenous. Indigenous peoples generally face violations of their right to self-determination and their unique relationship to the land on which they live and the natural resources that the land provides may not always be recognized. They frequently lack security of tenure and legal recognition of their land rights and rights over productive resources. On the other hand, indigenous women also face challenges as women, and they may suffer some of the same kinds of discriminatory practices that other women living under customary systems face.

ILO Convention No. 169 on Indigenous and Tribal Peoples provides that “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.”<sup>253</sup> On indigenous women specifically, the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security provide that:

*Indigenous peoples and other communities with customary tenure systems that exercise self-governance of land, fisheries and forests should promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women. Effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to increase the capacity of their members to participate fully in decision-making and governance of their tenure systems.*<sup>254</sup>

There are few examples of policies or programming which specifically address the land rights of indigenous women. However, in India, the Orissa Tribal Empowerment and Livelihoods Programme confers ownership rights to indigenous communities who have been cultivating hillsides without title for many decades. That program does provide that indigenous women will be given special attention.<sup>255</sup>

## **3. Draft Model Guidelines for Legislation, Policy and Programming on Women’s Rights to Productive Resources, with a Focus on Land**

### **Constitutional Frameworks**

- Recognize that women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to the acquisition, administration, control, use and transfer of land [Namibia].
- Recognize women’s equal rights within the context of marriage and the family [Malawi, Namibia and Japan].

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<sup>252</sup> Action Plan for National Recovery and Development of Haiti, 2010.

<sup>253</sup> International Labour Organisation (ILO), C169: Indigenous and Tribal Peoples Convention, 1989.

<sup>254</sup> FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 11 May 2012 at § 9.2.

<sup>255</sup> International Fund for Agricultural Development (IFAD), ‘Enhancing the Role of Indigenous Women in Sustainable Development: IFAD Experience with Indigenous Women in Latin America and Asia,’ Third Session of the Permanent Forum on Indigenous Issues, 2004.

- Recognize that violations of women's right to equality cannot be justified on the basis of customary, religious or cultural attitudes or laws and that discrimination against women is prohibited [*Uganda*].
- Ensure that international human rights standards such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are directly applicable within the national legal system [*Namibia*].

### **Marriage and Family Law: Marital Property Regimes and Removal of the Concept of Martial Power**

- Recognize full community of property [*Austria, Canada, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden and the United States*] or partial community of property [*Brazil, Cambodia and Ethiopia*] as the default marital property regime, as well as joint administration of marital property.
- Abolish the notion of marital powers and place spouses on equal footing. Marital property should be administered through joint decision making by both spouses [*Botswana, Mozambique, Namibia and Turkey*].

### **Marriage and Family Law: Inheritance Rights**

- Provide for the surviving spouse(s), regardless of gender, to have equal inheritance rights to the marital home as well as to moveable and immovable property, including land [*Canada, Ghana and Sierra Leone*].
- Ensure equality between daughters and sons in all matters of inheritance [*India*].

### **Marriage and Family Law: Polygamous and Customary Marriages**

- Recognize the equal land, housing and property rights of all married women regardless of whether their marriage is formal, religious or customary, including wives in polygamous marriages (regardless of whether polygamy is or is not legal) [*Polygamy: Kenya and South Africa; Customary Marriage: Ethiopia, Jamaica, Mozambique and Trinidad and Tobago*].

### **Marriage and Family Law: Divorce**

- Ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution [*Brazil and India; see also marital property regimes above*].

### **Legal Pluralism**

- Review, amend and/or remove existing laws, regulations, customs and practices which discrimination against women or which in any way limit or negatively affect their access to and control over productive resources, including land, housing and property [*Ethiopia, Mozambique, Namibia and Uganda; Court decisions in: Kenya, Nigeria, South Africa and Tanzania*].

### **Provision of Security of Tenure and Protection against Forced Evictions**

- Provide legal security of tenure for women and legal protection against forced eviction [*adapted from UN-Habitat recommendation and FAO Voluntary Guidelines*].

- Ensure that forced eviction at the hands of private actors perpetrated against women (for example, ‘property-grabbing’) is illegal and subject to criminal penalties [*Malawi, Zambia and Zimbabwe*].

### **Abolishing the Head of the Household’ Concept**

- Abolish the concept of “head of household” in all administrative practices [*Botswana, Brazil, Colombia, Cuba, Mexico, Mozambique, Namibia, Nicaragua, Republic of Korea and Turkey*].

### **Joint Tilting and Co-Ownership**

- Ensure the joint titling of productive assets, including land, housing and property and Ensure that married women and married women alike are able to benefit from titling and registration programs [*Brazil, Colombia, Costa Rica, Honduras, India, Nicaragua, Panama, Peru and Vietnam*].
- Ensure that titling and registration programs are accompanied by awareness-raising initiatives aimed at educating women about their land, housing and property rights [*adapted from UN-Habitat recommendation*].

