



UN-HABITAT

Shared Tenure Options for Women

A GLOBAL OVERVIEW



SHARED TENURE OPTIONS

FOR WOMEN

A GLOBAL OVERVIEW



UN-HABITAT

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United Nations Human Settlements Programme (UN-HABITAT)

P.O. Box 30030, Nairobi, Kenya

Tel: +254 20 621 234

Fax: +254 20 624 266

Web: www.unhabitat.org

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Susana Lastarria-Cornhiel and *Renee Giovarelli* conducted this desktop research and wrote this report.

Marjolein Benschop co-ordinated the research, provided additional information and carried out corrections and substantive editing. *Clarissa Augustinus* provided conceptual input with regard to forms of shared tenure.

Catalina Trujillo provided additional information on networks and coalitions in Latin America.

Edited by *Peta Nelson*.

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FOREWORD

Security of tenure is one of the cornerstones of Millennium Development Goal 7 on the improvement of the lives of slum dwellers, and is the main focus of the Global Campaign for Secure Tenure.

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.

Without specific affirmative measures to rectify the discriminatory practices of the past, recognition of equal rights between men and women remains a theory for the many women who cannot afford to buy land or housing. Such measures can entail independent registration of land in the name of women and/or shared forms of tenure, whether between husband and wife, extended families, communities or women's groups. For all tenure rights, from informal to formal, secure tenure for women within the household and within their community remains a crucial issue in need of more attention.

In this global report an overview is provided of different forms of shared tenure, whether between husband and wife, stable partners, extended families, women's groups or communities. An attempt is made to analyse to what extent such shared forms of tenure are beneficial to women. This includes a preliminary examination of the impact of shared tenure on women's effective land and housing rights, on women's access to credit and on domestic violence.

With this report, UN-HABITAT seeks to contribute to the development of tools and strategies towards women's security of tenure. The findings of this study will be used as a basis for further research and analysis, particularly with regard to urban, informal shared forms of tenure.



TABLE OF CONTENTS

FOREWORD	v
EXECUTIVE SUMMARY	1
Introduction	2
Joint Tenure	2
Impact of Joint Tenure	4
Other Forms of Shared Tenure	4
The Role of Organisations in Promoting Shared Tenure	6
Conclusions and Recommendations	7
CHAPTER ONE	
Introduction	9
CHAPTER TWO	
Joint Tenure	13
2.1 Introduction	14
2.2 Compulsory Joint Tenure	15
2.3 Optional Joint Tenure	26
2.4 Joint Tenure Regulations	34
2.5 Religious and Customary Laws	36
2.6 Gaps and/or Conflicts in Legal Framework	37
2.7 Challenges in Implementation	39
2.8 Impact of Joint Tenure	42
CHAPTER THREE	
Other Forms of Shared Tenure	47
3.1 Introduction	48
3.2 Customary Communal Tenure	48
3.3 Family Tenure	49
3.4 Community Titling	51
3.5 Co-Operatives	53
3.6 Land Market Transactions by Groups	54
3.7 Privatisation of State-Owned Housing	56

3.8	Shared Rental and Occupancy Rights	57
3.9	Shared Tenure Forms in Informal Settlements	58

CHAPTER FOUR

The Role of Organisations in Promoting Shared Tenure		63
4.1	Introduction	64
4.2	Governmental Organisations	64
4.3	Community Based Organisations	65
4.4	Legal Organisations	65
4.5	Labour Organisations	66
4.6	Non-Governmental Organisations	67
4.7	Network Organisations and Coalitions	68

CHAPTER FIVE

Conclusions	71
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CHAPTER SIX

Recommendations		73
6.1	Legal Recommendations	74
6.2	Implementation of Land and Housing Programmes	74
6.3	Monitoring and Evaluation	75

REFERENCES	77
-------------------	-----------

List of Tables

Table 2.1.1: Forms of Property Tenure	15
Table 2.2.1: Management of Community Property in Selected Countries	19
Table 2.2.2: Compulsory Joint Tenure by Country: Latin America	22
Table 2.2.3: Compulsory Joint Tenure by Country: Africa	23
Table 2.2.4: Mandatory Joint Tenure by Country: Asia	24
Table 2.2.5: Compulsory Joint Tenure by Country: Europe	25
Table 2.2.6: Mandatory Joint Tenure by Country: North America	26
Table 2.3.1: Optional Joint Tenure by Country: Latin America	29
Table 2.3.2: Optional Joint Tenure by Country: Africa	30
Table 2.3.3 Optional Joint Tenure by Country: Asia	32
Table 2.3.4: Optional Joint Tenure by Country: Europe	33
Table 2.3.5: Optional Joint Tenure by Country: North America	33
Table 2.3.6 Optional Joint Tenure by Country: Oceania	33
Table 2.4.1: Legal Requirements for Registration of Common or Joint Owners in Kyrgyzstan	35

EXECUTIVE SUMMARY

Introduction

Women and men have equal rights under international law and various constitutions throughout the world. This recognition has often not yet trickled down to other legislation, policies and programmes related to land, housing and (marital) property and is often not acknowledged in customs and practices. Thus inequalities in land tenure and housing rights between men and women continue to exist. These differences contribute to poverty for women and their families. In urban areas, secure tenure to adequate housing is a basic necessity for the well being of families, and households often use their residential properties for informal productive activities as well. In rural areas, secure tenure to land and control over its use are the basis for food and income production and, more broadly, for the well being of the household. Although in many cases women have access to land and housing, they often do not hold formal rights to it and their tenure is usually dependent on their relations with their husband or their in-laws; women risk losing such access after widowhood, divorce, desertion, or male migration.

It has been argued that, if women do not hold land tenure separate and independent from their husbands, they cannot expect to benefit from that land over time, as their husbands will still control the land. So far, independent rights to land and housing have mainly been allocated to female-headed households, or have been inherited in the few countries where widows and daughters have full inheritance rights. The development of the allocated land has been a major challenge for many of the beneficiaries. Up to recently, married women or women in consensual unions had been excluded from titling programmes, as a result of which the major portion of redistributed land was registered in the name of men. Several marital property regimes still do not constitute equal rights for both spouses, leaving women disadvantaged upon divorce, separation or desertion.

Without specific affirmative measures to rectify the discriminatory practices of the past, recognition of equal rights between men and women remains a theory for the many women who cannot afford to buy land or housing. Such measures can focus on independent registration of land in the name of women and/or on shared forms of tenure, whether between husband and wife, extended families, communities or women's groups.

This report seeks to provide a global overview of shared forms of tenure in legislation and practice. In this report, the terms *shared tenure* are used to refer to the broad category of rights to land and housing shared by two or more

people. Shared tenure can be formal or informal. Formal shared tenure conventionally refers to co-ownership or co-lease rights. In most countries, a range of land rights and tenure types exists, which forms a continuum (from informal to formal). At the one end of the continuum, there are the informal or illegal, shared forms of tenure, such as *de facto* recognition of an informal or illegal settlement, political protection against forced eviction etc. In the middle of this continuum, co-occupancy rights, shared user rights, collective adverse possession, special concessions and customary communal tenure are examples of shared tenure types, which can be either informal or formal. At the other end of the continuum, there are co-ownership and leases, which are conventionally referred to as formal tenure types. Shared tenure also includes land and/or housing which is owned, leased or occupied in shares by larger groups, such as through family tenure, community titling, women's groups and co-operatives, or by couples who each hold a portion of property together, but which do not necessarily constitute equal shares to this property. For all tenure rights, from informal to formal, secure tenure for women within the household and within their community remains a crucial issue in need of more attention.

A specific, formal form of shared tenure is *joint tenure*. Joint tenure is used to refer to land and/or housing held by both spouses (or by both members of a couple living in consensual union), whether through joint titling or through those marital property regimes, which ensure or provide the possibility for both spouses to have equal rights over the marital property.

While efforts were made to map out the different forms of shared tenure in the tenure continuum, the material that was available for this desktop study was mainly on joint tenure. This is why the main focus of this report is on joint tenure, while one chapter lists other forms of shared tenure.

Joint Tenure

Joint tenure can be compulsory or voluntary. *Compulsory* joint tenure usually provides women within a marriage or consensual union with the most secure rights to land. Compulsory joint tenure can occur in one or more of the following ways:

- a) The state distributes land to private parties and requires that the land be titled to all members of the household, or to all qualifying members of the household (regardless of gender), or specifically to both the husband and wife

EXECUTIVE SUMMARY

- b) A country's law provides for compulsory community property for married couples, and potentially for those who live in consensual union
- c) In some countries, peasant farms or other family businesses also create a presumption of compulsory joint ownership. That is, unless there is a contract to the contrary, joint ownership is compulsory.

It should be noted that even if compulsory joint tenure is a part of formal law, the more specific rules related to joint tenure can have a major impact on the implementation of this concept. The variations in joint titling regimes are related to the following issues:

1. When does property become the property of the community?
2. Which property is jointly owned?
3. Who will manage the community property?
4. If there is separate property, will the income from that property be owned by the individual or the community?
5. Do consensual unions trigger the joint titling rules and protections?
6. Is there a mandatory registration requirement for joint titling?

Countries that have a regime of *non-compulsory* or *optional* joint tenure allow joint ownership of land or property, but do not have the legal presumption that both members of a couple (married or not) have a right to land or property acquired during a marriage. This often leaves women at a serious disadvantage upon divorce from or the death of their spouses.

Without the support of a mandatory joint tenure law, in many cases women within a marriage will not be able to own land because customary laws or religious laws subordinate women to men in the household and vest property rights in the man only.

Both compulsory and non-compulsory joint tenure rights can be adversely affected by legal regulations, customary or religious practices and norms, gaps in legislation, and poorly implemented laws. While civil legislation establishes marital property regimes, the procedures for documentation and registration of joint titles, usually found in land legislation, make a real difference in terms of how many women formalise their rights to land and property. Procedures can be complicated, time consuming, and expensive. Formalisation may require proofs that women do not have.

Customary or religious law can have a great effect on the implementation of formal law. In some cases, where

customary law or religious law support or at least allow for joint tenure or equal rights to property, individualisation of rights and the formal law that supports individualisation may discourage joint tenure. In other cases, customs and traditions that vest power over property with males are more willingly embraced than religious or formal law that call for equality of property rights.

There are several common issues and conflicts in legislative frameworks at the country level regarding joint titling, joint registration, and assurance of women's rights to land and property. Very often legislation does not address or reflect issues related to traditions and customs at the household level, which have a much greater effect on women than on men. In other cases, legislation mirrors the reality for women, and memorialises discriminatory customs and traditions, not leaving any room for even small changes. Main legislative issues related to joint tenure are:

- Discriminatory laws and policies in language and/or content
- No linkage between land laws and marriage and family laws
- Customs Regarding Distribution of Family Wealth
- Legal/Civil marriage requirements
- Legal document requirements
- Polygamy

Mandatory titling and/or mandatory registration do not necessarily mean that women gain equal rights to land. The unequal outcome is related to cultural practices and biases, lack of information, or lack of enforcement of legal rules. Titling and registration legislation is implemented and enforced by government institutions. Administrative and judicial processes are critical to the exercise and enforcement of the right to joint ownership of land. Many titling and registration programmes fail to include women at the implementation phase. Administrative issues that must be considered are:

- Education of women and men about women's rights to co-own land and the procedure necessary to do so;
- Education of officials implementing joint registration in terms of procedures, documentation, and sensitivity to the need for women to be registered;
- Project and policy design;
- Judicial interpretation of joint titling legislation
- Customary and religious practices.

Impact of Joint Tenure

Titling programmes, in their design and implementation, have generally not targeted women. The reasons include legislation that does not explicitly guarantee women's rights, titling processes that focus on titling men, cultural norms that bias titling procedures, and specific constraints that women face in dealing with public institutions and officials. Joint titling has been recommended as a means of targeting women and ensuring that their name is included in the title documents for lands acquired by the family. Joint titling, however, often confronts the same difficulties and constraints in extending property rights to women that "traditional" (titling only one household head) titling programmes do. While specific legislation, regulations, and procedures that focus on women's rights to land are needed to title women both as individuals and as joint titleholders, cultural constraints to recognising women as full citizens, with the same and equal set of rights that men enjoy, may undermine those efforts.

Joint titling as a gender equity tool is a relatively recent phenomenon. Therefore there are few studies that have explored its effectiveness. While there is considerable theoretical evidence that women would benefit from participation in joint titling programmes, little information is available on the impact of these programmes for women. Further research is needed to provide information and analysis on the **effectiveness and impacts** of joint titling and other co-tenure efforts.

There are two types of justifications for joint tenure that extend legal rights to women. The fundamental objective is to improve gender equality and to empower women by improving their access and control over land. The other objective derives from these property rights: by virtue of having property rights, women are able to make decisions on the use of that property (land and/or housing), are able to use that property as collateral to secure credit and invest in the property, and increase their ability to provide for the well-being of themselves and their family.

One of the main justifications for titling programmes is greater access to credit for landholders. However, there are very few studies that have causally linked titling women with greater access to credit. In general, these studies have found that women with land rights are more likely to have received credit, albeit much smaller amounts than men.

Abuse against women is pervasive throughout the world. Although physical violence is the most obvious, emotional, sexual, psychological, and economic abuses are also common. Violence within the family is one of the

most dangerous and difficult to combat. Women find themselves not only physically and emotionally vulnerable but also without resources, making escape from the abusive situation difficult. This situation is related to their low status relative to men, particularly their lack of power and their economic dependence on men. One source of low status and economic dependence is women's lack of property rights. Without direct property rights, women are only able to gain access to resources through their partner. Thus, one way that women have struggled to improve their living conditions and reduce violence against themselves is by acquiring property rights in their own name.

Studies and interviews with women from many parts of the world, who have experienced domestic violence, attest to the fact that they feel trapped with no place to go because their home and land are owned and controlled by the perpetrator of the violence. One study in India found that women with property who experienced violence from their husbands were more likely to leave their marital home (71%) than those women who did not own property (19%).¹

Other Forms of Shared Tenure

In addition to joint ownership between spouses, there are other types of shared tenure ranging from communal property (such as those found in many customary tenure systems) to corporate ownership with formal legislation, formal legal recognition, and registered by-laws. The shared tenure types that the majority of the urban and rural poor have available to them can be *de facto* secure tenure, collective adverse possession, co-occupancy rights, shared use rights, special concessions, or shared lease and ownership.

Customary Communal Tenure

In communities based on customary communal tenure systems, the land of the community consists of both communal land and family/lineage-held land. Consistent with community rules, members utilise the land and other natural resources held in common. The family/lineage-held land is land allocated to extended family households for their use – normally this land consists of arable land and the homestead parcel. Some pastureland may also be assigned to individual households. Patrilineal

¹ Panda, Pradeep, & Bina Agarwal. 2005. Marital Violence, Human Development and Women's Property Status in India, in *World Development*, Vol. 33, No. 5, p. 836

customary societies allocate family/lineage-held land to the adult males belonging to the community, and this land is passed on from father to sons. Women are not generally allocated land, nor do daughters hold inheritance rights to it. However, there is evidence of some changes in this pattern within families. Fathers will sometimes allow their daughters to inherit (for example among Kikuyus in **Kenya** and in parts of **Tanzania** and **Ghana**), even if this is still resisted by the clan elders, or when fathers acquire non-family land they may gift it to their daughters.²

Family Tenure

Some customary tenure systems consist of strong family tenure forms where communal land is not significant, and community authorities do not allocate land. The family (often an extended one) is recognised as the owner of land and individual property rights are downplayed. Regions where this type of group ownership is found are the Caribbean, Eastern Europe, and Central Asia.

Community Titling

Where customary tenure systems based on strong communal land rights are still vibrant and individual titling programmes are not considered appropriate because private individual ownership rights are not seen as either necessary or economically efficient, community titling may be presented as an option. This mechanism is also used to support community-based natural resource management programs.

The community is a collection of families or households, and generally a man represents the family or household in the community. Thus, the men decide what the community can and will do, and who can directly enjoy the benefits and resources of the community. While granting title to a community does not necessarily mean that the women of the community will be treated differently than men, in practice it is the male household heads who, as the family representative, are invested with that family's rights to community land. In some societies, widowed or divorced women with children may also be considered as the head of household and landholder. In strongly patrilineal societies, however, the oldest male child, a brother, or a male relative from the husband's family assumes headship or guardianship of the family.

² Lastarria-Cornhiel, Susana. 1997. "Impact of Privatization on Gender and Property Rights in Africa" in *World Development*, Vol. 25, No. 8, pp. 1323-1324.

Co-operatives

In Eastern Europe and the Former Soviet Union, until the late 1980s or early 1990s, much land was held co-operatively or by the State. Privatisation of land has occurred in almost every country, but agricultural land is still held in tenancy in common or joint tenure in many countries. In **Russia**, for example, members of former state and collective farms received land shares, a non-demarcated percentage of the land of the former farm. Unless a farmer withdraws from the farm, his/her land is held in common with the other members. Under the land share system, usually land is held in tenancy in common rather than joint tenure and the members have a right to withdraw their land without the permission of the other members. Large co-operatives still exist in **Bulgaria, Estonia, Hungary** and **Slovakia**.³ In the **Kyrgyz Republic**, the Peasant Farm Law and the Civil Code state that the members of a peasant farm hold its land in joint ownership. A peasant farm is defined as a single-family farm.

Land Market Transactions by Groups

Groups of persons and families come together to participate in the land market in order to facilitate the transaction. Sometimes this is done to facilitate the transfer of land from the owner of a large property to many buyers or leasers. At other times, the group prefers to own and cultivate the land collectively. Some groups participate in state-sponsored land market programmes such as subsidised land purchase programmes, the leasing of state-owned land, or land banks that offer credit for the purchase of land. These market-oriented programmes do not generally have gender equity objectives nor do they target poor women farmers. Market-assisted (or market-led) land distribution programmes focus on identifying persons with already acquired capital and skills. This focus on experienced farmers with savings is likely to exclude women who tend to have little control over household income and few income-producing opportunities. In addition, cultural norms that ascribe secondary and dependent status to women constrain them from engaging in formal processes and contracts such as purchase or leasing contracts utilised in land market programmes.

Privatisation of State-Owned Housing

In sub-Saharan Africa, the availability of formal and informal urban housing is very much a consequence of colonial and post-colonial policies that tied housing to

³ Giovarelli, Renee. 2001. *Land Reform in Eastern Europe*. Food and Agriculture Organization, Rome.

employment.⁴ Colonial governments and companies provided rental housing for their colonial staff and African employees. Post-colonial state governments continued that policy by providing housing, generally under leasehold, to middle and high-level civil servants; many companies also follow this policy, particularly for their white-collar employees and skilled workers. Since these employees tend to be men, housing rentals are given mostly to men, although the rental contract usually included the name of the spouse.

Because of the lack of appropriate housing policies in the post-colonial period, many of the low-resource and low-income families who have migrated into urban areas, particularly in the last decades, have occupied vacant land and constructed informal settlements without secure tenure. The promotion of markets for land and housing has led some governments to privatise state-owned housing, without taking into consideration women's rights to property.

In **Zambia**, for example, the privatisation in the mid- to late-1990s of City Council, governmental, parastatal, and mining company housing has revealed the complexity of gender issues in the land market. The privatisation policy was to transfer ownership to "sitting tenants".

While the laws and regulations were gender-neutral, in practice, privatisation officers regarded the man as the main tenant and as head of household. This meant that title deeds were usually issued in the man's name only, even when rental contracts were in the names of husband and wife. Nevertheless, the housing market did open the opportunity for women with money to buy a house.

Shared Rental and Occupancy Rights

A number of countries have passed legislation to protect the rights to rented housing of spouses and other family members of the main tenant. Privatisation, combined with various legal reforms abolishing rental protection, has decreased affordable (shared) rental options in many countries. Legislation in some of the transition countries also appears to be weakening with regard to protecting rental rights on social grounds. In a few countries these protections are being improved.

⁴ Schlyter, Ann. 2004. *Privatisation of Council Housing in Lusaka, Zambia*. London: RICS Foundation.

Tenure Security in Informal Settlements

Low-income urban households often lack secure tenure to their housing. While formal titling and registration systems are more likely to be available in urban areas relative to rural areas, their services are generally not affordable, accessible, and transparent for low-income residents. In addition, low-income families in many urban areas do not have the financial means to purchase housing and are compelled to acquire it by either renting (often informally) or by occupying vacant land in or around cities. Thus, a large proportion of urban housing in most large cities in developing countries is informal in the sense that much of it is on land that has been occupied without legal title and that it is self-constructed, or consists of inner-city tenements informally rented. The basic tenure issues are

1. lack of land for the construction of housing by low-income families
2. lack of security on occupied land
3. lack of security for informal renters. Innovative approaches to improve tenure security of informal settlement and/or slum dwellers include collective adverse possession, collective special concessions, collective special use rights (**Brazil**), block starter titles and block land hold titles (**Namibia**).

The Role of Organisations in Promoting Shared Tenure

Numerous organisations deal with land rights and with gender issues, ranging from governmental agencies to informal community organisations. The number of organisations that deal with both sets of issues, however, is limited. Governmental programmes that implement land titling programmes often co-ordinate their activities with national-level and local-level organisations, such as rural workers' or peasant organisations. These organisations are generally dominated and led by men who seldom have any awareness of the need to extend property rights to women. If titling programmes have an objective of entitling women, they need to work with organisations that prioritise women's rights and interests.

Beginning in the 1980s, international organisations, such as agencies of the United Nations, took up the demands of the women's movement for equity and have been successful in pressuring member governments around the globe to modify laws and codes to explicitly recognise gender equality, including equity with regard to property rights.

At the national level, many countries created women's offices, usually attached to ministries or the presidential office, which advocate for and promote gender equity. These offices have generally dealt with basic legal rights, such as equality clauses in constitutions and civil codes, and with social services for women such as health care. At times they have also been active on other basic equity issues such as property and land rights, including joint tenure.

The participation of local organisations in the design and implementation of state programmes has been recognised as both valuable and effective. Local organisations, however, often reflect the discriminatory biases of local spaces based on gender, ethnicity/caste, religion, and class. Local organisations, even elected ones, generally consist of men, and decisions are made based on men's discussion of local issues. Women may have little if any input in these discussions.

Legal aid organisations can play an important role in providing legal counsel for women attempting to have their rights to joint property recognised and in setting legal precedents.

Labour organisations (particularly rural workers' unions and peasant groups) have been active in efforts to gain land rights for landless and land poor rural workers. While women are very active in these struggles, these organisations have often failed to recognise women as full members and to prioritise their needs and demands. Urban labour organisations, which generally have more active women's groups within them, have not always supported rural women's demands. One major problem that women activists experience in labour and peasant organisations is the perception by these organisations, and particularly the leadership, that the struggle for and recognition of women's rights weakens the class-based demands of these organisations.

Often, a number of organisations from different institutions will band together into a network or a coalition to promote legislative action on land rights or women's rights. Grouping together gives a coalition more political strength for lobbying and advocacy actions than each individual organisation could have. They can also draw upon different constituencies, thus giving the movement for women's land rights broader legitimacy. There are also cross-country regional networks that are active in promoting women's equal land rights.

Conclusions and Recommendations

Women's rights to ownership, use, and control over land are generally affected by their family status as daughter, wife, widow, or mother. Compulsory joint ownership in formal law for married women or for women living in consensual unions provides a woman with some protection against being left without land or a home when her relationship with her husband breaks down either due to divorce, abandonment, polygamy, or death. While separate property provides women with the most power and control over their own land, when women do not customarily inherit or purchase land, separate property can favour males. When joint tenure is not compulsory for married couples or those living in consensual unions, women rarely have equal right to land and housing. Even when joint tenure is compulsory under formal law, customary or religious law that does not recognise joint tenure frequently trumps written law. Moreover, if land is held in joint tenure under the civil law, but is not registered as such, women may not exercise their rights to this land.