### **Gender-Sensitive Land Tools**

- Ensure that women’s rights, needs and perspectives are taken into account in land and agricultural policy and program development [*Botswana, Brazil, Burkina Faso, Eritrea, Kyrgyzstan, Malawi, Mozambique, Nepal, Philippines, Tajikistan and Tanzania*], including in design, implementation, monitoring, evaluation, and budgeting. Ensure also that women receive land plots of equal size and value within the context of land reform and/or land distribution programs.
- Ensure that the full range of land tools developed (i.e. laws, policies, plans, guidelines, operational manuals, training modules, land tenure instruments, land records databases, monitoring and evaluation instruments) incorporate a gender perspective, promote women’s effective and equal enjoyment of land rights [*adapted from UN-Habitat recommendation*].

### **Agricultural Extension Services**

- Ensure that agricultural extension services respond to women’s needs and reflect women’s rights to equality. Extension workers should be trained in gender equality and gender analysis [*Botswana, India and Laos*].

### **Women’s Participation and Representation in Decision-Making**

- Ensure that affected women and women’s rights groups/collectives are effectively and equitably represented in all decision-making structures relevant to land and agricultural policies and programs, including in mechanisms that have a voting function, where they exist [*Mexico, Namibia, Philippines, Tanzania, Uganda and Zambia*].

### **Access to Loans and Credits**

- Provide effective loan and credit programs which enable women to gain access to productive resources [*Mexico, Morocco, Nicaragua and Philippines*].

### **Access to Seeds and Tools**



- Provide women with access to seeds, tools and equipment for farming *[adapted from FAO recommendation]*.

### **Gender Sensitive Monitoring and Evaluation**

- Ensure that agricultural censuses focus attention on areas in which women are relatively more active and collect sex-disaggregated data on ownership of, access to and control over productive resources *[adapted from FAO recommendation]*.

### **Access to Justice and Remedies**

- Ensure that women benefit from legal literacy campaigns and programs which help them to understand their rights to access and control productive resources, and where to claim them *[civil society initiatives in Mozambique, South Africa and Zimbabwe]*.
- Ensure that women are able to access appropriate avenue of justice, including by ensuring that courts are fully accessible and affordable to women, and that women are able to access low-cost or free legal aid and other legal services *[civil society initiatives in Kyrgyzstan]*.
- Create effective enforcement mechanisms, such as special police units, to ensure that women are able to claim rights where they have been violated by a third party. Such resources should be made available to women living in areas where disinheritance and property grabbing commonly take place. These enforcement systems should be adequately supported with all necessary human, financial, legal, technical, and other resources *[Zambia]*.
- Ensure that legal professionals, including judges and lawyers receive training on women's land, housing and property rights, including inheritance rights and equal marital property rights *[adapted from UN-Habitat recommendation and civil society initiatives in Mozambique]*.
- Ensure that customary justice systems (including religious authorities and traditional leaders) are sensitized to women's equality and rights based approaches, so as to improve the quality of the justice they deliver to women, including when it comes to issues of women's access to and control over productive resources *[civil society initiatives in Uganda and Tanzania]*.

### **Promising Local Initiatives**

- Support community-based systems and groups which provide alternatives to the formal justice institutions that affirm women's position and leadership and support women's rights, including via community-led paralegals, watch dog groups and land tribunals *[civil society initiatives in Cameroon, Ghana, Uganda, Tanzania and Zimbabwe]*.

### **Awareness Raising**

- Provide for media campaigns to inform the public about women's rights to access and control productive resources, distributing such information in local languages through various means *[civil society initiatives in South Africa]*.

### **HIV/AIDS**

- Incorporate gender equality in national HIV plans and strategies, including through specific protection of women's land, housing and property rights *[Rwanda]*.

## **Conflict, Disaster and Displacement**

- Ensure the equal right of men and women to land, housing and property restitution and ensure the equal right of men and women to voluntary return in safety and dignity, legal security of tenure, property ownership, equal access to inheritance, as well as the use, control of and access to land, housing and property [*adapted from the Pinheiro Principles, see also Colombia and Rwanda*].

## **Indigenous Women**

- Recognize the rights of ownership and possession of indigenous peoples over the lands which they traditionally occupy [*ILO Convention 169*].
- Ensure that indigenous peoples promote and provide equitable, secure and sustainable rights to productive resources, with special attention to the provision of equitable access for women. Effective participation women in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to increase the capacity of women to participate fully in decision-making and governance of their tenure systems [*adapted from FAO Voluntary Guidelines, see also India*].