In addition to joint ownership between spouses, there are other types of shared tenure, ranging from communal property (as found in many customary tenure systems) to corporate ownership with formal legislation, formal legal recognition, and registered by-laws. The informal and illegal tenure types that the majority of the urban and rural poor have available to them are part of a continuum (from illegal to informal to formal) that characterises tenure systems. Women's rights to land and other immovable property within these different forms varies considerably depending on family and lineage structures, the strength of customary norms and practices, observed and enforced legislation, and active organization on the part of women.

Recommendations can be divided into three main categories: legal recommendations, recommendations for implementation, and monitoring and evaluation.

Legal Recommendations

- Formal law should require gender equity in property relations
- Talk to local women to determine what legal rights and form of (shared) tenure are most valuable to them
- Review both land and housing legislation and family or personal laws that deal with inheritance,

marriage, and marital property for their impact on women's property rights.

- Encourage legal rules that require joint titling for conjugal couples, whether they are legally married or not.
- Language, particularly in the regulations written to implement land and housing laws, should not refer to one head of household but rather to women and men, to both spouses.

Implementation of Land and Housing Programmes

- Field research needs to be conducted to identify all property rights holders within a household in both rural and urban areas and among different ethnic groups. This information should be included in the design of the land or housing programme.
- During the recording of rights, the rules and procedures should ensure that the process and forms allow for including or indicating more than one property-right holder.
- Require education and gender training for participating populations and the officials implementing the programmes to be included in land and housing programmes.
- Involve civil society, community groups, social organisations, and NGOs in land and housing programmes.

Monitoring and Evaluation

- To monitor the extent to which gender-specific programme objectives are being met, to carry out mid-stream implementation adjustments, and more generally to evaluate the gender-specific impacts of a given programme, it is essential that projects maintain gender-disaggregated databases and carry out periodic data collection at different levels.
- At the programme level, information on programme participation and benefits should be disaggregated by gender, including programme personnel statistics, attendance at public information and training sessions, as well as issuance of legal titles and land certificates.
- At the community level, key informant interviews and focus groups of beneficiaries can provide qualitative feedback to community groups and programme officials and managers regarding the perception of programme impact and women's and men satisfaction with the implementation of the programme.
- Land and housing programmes should also administer a baseline household survey to collect gender-disaggregated information, and at least one mid-term and one end-of-programme household survey to be able to track gender-specific changes against the baseline data.

CHAPTER ONE

INTRODUCTION



INTRODUCTION

*"Property cannot own property."*⁵

Systemic differences in land tenure and housing rights between men and women contribute to structural inequality and to poverty for women and their families. In urban areas, secure tenure to adequate housing is not only basic for the well being of families; households often also use their residential properties for informal productive activities. In rural areas, secure land tenure and control over the use of land are the basis for food and income production and, more broadly, for the well being of the household. Access to other productive resources such as water, irrigation systems, and forest products is tied to land tenure as well.

Differences in the property rights held by women and men, as well as the lack of direct access to, and control of, land limits women's productive roles and their power and influence in the household and the community. Although in many cases women have access to land and housing, they often do not hold title to it and their secure tenure is often dependent on their relations with their in-laws. Rights to land imply security that is tied to an enforceable claim, while access to land is more informal and less enforceable.⁶ Women who become single heads of household are particularly vulnerable: as women's access to land is often through their husbands or fathers, they may lose such access after widowhood, divorce, desertion, or male migration.

While the constitutions of a large number of countries now explicitly recognise equal rights of men and women, this recognition has often not yet trickled down to other legislation, policies and programmes related to land, housing and property. According to some, if women do not hold land tenure separate and independent from their husbands, they cannot expect to benefit from that land over time, as their husbands will still control the land.⁷ So far, independent rights to land and housing have mainly been allocated to female-headed households or have been inherited in the few countries where widows and daughters have full inheritance rights. The development of such allocated land has been a major challenge for many of the beneficiaries. Up to recently, married women or women in consensual unions had been excluded from titling programmes, as a result of which the majority of redistributed land was registered in the name of men. Several marital property regimes still

do not constitute equal rights for women, leaving women disadvantaged upon divorce, separation or desertion.

Without specific, affirmative, measures to rectify the discriminatory practices of the past, recognition of equal rights between men and women remains a theory for the many women who cannot afford to buy land or housing. More recently, joint titling of land in the name of both spouses has become a requirement in some titling programmes and a number of amendments in civil and family law have improved women's rights in some marital property regimes.

With regard to forms of tenure other than ownership, some innovative initiatives have been taken, for example by countries like Tanzania (presumed co-occupancy right for spouses on family land) and Brazil (special use concession for low-income families, independent of sex or marital status). In the majority of cases, however, rights to land and housing are still vested in the husband..

In addition to explicit or implicit legal constraints, processes associated with implementation are, at best, more difficult for women to navigate than for men: socio-cultural norms, particularly patriarchal attitudes that consider women as dependent and of lower status, do not perceive women as full and equal participants in the economy and have not yet adapted to modified legal structures. Titling and other land and housing access programmes are often staffed by men who do not share the vision of gender equity and, thus, do not target or facilitate women as legitimate clients and property holders. In addition, women may lack the skills and confidence to approach institutions that have traditionally been the domain of men. Finally, there has been limited participation of women in farmer and community organisations through which titling and other land and housing access programmes were generally implemented.

This report seeks to provide a global overview of shared tenure in legislation and practice. Efforts were also made to map out, as much as possible, the extent to which other forms of co-tenure on the tenure continuum provide security for women. In this report, the terms *shared tenure* is used to refer to the broad category of rights to land shared by two or more people.

Shared tenure can be formal or informal. In most countries, a range of land rights and tenure types exists, which forms a continuum (from informal to formal). At the one end of the continuum, there are the informal or illegal, shared forms of tenure, such as *de facto* recognition of an informal or illegal settlement, political protection

⁵ A saying in Uganda referring to women's (non) capacity to co-own land, as quoted by Harriet Busingye. 2002. Customary Land Tenure Reform in Uganda: Lessons for South Africa, presented at International Symposium on Communal Tenure Reform, sponsored by the Programme for Land and Agrarian Studies (PLAAS), Johannesburg, (12-13 August 2002), at 7.

⁶ Deere, Carmen Diana & Leon, Magdalena. 2001. Empowering Women: Land and Property Rights in Latin America. Pittsburgh: University of Pittsburgh Press.

⁷ Agarwal, B. 1994. A Field of One's Own: Gender and Land Rights in South Asia. Cambridge: Cambridge University Press, p. 3.

INTRODUCTION

against forced eviction etc. In the middle of this continuum, co-occupancy rights, shared user rights, collective adverse possession, special concessions and customary communal tenure are examples of shared tenure types, which can be either informal or formal. At the other end of the continuum, there are co-ownership and leases, which are conventionally referred to as formal tenure types. Shared tenure also includes land and/or housing which is owned, leased or occupied in shares by larger groups, such as through family tenure, community titling, women's groups and co-operatives, or by couples who each hold a portion of property together, but which do not necessarily constitute equal shares to this property. For all tenure rights, from informal to formal, secure tenure for women within the household and within their community remains a crucial issue in need of more attention.

A specific, formal form of shared tenure is *joint tenure*. Joint tenure is used to refer to land and/or housing held by both spouses (or by both members of a couple living in consensual union), whether through joint titling or through those marital property regimes, which ensure or provide the possibility for both spouses to have equal rights over the marital property. The equal right to marital property might be a right of ownership or another right, such as a right of occupancy.

This study is based on extensive desk research and the professional experience of the authors. The desk research included a review of existing economic and legal scholarly journals, studies and projects of international development agencies, formal legislation, and case law. The legislation that was examined is mostly national legislation, for example civil codes, marriage laws and land laws, as provisions related to shared tenure are usually not found in urban legislation. Often joint titling provisions are also specifically linked to agricultural reform legislation, which is why a rural focus is included in this report. The global overview of countries with either compulsory or optional joint tenure legislation is not

exhaustive and other countries may be added in the next phase of this research.

While various efforts were made to find background documentation or legislation related to different forms of shared tenure in the tenure continuum, the material that was available for this desktop study was mainly on *joint tenure*, while in regard to other forms of shared tenure some early findings are provided. The current focus joint tenure does not imply any preference for joint *ownership*, but instead means that the information gap in terms of innovative forms of shared tenure must be bridged through further research. In fact, more attention is now being paid to recognition of informal tenure forms, because the majority of the urban poor have an informal or illegal right to the land and housing they occupy. The recent focus in the field has been on tenure forms affordable to the very poor, and to systems that allow for incremental upgrading of such tenure types. Further exploration of these shared tenure forms in the continuum identified above is crucial for the urban poor and will be subject to the next phase of this study.

Drawing on this research, the report addresses the formal, legal aspects of joint tenure and then implementation of that legislation. More specifically, chapter 2 discusses legal forms of joint tenure for marital couples and couples living in consensual unions. It also considers the existing challenges in the implementation of joint tenure forms and provides a preliminary examination of the impact of joint tenure on women's effective land rights, access to credit and domestic violence; chapter 3 describes other forms of shared tenure; chapter 4 analyses the role that different organisations play in the implementation of the formal law or efforts to change either formal or customary law; chapter 5 provides a conclusion while chapter 6 includes some recommendations on a way forward.



CHAPTER TWO

JOINT TENURE



2.1 Introduction

A woman can acquire rights to land and housing, when:

1. The state allocates land to both spouses (and/or to female-headed households);
2. She marries and the marital property regime includes joint rights;
3. She inherits land and/or housing; and/or
4. She purchases land or a house.

The first three are the most typical means by which women enter into a joint tenure arrangement. While any tenure type can be jointly held, usually joint tenure refers to ownership.

Ownership in common, also called tenancy in common, is less secure for women than joint ownership because it does not mean that the owners have equal rights. *Tenancy in common* means that each person owns a *portion* of the whole of the, not yet demarcated, property. If the amount each person holds is not specifically stated, the assumption is that the owners own equal parts. The owners can request that their portion be demarcated and thus do as they want with their portion of the land. Upon death, the owner's portion of the whole is part of his/her estate. If a husband and wife hold land as tenants in common and one of them dies without leaving a will, his/her share will be part of his/her estate and will be distributed to his/her heirs. Different forms of tenancy in common will be further discussed in chapter 4.

In contrast, *joint tenure* means that more than one person owns (holds) the *whole* of the property. Land held in joint tenure can only be acted on with the consent of all the owners, as each owner is acting for all owners on the whole property. For example, for land to be disposed of, all the joint owners must agree to do so. While still alive, a joint owner may transfer his/her interest to all the other owners, but to no other person. In some property systems, if a joint owner dies, his/her interest in the land will vest in the surviving owner(s) jointly. For example, in the United States, the state of Washington is a community property state and items purchased during the marriage are held in joint ownership. If one spouse dies, the other spouse automatically becomes the full owner of the joint property. In other systems, upon the death of one of the owners, the property must be divided equally among all owner/occupiers and the joint tenure becomes a tenancy in common. For example, in Azerbaijan when one spouse dies, the deceased's share of common joint property, including land plots, is defined and subtracted from the total amount or value of the property. A surviving spouse has the right to inherit by will or at law a deceased spouse's share of common

property, and is also able to keep his/her share of the common joint property.

Joint tenure forms can be universal or presumed, and compulsory or voluntary in law. *Universal* joint tenure means that *all* property brought into or acquired in marriage in any manner is jointly held. *Presumed* joint tenure means that there is a presumption that a married couple holds the property acquired during marriage jointly, but either spouse can prove that certain property is individually held (usually property that is inherited or gifted to one of the spouses only).

Compulsory joint tenure indicates that the law mandates joint tenure in certain circumstances (marriage, for example, or a specific land law requiring joint titling and/or registration of land in the name of both spouses). A presumption of joint tenure (usually for the plot of land that both spouses/partners in consensual unions occupy together) can therefore be compulsory by law. *Voluntary* tenure means that all parties must choose who will be property owners/occupiers and in what form.

Usually, the term "joint tenure" is thought of as referring to land, but in law, joint tenure provisions generally apply to the whole of the household property. That is, property includes land, other immovable assets (e.g. houses, fixtures), and moveable property (e.g. vehicles, animals, cookware).⁸

Larger groups (such as customary communal tenure, family tenure, community titling, or co-operatives) may hold land and property in either joint tenure or tenure in common, depending on the law and custom.

Separate property for married couples or household members is also a possibility under the law in some countries. Countries that have a separate property regime as the default regime have the presumption that both members of a couple (married or not) have a separate right to land or property acquired during a marriage or consensual union. Individual titles to land have been more successful in societies where women's right to own land is seen as a cultural and societal right, such as in Bulgaria or Russia.

⁸ Similarly, under customary and/or informal law, intra-household distribution of wealth may mean that males receive land as their inheritance from their parents, and females receive a dowry of jewellery, animals, and cash, for example. In many African countries the dowry is given to the bride's father and other male relatives. In some African areas, the males' family provides the female's family with gifts, representing a bride price. In Central Asia and some other Asian countries – also Islamic countries, the woman's family gives a dowry to the bride as her inheritance. In India, often for Hindus – depending on their tribe – the woman's family gives the dowry to the husband and his family and daughters receive nothing – except their "purchased" husband.

JOINT TENURE

Table 2.1.1: Forms of Property Tenure

TENURE	TENANCY IN COMMON	JOINT TENURE	SEPARATE TENURE
	Parties own a separate share of the whole.	Parties own the property together as a whole (each owns the whole).	Parties own all property separately.
COMPULSORY or VOLUNTARY (CIVIL LAW)	Usually voluntary.	Can be compulsory or presumed compulsory (unless contract to the contrary) for married couples, those in consensual unions, or household members of a farm. Can also be voluntary.	Can be the presumption for married couples and those in consensual union.
COMPULSORY or VOLUNTARY (LAND LAW)	Can be compulsory when land is privatised or individualised (land is distributed to all (or all adult) household members on a per capita basis).	Can be compulsory when land is privatised or individualised for married couples or families living in one household.	Can be the presumption as part of distribution of land.
INHERITANCE	Can bequeath a separate share of the property by will, or share will be distributed intestate.	Either the deceased's share of the control of the whole automatically vests in the remaining owners, or the property must be divided and becomes a tenancy in common.	Separate inheritance.
TRANSFER	Can transfer a separate share of the property without permission from other co-owners.	Usually permission of other joint tenure is required for any transfer of the whole of the property or portion of the property.	Can transfer without permission.

State land was distributed to individuals in Russia, and in Bulgaria land was restituted to whoever were the rightful heirs to the land, regardless of gender or household status.

In both of these cases, women are able to exercise full ownership rights to their land because in addition to the legal right to land, they have a socially accepted right to the land distributed to them.⁹ While separate property gives women the most control over land, women can be disadvantaged in a separate property system if they do not traditionally inherit or acquire land by themselves. Below is a table describing the differences in tenure forms.

2.2 Compulsory Joint Tenure

In examining common or joint tenure of property, defining the legal terminology becomes important because the meaning of specific legal terms can vary from country to country. In this section, compulsory joint tenure will be discussed. Compulsory joint tenure rights are usually established in civil law, through common ownership provisions and in various land laws. Formalising those rights through registration is not always mandatory, however, and is rarely fully enforced.

The European civil law has devised a system of marital property known as “community property” that reflects an effort to strengthen property rights of married women. The Spanish system of community property dated at least from the late sixteenth century and moved to the Spanish colonies at the beginning of the nineteenth century. The Napoleonic Civil Code, codifying French law in 1803 and 1804, also contained community property provisions based mostly on customary law at the time.¹⁰ Underlying community property is the philosophical premise that husband and wife are equal. Together in marriage they form a kind of marital partnership analogous to a legal business partnership.¹¹

Compulsory joint tenure in this context means that there is a presumption in law that when a couple is married, the family or “community” created by that marriage has a right as a whole unit to the property that is brought into that community. In many countries, especially in Western Europe and the United States where contract law is highly developed, the couple can choose to contract out of this presumptive status. Under a community property system, even if title to land is registered in one name only, there is a legal presumption that both spouses hold the land equally,

¹⁰ Holmberg, Tom. 2002. Reader's Articles: Politics and Government, The Civil Code (the Code Napoleon) in Napoleon Series. org <http://www.napoleonseries.org/articles/government/civilcode.cfm>.

¹¹ Giovarelli, Renee. 1999. Women and Land, in Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia (World Bank Technical Paper No. 436)

⁹ Giovarelli, Renee & Eilor, Elizabeth. 2002. Land Sector Analysis, Gender/Family Issues and Land Rights Study (unpublished report for the Government of Uganda).

if the land was acquired during the marriage and with marital funds.¹² Sometimes proof of marriage or commingling of household sources is required to formalise the right. In many jurisdictions, each spouse married in community of property may also own property in his or her individual right, called “separate” property. Such “separate” property often includes property acquired through inheritance. In practice this excludes women from inherited land in those countries, which favour inheritance by males, whether formally or informally.

Compulsory joint tenure provisions exist in the land law of several countries with customary land tenure, which provide for compulsory *co-occupancy* of marital land. In Tanzania, the land law provides for compulsory joint tenure on marital land for all spouses. While Tanzania does not recognise freehold ownership, section 161 of the Tanzanian Land Act seems to presume co-occupancy rights for spouses on the land they occupy together.

Compulsory joint tenure can occur in one or more of the following ways:

- a) The state distributes land to private parties and requires that the land be titled to all members of the household, or to all qualifying members of the household (regardless of gender), or specifically to both the husband and wife;
- b) A country's law provides for compulsory community property for married couples, and potentially for those who live in consensual union; or
- c) In some countries, peasant farms or other family businesses also create a presumption of compulsory joint ownership. That is, unless there is a contract to the contrary, joint ownership is compulsory.

It should be noted that even if compulsory joint tenure is a part of formal law, the more specific rules related to joint tenure, which are discussed below, could have a major impact on the implementation of this concept.

There are six significant issues associated with formal legal rules for joint titling of property. The variations in joint titling regimes are related to the following questions:

1. When does property become the property of the community – at the time of the marriage or at the time of divorce or death, i.e. when does property vest?
2. Will all of the property obtained by both spouses

be community property or will each spouse have control over separate property as well, i.e. which property is jointly owned?

3. Who will manage the community property?
4. If there is separate property, will the income from that property be owned by the individual or the community?
5. Do consensual unions trigger the joint titling rules and protections?
6. Is there a mandatory registration requirement for joint titling?

This section will discuss each of these issues and will provide a country example for each. There are many variations as to combinations of answers to these questions.

2.2.1 When does property vest?

In a community property system, the first issue is when the property will begin to vest in the community, at the time of marriage or at the time of divorce (or death). If by law property interests are vested in the community *at the time of marriage*, both spouses have a vested, equal interest in all of the marital property unless they intentionally contract out of this provision. For example, the Civil Code of the Czech Republic provides that any object that was acquired by either spouse during their marriage, with several exceptions, is presumed to be held in undivided joint ownership.¹³ The exceptions include:

1. property that was received by one of the spouses through gift or inheritance
2. property that serves the personal needs or occupational needs of one of the spouses
3. property that was returned, based on restitution legislation. Spouses may agree to extend or restrict the scope of their legally-defined undivided ownership, but if this agreement regards real estate, the agreement must be in writing and registered in the real estate cadastre.

In any case, the agreement must be in the form of a notarial record (deed). Both spouses are entitled to use and enjoy all property that is in their undivided co-ownership.¹⁴

When property is not vested until *the time of a divorce*, it is called “deferred community property.” Deferred community property provides very limited protection for women because during the marriage, property is treated as separate property with each spouse making independent decisions. In case of divorce, property that is deemed to be part of the “community” will be divided equally.

¹³ Civil Code of the Czech Republic, sec. 143.

¹⁴ Giovarelli, Renee. 1999. Women and Land, in *Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia* (World Bank Technical Paper No. 436).

¹² The term “marital funds” refers to funds brought into the marriage by either spouse, which are not the separate property of that spouse (inherited funds or funds acquired as a gift to only one of the spouses would be considered separate property)

Deferred community property systems, while providing some protection upon divorce, do not provide for joint title to property. Another legal term that is used is “forced inheritance.” This term means that if one spouse dies, the other spouse has a right to receive a portion of the property, even if the deceased made a will to the contrary. While this provision recognises a community, the property is separate property up to the time of death.

Many common law countries and provinces have a deferred community property system. As one example, in Quebec, Canada, property will be divided equally upon divorce or the death of one of the spouses. However, property acquired from a third party by gift or inheritance is excluded, as is the personal property of the spouses.¹⁵ In Ontario, Canada, family assets are divided equally on divorce or death, but the law gives the court wide discretion to deviate from this rule.¹⁶ Neither of these provinces has compulsory joint titling. Sweden also has a deferred community property system, with independent management of property during marriage.¹⁷

2.2.2 Which property is jointly owned?

The most common community property regimes provide that property acquired by either spouse during marriage, which is not by gift or inheritance, is jointly owned. Thus, all earnings by either spouse during marriage and all assets acquired with such earnings, form part of the community property.

Each spouse may own property in his or her individual right, called “separate” property. Generally, such separate property is property acquired by either spouse before marriage, along with property acquired by one spouse during marriage either by gift or inheritance. Each spouse has full power to manage and dispose of his or her separate property.

This community property scheme is the formal law in France and Italy and in several states in the United States. In addition, many of the former Spanish colonies, such as Colombia, Ecuador, and Guatemala also have joint ownership of the community property.¹⁸ Universal or total community property is less common. Under universal community property, all property is community property with no separate property. In El Salvador, for example,

all property and rents from property either brought into the marriage or acquired during the marriage are, by law, owned jointly. In the Netherlands, all property is jointly owned, but each spouse has the right to administer and dispose of the assets that have been brought into the community.¹⁹

2.2.3 Who manages the property?

Even where property is jointly owned, formal law might mandate three different management systems. One system, which is called *joint management*, requires the spouses to act jointly regarding the community property. Another system, called *sole management*, allows one spouse the sole power to manage jointly held property. The third system, referred to as *equal management*, gives either spouse, acting alone, the power to manage the whole of the property that is jointly titled.²⁰ Most countries have adopted a combination of management rules, the application of which depends on the nature of the property at issue. For example, one spouse can make all decisions except those related to the house and land, which requires agreement of both spouses.

In Italy and Belgium there is equal management of community property. Spain has joint management of community property,²¹ and Ecuador, Dominican Republic, Guatemala, Honduras, and Mexico have male management of community property.²² In Latin American countries, the concept of “marital authority” was at one time written into the formal law of most countries. Although this is no longer true for the majority, it is still a strong customary norm. In Ecuador, under the formal law, any property acquired by a couple automatically forms part of the marital property and is jointly owned, but in practice if the land is titled under the name of the husband, he can dispose of it without her signature because the signature rules are rarely enforced.²³

The English Law Commission conducted a survey of the community property management systems in different jurisdictions. The commission found that community property countries were moving toward more of an equal

15 Andrews, Thomas R. 1993. “Income from Separate Property: Towards a Theoretical Foundation,” in *Law and Contemporary Problems*, Vol. 56-SPG, 171.

16 Parkinson, Patrick N., 1987. “Who needs the Uniform Marital Property Act?” in *University of Cincinnati Law Review*, Vol. 55, 677.

17 Ibid.

18 Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press.

19 Parkinson, Patrick N., 1987. “Who needs the Uniform Marital Property Act?” in *University of Cincinnati Law Review*, Vol. 55, 677.

20 Oldham, J. Thomas. 1993. “Management of the Community Estate during an Intact Marriage,” in *Law and Contemporary Problems*, Vol. 56-SPG, 99.

21 Abogao Sevicios Juridicos. 2003. *Legal Guide, Marriage in Spain*. <http://www.spainlawyer.com/guialegal/guialegal.cfm?IDCAPITULO=01010000> Last visited on June 20, 2005.

22 Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press. Civil Code of the Dominican Republic, Art. 1421, 1428; Family Code of Honduras, Article 82; Family Law in Mexican States of Aguas Calientes, Oaxaca, and Sonora; Civil Code of Ecuador; Civil Code of Guatemala.

23 Ibid.

JOINT TENURE

management system, and concluded that systems which do not permit equal management during marriage are “unacceptable”²⁴ and in violation of the Convention on the Elimination of All Discrimination Against Women (CEDAW). In addition, civil codes and family laws that still allow for unequal marital property management also violate other international human rights instruments and may be contrary to the constitutions of these countries.²⁵

24 Oldham, J. Thomas. 1993. “Management of the Community Estate during an Intact Marriage,” in *Law and Contemporary Problems*, Vol. 56-SPG, 99

25 For example, the International Covenant on Civil and Political Rights (Article 3) requires States Parties to ensure the equal right of men and women to enjoy all rights laid down in this Covenant. Article 23(4) requires States Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and upon the dissolution of marriage. 154 States are Parties to this Covenant.

JOINT TENURE

Table 2.2.1: Management of Community Property in Selected Countries²⁶

COUNTRY	JOINT MANAGEMENT ^a	SOLE MANAGEMENT	EQUAL MANAGEMENT ^b
Belgium			X ^c
Bolivia	X ^d		
Botswana		Husband ^e	
Brazil			X ^f
Bulgaria			X
Chile		Husband ^g	
Dominican Republic		Husband, even under separate property regime ^h	
Ecuador		Husband, unless otherwise agreed by contract ⁱ	
El Salvador	X	Husband if wife is a minor ^j	
Ethiopia			X ^k
France	X		
Guatemala		Husband ^l	
Honduras		Husband ^m	
Italy			X ⁿ
Lesotho		Husband ^o	
Mexico		Husband ^p	
Mozambique			X ^q
Namibia	X ^r		
Paraguay		Husband ^s	
Philippines	X ^t		
Serbia	X ^u		
Spain	X ^v		

a Spouses act jointly regarding community property.

b Either spouse may manage the whole of the community property.

c Oldham, J. Thomas. 1993. "Management of the Community Estate during an Intact Marriage," in *Law and Contemporary Problems*, Vol. 56-SPG, 99.

d If common property is sold without the consent of one spouse, the other may annul the sale with respect to his/her property. Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press. p. 53.

e Married Persons Property Act.

f Family Code 2002. FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

g However, each spouse must consent to sales or mortgage of any major piece of common property (even without both names on the title. Civil Code. Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press. p. 51.

h Art. 1421, 1428 Civil Code. FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

i Civil Code.

j Civil Code.

k Family Law 2000

l Civil Code..

m Family Code, Art. 82. Civil Code recognises the husband as the head of the household (Art 167). FAO Legislative Study. 2002. *Gender and Law-Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

n Either can manage the property for smaller management, but for a transaction, both must agree. FAO Legislative Study. 2002. *Gender and Law-Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

o As per customary law allowed by Section 18 of the Constitution. UN-HABITAT, *Law, Land Tenure and Gender Review Series: Lesotho*, draft, 2005, p. 23.

p Family Law in Mexican States of Aguas Calientes, Oaxaca, and Sonora.

q The express permission of both spouses is required, through a joint declaration before a notary, before immovable property (whether belonging to either spouse individually or common property) may be transferred to others. Family Law, adopted in August 2004. UN-HABITAT, *Law, Land Tenure and Gender Review Series: Mozambique*, draft, 2005, p. 25.

r Article 5 Married Persons Equality Act of 1966.

s Food and Agriculture Organization, Sustainable Development Department. 1997. *Women: The Key to Food Security*. Rome, Italy.

t However, in case of disagreement, the husband prevails.

u Article 324 of the Marriage Law of 1980; Family Law of 2005.

v Civil Code.

²⁶ Information regarding Latin American countries was taken from Deere, Carmen Diana & Leon, Magdalena. 1994. *The Legal Status of Rural Women in Nineteen Latin American Countries*. Food and Agriculture Organization of the United Nations, Rome.

2.2.4 *Is income from separate property owned by the community?*

Historically, the Spanish community property system provided that the income from separate property should be classified as community property.⁴⁹ Most of the former Spanish colonies also have this rule. Several states in the United States opted out of this rule, but for the most part, in countries where property is jointly titled, the income from the separate property becomes marital property.⁵⁰

Income from separate property is of key importance in relation to land ownership. In many countries women do not customarily inherit land. Under a system where inherited or gifted land remains separate property, the income from the inherited or gifted land would remain the separate property of the male if a rule were enacted that allowed income from separate property to remain separate rather than to be brought into the community property of the couple.

2.2.5 *Do consensual unions trigger joint titling rules?*

Many women are not legally married, especially where customs and traditions predominate.²⁷ Legal marriage can be expensive and time-consuming, and may require residence documentation that women do not have. In many countries, if property is not jointly registered, proof of legal marriage is necessary before joint titling provisions can be enforced, if they are enforced at all. A specific legal provision, which provides that consensual unions will trigger legal protection of property rights acquired during that union, enables many women, who would not otherwise be able to, to enforce their property rights.

The issue of what to do with people living in consensual union, without being legally married, was taken up in Peru and Ecuador.²⁸ In those countries, people who live together are declared to be property co-owners as distinct from joint property owners. The distinction is that their marital status is not important because they both own a separate share of the property rather than owning the property together as a whole. In Colombia, consensual unions do not have to be proved, only stated as true.²⁹

27 For example, in rural Peru 40% of women report living in a consensual union. In rural El Salvador, 63% of couples report living in consensual union. Deere, Carmen Diana and Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press.

28 Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press.

29 Ibid.

The Philippines enacted a law that went even further than co-ownership for consensual unions.³⁰ 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.³¹ Even if one partner does not participate in the acquisition of property, she is deemed to have contributed jointly if she cared for and maintained the family and household.³²

2.2.6 *Is there a mandatory registration requirement for joint titling?*

A legal presumption of joint tenure protects the property rights of married women. However, such provisions do not necessarily require that women be *registered* as joint owners. When mandatory joint registration is not required by law or enforced in practice, land acquired during marriage can be registered in the name of the household head only, and a court or other dispute resolution body would have to adjudicate whether there is joint title to the land under the precepts of the law. Therefore, joint ownership provisions, without mandatory joint registration, are subject to customary and traditional interpretations of intra-household ownership, as well as administrative and judicial decisions.³³

Often women have a right to a specific parcel of land (housing) regardless of the marital property system because government land distribution programs require that land that is distributed to a marital couple (or those in consensual unions) be titled jointly to both the husband and wife. However, even in these programs, joint *registration* is often not mandatory. If joint registration is not mandatory or not enforced, even if the woman's name is on the title, a purchaser may not have notice that she must give permission to sell, because her name does not appear on the registration of the property.

Women's property rights are most secure within joint tenure systems when they are formally registered as joint owners of property. In Viet Nam, land legislation approved by the national Assembly in November 2003 requires that the Land Use Right Certificates bear the names of both husband and wife. In addition, the Marriage and Family Law requires the names of both wife and husband be registered on the Land Use Rights Certificate, and land acquired during marriage is consid-

30 The Family Code of the Philippines (Executive Order No. 209, July 6, 1987, as amended by Executive Order No. 227, July 17, 1987), Articles 147-148.

31 Judd, M. & Dulnua, J. 2001. *Women's Legal and Customary Access to Land in the Philippines*. World Bank Report.

32 Ibid.

33 Giovarelli, Renee. 2004. *Women's Land Rights in Bulgaria*. Unpublished Report.

ered to be a common asset. However, only 3% of existing Land Use Rights certificates have both names on the certificate. ³⁴ In response, the Vietnamese government and the World Bank initiated a pilot project in two communes in which they re-issued land title certificates in the name of both joint owners after village meetings and the distribution of information about joint titling. ³⁵

In Nicaragua, joint titling and registration is required for all land allocated under the agrarian reform. ³⁶ In practice, however, these provisions are difficult to enforce, even after extensive education campaigns. ³⁷

In the Philippines, the administrative regulations adopted by the Department of Agrarian Reform to implement the gender equality provision of the Comprehensive Agrarian Reform Law provided that land titles had to be issued in the name of both a husband and wife or a couple living in consensual union “when spouses are jointly working and cultivating common tillage.” ³⁸ The consent of both parties is required for any transaction. ³⁹

The Tanzania Land Act of 1999 (Sect. 161) states that the “registrar shall register the spouses as occupiers in common” when one spouse obtains land under a right of occupancy and there is not a provision in the certificate of occupancy or certificate of customary occupancy that clearly states that one spouse is taking the right of occupancy in his or her name only.

In Laos, legislation, including the 1991 Constitution, acknowledges gender equity with regard to family, inheritance, and property laws. Land acquired by a couple is required, by law, to be issued a joint land use certificate or title. ⁴⁰

2.2.7 Overview of Countries with Compulsory Joint Tenure

The tables below, presented by region, show in which countries compulsory joint tenure exists, either through the applicable marital property regime or through specific joint titling provisions. It is important to keep in mind that even where a marital property regime is classified as

compulsory joint tenure, there may still be cases where the husband has sole management privileges, which means that he may be able to decide to sell the land without consent. ⁴¹ Also, in some jurisdictions with equal management rights each person can act for the whole, – which theoretically means either spouse could sell without consent. (see Table 2.2.1 on page 18 for examples of community property management).

³⁴ UN Volunteers, 2004. “Vietnamese Land Use Certificates Must Now Bear Both Husband and Wife Names,” at <http://www.unv.org/infobase/voices/2004/vietnam.htm>, last visited on February 9, 2005.

³⁵ World Bank Gender and Development Group. 2005. *Improving Women’s Lives, World Bank Action Since Beijing*. Washington DC.

³⁶ Article 49 of Law 278 of 1997.

³⁷ Lastarria-Cornhiel, Susana. 2005. *Gender Sensitive Land Policies and Implementation*. Unpublished manuscript. Madison: University of Wisconsin-Madison.

³⁸ Memorandum Circular 18 of 1996. Administrative Order 1 of 2001.

³⁹ FAO Legislative Study. 2002. *Gender and Law – Women’s Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

⁴⁰ Article 43 of Law on Land; Family Law; and Property Law.

⁴¹ Such provisions are contrary to international human rights law and often also to the constitutions of the countries concerned. For example, the International Covenant on Civil and Political Rights (Article 3) requires States Parties to ensure the equal right of men and women to enjoy all rights laid down in this Covenant. Article 23(4) requires States Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and upon the dissolution of marriage. 154 States are Parties to this Covenant.

JOINT TENURE

Table 2.2.2: Compulsory Joint Tenure by Country: Latin America

COUNTRY	FORM OF COMPULSORY JOINT TENURE	LEGAL BASIS
Most Latin American countries, except for Costa Rica, El Salvador, Honduras and Nicaragua	<ul style="list-style-type: none"> Default regime is compulsory community of property, allowing for separate property by gift, inheritance, or what is brought into the union. Profits derived from the separate property are deemed to be marital property. 	Civil Codes
Bolivia	<ul style="list-style-type: none"> Property acquired through concession or adjudication by the state forms part of the common property of the couple.^a Disposition of community property requires the express consent of both spouses. 	Articles 111 and 116 Family Code
Colombia	<ul style="list-style-type: none"> Joint allocation, titling and registration of agricultural land to spouses and stable partners in Family Agricultural Units, as part of land reform programme. 	Article 70 Law 160 of 1994
Costa Rica	<ul style="list-style-type: none"> Separate property regime, but the Law to Promote the Social Equality of Women required mandatory joint titling of land that was distributed by the state to married couples. For other marital property joint titling is optional. 	Law to Promote the Social Equality of Women of 1990
Cuba	<ul style="list-style-type: none"> No private ownership of land but women are joint owners within the co-operatives. Women were direct beneficiaries of land reform.^b 	
El Salvador	<ul style="list-style-type: none"> Default regime is full or universal common property (pooling of all property and rents from property either brought into the marriage or acquired during the marriage, including through inheritance). 	Civil Code
Guatemala	<ul style="list-style-type: none"> A post-1996 state-sponsored land purchase programme required joint titling to spouses and partners in consensual union, and some women were jointly titled.^c 	Article 20 Law on the Land Fund of 1999 (Ley el Fondo de Tierras Decree No 24-99)
Nicaragua	<ul style="list-style-type: none"> Separate property regime is default regime. Community of property regime can be established by pre-nuptial agreement. Provides for compulsory joint titling for couples, whether married or not, in land titling programme.^d Titles issued in the name of the household head are considered as issued to both spouses/partners. Civil Code recognises the husband as the head of the household (Art. 151).^e Women are recognised as direct beneficiaries of land reform, regardless of family status.^f 	Article 153 Civil Code Article 49 Law 278 of 1997 Article 151 Civil Code, Agrarian Reform Act of 1981
Peru	<ul style="list-style-type: none"> Community property regimen for married couples, but no legislation recognising consensual union. Mandatory joint titling and registration in the Urban Property Rights Project.^g 	1948 Civil Code

a. Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press. p. 51

b. FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

c. Lastarria-Cornhiel, Susana. 2005. *Gender Sensitive Land Policies and Implementation*. Unpublished manuscript. Madison: University of Wisconsin-Madison

d. FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

e. *Ibid*

f. *Ibid*

g. Atuahene, Bernadette. 2004. "Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations," in *George Washington International Law Review*, Vol. 36, pp. 1109-1179.

JOINT TENURE

Table 2.2.3: Compulsory Joint Tenure by Country: Africa

COUNTRY	FORM OF COMPULSORY JOINT TENURE	LEGAL BASIS
Burkina Faso	<ul style="list-style-type: none"> Community property in case of monogamy. Compulsory joint titling if monogamous marriage. 	1997 Constitution Persons and Family Code of 1990 ^a
Ethiopia	<ul style="list-style-type: none"> Community property for property acquired after marriage. Creates a presumption of common property for property registered in the name of one spouse. Requires the consent of both spouses for transfers of common property. Community property for consensual unions of more than 3 years.^b In some States, joint titling of land is mandatory (see Section 2.3 below for more details) 	Family Code, 2000 Federal Proclamation No. 89/1997, Rural Land Administration Proclamation
Senegal	<ul style="list-style-type: none"> For monogamous marriages only, the presumptive regime under Family Law is compulsory community property. 	Family Law
Tanzania	<ul style="list-style-type: none"> Spousal co-occupancy right of family land is presumed. Consent of both spouses is required to mortgage the matrimonial home. 	Section 161 Land Act of 1999
Zambia	<ul style="list-style-type: none"> For couples legally married under the Marriage Act, property belonging to either party and acquired during the marriage is treated as joint property, except for inherited property. The courts are required to distribute assets on an equitable basis with due regard to the facts of the case and they have a wide margin of discretion. In practice, many men wish to keep their property separate and choose not to marry under the Act. 	Marriage Act, Cap. 50

a. FAO Legislative Study. 2002. *Gender and Law – Women’s Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.
b. *Ibid*, Chapter II. F (Land, Sect. 161, 1999).

JOINT TENURE

Table 2.2.4: Compulsory Joint Tenure by Country: Asia

COUNTRY	FORM OF COMPULSORY JOINT TENURE	LEGAL BASIS
Azerbaijan	<ul style="list-style-type: none"> Marital property is to be held jointly unless the Matrimony Contract establishes another agreement. However, the property belonging to each party before marriage or received as a present or inheritance during marriage will be separate property of the individual who received it. Separate property can be deemed joint property if it is established as a matter of fact that the property was improved to a considerable extent by the joint property of the community or by the individual property of the other spouse. 	Article 225 Civil Code
India (Karnataka, Madhya Pradesh and West Bengal states)	<ul style="list-style-type: none"> Under some housing schemes there has been joint titling, providing either land for a house, loan for construction of a house if site is already available, or constructed house with site (Karnataka). In Madhya Pradesh and West Bengal joint titling has been mandated in land reform programmes. 	2000 Housing Policy
Indonesia	<ul style="list-style-type: none"> Community (co-ownership) property regime in both formal and customary law. 	Law No. 1/1974 on Marriage ^a
Japan	<ul style="list-style-type: none"> There are three types of spousal property: property that cannot be proved to belong to either spouse individually is presumed to be community property. All other property is separate. 	Civil Code
Kyrgyzstan	<ul style="list-style-type: none"> Joint ownership of marital property and for peasant farms, but separate property by gift, inheritance or that which is separate property at the onset of the union.. Mandatory joint registration for land that is held in co-ownership or joint ownership. In distribution of state land to individuals, the title certificate was given to the head of the household, but all members of the household received an equal share and were listed on the land certificate as joint owners. 	Civil Code Law on Registration
Laos	<ul style="list-style-type: none"> Property acquired during marriage is jointly held and joint title is required. Customary law also supports co-ownership of land by marital couples.^b 	Article 43 Law on Land Family Law Property Law
Philippines	<ul style="list-style-type: none"> Presumption is that if two people live together their land is jointly owned.^c Alienation requires the approval of both. Even if one partner does not participate in the acquisition of property, s/he is deemed to have contributed jointly if s/he cared for and maintained the family and household.^d 	Family Code ^e Comprehensive Agrarian Reform Law
Vietnam	<ul style="list-style-type: none"> Names of both wife and husband must be registered on the Land Use Rights Certificate, and all land acquired during marriage is considered to be a common asset.^f 	Revised Land Law of 2003 Marriage and Family Law of 2001

a. Reprinted in Department of Information, Republic of Indonesia, The Indonesian Marriage Law 9 (1975).

b. Lastarria-Cornhiel, Susana. 2005. *Gender Sensitive Land Policies and Implementation*. Unpublished manuscript. Madison: University of Wisconsin-Madison.

c. Judd, M. & Dulnua, J. 2001. *Women's Legal and Customary Access to Land in the Philippines*. World Bank Report.

d. Ibid

e. Executive Order No. 209, July 6, 1987, as amended by Executive order No. 227, July 17, 1987) Articles 147-148.

f. UN Volunteers, 2004. *Vietnamese Land Use Certificates Must Now Bear Both Husband and Wife Names*, at <http://www.unv.org/infobase/voices/2004/vietnam.htm>, last visited on February 9, 2005.

JOINT TENURE

Table 2.2.5: Compulsory Joint Tenure by Country: Europe

COUNTRY	FORM OF COMPULSORY JOINT TENURE	LEGAL BASIS
Belgium	<ul style="list-style-type: none"> Community property is the default regime. 	Civil Code
Bulgaria	<ul style="list-style-type: none"> Any property acquired during marriage as a result of joint contribution shall belong to both spouses in equal proportion. Joint contribution can include investment of resources or work, including caring for the children or household. Spouses have equal rights to possession, use, disposal, and administration of common property, and joint contribution is presumed until proven otherwise. Property that is gifted or inherited by one spouse remains the property of that spouse. Common owners must be listed at the time of registration. Registration of immovable property is not required proof of co-ownership. Customary law may have an impact on minority communities' exercise of this law. 	Family Code Law on Registration
Croatia	<ul style="list-style-type: none"> Common property is presumed (property acquired during the marriage or resulting from such property is jointly owned and in equal shares) unless spouses agree otherwise. In common property regime, real property transactions require explicit consent of both spouses. Separate Property is acquired either before or during the marriage by gift, bequest, devise, inheritance, etc. Legally recognises consensual unions which have lasted for 3 years, or if child is born out of this union. Cohabitants create property rights that rise to the level of common property. 	Article 253 Marriage Law of 2003 Article 258 Marriage Law of 2003
Czech Republic	<ul style="list-style-type: none"> Any object acquired by either spouse during their marriage is presumed to be held in undivided joint ownership. Exceptions: property received through gift, inheritance or on basis of restitution legislation, and property serving the personal needs or occupational needs of one of the spouses. Spouses may agree otherwise, but if this agreement regards real estate, it must be in writing and registered in the real estate cadastre. Both spouses are entitled to use and enjoy all property that is in their undivided co-ownership. 	Articles 143–144 Civil Code
France	<ul style="list-style-type: none"> Community of property, with option to contract out. Both spouses must sign for sale/lease of land. Either spouse may dispose of community property represented by his/her earnings, after contributing to the household expenses. Neither spouse may dispose of the "rights which assure the family's lodging and furniture" without the other spouse's consent. 	Civil Code
Italy	<ul style="list-style-type: none"> All property purchased after marriage is considered community property, unless both spouses agree otherwise in writing signed by a notary.^a 	Civil Code of 1975
Netherlands	<ul style="list-style-type: none"> Universal or full community property system, but each spouse has the right to administer and dispose of the assets that have been brought into the community.^b 	Civil Code
Russia	<ul style="list-style-type: none"> Individuals, not households, received land shares, when state land was distributed to private individuals. Peasant farms are held in joint ownership and registered under the head of household.^c Community property regime for married couples. 	Civil Code
Serbia	<ul style="list-style-type: none"> Common immovable property must be registered in the name of both spouses. If registered only in the name of one spouse, it is presumed to have been registered in the name of both spouses, unless the registration is based on a written contract of the spouses providing for the contrary. Separate property is property acquired by each spouse prior to or during the marriage through other means than the spouses' work, such as inheritance or gifts.^d 	Article 322 Marriage Law of 1980; Family Law of 2005 Article 320 Marriage Law; Family Law 2005
Spain	<ul style="list-style-type: none"> First country to adopt community property provisions in Civil Code. Spouses may agree to a different property regime in the "articles of marriage," a contract between the married partners. In some autonomous communities, regional law may apply, and community property may not be the default property regime. 	Civil Code

a. Giovarelli, Renee. 1999. *Women and Land*, in *Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia* (World Bank Technical Paper No. 436)

b. Parkinson, Patrick N., 1987. "Who needs the Uniform Marital Property Act?" in *University of Cincinnati Law Review*, Vol. 55, 677.

c. Art. 257(1) of the Civil Code of the Russian Federation establishes that peasant farms will belong to the members by right of joint ownership unless otherwise established by law or contract.

d. UN-HABITAT, *Housing and Property Rights in Bosnia and Herzegovina, Croatia, Serbia and Montenegro*, 2005.

JOINT TENURE

COUNTRY	FORM OF COMPULSORY JOINT TENURE	LEGAL BASIS
Switzerland	<ul style="list-style-type: none"> Statutory community property. Ability to contract out of that scheme.^a 	
Turkey	<ul style="list-style-type: none"> Husband is no longer deemed head of household and new code introduces a community property regime with equal shares for the spouses (but only for property acquired after 2002).^b 	Civil Code of 2001
Ukraine	<ul style="list-style-type: none"> Compulsory joint tenure for married couples. 	Civil Code

e Jakovac-Lozie, Dijana. 2000. "Croatia's New Family Act and its Implications on Marriage and Other Forms of Family Life", in *California Western International Law Journal*, Vol. 31 (pp. 83, 92).

f FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome

Table 2.2.6: Mandatory Joint Tenure by Country: North America

COUNTRY	FORM OF COMPULSORY JOINT TENURE	LEGAL BASIS
United States 9 states only	<ul style="list-style-type: none"> Community property regime in 9 states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) excluding gift, inheritance etc. All community property states vest equal powers of management and disposition in each spouse, except that one spouse alone may have enhanced powers when the other spouse leaves, disappears, or becomes incompetent to act as a property manager. Both spouses must participate in and provide written consent to transactions when they involve land, household necessities, and other specified assets. 	State Family Law

2.3 Optional Joint Tenure

Countries that have a regime of non-compulsory or optional joint tenure allow joint ownership of land or property, but do not have the *legal presumption* that both members of a couple (married or not) have a right to land or property acquired during a marriage. Thus, even if someone is formally married and uses the marital resources to purchase land, that land can be in the sole ownership of one person only. In such a case, if the land right were formally documented, it would also be titled and registered solely in the name of one of the parties. This often leaves women at a serious disadvantage upon divorce from or death of their spouse.

Without the support of a mandatory joint tenure law, in many cases women within a marriage will not be able to own land because customary laws or religious laws subordinate women to men in the household and vest property rights in the man only. As indicated above, joint titling and registration are uncommon - even where mandatory - due to customs and traditions. Below are examples of systems in which the formal law allows joint tenure - but does not make it mandatory - and customary or religious law prevails.

In most countries in Africa and most common law countries, joint titling of land is allowed but not mandatory. Women in these countries can either own (hold) land as

their separate property or they can hold the property in common ownership if agreed to by all parties. Usually, any two or more people can be co-owners. In countries where separate property is the default regime for property acquired during a marriage, often women do not own land at all because all land that is acquired is deemed to be the separate property of the husband.

Historically, the idea of joint or community property was that the family must be treated as a whole.⁴² Some countries, most specifically in continental Europe, created a system where property was jointly owned but managed by the husband. In common law countries (England, Australia, U.S.) property was vested in the husband and the wife's identity was subsumed into his, thus creating a separate property system, in which the wife had no rights to any land.⁴³ Reform of property law in common law countries separated the legal identity of the husband and wife, allowing each to own separate property. In most countries with community property laws, the law moved away from requiring sole management of the resources by the male head of household, leaving the marital community with joint ownership and joint management.

42 Parkinson, Patrick N., 1987. "Who needs the Uniform Marital Property Act?" in *University of Cincinnati Law Review*, Vol. 55, 677.

43 Ibid.

Examples of optional joint tenure systems and their variations are discussed below.

South Africa

South African land reform legislation is gender neutral and non-discriminatory on its face. Joint tenure is permitted, but in practice customary law predominates, and in many cases women do not hold land titles. In the former homelands, customary land tenure is such that chiefs almost never allocate land to women, land cultivated by women is often the poorest and least accessible, and widows cannot remain on their husband's land.⁴⁴

Swaziland

The Deeds Registry Act (1968) and Marriage Act expressly deny women in civil marriages who choose community property status to register land in their own names, although they can register the land jointly with their husbands, if their husbands agree.⁴⁵ Women who are married under customary law can register land in their own names as separate property.

The Marriage Act 47 of 1964 refers to marriage inside or outside community of property. In both cases, the husband is the administrator of the property. If marriage in community is chosen, every right to property gained by either spouse is held as an undivided half share by each and is held in tenancy in common. The default regime is outside community property (separate ownership).⁴⁶

Ghana

While mandatory joint titling does not exist in Ghana, under statutory law (Constitution, Article 22) assets jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage. However, the courts must define the circumstances in which property acquired during a marriage can be described as “jointly acquired” property.

Cambodia

When land was distributed in Cambodia in the 1980's, it was divided in accordance with the number of household members, and private ownership replaced communal ownership of land. While traditionally men and women had an equal right to land, when registration of the private rights to land occurred, the land was usually registered in the name of the husband only. Women became

much more vulnerable in the case of divorce because men could choose not to divide the land evenly.⁴⁷

Nepal

Equal property rights are constitutionally provided, although neither formal nor customary law otherwise provides for equal rights of men and women. Women have full rights to their separate property (*Stridhan*), including land, brought into or acquired during marriage. Wives have limited rights to property acquired by the husband and wife during marriage (*Ansa*). Women seeking divorce have no claim to *Ansa* property.⁴⁸

Pakistan

Even when Pakistani women formally own land, custom may limit their rights to use or dispose of this land. Although women have the legal right to own land independently and jointly with their husbands, according to lending institutions surveyed for a micro-finance study, “women's right to own property does not automatically translate into the right to develop or dispose of it as they see fit.”⁴⁹ There are no specific legal requirements as to women's rights to control or dispose of land.

Samoa

In Samoa, legislation provides the husband the option of naming a wife as a joint owner. However, custom largely prevents naming women as joint holders when title is formalised. Moreover, there are cases where husbands do not jointly title the family land if the wife is not working because they believe their wives do not “deserve” to be the joint owners of land.⁵⁰

Costa Rica, Honduras and Nicaragua

In these three Latin American countries, the presumption is that all marital property remains separate property and rents or profits from that property are also separate property. Property is administered individually.⁵¹ Joint ownership and joint titling is a legal option, except for the mandatory joint titling programmes in Costa Rica and Nicaragua, as mentioned in Table 2.2.2 above. However, if land is registered in the name of the husband only, the

47 Japanese International Cooperation Agency Planning Department. 1999. Country WID Profile (Cambodia), <http://www.jica.go.jp/english/global/wid/report/pdf/e99cam.pdf>. Last visited May 8, 2005.

48 Shrestha Samjhana. 1999. “Nepal: The Right to Land is the Right to Livelihood,” in *Women in Action* (2:1999).

49 Deshpande, Rani & Burjorjee, Deena M. 2002. *Increasing Access and Benefits for Women: Practices and Innovations among Microfinance Institutions, Survey Results*. United Nations Capital Development Fund, New York: New York.

50 National Council of Women (NCW), and members of Civil Society. 2004. “NGO Shadow Report on the Status of Women in Samoa,” (online). [http://www.iwraw-ap.org/resources/samoa\(English\).pdf](http://www.iwraw-ap.org/resources/samoa(English).pdf).

51 Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press.

44 FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome

45 McDermott, M.D. 1997. *Common Country Assessment – Swaziland, 1997*. Mbane. <http://www.ecs.co.sz/>. Last visited May 5, 2005.

46 Ibid.

woman has little chance of receiving a share in the case of divorce or separation or in the event that her husband sells or mortgages land or other property that they are using as a couple or family.

Lesotho

The Lesotho Constitution provides for equality in formal property rights but exempts customary law from this equality requirement. Under customary law, women are treated as minors and lacking capacity to contract. The Deeds Registry Act (1967) permits the registrar to refuse registration if the woman's rights are customary rights only.⁵² Upon divorce, women surrender their homes and land and must return to their parents' village if possible.

Malawi

Patrilineal custom (common in the northern regions of Malawi), is such that lineage is through the males, so women lose land upon divorce. When a woman is widowed, she holds the land until her remarriage or the land passes to her sons. There are two types of matrilineal systems in Malawi – "chitengwa," which is patrilocal or "chikamwini," which is matrilocal. If the husband dies under the chitengwa system, women must leave their homes. Conversely if a wife dies under the chikamwini system, men must leave the home. However, the Malawi National Land Policy of 2002 (not yet law) promotes registration of individual and family title to customary land in the names of all members of the nuclear family.⁵³ If either the husband or wife dies, the other spouse inherits the land and the customary rules no longer apply.⁵⁴ While this assists women in patrilineal patrilocal clans, it may threaten women's sole tenure in groups that are matrilineal and matrilocal.

Uganda

After years of lobbying for co-ownership of marital land, land legislation was recently passed that falls short of compulsory joint tenure but provides some protection for women. Under this law, women have security of occupancy (not ownership) of family land only.⁵⁵

52 Mutangadura, Gladys. 2004. "Women and Land Tenure Rights in Southern Africa: A human rights-based approach." Prepared for Workshop, Land in Africa: Market Asset, or Secure Livelihood? London, p. 5.

53 Ibid.

54 Ibid.

55 An amendment to the Ugandan Land Act (18 June 2003) provides: "security of occupancy on family land"

39 A (1) Every spouse shall enjoy security of occupancy on family land.

(2) The security of occupancy prescribed under subsection (1) shall mean a right to have access and live on family land.

(3) For the purpose of subsection (2), the spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred in Section 40 which may affect his or her rights.

(4) In this Section, "family land" means land:-
 (a) on which is situated the ordinary residence of a family; or
 (b) on which is situated the ordinary residence of the family and from which the family derives sustenance; or
 (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraphs (a) and (b); or
 (d) which is treated as family land according to the norms, culture, customs, tradition or religion of the family.
 "ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in place when he or she intends to make that place his or her home for an indefinite period.
 "land from which the family derives sustenance" means:-
 (a) land which the family farms; or
 (b) land which the family treats as the principal place which provides the livelihood of the family; or
 (c) land which the family freely and voluntarily agrees shall be treated as the family's principal place and source of income or food.

JOINT TENURE

Table 2.3.1: Optional Joint Tenure: Latin America

COUNTRY	FORM OF OPTIONAL JOINT TENURE	LEGAL BASIS
Brazil	<ul style="list-style-type: none"> The beneficiaries of distribution of rural land through agrarian reform shall receive title deeds or concessions of use. These shall be granted to the man or woman, or to both, irrespective of their marital status, according to the terms and conditions set forth by law. 	Article 189 Federal Constitution
Costa Rica	<ul style="list-style-type: none"> Marital property (except state distributed land) remains separate property and rents or profits derived from that property is also separate property. Property is administered individually.^a Consensual unions may be jointly titled. 	Civil Code 1887/ revised 1973
Honduras	<ul style="list-style-type: none"> All property remains separate property and rents or profits from that property is also separate property. Property is administered individually.^b No provision for double signature for sale or mortgage. Joint titling allowed upon request. Law of Modernisation provides that "the property title for land will be issued in the name of the couple, if they request it". 	Civil Code Family Code Article 97 Law of Modernisation
Mexico	<ul style="list-style-type: none"> Family property is either community property or separate property depending on the agreement of the spouses. 	Articles 178 and 179 Federal Civil Code

a. Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press.

b. *Ibid*, p. 52.

JOINT TENURE

Table 2.3.2: *Optional Joint Tenure by Country: Africa*

COUNTRY	FORM OF OPTIONAL JOINT TENURE	LEGAL BASIS
Botswana	<ul style="list-style-type: none"> Women in civil marriage may acquire property and marry in or out of community property.^a Customary law applies to married persons subject to it, unless they contract out of its application, make a will, or otherwise demonstrate their intention to have common law apply. 	Married Persons Property Act (MPPA); Dissolution of Marriage of Persons Subject to Customary Law Act; Succession Act; Common Law and Customary Law Act
Burkina Faso	<ul style="list-style-type: none"> Joint tenure is not compulsory for polygamous marriage, but shared tenure of one or more persons is optional. 	Persons and Family Code of 1990 ^b
Eritrea	<ul style="list-style-type: none"> The State provides every individual of 18 or over who makes a living from the land an individual right to land, irrespective of marital status.^c 	1994 Land Proclamation
Gambia	<ul style="list-style-type: none"> Optional joint titling. Women are prevented by custom from independently buying land. Husband or male relative serves as titleholder.^d 	
Ghana	<ul style="list-style-type: none"> Assets jointly acquired during civil marriage shall be distributed equitably between the spouses upon dissolution of the marriage. However, the courts determine which property is "jointly acquired" property.^e Customary marriage has no effect on the property of spouses. Even during marriage, the wife does not in a strict sense become a part of the customary family of the man and the converse is also true for the husband.^f 	Article 22 Constitution Matrimonial Causes Act of 1971 (Act 367)
Kenya	<ul style="list-style-type: none"> Joint ownership and ownership in common are optional for any co-owner Marital property can be kept separate or can be held by one spouse in trust for both spouses, while the other spouse can obtain a declaration that the property acquired by joint venture is held in trust for them both. In case of divorce, non-monetary contribution must be taken into account. The Court of Appeal accepts a 50-50 division of marital property in most cases brought before it. Registration programme did not consider women's secondary rights; judicial interpretation is that registration extinguishes all non-registered rights.^g 	Sections 101 – 103 Land Registration Act Married Women's Property Act of 1882 Court cases ^h
Lesotho	<ul style="list-style-type: none"> Land Act (1979) is gender neutral but, under customary law, women are treated as minors and lack legal capacity to contract. Registrar may refuse joint registration if/because the woman's rights are provided for by custom.^h 	Section 18(4) Constitution Land Act of 1979 Deeds Registry Act 1967
Malawi	<ul style="list-style-type: none"> Land policy promotes registration of individual and family title to customary land in the names of all members of the nuclear family.⁵⁵ Formal law does not prevent women from obtaining formal land rights.ⁱ 	Malawi National Land Policy of 2002 (not yet law)
Mozambique	<ul style="list-style-type: none"> Where no specific marital property regime is selected, <u>community of accrued property</u> is the default regime for de-facto unions and traditional marriages: On separation or divorce, both spouses are entitled to 50% of the assets held in common, which are: the product of the work of both spouses, goods acquired by both spouses during the marriage (except through succession and donation and except for tools for each spouse's work) and profits or products arising from the individually-owned assets.^j For formal marriages the most common regime is <u>general community of property</u>: all property brought into the marriage by both spouses and all property acquired for use by the couple during the marriage is considered joint property of both. However, couples must choose before marriage between the three property regimes (general community of property, community of accrued property, or separation of property).^k 	Family Law of 2004

a If married in community property, all property is pooled and shared upon divorce. If married out of community property, essentially each spouse retains the property they owned before marriage and property acquired after marriage is treated as individual property unless it is clear that the intention of the parties is to have joint ownership of their property (usually a written contract). Ministry of Lands, Housing, and the Environment of Botswana, *Review of Botswana National Land Policy*; Final Report, 80 (January 31, 2003).

b FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome

c Food and Agriculture Organization, Sustainable Development Department. *Women and Land Tenure*. <http://www.fao.org/sd/fsdirect/fbdirect/FSP002.htm>. Last visited on May 17, 2005.

d Lastarria-Cornhiel, Susana. 2005. *Gender Sensitive Land Policies and Implementation*. Unpublished manuscript. Madison: University of Wisconsin-Madison.

e Dowuona-Hammond, Christine. 2003. *State Land Management Regime: Impact on Land Rights of Women and the Poor in Ghana*, Report for GTZ, Accra, Ghana.

f Daniels, W.C. E., "Towards the Integration of the Laws relating to Husband and Wife in Ghana" (1965) II U.G.L.J. 20, 38.

g FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

h *Karanja vs. Karanja*, 1976, Justice Simpson at p. 311 of (1976) Kenya L.R. 307; *Mary Anne Mutanu Kivuitu vs Samuel Mutua Kivuitu*, 1991 K.A.R. 241; *Tabitha Wangechi Nderitu vs Simon Nderitu Kariuki*, Civil Appeal Case No 203 of 1997, Court of Appeal, Nairobi

i Mutangadura, Gladys. 2004. "Women and Land Tenure Rights in Southern Africa: A human rights-based approach." Prepared for Workshop, *Land in Africa: Market Asset, or Secure Livelihood?* London. p. 5.

j *Ibid.*

k *Ibid.* p. 7.

JOINT TENURE

COUNTRY	FORM OF OPTIONAL JOINT TENURE	LEGAL BASIS
Nigeria	<ul style="list-style-type: none"> Joint tenure is not mandatory under any family law system, and in many parts of Nigeria under customary law women are seen as not belonging to their husband's family and having no right to land or housing.^l 	
Rwanda	<ul style="list-style-type: none"> Requires couples registering for civil marriage to make a joint commitment to choose one of the options for ownership of marital property. The options are <ul style="list-style-type: none"> - community property - limited community property - separate property. If no choice is made, community property is the default system.^m 	Law 22/99 of 1999 to supplement Part I of the Civil code
Senegal	<ul style="list-style-type: none"> Polygamous relationships must choose a property regime for each marriage. Under customary law, women only have the use-right to land. Women rarely exert their rights in civil court. 	Family Law
Swaziland	<ul style="list-style-type: none"> Default regime is out of community of property. Women can register the land jointly with their husbands if they choose to marry "in community", and their husband agrees to joint registration.ⁿ 	Deeds Registry Act of 1968 Marriage Act
Tanzania	<ul style="list-style-type: none"> Only when spouses jointly register their names on matrimonial property, is there a presumption that they have equal interest in it. Joint property is often held in the husband's name and the wife must provide evidence of her contribution. This contradicts Section 161 of the Land Act, on the basis of which spousal co-occupancy is presumed for family land, whether spouses have jointly registered or not. 	Marriage Act of 1971
Tunisia	<ul style="list-style-type: none"> Law 98-91, (1998) allows spouses to choose community property regime. Without this specific choice, separation of property applies.^o 	Law 98-91 of 1998
Uganda	<ul style="list-style-type: none"> Drafts of the Land Act of 1998 included a provision for spousal co-ownership of land. This provision did not make it into the final version of the Land Act.^p Joint titling remains optional and most land is titled in the name of the male head of household, although some joint titling is occurring with land purchased in peri-urban and urban areas. Spousal co-ownership of matrimonial property is foreseen in Domestic Relations Bill, adoption of which has been pending for years. 	Land Act of 1998 Draft Domestic Relations Bill Article 31(1) of the 1995 Constitution guarantees women's equal rights upon, during and after marriage
Zambia	<ul style="list-style-type: none"> Under customary law, where marriage is uxorilocal (husband settles in wife's village), the woman holds the land rights. Where marriage is virilocal (most common situation and one where wife settles in husband's village), husband holds rights, and wife loses land access upon end of marriage and must return to her own village.^q 	
Zimbabwe	<ul style="list-style-type: none"> In 1990, resettlement land was allocated to households as a unit. Data from 1997 indicate that about 75% of the registered landowners are male, about 20% of farms are held jointly, and fewer than 5% were owned by women.^r Joint titling is optional and rare. Women are expected to demonstrate commitment to marriage by not insisting on joint or sole ownership of property.^s 	

l UN-HABITAT. 2005 *Law, Land Tenure and Gender Review Series: Mozambique*. Draft report. p. 7.

m *Ibid.*, p. 26.

n Centre on Housing Rights and Evictions (COHRE). 2004. *Bringing Equality Home: promoting and protecting the inheritance rights of women*. pp. 74-75.

o *Ibid.*, pp. 91-92.

p UN-HABITAT. 2005 *Law, Land Tenure and Gender Review Series: Mozambique*. Draft report. p. 7.

q *Ibid.*, p. 26.

r Centre on Housing Rights and Evictions (COHRE). 2004. *Bringing Equality Home: promoting and protecting the inheritance rights of women*. pp. 74-75.

s *Ibid.*, pp. 91-92.

JOINT TENURE

Table 2.3.3: Optional Joint Tenure by Country: Asia

COUNTRY	FORM OF OPTIONAL JOINT TENURE	LEGAL BASIS
Cambodia	<ul style="list-style-type: none"> • In the late 1980s land was divided in accordance with the number of household members and each member had an individual right to a portion of land. But land was most frequently registered only in the name of the husband.^a • Traditionally men and women had an equal right to land.^b • Joint ownership is allowed by law, but not mandatory. 	Land Law Chapter 9
China	<ul style="list-style-type: none"> • Land contracts, where issued, are issued in the name of the head of household. Household members' names may or may not be listed in the contract, but no specific land parcel or parcels are attributed to individual members.^c 	
India (West Bengal)	<ul style="list-style-type: none"> • To the extent possible (not compulsory), government allocated land must be granted either to a woman individually or jointly to husband and wife, but policy has not been implemented effectively.^d 	Policy Directive of 1992
Nepal	<ul style="list-style-type: none"> • Wife has limited rights to property acquired by husband and wife during marriage (Ansa). Women seeking divorce have no claim to Ansa property.^e 	
Uzbekistan	<ul style="list-style-type: none"> • There is no mandatory joint ownership of land but joint ownership and tenancy in common are allowed • Most land parcels have been issued and registered in the name of the male head of household.^f 	Articles 216-227 Civil Code

a Japanese International Cooperation Agency Planning Department. 1999. *Country WID Profile* (Cambodia), <http://www.jica.go.jp/english/global/wid/report/pdf/e99cam.pdf> Last visited May 8, 2005.

b *Ibid.*

c Zongman, Li & Bruce, John. 2005. Chapter 11. Gender, Landlessness and Equity in Rural China, in: Ho, Peter (ed), *Developmental Dilemmas; Land Reform and Institutional Change in China*. Routledge, New York. (in press 2005).

d Brown, Jennifer & Chowdhury, Sujata Das. 2002. *Women's Land Rights in West Bengal: A Field Study* (Reports on Foreign Aid and Development No. 116). Seattle: Rural Development Institute.

e Shrestha, Samjhana. 1999. "Nepal: The Right to Land is the Right to Livelihood," in *Women in Action* (2:1999). pp. 2-3.

f Lastarria-Cornhiel, Susana. 2005. *Gender Sensitive Land Policies and Implementation*. Unpublished manuscript. Madison: University of Wisconsin-Madison.

JOINT TENURE

Table 2.3.4: Optional Joint Tenure by Country: Europe

COUNTRY	FORM OF OPTIONAL JOINT TENURE	LEGAL BASIS
Albania	<ul style="list-style-type: none"> No compulsory joint titling. Couples may specify in a marriage contract who will own the property. Privatised land was registered in the name of male head of household. The rights of other household members are unclear.^a 	Family Code of 2003
Bosnia-Herzegovina	<ul style="list-style-type: none"> Federation of Bosnia and Herzegovina: Co-ownership over marital property in equal amounts not specifically provided for. Courts have wide discretion in determining allocated common property to each spouse. Amendment of this law is expected to recognise co-ownership of marital property in equal amounts.^b Republika Srpska: In case of division of common property, each spouse is entitled to 50%. In court each spouse may request a higher share if s/he proves that his/her contribution to common property was higher 	Marriage Law No. 21 of 1979 as adopted by Socialist Republic of Bosnia and Herzegovina is still in force Articles 272(1) and 273(1) Marriage Law of 2002
England	<ul style="list-style-type: none"> England rejects community property and allows judges to issue property adjustments according to stated equitable concerns.^c 	
Germany	<ul style="list-style-type: none"> Community property must be specified in a contract or covenant of marriage that is certified by a notary. Without a designation of community property, upon divorce or annulment of the marriage, division between the spouses of the total increase in assets or acquisitions realised during the course of the marriage is required. 	German Civil Code
Romania	<ul style="list-style-type: none"> If a divorced couple decides to physically separate, all assets must be divided equally. The house or apartment must usually be sold, with the proceeds divided equally.^d 	
Scotland	<ul style="list-style-type: none"> Spouses can choose joint ownership or separate ownership. If separate ownership, the court will consider the size of the woman's contribution to the property of her husband in dividing the property. 	Matrimonial Homes (Family Protection) (Scotland) Act 1981
Sweden	<ul style="list-style-type: none"> Legally recognises unmarried couples.^e Deferred community property system, independent management of property during the marriage.^f 	

a Lasterria-Cornhiel, Susana. 2005. Gender Sensitive Land Policies and Implementation. Unpublished manuscript. Madison: University of Wisconsin-Madison.

b UN-HABITAT, Housing and Property Legislation and Policies in Croatia, Bosnia and Herzegovina, Serbia and Montenegro. 2005.

c Glennon, Theresa. 2004. "An American Perspective on the Debate over the Harmonisation or Unification of Family Law in Europe," Book Review of Perspectives on the Unification and Harmonisation of Family Law in Europe," in Family Law Quarterly, Vol 38, pp. 191.

d Negrau, Nick. 1996. Symposium, "The Status of Women in New Market Economies: Living in Post-Communist Romania," in Connecticut Journal of International Law, Vol 12, pp. 117, 131-32.

e Jakovac-Lozie, Dijana. 2000. "Croatia's New Family Act and its Implications on Marriage and Other Forms of Family Life," in California Western International Law Journal, Vol. 31 (83).

f Parkinson, Patrick N., 1987. "Who needs the Uniform Marital Property Act?" in University of Cincinnati Law Review, Vol. 55, p. 677.

Table 2.3.5: Optional Joint Tenure by Country: North America

COUNTRY	FORM OF OPTIONAL JOINT TENURE	LEGAL BASIS
Canada	<ul style="list-style-type: none"> Each province has separate family law provisions, but none of them has a mandatory community property system. Separate tenure or co-tenure is allowed under the common law system. 	Province level family law
United States	<ul style="list-style-type: none"> Land and housing can be held as separate property, tenancy in common or joint property. Only 9 states have mandatory joint tenure for marital property. The other 41 states permit but do not mandate joint tenure. 	State Land Law and Family Law

Table 2.3.6 Optional Joint Tenure by Country: Oceania

COUNTRY	FORM OF OPTIONAL JOINT TENURE	LEGAL BASIS
Samoa	<ul style="list-style-type: none"> Statute provides for optionally naming women as joint titleholders, although 90 percent of all land is held informally.^a 	

a National Council of Women (NCW), and members of Civil Society. 2004. "NGO Shadow Report on the Status of Women in Samoa," (online). [http://www.iwraw-ap.org/resources/samoa\(English\).pdf](http://www.iwraw-ap.org/resources/samoa(English).pdf).

2.4 Joint Tenure Regulations

While civil legislation establishes marital regimes, the procedures for documentation and registration of joint titles make a real difference in terms of how many women formalise their rights to land and property. Procedures can be complicated, time consuming, and expensive. Formalisation may require proofs that women do not have. Below are four examples of regulations and procedural mechanisms for titling and/or registration of land.

Ethiopia

In Ethiopia, all land is owned by the State. Land law and family law are adopted at national level, while regulations for the implementation of these laws are issued at regional level. Recently a new, systematic titling and registration effort has begun in all the states. This process is described below.⁵⁶

A village committee is selected in a given kabele (organised regional group) for the registration exercise. Individual plots are demarcated and the owner(s) identified. Each of the neighbours (north, south, east, and west) are also identified and recorded.

In all regions except Oromiya, this is done household by household, meaning all of a given household's land is identified and demarcated before moving to the next household. This, of course, results in a duplication of effort in measuring and demarcating boundaries since each boundary will have to be demarcated twice. (The rationale for this duplication is related to the structure of the title certificate which lists all of a given household's land holdings on one certificate – not a separate certificate for each land holding. Unique parcel identification numbers are not given.)

The Regional State of Oromiya systematically maps the kabele, identifying land use right holders as they progress across the land area. While boundaries are only measured and demarcated once, the certification exercise cannot be completed until all of the neighbouring land has also been demarcated and owners recorded. In Oromiya, each parcel is also given a unique identification number even though there is still only one certificate issued per household. The Oromiya regulations are gender sensitive with an initial provision as to the language used: "Provisions of this Regulation set out in the masculine gender shall also apply to the feminine gender."⁵⁷ The Regulations also require that the husband and wife be

given a joint certificate for their commonly held land. In a polygamous marriage, a husband is allowed to get a holding right certificate with only one of his wives, and the other(s) will get an individual right certificate. The use right of a family is not affected, if any or both of the spouses leave the area.

In the Southern Nations, Nationalities, and People's Regional State (SNNP – one of nine states in Ethiopia), the land registration regulations have similar provisions as in Oromiya, but additionally the regulations also refer extensively to the rights of married couples, divorced couples, and women.⁵⁸

If a husband and wife each had their own land before getting married, their holdings must be registered under a common certificate at the time of marriage, even if their respective holdings are not in the same *kabele*. Women who make their living with agriculture but whose husbands have a non-agricultural job or work in another area will be given certificates bearing their own names.

The SNNP regulations stipulate that, when a husband and wife file for and get a divorce, either one of the two is entitled to another land holding if their holding at the time of marriage could not be parcelled or they could not use it in common. However, in the event that it becomes impossible to provide either of them with another land holding, they can, by mutual agreement, seek other alternatives to use the land in common. The spouse who takes care of the children will be able to keep the holding if it cannot be parcelled (Section 7).

In the Tigray region, between 1996 and 1998, certificates were distributed to the head of the household. Women are generally allowed to keep their field when they marry and leave for another village, until they receive land in their husband's village, even though this is against the formal law.⁵⁹

The Amhara National State has distributed use rights to men and "qualified" women equally. That is, only single, income-generating women are eligible and not women who are married or dependent on their family.⁶⁰ Amhara mandates joint titling of land used by married couples.

In all regions, with the exception of Tigray, both the hus

⁵⁶ Interview with Marquardt, March 7, 2005, who participated in a land assessment for USAID (which funds this project) in December 2004.

⁵⁷ Oromia Rural Land Use and Administrative Proclamation Number 56/2003. A similar provision is laid down in the Ethiopian Constitution.

⁵⁸ Southern Nations, Nationalities and Peoples' Regional State. Regulations and Procedures for the Implementation of Rural Land Administration and Land Utilization Proclamation; Issued by the Regional House of Peoples' Representatives. 1996/2003/2004. Section 7.3

⁵⁹ International Institute for Environment and Development. 2003. Securing Land Rights in Africa: Can Land Registration Serve the Poor? (Workshop Report).

⁶⁰ Centre on Housing Rights and Evictions (COHRE). 2004. Bringing Equality Home: promoting and protecting the inheritance rights of women, p. 50.

JOINT TENURE

Table 2.4.1: Legal Requirements for Registration of Common or Joint Owners in Kyrgyzstan

COMMON OWNERSHIP	JOINT OWNERSHIP
All owners must be listed under “owners’ name”	Both names must be listed under “owner’s name”
Under “common ownership” field, the size of the share must be noted	Joint Ownership is recorded as “type of ownership”
One owner may transact with his/her share without the consent of the other owners, but in case of sale, the other owners have a right of first refusal.	Consent of all owners is required for a transaction

band’s and wife’s names are recorded on the certificate. The names of all family members are also recorded. At this early stage in the registration process, both of these requirements are regularly being met.

Kyrgyzstan

In Kyrgyzstan, where State land was privatised beginning in 1991, the 1998 Law on Registration⁶¹ applies both to land shares and to household plots. The two main components of the registration system are the registration card and registration file. The registration card contains a registration number, the identity of the rights holder(s), the type of rights held, and specifies the type of rights-establishing document on which registration is based. The registration file contains copies of all documents referred to on the registration card, including information on the origin, change, term, or limit of the rights, as well as a map of the property.

The registration card contains two important fields that can be used to identify shared ownership rights.⁶² One is a field for “owner’s name” and the other is a field for “joint or common ownership.” Married couples are joint owners of property unless otherwise specified by law or contract.⁶³ To register joint ownership, the registrar must record the names of all of the joint owners under the field for “owner’s name.” In the field for “joint or common ownership,” the registrar must record “joint ownership.” Disposal of immovable property held in joint ownership (which includes sale, mortgage and lease) requires consent of all the joint owners.⁶⁴ Both spouses who are joint owners must give written consent to the transaction.⁶⁵

To register common ownership, the registrar must list all common owners in the “owner’s name” field, and under the

“joint or common ownership” field must record the sizes of the shares in percent, fraction or hectares. Common owners may transact their share without the consent of the other shareowners except that, in the event of a sale, the selling shareowner must inform the other shareowners, who hold a right of first refusal.

In reality, registrars do not list each of the names of intra-household common owners on the registration card under the “owner’s name” field in all instances. Nor are they uniformly recording the percentage share held by each common shareowner.

In registering houses, registrars rarely record the interests of anyone other than the head of the household. In one rapid appraisal done in 2001, registrars distinguished between the need to record interests of two or more households holding property in common and intra-household joint owners (husband and wife). For the former, registrars indicated the names of both joint owners and marked the field for joint ownership. For the latter, they appeared to do neither.

In the event that the spouse with the registered interest in the house attempts to transact it, Kyrgyzstan’s system relies on notaries to identify and gain the approval of all joint owners. Notaries operate on the presumption that the existence of a spouse indicates that he or she is a joint owner. Because the rights-establishing document does not generally include the names of anyone but the applicant, in practice, notaries rely heavily on items not included in the registration files to identify joint owners.

Bolivia

The current law regulating land rights and use in Bolivia (Law No. 1715 on National Service of Agricultural Reform – Servicio Nacional de Reforma Agraria) was approved in 1996. One of the distinguishing features of this land law is the recognition of women’s and men’s equal rights to land. While the earlier agrarian reform law (1953) also stated that all Bolivian farmers 18 years and

61 Law of the Kyrgyz Republic “On State Registration of Rights to Immovable Property” (November 26, 1998) (hereinafter Law on Registration).

62 Shared ownership includes joint ownership and common ownership. Civil Code, Art. 266.

63 Civil Code, Art. 275.

64 Civil Code, Art. 272 (2), *supra* note.

65 Marriage Code, Art. 24, *supra* note.

older, without distinction of sex, were entitled to benefit from agrarian reform and land settlement programmes, in practice the only women who received land were female heads of household such as widows with small children.

With regard to gender, the 1996 law explicitly states that gender equality be observed in the distribution, administration, tenancy, and use of land.⁶⁶ More importantly, it states that women have land rights independent of their civil status. The last phrase is important since it does not require that a woman be head of household or married in order to be eligible for land rights. These gender provisions are supported by other Bolivian legislation such as the Constitution and the Civil Code. The Civil Code, for example, specifies that property acquired through concession or adjudication from the state forms part of the common property of the couple. Unfortunately, the 1996 law did not stipulate any mechanisms for achieving gender equity, nor did the first set of regulations (July 1997) mention how Article 3 was to be implemented. A later set of regulations (May 2000) had more explicit gender considerations.

As part of the implementation of the 1996 land law, a land regularisation programme (*saneamiento*) implemented by INRA (the Bolivian Land Titling Agency) began in 1997. The objective of the *saneamiento* process is to formally title and register land parcels that were distributed through the 1953 agrarian reform law and to update the registration of titled land. Initially, INRA did not take any measures to ensure that women were made aware of their legal rights nor to train its personnel and the titling brigades with regard to these rights. As it advanced, it was evident that very few women were being titled, either as individuals or as co-owners. In the early 2000s, INRA took advantage of a regulation (Art. 28 (g) of the Reglamentos 2000) that gave the director of INRA the authority to make administrative changes in implementing *saneamiento*, in order to build a gender programme within INRA.

Initially this gender programme consisted of administrative instructions to INRA personnel and titling brigades to include women in the titling process such as information and educational meetings, to include spouses' names in the titling process documentation that leads up to actual titling, and to include the names of both spouses on the title when land is being titled for the first time. This last directive was based on the Civil Code stipulation of community property for land acquired through the state (by extending that stipulation to land acquired through agrarian reform)

and the 1996 Agrarian Reform law that recognised equal legal treatment with regard to land rights.

2.5 Religious and Customary Laws

Customary or religious law can have a great effect on the implementation of formal law as we saw above under Section 2.3.1. In some cases, where customary law or religious law support or at least allow for joint tenure or equal rights to property, individualisation of rights and the formal law that supports individualisation may discourage joint tenure. In other cases, customs and traditions that vest power over property with males are more willingly embraced than religious or formal law that calls for equality of property rights.

In **Laos**, for example, the largest proportion of society is customarily matrilineal.⁶⁷ With regard to land rights, in practical terms this means that in the matrilineal areas both daughters and sons inherit land and that there are no cultural restrictions on women owning land. Inheritance practices are not rigid and parents usually decide which children will inherit what family property. Often this is done on the basis of need and the relationship between parent and child. The traditional practice is for the youngest daughter to remain in her parents' home after marriage to take care of them in their old age; she therefore inherits the family homestead. Lao legislation, including the 1991 constitution, acknowledges gender equity with regard to family, inheritance, and property laws. Land acquired by a couple is considered marital property and is supposed to be issued as a joint land use certificate or title.

However, once land titling became a formal process, it moved into the sphere of men. Under customary law, men were responsible for official or public business, and therefore were the ones to register property. Even with a tradition of land ownership, far fewer women had their name on land certificates than did men.

Under the Qur'an, women are able to retain control over their pre-marital property and finances through marriage and, where applicable, upon divorce and widowhood.⁶⁸ The Islamic approach to property rights takes into account all aspects of a family's wealth and responsibilities and provides for an "equal" distribution of property between men and women. While women have reduced inheritance rights under the law (one half of male members of the family generally), they are to receive other

⁶⁷ The three major ethnic groups are: Lao Lum (68% of population), Lao Theung (22%), and Lao Sung (10%).

⁶⁸ UN-HABITAT. 2004. Muslim Women and Property paper No. 4. Draft.

⁶⁶ Article 3, Paragraph V of Law 1715 on National Agrarian Reform Service.

compensations throughout their life cycle. In practice, this rarely occurs because rather than looking at family life as a whole, individual events are viewed individually. Inheritance, dower, and maintenance are promised to women. Dower and maintenance are usually not land and have often been reduced to nominal amounts because family traditions and customary law seem to have trumped religious principles. While inheritance remains sacrosanct, women's inheritance rights are fewer than men's

2.6 Gaps and/or Conflicts in Legal Framework

There are several common issues and conflicts in legislative frameworks at the country level regarding joint titling, joint registration, and assurance of women's rights to land and property. Very often legislation does not address or reflect issues related to traditions and customs at the household level, which have a much greater affect on women than on men. In other cases, legislation mirrors the reality for women, and memorialises discriminatory customs and traditions, not leaving any room for even small changes. Examples of some of the main legislative issues follow.

Discriminatory laws and policies in language and/or content

The most obvious problems relate to legislation that memorialises discriminatory practices. For example, although **Chile** provides for joint ownership of marital property, the law also mandates that the husband manage the property.⁶⁹ In **Ecuador**, if an administrator of the common property is not specifically assigned, the male is legally required to administer the property. Such provisions are contrary to international human rights law and often also to the constitutions of the countries concerned.⁷⁰

While in many countries, constitutions prohibit discrimination based on gender, there are examples of constitutions that qualify the principle of non-discrimination by providing exceptions for family and succession law and for customary practices.⁷¹ For example, in **Zambia**,

Article 23(4) of the 1996 Constitution specifically excludes from application of the non-discrimination clause, all law:

- (c) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
- (d) For the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;

Additionally, the Constitution explicitly allows for discriminatory treatment of persons, provided that such treatment is "reasonable and justifiable in a democratic society" (Art. 32 (3) (d)).

Similar provisions exist in the constitutions of **Zimbabwe**, **Kenya** and Lesotho.⁷² the Constitution provides that adoption, marriage, divorce, inheritance, and "African customary law" cannot be held to be discriminatory (Section 23 (3)).

No Linkage between Land Laws and Marriage and Family Laws

Family law is rarely considered as part of land and housing legislation, and of titling and registration laws and programmes, and yet family law has the greatest impact on women's right to use or own property. In many cases, family law presumes joint ownership of marital property, but the registration law does not require joint registration of this property, for example.

In addition to no legal requirement for joint registration of jointly held property, registration forms or cards may lack space for listing a spouse and her share of the property. As a result, land officials/registrars are likely not to check on whether the property is jointly owned. Regulations to implement joint titling legislation should require these details and insert checks to ensure that registrars record not only the interest of the head of household but also the interests of co-owners.

Customs Regarding Distribution of Family Wealth

If, as in much of **Central Asia**, daughters traditionally receive a dowry and sons inherit a house and land, it may be that legislation providing that individual gifts or inheritances remain separate property will likely be detrimental to women, since the value of houses and land has increased whereas the value of carpets and blankets has not. Or if polygamy is commonly practised and accepted

⁶⁹ Hartl, Maria. 2003. Rural Women's Access to Land and Property in Selected Countries, FAO/IFAD/International Land Coalition, SD dimensions. http://www.fao.org/sd/2003/PE07033a2_en.htm

⁷⁰ The International Covenant on Civil and Political Rights (Article 3) requires States Parties to ensure the equal right of men and women to enjoy all rights laid down in this Covenant. Article 23(4) requires States Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and upon the dissolution of marriage. 154 States are Parties to this Covenant.

⁷¹ FAO Legislative Study. 2002. Law and Sustainable Development since Rio – Legal Trends in Agriculture and Natural Resource Management," Food and Agriculture Organization of the United Nations, Rome.

⁷² Zimbabwe: Article 23(3); Kenya: Article 82(4); and Lesotho: Article 18(4)(b).

but is officially “illegal”, joint property provisions will not sort out property relations among two wives and one husband.

In **Karnataka State, India**, high dowry and wedding expenses are one of the primary reasons that families sell land, and one of the main reasons that daughters do not inherit land. Despite the fact that a wife has no control over dowry and generally cannot reclaim it if divorced or widowed, the fact that a high dowry was paid on her behalf by her parents also keeps her from inheriting any of her birth family's land. Women in India who divorce are generally left with nothing. A community property rule that provided that all property brought into the community and purchased during the community (universal community property) would at a minimum bring the dowry into the community rather than be under the total control of the husband.⁷³

Legal/civil Marriage Requirements

In many cultures, marriages are not registered or legalised under civil law. Religious marriage plays a very important role in countries with Muslim populations, and customary marriage is common in many countries in Africa and Asia. Civil marriage is expensive, time consuming, and requires an ability to cope with legal requirements and paperwork. In Eastern Europe and the former Soviet Union, civil marriages were the norm and marriage registration was mandatory. But research indicates that legal marriage rates are decreasing in many of these countries. In **Bulgaria**, for example, legal marriage is dropping from 9 per one thousand in the 1970s to 4.2 per one thousand in 1997. According to research on tendencies among young people conducted in May 1999, 60% of the respondents stated that they did not prefer marriage as a form of cohabitation.⁷⁴ Civil marriage is not the norm in much of rural Latin America. For example, in rural **Peru**, 40% of women who live as a couple are in a consensual union and in El Salvador, 63%.⁷⁵ If consensual unions (non-registered marriages) are not recognized under mandatory community property legislation, many women (especially in rural areas) will not be protected by community property legislation and will not have rights to use, ownership, or disposal of marital property.

An additional problem with consensual unions among low-income rural households is the difficulty of obtain-

ing the proper documentation that certifies existence of the union. One solution to this problem that has been implemented in several countries is to issue co-ownership (not joint) titles. This has been done, for example, in **Peru** and in **St. Lucia**.⁷⁶ 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.⁷⁷ 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.⁷⁸

Legal document requirements

Obtaining land titles and registering land usually involves personal documents such as proof of marriage, proof of citizenship, and/or identity cards. Legal documentation is a major hurdle for illiterate and poor women. In **Brazil**, for example, joint registration did not occur even though it was mandated, because a substantial number of rural women lacked the documents required to obtain land titles (identity cards, tax registration number, marriage certificate, etc.).⁷⁹

Lack of official identification also hinders land registration for **Bolivian** women. Official personal documents include a birth certificate, and when one is of majority age, the national identification card. Women from land-poor households are less likely to have national identification cards than men for several reasons. The cost of processing official documentation such as birth registration and identification cards are high for low-income families, particularly those living in isolated communities. Families are more likely to incur these costs for their sons and not their daughters. Without a birth certificate, it is expensive and difficult for an adult to obtain an identification card. This becomes particularly difficult for rural women who are more likely to be illiterate than men. When the titling brigade determines the identity of the parcel owners in a household, one requirement for title is official citizen status shown by possession of an identification card.

73 Brown, J., Ananthpur, K. & Giovarelli, R. 2002. Women's Access and Rights to Land in Karnataka, India (Rural Development Institute Reports on Foreign Aid and Development, No. 114).

74 Giovarelli, Renee. 2004. Women's Land Rights in Bulgaria. Unpublished Report.

75 Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press.

76 Fernández, Blanca; Trigo, María Amelia; Del Castillo, Laureano; Becerra, William; Arias, Pedro; Pozo, Katherine & Aragón, Karla. 2000. *Campaña Por una titulación de tierras con equidad: una experiencia para compartir*. Lima: Flora Tristan.

77 Judd, M. & Dulnua, J. 2001. Women's Legal and Customary Access to Land in the Philippines. World Bank Report.

78 Ibid.

79 FAO Legislative Study. 2002. Gender and Law – Women's Rights in Agriculture, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

INRA (the Bolivian Land Titling Agency) has attempted to circumvent this problem temporarily by allowing undocumented persons to be included on the forms, such as the *ficha catastral*, which is filled out during the adjudication and parcel measurement processes. The understanding is that while the titling process proceeds, these persons will have the opportunity to obtain their personal identification documents before titles are actually issued. While some persons are able to do this, many more do not have the economic means to pursue this legal process, particularly if they do not have a birth certificate.⁸⁰

In **Laos**, women have a difficult time proving ownership of property because many families, particularly in rural areas, do not have ownership documentation regarding their land rights. If documentation is required for taxation, for example, the male head of household traditionally deals with these formal and written procedures,⁸¹ and his name appears on these types of documents.⁸²

Polygamy

Polygamy affects a variety of land issues, including division of property, management of property, and joint ownership. In countries where polygamy is illegal but widely practised, the effect on land rights is ignored. However, several countries have addressed it in their marriage and family, inheritance, or land legislation. In **Burkina Faso**, for example, under the 1990 Family Code, if a couple is monogamous, their property is community property. But, if there is more than one wife, all property is separate property. In **Ethiopia** during distribution of land rights, a man with two wives must choose one with which he will jointly own land, and the other wife will receive an independent right to a separate plot of land.

2.7 Challenges in Implementation

2.7.1 Introduction

Mandatory titling and/or mandatory registration do not necessarily mean that women gain equal rights to land. The unequal outcome is related to cultural practices and biases, lack of information, or lack of enforcement of legal rules. Titling and registration legislation is implemented and

enforced by government institutions. Administrative and judicial processes are critical to the exercise and enforcement of the right to joint ownership of land. Many titling and registration programmes fail to include women at the implementation phase. The key issues are:

1. Education of women and men about women's rights to co-own land and the procedure necessary
2. Education of officials implementing joint registration in terms of procedures, documentation, and sensitivity to the need for women to be registered;
3. Project and policy design;
4. Judicial interpretation of joint titling legislation; and
5. Customary and religious practices.

2.7.2 Educating Women

In many countries, a major impediment to women's participation in joint titling is widespread ignorance among women (and to a lesser extent, men) of their rights to land due to illiteracy and lack of dissemination of information and legislation at the local level.⁸³ By contrast, in **Mozambique**, where the New Land Law campaigns have been successfully carried out in rural areas, women know their legal rights to land. Specifically, when land legislation was integrated into literacy programmes or where NGOs that distributed Land Law information had been working in the area a long time, women were more likely to know their rights to land.⁸⁴

In **Honduras**, a 1996 INA report noted that one of the main constraints to women being granted land titles under the titling programme was that women were rarely aware of their rights to have titled land either jointly with their spouses, when they had acquired the land together, or in their own names, when they themselves had inherited the parcel or had claimed and worked a parcel directly. Moreover, there had been little publicity regarding the rights of women under the Law of Modernisation, which provided that "the property title for land will be issued in the name of the couple, if they request it" (Article 97).⁸⁵ Without education aimed specifically at providing women with information about this optional right to joint titling, they were unable to exercise those rights.

In **Indonesia**, although law mandates joint titling and registration, few titles have been issued in the name of both

⁸⁰ World Bank. 2005. Evaluating Gender Issues and Practice in Land Administration Projects, Prepared for the Gender and Rural Development Thematic Group. Unpublished draft report.

⁸¹ One reason given for this practice is that women, particularly in rural areas, are less literate than men and have less confidence in dealing with written documentation and official transactions (Viravong 1999).

⁸² World Bank. 2005. Evaluating Gender Issues and Practice in Land Administration Projects, Prepared for the Gender and Rural Development Thematic Group. Unpublished draft report.

⁸³ Mutangadura, Gladys. 2004. "Women and Land Tenure Rights in Southern Africa: A human rights-based approach." Prepared for Workshop, Land in Africa: Market Asset, or Secure Livelihood? London.

⁸⁴ Ibid.

⁸⁵ Lastarria-Cornhiel, Susana; Agurto, Sonia; Brown, Jennifer; Rosales, Sara Elisa. 2003. Joint Titling in Nicaragua, Indonesia, and Honduras: Rapid Appraisal Synthesis, Land Tenure Center, University of Wisconsin-Madison.

spouses. One primary cause is that most landowners are not aware that it is possible to register land in more than one person's name because this is not explained to registrants at the meetings meant to educate the public about registration rights.⁸⁶ Reasons officials gave included: they did not want to influence a couple's decision about how to register their land; the topic was outside the scope of the meeting; and the application for registration did not state that land could be registered in more than one name.⁸⁷

Vietnamese law provides that land use certificates must have the name of both the husband and wife; yet, due to a lack of public education and training of local officials, only 3% of land titles bear both the husband's and the wife's name.⁸⁸ Further complicating joint titling is Viet Nam's low literacy rate and lack of information regarding titling in ethnic minority languages.⁸⁹

A study undertaken in **Laos**, which revealed that land inherited by women or acquired by wife and husband were being recorded in the names of men only, offered various reasons for the discrepancy between name of landholder and name on land use documents. Some reasons relate to education about the certification or titling process itself: in most households, men participated in the information meetings and other certificate or titling activities. Therefore, women were not aware of the legal and economic significance of having their names on land use documents nor were they present when decisions were made as to whose name would appear on the certificate or title. The study speculates that cultural norms also influenced. Men are the traditional head of the family and wives defer to husbands, particularly in public situations. Women may have felt that the husband's name, as head of the family, should be on land use certificates. In addition, women, particularly in rural areas and among the urban poor, are less literate than men and have less confidence in dealing with written documentation and official transactions.

2.7.3 Educating Officials

In a World Bank Urban Property Rights Project in **Peru**, of individuals who received titles, women were the primary (66%) beneficiaries, in part because those in charge of the project training received gender sensitivity training. In

addition, the 1948 Civil Code establishes a community property regimen for married couples.⁹⁰

In **Ghana**, although under the Married Persons Property Act of 1971 wives may acquire property, some Land Boards still require married women who apply for land to produce written permission from their husbands.⁹¹

In **Indonesia**, training of land registration employees did not include any information about marital property or joint registration of land, which was specified in the law. The registrars stated that they would not make any changes in their behaviour based on the law alone – they had to receive notice from their head supervisor to the effect that they should now do something different.⁹²

This example makes an additional point about land professionals who are also government officials. Unfortunately they usually have less of a personal need or desire to learn about land issues than members of the community, especially if neither their job security nor their pay depends on such knowledge. In a study done in **Vietnam** related to training of officials, the post training analysis was very positive from students, and they felt that they had learned much needed information. However, a follow-up study indicated that none of the managers had implemented any of the ideas and projects presented in the training.⁹³

2.7.4 Project Design

Design of a titling project will have a great affect on whether or not women are titled under the programme. A **South African** land and housing titling project (People's Housing Process or PHP) had as its beneficiaries an overwhelming majority of women because, to qualify for the subsidy of the programme, the beneficiary had to live with dependents and there were a large number of female-headed households. Also, the property rights of women in consensual unions were protected because qualification for the subsidy allowed the beneficiary to be married or to live with a long-term partner. However, because mandatory joint formalisation of the right was

86 Brown, Jennifer. 2003. "Rural Women's Land Rights in Java, Indonesia: Strengthened by Family Law, but Weakened by Land Registration," in *Pacific Rim Law and Policy Journal*, Vol. 12, pp. 631-651.

87 *Ibid.*, p. 163.

88 UN Volunteers, 2004. "Vietnamese Land Use Certificates Must Now Bear Both Husband and Wife Names," at <http://www.unv.org/infobase/voices/2004/vietnam.htm>, last visited on February 9, 2005.

89 *Ibid.*

90 Atuahene, Bernadette. 2004. "Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations," in *George Washington International Law Review*, Vol. 36, pp. 1109, 1143.

91 Mutangadura, Gladys. 2004. "Women and Land Tenure Rights in Southern Africa: A human rights-based approach." Prepared for Workshop, *Land in Africa: Market Asset, or Secure Livelihood?* London.

92 Brown, Jennifer. 2003. "Rural Women's Land Rights in Java, Indonesia: Strengthened by Family Law, but Weakened by Land Registration," in *Pacific Rim Law and Policy Journal*, Vol. 12, pp. 631-651.

93 Gray-Donald. 2001. "The Potential for Education to Improve Solid Waste Management in Vietnam: A focus on Hanoi," *Environmental Research and Teaching*, University of Toronto.

not a requirement, many women did not place their name on the formal documents.⁹⁴

In addition, design of procedural mechanisms for implementation of titling and/or registration can have a significant impact on the success of the programme. Problems encountered with regard to joint tenure forms, such as lack of clear forms for joint registration, lack of actual space on forms to enter the name of both spouses, and lack of instructions for determining joint tenure situations often lead to few women being named on titles.

In **Vietnam**, even though the law states that land use certificates must have the name of both the husband and wife, the land certificates have room for only one name.⁹⁵ Only 3% of land certificates have both names listed.

In **Brazil**, until 2000 the agrarian reform registration form (*cadastro*) did not have space for writing in the names of two persons. INCRA also insisted on naming men as beneficiaries – if a woman applied, INCRA officials would ask the whereabouts of the spouse, and in the absence of a spouse they would try to grant beneficiary status to a son.⁹⁶

2.7.5 Judiciary Interpretation and Informal Adjudication

Judicial enforcement of decisions can have a major impact on how joint titling is implemented. In **Tanzania**, the Land Act and Constitution are progressive and mandate equality for men and women. The Tanzanian High Court invalidated customary norms preventing women from selling land.⁹⁷ However, in **Zimbabwe**, where the Constitution still allows discrimination against women in personal and customary law matters, the Supreme Court ruled in *Jenah v. Nyemba* (SC4.86) that “for African law and custom, property acquired during a marriage becomes the husband’s property whether acquired by him or his wife.”⁹⁸ In *Magaya vs. Magaya* (1999),⁹⁹ the

Zimbabwe Supreme Court ruled that under customary law women are juveniles, and therefore a woman could not inherit her father’s property even though she was named in his will.¹⁰⁰

In **Kenya**, the land registration programme was carried out during a time when gender was not part of the development agenda. At that time, land adjudication committees were male dominated and adjudication committees lacked skill and time to properly carry out their duties, which included registering all rights (primary and secondary) to land.¹⁰¹ Women’s secondary rights were often unregistered. Later, some court cases, dealing mainly with the highly valued urban lands especially in and around Nairobi, followed the dominant judicial interpretation of the law – that registration extinguishes all non-registered rights.¹⁰² But, in another case, the court said that when the husband was registered as sole owner of property and the property was acquired during the subsistence of the marriage, evidence of co-ownership may be given under the Married Women’s Property Act of 1882 and Section 126 of the Registered Land Act.¹⁰³ The court issued an injunction to stop the sale of property by the mortgagee, limiting the absolute power of the registered owner as is provided for in the statute.¹⁰⁴

Uganda granted judicial capacity to Local Councils at the village, parish, and sub-county levels in an attempt to encourage inexpensive, expedient, and culturally appropriate justice.¹⁰⁵ The Local Councils share concurrent jurisdiction with magistrates’ courts but also are connected to customary law in that the judges are lay judges and they make their decisions based on local norms and social ties.¹⁰⁶ The Local Councils also hear cases related to land disputes. While such courts should have been more accessible to women, in fact financial corruption and social biases made it difficult for women to get justice in these

Under the Zimbabwean Constitution and international human rights treaties, Magaya had a right to the land. The court ruled that women should not be able to inherit land “because of the considerations in African society.” The court used Section 23 of the Constitution of Zimbabwe that prohibits discrimination in the application of African customary law (Article 23).

100 Izumi, K. *Liberalisation, Gender, and the Land Question in Sub-Saharan Africa*, in *Women, Land, and Agriculture* 9, 14. C. Sweetman, Ed., Oxfam 1999.

101 FAO Legislative Study. 2002. *Gender and Law – Women’s Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

102 Nquqi, Joel M. 2004. “Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration,” in *Michigan Journal of International Law*, Vol. 25, p. 467, 511.

103 Grace Muchiru vs. Simon Muchiru, HCCC No. 290 of 1998, Kasanga Mulwa, J.

104 Nquqi, Joel M. 2004. “Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration,” in *Michigan Journal of International Law*, Vol. 25, p. 467, 511.

105 Khadiagala, Lynn S. 2001. “The Failure of Popular Justice in Uganda: Local Councils and Women’s Property Rights,” in *Development and Change*, Vol 31, p. 56.

106 *Ibid*, p. 64.

94 Atuahene, Bernadette. 2004. “Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations,” in *George Washington International Law Review*, Vol. 36, pp. 1109, 1163, 1164.

95 UN Volunteers. 2004. “Vietnamese Land Use Certificates Must Now Bear Both Husband and Wife Names,” at <http://www.unv.org/infobase/voices/2004/vietnam.htm> Last visited on February 9, 2005.

96 Deere, Carmen Diana. 2003. “Women’s Land Rights and Rural Social Movements in the Brazilian Agrarian Reform,” in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 257-288.

97 FAO Legislative Study. 2002. *Gender and Law – Women’s Rights in Agriculture*, Chapter II. Food and Agriculture Organization of the United Nations, Rome.

98 *Ibid*.

99 ICHRL 14 (16 February 1999). The Supreme Court ruled 5-0 that customary law had precedence over the Constitution. Venia Magaya, a 58 year old, sued her half brother for ownership of her deceased father’s land after her brother evicted her from the home.

courts because women could neither afford to pay for justice nor effectively fight against their basic position as outsiders in the male-dominated community.¹⁰⁷ In fact, women often choose to go to magistrates rather than the Local Councils because they want to incorporate actors from the formal legal system. Informal justice does not have the legal authority and leverage of state power and has wide discretionary powers to define custom. In this instance, the Local Councils have little ability to make dramatic pronouncements about women's rights to land, and also lack the authority to enforce formal laws, which may be in favour of women's rights.¹⁰⁸ On the other hand, local councillors who received gender training and paralegals and have become local councillors are making a difference in parts of the country.¹⁰⁹

The Civil Code of **Kyrgyzstan** provides for mandatory joint ownership of property for married couples, and the Registration Law requires that if land is held in joint ownership, both names must be registered (Article 39, Registration Law). However, the Civil Code does allow for separate property by gift or inheritance to one spouse. Customary law considers the marital house and land as the pre-mortem (before death) inheritance of youngest sons.¹¹⁰ Given this custom, if a house is not registered in both names, the judicial interpretation in a divorce is generally that the house and land surrounding the house are the separate property of male heads of household.

2.7.6 *Conflicting Customary and Formal Law*

In many countries with both formal and customary law, formal law provides women with rights that are not yet recognised by social or customary norms. Therefore, even though formal law may provide for compulsory joint ownership, customary law may make implementation of that law difficult. In some countries, formal law promotes women's rights to own land and property while at the same time it prioritises customary law over formal law, in effect negating that right.

In **Ethiopia**, customary and formal law contradict one another although the most recent laws have moved women's rights to land and property forward. The Family Code (2000) in Ethiopia puts civil law ahead of customary law and mandates joint tenure for married couples and those living in long-term (more than 3 years) consensual

unions. The law also requires equal management of marital property. The Civil Code of 1960 also provides that civil law is superior to customary law but then makes men the head of the household and vests them with "marital power." The Constitution (1995), which calls for equality for men and women, opens up the door to customary law for intra-family relations, by stating that, with the consent of the parties, disputes relating to personal and family laws can be resolved in accordance with religious or customary laws.¹¹¹

This confusion in the law is troublesome, especially since most rural women and the urban poor do not know their rights or have the ability to claim them. In a recent study, it was found that in all but the Amhara region, custom overshadows formal inheritance and marital property rights. Custom dictates that a woman has no right to inherit property, and often she herself is considered property.¹¹²

In **Burkina Faso**, under Mossi (majority ethnic group) customary law, women do not have direct land rights, but access land through husbands and male relatives. The chief allocates land and only men can be chiefs. Men have a duty to marry and provide a plot of land to their wives for their use, but since there has been recent land pressure, there are reports of husbands not allocating land to their wives. While under the Persons and Family Code of 1990, monogamous couples hold their common land in joint tenure, under customary law, rather than joint ownership, women have use and control over their own plot of land, given to them by their husband but do not own land.¹¹³

2.8 Impact of Joint Tenure

As we noted in the introduction, titling programmes, in their design and implementation, have generally not targeted women. The reasons include legislation that does not explicitly guarantee women's rights, titling processes that focus on titling men, cultural norms that bias titling procedures, and specific constraints that women face in dealing with public institutions and officials. Joint titling has been recommended as a means of targeting women and ensuring that their name is included in the title documents for lands acquired by the family. Joint titling, however, often confronts the same difficulties and constraints in extending property rights to women that "traditional" (titling only one household head) titling programmes do. While specific legislation, regulations, and procedures that focus on

¹⁰⁷ *Ibid.*, pp. 66-67.

¹⁰⁸ *Ibid.*, p. 73.

¹⁰⁹ One example of this is the southwestern district of Kabale, where several paralegals have become local councilors. UN-HABITAT. 2002. *Rights and Reality: Are women's equal rights to land, housing and property implemented in East Africa?* p. 97.

¹¹⁰ Giovarelli, R; Aidarbekova, C; Duncan, J; Rasmussen, K. & Tabyshealieva, A. 2001. *Women's Rights to Land in the Kyrgyz Republic*, World Bank Report.

¹¹¹ Centre on Housing Rights and Evictions (COHRE). 2004. *Bringing Equality Home: promoting and protecting the inheritance rights of women*. p. 56.

¹¹² *Ibid.*, p. 55.

¹¹³ FAO Legislative Study. 2002. *Gender and Law – Women's Rights in Agriculture*, Food and Agriculture Organization of the United Nations, Rome.

women's rights to land are needed to title women both as individuals and as joint titleholders, cultural constraints to recognising women as full citizens, with the same and equal set of rights that men enjoy, may undermine those efforts. For example, a study conducted in Nicaragua found that some beneficiaries of joint titles stated that their husbands will do as they please with the property and they have nowhere to turn to denounce this type of abuse.¹¹⁴

Joint titling as a gender equity tool is a relatively recent phenomenon. Therefore there are few studies that have explored its effectiveness. While there is considerable theoretical evidence that women would benefit from participation in joint titling programmes, little information is available on the impact of these programmes for women. This report has attempted to shed light on whether joint titling programmes are achieving the objective of granting women legal rights to household land. Further research is needed to provide information and analysis on the **effectiveness and impacts** of joint titling and other co-tenure efforts.

2.8.1 *Impact of Joint Tenure on Women's Effective Land Rights*

There are two types of justifications for joint tenure that extend legal rights to women. The fundamental objective is to improve gender equality and to empower women by improving their access and control over land. The other objective derives from these property rights: by virtue of having property rights, women are able to make decisions on the use of that property (land and/or housing), are able to use that property as collateral to secure credit and invest in the property, and increase their ability to provide for the well-being of themselves and their family. In this section, we will explore the fundamental justification for joint tenure. The following sections will look at the evidence on their access to credit and domestic violence. It should be pointed out that there has been very little research on the impact of joint tenure (ownership or other property rights) on gender equality. Our conclusions, therefore, should be considered preliminary.

The mechanisms of joint tenure, such as joint titles, are generally considered under more specific legislation such as land laws, titling legislation, and registration legislation. Some agrarian reform laws also consider the mechanism of joint tenure in the moment of adjudication and titling. The mechanism of joint title provides married women with the opportunity to gain formal property rights, often

to land they already have access to. In other words, joint title provides women with legal rights to the land they are cultivating, to the pastures where they are raising livestock, to the house where they are raising their children. Thus, in many cases women's use rights to land are not greatly modified with joint title. Joint title does, however, offer a greater security of tenure for married women, particularly under conditions of abandonment, divorce, and widowhood.

The question can then be asked whether joint title is an effective mechanism in granting women control over joint property. In other words, beyond the legality of the title and the continued use of that property to provide for and shelter their family, do they have effective rights such as the ability to control the use of the property and the right to benefit from the property? One study of agricultural land in Nicaragua found that women who have either individual title or joint title administer over half of crop income (52%) while women who have no land rights only control 14% of crop income.¹¹⁵ This would seem to suggest, at least in this Nicaraguan case, that extending legal land rights to women, including joint ownership rights, increases their effective rights over land.

For property rights to be effective, two conditions are needed: (1) community and family members must perceive that right as justified and appropriate and (2) state institutions or local authorities must be able to enforce observance of that right. Husbands who do not consider the joint title to be legitimate, may deny their wife the effective use of her rights to the joint property. In-laws may be able to claim the property as belonging exclusively to their family. This appears to be a growing problem in areas where many people die of HIV/AIDS. Women who attempt to exert their legal rights may find themselves ridiculed if not ostracised by family and community members.

Ability by the state or, in the absence of the state, by local authorities to enforce women's rights is, therefore, also needed. Enforcement entails a clear understanding to what joint title really means: that is, what rights each spouse has under different conditions. For example, during marriage, how are conflicting desires resolved? At the time of separation or divorce, how will the property be divided between the two spouses? It is not always feasible or desirable to divide a property in two. For example, a house cannot generally be subdivided and titled to each ex-spouse. And in the case of the death of one spouse,

114 Agurto, Sonia & Guido, Alejandra. 2003. "Nicaragua: Diagnóstico rápido sobre el impacto de la titulación mancomunada". In Lastarria-Cornhiel, Susana et al. 2003. *Joint Titling in Nicaragua, Indonesia, and Honduras: Rapid Appraisal Synthesis*. Madison: Land Tenure Center. p. 18.

115 Katz, Elizabeth & Chamorro, Juan Sebastian. 2002. *Gender, Land Rights and the Household Economy in Rural Nicaragua and Honduras*. Paper prepared for USAID/BASIS CRSP. Madison, Wisconsin.

exactly what rights are left in the hands of the surviving spouse?

2.8.2 *Impact of Joint Tenure on Access to Credit*

One of the main justifications for titling programmes is greater access to credit for landholders. Briefly, the theorised causal relationship consists of several links: legal title gives the landholder(s) security of tenure over the property. This security stimulates investment in the property, in this way increasing production on the land (whether agricultural, industrial, or commercial) because the titleholder is secure in the knowledge that she and/or he will be able to benefit from this increased production. The desire to invest motivates the titleholder to seek out credit (demand) and financial institutions such as banks are motivated to give out credit based on the land title as secure collateral (supply). The extension of this argument to jointly titled land is that women would be able to utilise the joint title to secure a loan in their own name and for her own purposes.

We found very few studies that have causally linked titling women with greater access to credit. Before reviewing these studies, however, it should be noted that the above theoretical causality linking titles to credit access has often proven to be non-operational for smallholders and low-income families for two reasons. First, smallholders and low-income families are reluctant to risk losing their land or home (often the only real asset they own) by using it as collateral for a loan they may not be able to repay. Considering the vagaries of agricultural production and the lack of crop insurance, it is not surprising that owners of small landholdings are not rushing to use their titles to secure credit. Secondly, commercial financial institutions are not likely to grant credit in the small amounts; the transactions costs of processing loans are not negligible and so banks prefer to give out sizable loans to owners of medium and large landholdings and to urban residents with high incomes and more secure employment. Smallholders and low-income families are more likely to obtain credit from informal sources such as storekeepers and intermediaries, or from development projects implemented by NGOs (such as the Honduras case mentioned in the previous chapter) or the state, or from state-financed credit programmes such as state-run agricultural and housing banks.

A rural household survey undertaken in Honduras and Nicaragua in 2000 explored the impact of titling on a number of factors such as credit access, agricultural production, household welfare, and off-farm income. Both countries have joint titling mechanisms: joint titling for state allocated land is mandatory in Nicaragua, while op-

tional in Honduras. The data analysis showed that women with land rights are more likely to have received credit, albeit much smaller amounts than men. Comparing women in female-headed and male-headed households, female heads of household were almost three times more likely to access credit than women in male-headed households; in addition, the amounts of credit they received were also higher (10 times higher in Nicaragua and twice the amount in Honduras).¹¹⁶

Another study done in low-income urban neighbourhoods in 8 cities of Peru,¹¹⁷ where an on-going systematic titling programme had as one of its objectives issuing joint titles to couples, compared credit access between titled and non-titled households broken down by gender.¹¹⁸ The study found that all female-headed households in the sample were less likely than male-headed households to access credit, and that the credit tended to be from informal sources, particularly from shopkeepers¹¹⁹, not from a bank or other financial institution. Obtaining a title slightly increased the likelihood of obtaining formal credit, but most of this credit came from the state-run Banco de Materiales that gives out building materials on credit.¹²⁰

Using another dataset for just one city (Huancayo), the authors found that women have significantly less access to credit than men (smaller credit amounts and credit periods), and that when titled, while the differences decrease, they are still significant. In other words, women with title increased their ability to access credit, approximating men's ability to access credit, but the gap was still significant. Not surprisingly, titled individuals as a group have access to more credit, bigger amounts, and for longer periods than untitled persons. However, this ability to access credit becomes operational among the higher income groups (fourth and fifth income quintiles), not for the lower-income groups.¹²¹ The results from this study highlight the difficulty that low-income urban residents, like rural smallholders, have to access formal credit; it also shows that women have less access than men, including less access to formal credit.

116 Katz, Elizabeth & Chamorro, Juan Sebastian. 2002. *Gender, Land Rights and the Household Economy in Rural Nicaragua and Honduras*. Paper prepared for USAID/BASIS CRSP. Madison, Wisconsin.

117 The 8 cities include Metropolitan Lima, Piura, Chiclayo, Trujillo, Chimbote, Arequipa, Iquitos, and Huancayo.

118 Unlike the Honduras and Nicaragua study, this 8-city household survey did not disaggregate credit access by the household member. Thus, gender comparison was done by comparing female-headed and male-headed households.

119 This type of loan tends to be short-term (under one month) and for the purchase of goods sold by the shopkeeper.

120 Field, Erica & Torero, Maximo. 2003. *Diferencias en el acceso de las mujeres al micro-credito en el Peru y el impacto de tenencia del titulo de propiedad*. Lima: Grupo de Analisis para el Desarrollo (GRADE).

121 *Ibid.*

2.8.3 Impact of joint tenure on domestic violence

Abuse against women is pervasive throughout the world. Although physical violence is the most obvious, emotional, sexual, psychological, and economic abuses are also common. Economic abuse denies a woman access to basic survival needs, such as food and shelter for herself and her children. Examples of economic abuse include a partner not providing enough money to buy food for the family, withholding information from the woman regarding the amount of money that comes into the household, not allowing her access to the money she earns through work outside the home, and denying her rights to property and credit. The consequences of this form of abuse can be seen in poor health outcomes for women due to lack of adequate nutrition, and difficult, often dangerous working and living conditions. This is especially true for agricultural women who live in isolated areas with little access to support or social services. Since economic abuse often accompanies other forms of abuse, such as physical and sexual abuse, the problem for rural women living in abusive relationships is extreme.

Violence against women takes many forms and occurs at many levels: state, community, and family. Violence within the family is one of the most dangerous and difficult to combat. Women find themselves not only physically and emotionally vulnerable but also without resources, making escape from the abusive situation difficult. This situation is related to their low status relative to men, particularly their lack of power and their economic dependence on men. One source of low status and economic dependence is women's lack of property rights. Without direct property rights, women are only able to gain access to resources through their partner. Thus, one way that women have struggled to improve their living conditions and reduce violence against themselves is by acquiring property rights in their own name.

When women lack the property rights that men enjoy, they become like property themselves in their dependent relation with men. As a report on domestic violence in Eastern Europe asserts: "the majority of women are of the opinion that male mentality of the woman as a property is the basis of violence."¹²²

Studies and interviews with women from many parts of the world who have experienced domestic violence attest to the fact that they feel trapped with no place to go because their home and land are owned and controlled by the

perpetrator of the violence. Documentation of domestic abuse in some Eastern European countries confirms both the relation between lack of property rights and domestic abuse and degrading attitudes towards women when they are denied property rights. Reports on violence against women in Albania and the Former Yugoslav Republic of Macedonia demonstrate that one reason physical violence is endured is their dependence on men for housing.¹²³ The UN Special Rapporteur on Violence Against Women in her latest report on violence against women in the context of HIV/AIDS also maintains that lack of secure property rights discourages women from leaving abusive relationships, as they would have to choose between violence and poverty.¹²⁴ There has furthermore been much evidence to show that wives whose husbands die of AIDS are often violently dislodged from their homes when the husband's family claims all his property as belonging to them.

The only study we are aware of that has specifically explored the relationship between property rights and domestic violence is a recent survey in Kerala (India).¹²⁵ Panda and Agarwal looked at two aspects of property rights and domestic violence: rights to house or land as a deterrent to violence and as a means of escape from a violent relationship.¹²⁶ Their 500-case study found that women with property (house and/or land) reported a much lower incidence of physical (7%) and psychological (16%) abuse than those women who did not own any property (49% and 84% respectively). The study also found that women with property who experienced violence from their husbands were more likely to leave their marital home (71%) than those women who did not own property (19%).¹²⁷ However, no distinction was made in the study between women owning property independently or jointly.

Attempts to grant women, particularly married women, property rights appear to have different impacts with regard to domestic abuse and violence. The hoped-for result is that domestic violence will decrease because of women's increased status and independence in the household and in the community. In addition, women's legal rights to household property and therefore her potential ability

¹²³ *Ibid.* Macedonian Information Centre. 1996. *Women in Transition*. Skopje: Macedonian Information Centre.

¹²⁴ United Nations Economic and Social Council. 2005. *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women. Intersections of Violence Against Women and HIV/AIDS* (Special Rapporteur Report, 17 January). <http://daaccessdds.un.org/doc/UNDOC/GEN/G05/102/11/PDF/G0510211.pdf?OpenElement>

¹²⁵ Panda, Pradeep & Agarwal, Bina. 2005. *Marital Violence, Human Development and Women's Property Status in India*, in *World Development*, Vol. 33, No. 5, pp. 823-850.

¹²⁶ The Panda & Agarwal study also examined other factors that influence domestic violence such as education, employment, number of children, and length of marriage.

¹²⁷ Panda, Pradeep & Agarwal, Bina. 2005. *Marital Violence, Human Development and Women's Property Status in India*, in *World Development*, Vol. 33, No. 5, p. 836.

¹²² Minnesota Advocates for Human Rights. 1996. *Domestic Violence in Albania*. Minneapolis: Minnesota Advocates for Human Rights. p. 14.

JOINT TENURE

to withdraw it together with her person from an abusive relationship may act to temper abusive treatment.

There is also, however, the possibility, particularly in the short term, that men will feel their power in the household being usurped and the reaction may be violence against their sisters or wives for challenging traditional rights. In many societies where Muslim law recognises daughters' inheritance but customary tenure practice is only for sons to inherit land; sisters routinely give up their inheritance rights to their brothers. Women maintain that they would lose their natal family's support if they claimed their legal inheritance rights. Withdrawal of emotional and economic support is a type of family abuse.

There is also anecdotal evidence that some wives are reluctant to enter into joint tenure arrangements because of their husband's opposition. It is not unusual for titling brigade workers to encounter men who oppose having their spouse included in the property title. This type of reaction has been related in Peru, Nicaragua, and South Africa, to name just a few. For example, a focus group discussion among rural women in Nicaragua elicited this reaction regarding joint title: "Why do I want [joint] title if my husband will just end up selling it, and where would I go to complain, he may kill me or break my arm or beat me."¹²⁸ On the other hand, women from the women's urban movement in an urban informal settlement in Masaya stated that joint titling could support the process by which men could be more involved in shared family rights and obligations.¹²⁹

128 Agurto, Sonia, & Guido, Alejandra. 2002. *Nicaragua: diagnostico rapido sobre el impacto de la titulacion mancomunada*. Managua: Fundación Internacional para el Desafío Económico Global (FIDEG).

129 UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Latin America: Regional Overview. Draft report*.

CHAPTER THREE

OTHER FORMS OF SHARED TENURE



3.1 Introduction

In addition to joint and co-ownership between spouses, there are other types of shared tenure ranging from communal property (such as those found in many customary tenure systems) to corporate ownership with formal legislation, formal legal recognition, and registered by-laws. The informal and illegal tenure types that the majority of the urban and rural poor have available to them are part of a continuum (from illegal to informal to formal) that characterises tenure systems. This continuum includes perceived *de facto* secure tenure at one end, through adverse possession and occupancy rights, to lease and ownership at the other end, whether this is group or individual tenure. In this section those groups or shared tenure forms that are potentially beneficial for disadvantaged (low-income or low-resource) women are explored, including different forms of shared tenure systems that underpin such forms (e.g. land administration system in place, or family relations controlling such a form), examples of each type, and their respective advantages and disadvantages.

3.2 Customary Communal Tenure

In communities based on customary communal tenure systems, the land of the community consists of both communal land and family/lineage-held land. Consistent with community rules, members utilise the land and other natural resources held in common. The family/lineage-held land is land allocated to extended family households for their use – normally this land consists of arable land and the homestead parcel. Some pastureland may also be assigned to individual households. Patrilineal customary societies allocate family/lineage-held land to the adult males belonging to the community, and this land is passed on from father to sons. Women are not generally allocated land, nor do daughters hold inheritance rights to it. However, there is evidence of some changes in this pattern within families. Fathers will sometimes allow their daughters to inherit (for example among Kikuyus in **Kenya** and in parts of **Tanzania** and **Ghana**); even if this is still resisted by the clan elders, or when fathers acquire non-family land they may gift it to their daughters.¹³⁰

In African matrilineal societies, community authorities generally allocate land to adult men and this land is passed down through their mother's lineage, for example, to the sister's male children, or to maternal uncles or brothers. While women do not generally inherit land

in African matrilineal communities, if married women remain in their community they are able to retain some access rights to their lineage land. In Asian matrilineal societies, land was customarily allocated to adult women, and inherited land is often passed down to daughters (**Malaysia**¹³¹, for example), or to both sons and daughters (**Laos**¹³², for example).

Women's secure access to land within customary tenure societies depends not only on whether they are patrilineal or matrilineal, but also on whether the marriage practice for residence is patrilocal or matrilocal. Where women remain on their birth family's land or their own community after marriage, they are more likely to have secure access to land. On the other hand, women in patrilineal societies that move to their husband's community are unlikely to acquire any rights to land in that community (nor are they likely to inherit from their own family). In some Asian matrilineal societies, such as **Java (Indonesia)**, even if women move away, they do inherit land from their birth family.¹³³

While male household members generally control the family/lineage-held land, both women and men in the community have access to communal land. This type of access (use rights) is very useful for women as they are able to forage and gather on these lands. They may also be able to access cropland from community authorities even though customary norms, such as those of patrilineal societies, may not permit allocation of land to women. For example, in **Southwest Niger**, Zarma women are leasing land from customary chiefs who leave it to them to determine the rent. Usually women pay between ten and fifteen percent of the crop yield, but feel that their tenure is more secure the more they pay.¹³⁴

With the exception of some matrilineal customary societies, it would seem that customary communal tenure does not offer women direct and secure land rights to agricultural land, but rather access rights through male relatives or husband. On the other hand, women do seem to have broad and equal access right to communally managed lands such as forests and pastureland.

131 Stivens, Maila. 1985. "The Fate of Women's Land Rights: Gender, Matriliney, and Capitalism in Rembau, Negeri Sembilan, Malaysia," in Haleh Afshar (ed.), *Women, Work, and Ideology in the Third World*. London: Tavistock Publications.

132 Schenk-Sandbergen, Loes; Rodenburg, Hermien & Phengkay, Chansamone. 1997. *Land, Gender and Social Issues in Lao PDR* (Report prepared for AusAID). Vientiane: AusAID.

133 Lastarria-Cornhiel, Susana; Agurto, Sonia; Brown, Jennifer & Rosale, Sara Elisa. 2003. *Joint Titling in Nicaragua, Indonesia, and Honduras: Rapid Appraisal Synthesis*. Madison: Land Tenure Center, University of Wisconsin-Madison.

134 Göler von Ravensburg, Nicole & Jacobsen, Ingrid. 1999. *Gender Responsive Land Tenure Development*. Eschborn (Germany): Rural Development Division, GTZ.

130 Lastarria-Cornhiel, Susana. 1997. "Impact of Privatization on Gender and Property Rights in Africa" in *World Development*, Vol. 25, No. 8, pp. 1323-1324.

3.3 Family Tenure

Some customary tenure systems consist of strong family tenure forms where communal land is not significant, and community authorities do not allocate land. The family (often an extended one) is recognised as the owner of land and individual property rights are downplayed. Regions where this type of group ownership is found are the Caribbean, Eastern Europe, and Central Asia.

In **St. Lucia** of the Caribbean, for example, family land emerged following the end of slavery in the 1800s within the context of French Civil law. Land assigned or bought by former slaves was transferred, unpartitioned, to their heirs.¹³⁵ Still today, much of St. Lucia's land is held as family land owned by a number of heirs who hold shares in the land, but without a physical partition of the property. Family land is a Caribbean-wide phenomenon based on labour and economic factors and not simply a local legal oddity resulting from the Civil Code's provisions on succession. As such, family land may perform an important economic safety-net function in fragile economies.

In the Caribbean, family land is not formally divided among the heirs; rather, each heir has a proportional share of the land and arrangements are made among the heirs as to who will use what part of the land.¹³⁶ Thus, heirs who remain on the land utilise the land they need or can cultivate, sometimes incorporating shares of land to heirs who have migrated. Absent heirs do not lose their rights and when they return may claim their share. This system allows usufruct rights to be distinguished from tenure shares (the proportional shares¹³⁷) and for flexibility as conditions change for specific members. As Crichlow concluded, "... unpartitioned family land can serve the ideals of security and provide support for family members who most need it."¹³⁸

Several recent studies document the persistence of family land in St. Lucia, even after a comprehensive land registration project¹³⁹ was implemented there in the mid-1980s. One study concluded that family land constitutes a major form of land management in St. Lucia because it

is integrated into economic strategies that buffer farmers against unstable markets.¹⁴⁰ In addition, family land is inherited by all children, both sons and daughters. Both mothers and fathers can bequeath land to their children, and both sons and daughters inherit equal shares of their parents' property.¹⁴¹ A more recent study found that not only was family land still wide-spread, but also found a gender difference between individually owned land and family land. While the great majority of individually owned registered parcels are owned by men (82%), all of the registered family-land parcels have both women and men as owners. It would seem that family land offers women an opportunity to have legal rights to land, a right that is more difficult for women to obtain when land becomes individually owned.¹⁴²

Albania and the Kyrgyz Republic are examples of strong family ownership tenure in some countries of Eastern Europe and Central Asia.¹⁴³ Under customary rules in **Albania**,¹⁴⁴ landed property belongs to the family and male family members do not forfeit their inheritance claim to the land should they leave the family household. Daughters, when they marry, leave their birth-family households and lose any rights to family land. Heirs are generally sons and their families, not daughters and their families. In the **Kyrgyz Republic**, which is both patrilineal and patrilocal, sons receive land and housing upon marriage as their pre-mortem inheritance. Extended families often live together and the youngest son inherits the parents' home. Daughters lose rights to family land under customary law and rarely receive a portion of marital land upon divorce.

In pre-socialist Albania, the custom was for each male heir to receive a specific piece of land, particularly if he had his own family. This practice allowed sons to set up their own households. Following the death of the father, if several brothers continued to live under the same

135 Bruce, John W. 1983. *Family Land Tenure and Agricultural Development in St. Lucia*. (Research Paper No. 79). Madison: Land Tenure Center, University of Wisconsin-Madison.

136 *Ibid.*

137 Heirs inherit equal, but unproportioned, ownership shares in family land. Those heirs who actually remain on the land have usufruct rights to all of the land.

138 Crichlow, Michaeline A. 1989. *An Alternative Approach: Family Land Tenure in the Anglo-phone Caribbean*, paper presented at Latin American Studies Association, 15th International Congress. St. Augustine, Trinidad: Institute of Social and Economic Research, University of West Indies. p. 24

139 One of the major objectives of the systematic land titling and registration project was to convert family land into individually owned parcels.

140 Dujon, Veronique. 1995. *National Actors Against World Market Pressures: Communal Land, Privatisation And Agricultural Development In The Caribbean*. Unpublished PhD dissertation. Madison: University of Wisconsin-Madison.

141 Barrow, Christine. 1992. *Family Land and Development in St. Lucia*. Cave Hill, Barbados: Institute of Social and Economic Research, University of the West Indies.

Bruce, John W. 1983. *Family Land Tenure and Agricultural Development in St. Lucia*. (Research Paper No. 79). Madison: Land Tenure Center, University of Wisconsin-Madison.

142 Bloch, Peter C.; Lastarria-Cornhiel, Susana; Griffith-Charles, Charisse; Batise, Celsus & Baptiste, Rufinus. 2005. *Property Rights and Land Markets in St. Lucia*. Madison: Land Tenure Center, University of Wisconsin-Madison.

143 Giovarelli, Renee & Duncan, Jennifer. 1999. *Women and Land in Eastern Europe and Central Asia*, Paper presented to Women Farmers: Enhancing Rights and Productivity Conference, Bonn, Germany, August 26-27.

144 Albania is a strongly patrilineal and patriarchal society. For a written version of Albanian customary law, consult: Gjecov, Shtjefen. 1989. *The Code of Leke Dukagjini (Kanuni I Leke Dukagjinit)*. Translated by Leonard Fox. New York: Gjonlekaj Publishing Company.

family roof, they might continue to farm together and not formally subdivide the land. Each heir, nevertheless, would know which part of the family property was his, could eventually subdivide the land, and knew what land he could pass on to his own heirs. It is still too early to know how land subdivision among heirs will be administered in Albania – family landownership and private property was re-established only in the early 1990s.¹⁴⁵

When agricultural co-operative land was privatised and distributed in the early 1990s, land was given as private property to village families. Only one name was listed on the property title (*tapi*) given to the family: the head of household. While the majority of these household heads are men, one would also expect a good proportion of households where the husband had died or left, leaving the wife as household head. An informal survey in 1993 of village distribution documentation, however, found that very few women had signed the *tapi*: only between 1.6 and 3% of the *tapi* were signed by women. An exception was a mining village within Tirana district (central hills region) where 15 women out of the 204 families (7% of the families) had signed the *tapi* as representative of their families. This high number is due to the fact that there are many widows in the village because many of the men had been killed in coal mine accidents.¹⁴⁶

Inquiries into the structure of the female-headed households encountered revealed that they do not have an adult male – no husband, father, nor adult son. These women are widows who either live alone, with an adult single daughter, or with young children. The low number of female-headed households reveals the customary nature of Albanian families and their continued patriarchal character. When the family patriarch passes away, it is customary for one of his sons to assume the position of family head. Thus, women seldom assume headship of the family. In addition, divorced and single (never married) women above a certain age have been rare in Albania.

If we compare family property in the Caribbean and Albania, we find that in some respects family landownership characteristics in Albania are similar to those of family land in the Caribbean. In both systems, (1) land belongs to the family, not to one person; (2) there is a strong reluctance to alienate family property; and (3) family members do not forfeit their claim when they leave the land. These characteristics offer security to

some family members and future generations, and ensure that they will not lose a basic and permanent means of subsistence.

Where they essentially differ is (1) in the degree and type of control that individual family members have over family-owned land and (2) in the subdivision of inherited land, and (3) who in the family can inherit family land. In the Caribbean, all children have rights to family land, which is not formally and definitively subdivided among heirs. Both mothers and fathers can bequeath land to their children, and both sons and daughters inherit equal shares of their parents' property. In Albania, in contrast, daughters do not inherit land. Prior to collectivisation, women had some access rights to family-owned land but did not have the right to own, control, or inherit family property; sons in Albania inherited ownership rights to specific pieces of family land, property which they and their families worked and which would in turn be inherited by their sons. When Albania privatised and distributed collectively owned land, they followed patriarchal norms and titled land intended for the family overwhelmingly to male household heads. It would be interesting to study current inheritance practices in formerly collectivized and strongly patrilineal societies like Albania.

Some governments have privatised state-owned housing and in the process the existence of the "family house" has come to light. In **Zambia**, for example, the privatisation in the mid- to late-1990s of City Council, governmental, parastatal, and mining company housing has revealed the complexity of gender issues in the land market. One problem for women related to this privatisation effort was the intra-household conflicts that emerged from the norm of the "family house." This norm is not only in conflict with the concept of private individual ownership; it also has implications for women's housing security. The concept of family house is a type of collective family ownership; the house belongs to the heirs of the owner (usually his children) as undivided property.¹⁴⁷ The family house is for the man's lineage; the wife who is from another lineage is allowed to live in the house but is not an owner. For this reason, male owners reject joint ownership of housing with their wives and do not include their wife as an heir. They feel that a widow will remarry

145 Rules for the subdivision of agricultural land (designated as agricultural family land) are spelled out in Articles 207 and 226 of the Albanian Civil Code (1994).

146 Lastarria-Cornhiel, Susana, & Wheeler, Rachel. 1998. *Social Issues and Landed Property in Albania*. Madison: Land Tenure Center, University of Wisconsin-Madison.

147 Schlyter, Ann. 2003. "The Privatisation of Public Housing and the Exclusion of Women: A Case Study in Lusaka, Zambia" in *Gender and Urban Housing in Southern Africa: Emerging Issues*. Roma (Lesotho): Institute of Southern African Studies, National University of Lesotho.

and that her new husband would take over control of the property, thus taking it away from “the family”.

Although widows have the legal right to remain on their husband's property as long as they do not re-marry, land grabbing by his relatives is common. Thus, wives are generally in agreement with the family house norm because they feel that ownership and control by their children will safeguard their occupancy rights to the house after her husband's death.¹⁴⁸

3.4 Community Titling

Where customary tenure systems based on strong communal land rights are still vibrant and individual titling programmes are not considered appropriate because private individual ownership rights (the basis for development of a land market) are not seen as either necessary or economically efficient, community titling may be presented as an option. This mechanism is also used to support community-based natural resource management programmes.

The community is a collection of families or households, and generally a man represents the family or household in the community. Thus, the men decide what the community can and will do, and who can directly enjoy the benefits and resources of the community. While granting title to a community does not necessarily mean that the women of the community will be treated differently than the men, in practice it is the male household heads who, as the family representative, are invested with that family's rights to community land. In some societies, widowed or divorced women with children may also be considered as the head of household and landholder. In strongly patrilineal societies, however, the oldest male child, a brother, or a male relative from the husband's family assumes headship or guardianship of the family.

Mozambique, in its recent land legislation, has attempted to extend community property rights to women. The Land Law of 1997 allows some space for devolution of power over land and natural resource management from central government, to local community level, where land management is to follow customary norms and practices. The 1997 Land Law is one of the most interesting in sub-Saharan Africa. While the State retains formal ownership of land, it recognises communities' customary use rights to land and specifically states that communities

demonstrate rights to their land by the simple occupancy of the land, even if they have no written title or other documentation. If a community requests, it can obtain a community title from the national cadastre office, DINAGECA, which formally recognises, demarcates community boundaries, and registers the community title in the property registry. This formal community title is not necessary, however, to prove a community's rights to its land.

The Land Law was significant in strengthening women's legal land rights in Mozambique where previously women were considered minors. Article 10 declares that men and women can hold land rights; Article 13 states that men and women can request and obtain individualised land-use titles within communities; and Article 16 holds that men and women can inherit land. Finally, to the extent that the law bolsters smallholder tenure security in general, it offers women (particularly widows and single women whose land rights may be contested by family and community members) explicit protection of their legal rights to land. As for most rural women in sub-Saharan Africa, this type of protection is important because they are the primary cultivators in rural households and thus, the most seriously affected by the loss of land. In addition, to the extent that the law allows “customary norms and practices” to play a role in the new legal framework (for example to assign land rights and resolve conflicts), it also specifies that such norms and practices cannot violate a person's equal rights as stated in the country's Constitution (Article 12).

Another example of community title that demonstrates the risk of excluding women as full community members is the *ejido* in **Mexico**. The *ejido* is both a community and a collective land tenure form that emerged out of the Mexican 1917 agrarian reform. Groups of farming families received land from the state as a collective property and the heads of household within the *ejido* were assigned land parcels for housing and for farming. They were also given access to common lands and collective resources.¹⁴⁹ These heads of household were the official members of the *ejido* and considered ‘owners’ or use right holders of the assigned land parcels. From the beginning, male household heads comprised the great majority of *ejido* members, while only single or widowed women with dependents were eligible to become *ejido* members. Only in 1971 were the same agrarian rights granted to men and women and with that, the right to speak and vote in the internal decision-making bodies of the *ejido*. In

148 Schlyter, Ann. 2003. “The Privatisation of Public Housing and the Exclusion of Women: A Case Study in Lusaka, Zambia” in *Gender and Urban Housing in Southern Africa: Emerging Issues*. Roma (Lesotho): Institute of Southern African Studies, National University of Lesotho.

149 Appendini, K. 2002. “Land Regularization and Conflict Resolution: The Case of Mexico,” in *Land Reform, Land Settlement and Cooperatives*, No. 2002/2, pp. 37-50.

the 1970s, 1 out of 100 peasants with agrarian rights to *ejido* land was a woman; today, 2 out of 10 are women. Women have user rights over 17.6% of *ejido* and *communal* land and represent 27% of subjects with agrarian rights. In spite of this, they are underrepresented in *ejido* bodies, holding only 5.2% of principal and deputy positions in assemblies. This means that they have little decision-making power on issues related to life in the *ejido* group and particularly with respect to land use, although they are responsible for ensuring the livelihood of their families. If a person holding a user right to an *ejido* land parcel wanted to sell this right, they could only sell to other members of the *ejido* group and had to respect the right of first refusal of the spouse and children, in that order. When the *ejidos* were given the option of privatising its land beginning in 1992, most individual titles were issued to men. Once an *ejido* parcel is transformed into private property, the spouse has to "compete" with other relatives if she wishes to buy it.¹⁵⁰ An additional factor here is that if the parcel is part of the growth reserves of a city provided in its land use plan, the right of first refusal goes to municipal and state governments.¹⁵¹

Programmes for collective titles should recognise that both women and men have the same and equal rights. For women, this means rights independent of male relatives, family members, or any other person. Recognising women as full community members does not preclude a community's ability to take collective action and assume collective rights. While legislation regarding community titles can be advantageous for women, protecting their rights as individuals and as community members, many questions remain around implementation of the law and the degree to which women, in practice, will be able to benefit from the rights bestowed on them.

One point to keep in mind in the granting of community titles is that the allocation of land and distribution of property rights within the community is generally decided along customary norms as defined and practised at the time. These customary practices may not be in accordance with formal legal norms and regulations that recognise gender equity. Significant amounts of land and natural resources are often already in the control of individual community members and households, as seen in the Mexican *ejido*. And inheritance practices will most likely continue to follow customary norms. In patrilineal communities, this

means that sons and other male relatives are the principal heirs and holders of land. Thus, while community titles may not explicitly prevent women from accessing land and obtaining other land rights, legislation should include specific mechanisms and procedures to guarantee that women are not excluded from participating as full community members and enjoying all community land rights.

The establishment of a Community Land Trust in **Kenya** provides an example of a type of group title in an urban environment. This Community Land Trust in Voi was created to provide secure and affordable housing for low-income families. The land for the entire community is held as one leasehold title by the Community Land Trust, held by a Board of Trustees. The land trust cannot be sold or mortgaged. Each individual family sub-leases a parcel of land from the Community Land Trust, and these parcels can be used as collateral for credit and can be passed on to heirs. Each parcel is surveyed and registered to the sub-lessee. When sold, only the developments on the land can be sold, not the land itself, and the Community Land Trust has rights of first refusal. What is unusual about this particular land trust is that low-income families, female-headed households, and the elderly are given preferential access to the land. In addition, when the parcels and buildings on the land are registered, they are recorded in the names of both wife and husband.¹⁵² This mandatory joint title is not common in sub-Saharan Africa.

The establishment of an American Community Land Trust under the Kenyan legal framework that did not accommodate this tenure form meant that a very complex legal structure had to be devised. In addition, the land administration of this Community Land Trust requires technical intervention of an NGO. These complexities stand in the way of the Voi Community Land Trust being considered a best practice, even if GTZ is looking into replicating this system in urban informal settlements of Nairobi.¹⁵³ However, the elements of recording parcels and buildings in the names of both spouses within such community tenure still can be considered a best practice.

150 In case of privatised *ejido* land, the right of first refusal applies to the relatives of the seller, the people who have worked on the parcel for more than one year, the *ejidatarios* (farmers belonging to the *ejido* group), the settlers and the *ejido* population group, in that order.

151 UN-HABITAT. 2005 *Law, Land Tenure and Gender Review in Latin America: Mexico* Draft report.

152 Presentation by David Mshila, Project Co-ordinator, German Technical Co-operation – Small Towns Development Project, during African Regional Civil Society Consultation on Women and Adequate Housing, Nairobi, 2002. See Proceedings of the African Regional Civil Society Consultation on Women and Adequate Housing Reports. 2002. Nairobi, <http://www.unhabitat.org/programmes/landtenure/documents/ARCSC.pdf>.

153 Jacobs, Harvey Martin & Bassett, Ellen M. 1996. *Community-based tenure reform for informal settlement upgrading: the community land trust experiment in Voi, Kenya*. Madison, WI: Land Tenure Center, University of Wisconsin-Madison.

3.5 Co-operatives

In Eastern Europe and the Former Soviet Union, until the late 1980s or early 1990s, much land was held co-operatively or by the State. Privatisation of land has occurred in almost every country, but agricultural land is still held in tenancy in common or joint tenure in many countries. In **Russia**, for example, members of former state and collective farms received land shares for a non-demarcated percentage of the land of the former farm. Unless a farmer withdraws from the farm, his/her land is held in common with the other members. Under the land share system, usually land is held in tenancy in common rather than joint tenure and the members have a right to withdraw their land without the permission of the other members. Large co-operatives still exist in **Bulgaria, Estonia, Hungary and Slovakia**.¹⁵⁴ In the **Kyrgyz Republic**, the Peasant Farm Law and the Civil Code state that the members of a peasant farm hold its land in joint ownership. A peasant farm is defined as a single family farm.

The most extensive experience with co-operative control of land, outside of Eastern Europe, comes from the Latin American agrarian reforms beginning in the 1950s and through the 1980s.¹⁵⁵ In many Latin American countries, large landholdings were redistributed to groups of farm workers, generally those that had worked on the hacienda or plantation, instead of adjudicating the land to individual farmers. The largest proportion of this land was distributed to men. How this occurred is described in detail in Deere and Leon's book on women's land rights in Latin America.¹⁵⁶ Here, we will summarise the major points.

Land reform regulations declared that heads of household were eligible to be land reform beneficiaries. The ideological mindset at the time was that heads of household were representatives of the family and acted for the benefit of all household members. In addition, only full-time or permanent farm workers were considered eligible, not seasonal or part-time workers. Large landholdings had generally employed men as permanent workers. If more workers were needed during the agricultural cycle, these men's family members such as wives and older sons were brought in to work. Often, the wages of these part-time workers was paid to the household head. Thus, when the agricultural co-operatives were formed, they consisted mainly of male household heads with very few female heads.

The co-operative continued the practice of hiring family members as part-time farm workers. The majority

of these part-time workers were women who did not directly benefit from co-operative benefits. With regard to land rights, when the co-operatives began to subdivide the land into individually owned parcels in the 1980s and 1990s, they issued land certificates in the name of their full-time members.¹⁵⁷

The co-operatives also continued the practices of the previous landowner by restricting membership to male household heads, while only a minimal number of female heads, usually widows, joined the co-operatives. The two exceptions to this policy are Cuba and Nicaragua where all adult family members, without regard to sex were allowed to join. In **Nicaragua**, where the rhetoric of the land reform programme promoted women's participation in the land reform process, women initially joined in relatively large numbers, in spite of the opposition from male cooperative members, encouraged by the women's movement and strong state support.

A study in the coffee-growing region of Jalapa (Nicaragua), documents what happened to women's participation in the co-operatives in the 1990s. Two major events affected women's ability to continue in the co-operatives. The neo-liberal economic reforms of the early 1990s resulted in the state withdrawing support such as affordable credit and other services from the co-operatives. At the same time, the men in the co-operative who had been involved in the civil war of the 1980s returned to the co-operatives. Male co-operative members began to express their disapproval of women members, complaining that they were not as productive in agricultural tasks as men because of women's domestic and reproductive "tasks" such as taking care of ill family members and childbirth. The difficulties the co-operatives were experiencing because of lack of credit, together with men's negative attitudes, persuaded many women to leave the co-operatives. In the six-year period between 1989 and 1995, women co-operative members in Jalapa region fell from 27% of members to only 7%.¹⁵⁸

This co-operative experience in Latin America was generally not beneficial for women's land rights. The issue seems once again to fall on the tendency to view households as units with shared common interests and preferences, and that the household head is altruistic in distributing household resources and income. The growing tendency to consider both wife and husband as

154 Giovarelli, Renee. 2001. *Land Reform in Eastern Europe*. Food and Agriculture Organization, Rome.

155 The countries that experimented with agricultural cooperatives are Cuba in the 1950s, Peru in the 1960s and 1970s, Chile and Honduras in the 1970s, Nicaragua and El Salvador in the 1980s.

156 Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press. pp. 62-106.

157 As the sections on joint titling have shown, when land reform parcels distributed throughout the 1950s to 1980s are now being formally titled and/or registered, joint titling policies put into place in the late 1990s and 2000s can extend land rights to spouses.

158 Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press. pp. 161-163.

household heads and to consider the needs of female-only headed households may counter the tendency to target only men in future group tenure programmes.

3.6 Land Market Transactions by Groups

Groups of persons and families come together to participate in the land market in order to facilitate the transaction. Sometimes this is done to facilitate the transfer of land from the owner of a large property to many buyers or leasers. At other times, the group prefers to own and cultivate the land collectively. Some groups participate in state-sponsored land market programmes such as subsidised land purchase programmes, the leasing of state-owned land, or land banks that offer credit for the purchase of land. These market-oriented programmes do not generally have gender equity objectives nor do they target poor women farmers.¹⁵⁹ For example, market-assisted (or market-led) land distribution programmes focus on identifying persons with already acquired capital and skills.¹⁶⁰ This focus on experienced farmers with savings is likely to exclude women who tend to have little control over household income and few income-producing opportunities. In addition, cultural norms that ascribe secondary and dependent status to women constrain them from engaging in formal processes and contracts such as purchase or leasing contracts utilised in land market programmes. As a result, there is gender discrimination in the selection of participants within these programmes.

Spontaneous groups of persons also come together to participate in the land market without state support, sometimes with the assistance of NGOs. Following are two examples of market participation by groups. One consists of families purchasing land as a group, while the other presents a case of women leasing or purchasing land as a group.

In **Guatemala**, after the Peace Accords of 1996, a state-sponsored land market programme (FONTIERRAS)

¹⁵⁹ It appears that procedures for market-assisted land distribution programmes have not attempted to include women and the data they collect and surveys they conduct are generally not disaggregated by gender. Project documentation of market-assisted land reform programmes financed by the World Bank, for example, do not include gender considerations, and project evaluations until recently did not consider gender effects or impacts. An interview by S. Lastarria-Cornhiel in 1998 with a senior researcher carrying out a mid-term evaluation study of the Colombia market-assisted land reform programme revealed, for example, that the survey instrument did not include the gender of those farmers who had purchased land under the programme, revealing that gender participation was not a programme objective.

¹⁶⁰ Buaintain, Marcio Antonio; da Silva, Jose Antonio; Souza, Hildo Meireles & Magalhaes, Marcelo. 1999. *Community-Based Land Reform Implementation in Brazil: A New Way of Reaching Out to the Marginalized?* Paper presented at the GDN Conference, Bonn (Germany), December 1999.

based on a land bank was established. The land acquired through FONTIERRAS consists of large estates purchased by a group of smallholder families; generally these groups conform themselves into co-operatives or smallholder enterprises (*Empresas Campesinas Asociativas*). As a result of pressure by Guatemala women's organisations, particularly returning refugee women, and international organisations such as the United Nations High Commission for Refugees, both spouses were to be considered direct beneficiaries of the programme. Thus, the original purchase contract is in the names of all the families, with both spouses from each family appearing on the document.¹⁶¹ This example highlights the importance of women's participation and the support of women's demands by international organisations, in policy formulation and programme design. But we should look beyond programme design and examine how these land market programmes are being implemented. While no comprehensive studies were found to corroborate whether both spouses are ultimately titled when the land purchased through state programmes is registered, some case studies indicate that serious problems exist in women's ability to gain effective land rights.

After the initial land purchase by the co-operative or smallholder enterprise, most groups subsequently decide to subdivide the large estate into individual family parcels and to title these parcels. During this process, women often lose their legal land rights, in spite of the fact that their names are on the original purchase contract. Men in the community apply several different tactics, including intra-household pressure on women not to insist on having their name included on the title and by denying women membership in co-operatives and in *Empresas Campesinas Asociativas*, to deny women their land rights.

Women find it difficult to join these co-operatives and associations because (1) regulations for co-operatives dictate that only one person per family can become a member and that person is traditionally the male head of household, (2) women are denied leadership and governance positions in these organisations, and (3) the requirements for membership established by the leadership makes it close to impossible for women to fulfil, as they most likely also have taken up household and child-rearing responsibilities that reduce the number of hours available for co-operative fieldwork. In addition, many women who attempt to join co-operatives or

¹⁶¹ The 1999 Land Fund Law (Ley del Fondo de Tierras, Decreto Número 24-99) that created FONTIERRAS stipulates that the land titles issued by FONTIERRAS have to include the name of both spouses, whether legally married or not: "... los títulos serán emitidos a favor de los cónyuges o convivientes, jefes de la familia beneficiaria" (Article 20).

associations find hostile responses from their husbands and other male members. One case study of six group land purchases showed that while 26% of the persons on the original purchase document are women, only 8% became co-operative or association members; most of these women were single women with children.¹⁶²

Consequently, when co-operative land is subdivided, wives of co-operative members are not included as owners when the individual sale-purchase contracts between co-operatives and families are drawn up and when these contracts are recorded in the Land Registry. The state institutions in charge of these land transactions appear to turn a blind eye to this discrimination against women as landowners. This case of a clear legal mandate, to extend to women their legal rights to land in a post-conflict situation, being ignored or subverted attests to the strength of cultural norms and practices.

There is also evidence that women create opportunities to access the land market, independent of state-sponsored land market programmes and independent of male relatives. Groups of low-income women are able to pool their resources and either purchase or lease land in order to support themselves and their families. An NGO in Andhra Pradesh (**India**), the Deccan Development Society (DDS), has worked with groups of landless and land poor women since 1989 to gain the financial support for these groups to lease or purchase agricultural land for collective cultivation. The DDS programme focuses on poor and low-caste women in order to ensure food security for their households. In the beginning, groups leased land from one or several landowners on a sharecropping basis. Now, most leases are cash rentals. While initially there was scepticism among the men of the community and the landowners, these group leases (*sangam*) have proven viable and successful and have earned the respect of family and community members. The financing comes in part from the women themselves (either in cash or in labour) and in the form of loans from DDS or from state poverty-alleviation programmes. Since 1994, DDS began to support group purchases of land by women utilising funds from Andhra Pradesh's Scheduled Caste Development Programme.¹⁶³

Accessing land and cultivating it as a group has been beneficial both in material terms and for morale. Not only are the women able to consolidate their financial resources for

the purchase of land and inputs, they can also collectively utilise other resources they have such as tools and machinery. The knowledge and skills they each possess, since these may differ across the group, can also be shared. And finally, as a group they have greater negotiating power within their community and with landowners. This is particularly important for single women who may have minimal support from their family. For married women, group access and cultivation decreases the ability of husbands obtaining control over their land.¹⁶⁴

The Community Land Trust in Voi (**Kenya**) described above (Section 3.4) provides an urban example of a group leasehold transaction. The land for the entire community is held as one leasehold title by the Community Land Trust and each individual family sub-leases a parcel of land from the Community Land Trust.

In Nairobi and other urban areas in Kenya, women's groups have managed to buy land and housing through co-operatives. By joining saving systems and organising fundraising activities, they have been able to borrow at an agreed interest rate from housing finance institutions. The majority of women in these groups are from female-headed households. The National Co-operative Housing Union (NACHU) helps these women's groups with checks on whether the land is "clean" i.e. not subject to double allocations.¹⁶⁵

Anecdotal evidence regarding three grassroots women's groups in Rachuonyo District (**Kenya**) reveals the difficulty of obtaining secure, shared, tenure to property and of sustaining productive activities by groups. All three of these groups had men who participated in their committees and the local Chiefs or Assistant Chiefs were patrons of these groups, so it would appear that they had support of the local community. One women's group (in Ranen) produces traditional cooking pots (*agulu*) and other ceramics for sale. They rent land on which they have built a locale for their business and appear to be doing well. Another group (in Oyugis) makes sisal products such as baskets, flowerpot hangers, and trays. This group was given land by a female local councillor where they built an office, a storage room, and other facilities. Unfortunately, when the councillor died, they land was taken away from them. It is not clear whether the councillor had given them title deed to the land. And finally, another group of women (in Nyabola) purchased land as a group to set up a pineapple plantation. They were quite successful until

162 Hernández, Julieta. 2002. *Situación actual de los derechos de las mujeres a la propiedad y copropiedad de la tierra, en los procesos de legalización y regularización*. Guatemala: Consejería en Proyectos. p. 29.

163 Agarwal, Bina. 2003. "Gender and Land Rights Revisited: Exploring New Prospects via the State, Family and Markets," in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 184-224.

164 *Ibid.*

165 Interview with Catherine Muthoni, former staff member of Shelter Forum and NACHU. Nairobi. November 2001.

their delivery truck was involved in an accident and they could not afford to repair it. The group fell apart and lost their business and the land they purchased has now been involved in a court case for several years. It is not clear who will end up owning the land.¹⁶⁶

In conclusion, it can be said that the land market offers women some opportunities to obtain secure access to land where otherwise customary norms and practices have denied them such rights. There are two observations, however, as to how effectively the land market and land-market programmes are able to benefit women. In the first place, persons who participate in the land market must have cash incomes – sufficient cash both to support themselves and their families and to pay for the land over time (whether mortgage payments or annual leases). Women, who are typically less educated than men, are not likely to be employed and to have adequate salary income. Women in rural areas, particularly women from households with minimal resources, are even less likely to be able to participate in commercial farming that yields sufficient income. Coming together as a group to purchase, manage, and cultivate the land offers individual women an opportunity to overcome some of these problems, but perhaps this is not enough to be successful in a group enterprise. Assistance with business and money management may also be needed.

Secondly, state-sponsored land market programmes generally focus on the economic and financial aspects of the programme, disregarding the social and cultural context and the gender differentiated norms and practices of the participating communities and households. This disregard may have several negative effects for women and gender equity. One effect is that population sectors such as asset-poor women, who may also have lower status than men, are in practice excluded from participating in these programmes. Another negative effect is the stripping of any social meaning related to land. Land market programmes consider land only as an economic asset and as part of the market economy. In some countries, however, large segments of the rural population, and particularly women, do not participate or do so only marginally in the market economy. For these rural populations and for the urban poor, land is not an economic

asset, or at least not just an asset – land is a material and social basis for the household and its livelihood.

3.7 Privatisation of State-owned Housing

In sub-Saharan Africa, the availability of formal and informal urban housing is very much a consequence of colonial and post-colonial policies that tied housing to employment.¹⁶⁷ Colonial governments and companies provided rental housing for their colonial staff and African employees. Post-colonial state governments continued that policy by providing housing, generally under leasehold, to middle and high-level civil servants; many companies also follow this policy, particularly for their white-collar employees and skilled workers. Since these employees tend to be men, housing rentals are given mostly to men.¹⁶⁸ Because of the lack of appropriate housing policies in the post-colonial period, many of the low-resource and low-income families who have migrated into urban areas, particularly in the last decades, have occupied vacant land and constructed informal settlements without secure tenure.

The promotion of markets for land and housing has led some governments to privatise state-owned housing, without taking into consideration women's rights to property. In **Zambia**, for example, the privatisation in the mid- to late-1990s of City Council, governmental, parastatal, and mining company housing has revealed the complexity of gender issues in the land market. The privatisation policy was to transfer ownership to "sitting tenants". While the laws and regulations were gender-neutral and did not mention that women were to be excluded, in practice, privatisation officers regarded the man as the main tenant and as head of household, and that as head of household a man does not need to consult with his family regarding property.¹⁶⁹ This meant that title deeds were usually issued in the man's name only, even when rental contracts were in the names of husband and wife. Nevertheless, the housing market did open the opportunity for women with money to buy a house. According to Schlyter, women with good incomes

¹⁶⁶ Information provided by Silvia Ragoss, former volunteer Project Coordinator, Mangima Self Help Project, Oyugis, Rachuonyo District, South-Nyanza, Kenya, in 2002. The information was provided per email on May 31, 2005.

¹⁶⁷ Schlyter, Ann. 2004. *Privatisation of Council Housing in Lusaka, Zambia*. London: RICS Foundation.

¹⁶⁸ Because the policy in most cases was to provide housing for married employees, the rental contract usually included the name of the spouse.

¹⁶⁹ Schlyter, Ann. 2003. "The Privatisation of Public Housing and the Exclusion of Women: A Case Study in Lusaka, Zambia" in *Gender and Urban Housing in Southern Africa: Emerging Issues*. Roma (Lesotho): Institute of Southern African Studies, National University of Lesotho.

took advantage of this opportunity to secure housing for themselves and their children.¹⁷⁰

3.8 Shared Rental and Occupancy Rights

A number of countries have passed legislation to protect wives' and mothers' rights to rented housing. Privatisation combined with various legal reforms abolishing rental protection has decreased affordable (shared) rental options in many countries. Legislation in some of the transition countries also appears to be weakening with regard to protecting rental rights on social grounds. In a few countries these protections are being improved.

In former **Yugoslavia**, occupancy rights to apartments within the social ownership system applied to both spouses.¹⁷¹ This joint occupancy right of spouses was also recognised in all the republics (with the exception of Slovenia) and autonomous regions that resulted from the break-up of Yugoslavia.¹⁷² The only requirements for establishing joint occupancy rights were that the two persons be married, live together, and together use the socially owned apartment. This legal right was valid even if the registration of the apartment did not include both names. In the case of divorce, women (particularly those with children) generally preserved the right to continue occupying the apartment.

The privatisation process that took place in the 1990s allowed occupancy right holders to buy their apartment.¹⁷³ Spouses jointly registered as common holders of the occupancy right could purchase an apartment together.¹⁷⁴ The purchasing contract indicates that both spouses, with their names and identity card numbers, are the new owners and they are both registered as common owners of the apartment in the Land Register.¹⁷⁵ The Decision of the Land Register confirms the rights of joint ownership in equal shares of both spouses. A further sale of the apartment requires the approval of both spouses. Remaining occupancy rights were replaced

with lease contracts. While the Law on Lease in Croatia, for example, offers joint lease contracts as an option, there is closer examination of apartment occupants. If persons not explicitly registered on the lease contract are occupying an apartment, the contract can be cancelled. Exceptions to this include a spouse, children, parents, or other persons that the tenant(s) is obliged to support.¹⁷⁶ In general, the diminished attention to social housing in these republics makes it important to safeguard the documentation of both spouses' names in the lease contract.

In **Brazil**, a form of rental used by low-income groups is the multifamily collective housing such as tenement houses (*cortiços*), often located in the central or historical areas of larger cities. Often the owners of these tenement houses lease the building to another party, who then converts the houses into a collective residential building as cheaply as possible. Subsequently, this prime lessee rents out small rooms at exorbitant prices to people with low incomes. The rents are very high especially considering the precarious state of the building and the barely habitable state of the rooms. Federal Law 8,245 of 1991 states that the residents of tenement houses have rights as tenants or subtenants of multifamily collective dwellings. Even an informal relationship in these properties constitutes a tenancy or sub-lease. This means that even if no written (sub)-lease agreement exists, the characterisation of the tenement property as a multifamily, collective dwelling (houses, rooms, boarding houses), gives the residents the right to be treated legally as tenants or subtenants. Article 21 of the Law also stipulates that the rent for a sub-lease cannot exceed that of the primary lease and, in multifamily houses, the sum of the rents cannot be more than double the value of that lease. Article 24 establishes special procedures to ensure that collective housing presents decent living conditions. Obviously, for these two provisions to be observed in practice it is essential that the Municipal Government carries out regular inspections of the buildings and punishes offenders. According to Article 24(3), residents of tenement houses may directly demand the owner to carry out the necessary repairs and reforms to make the property adequate for habitation, provided that the building has been declared to be in a precarious state by the Public Authority. The Law on Lease has given considerable scope for initiative by human rights organisations and those judges who work for the defence of the poorer population. In order for this law

¹⁷⁰ Schlyter, Ann. 2004. *Privatisation of Council Housing in Lusaka, Zambia*. London: RICS Foundation.

¹⁷¹ Article 18 (2) of the 1996 Law on Housing Relations.

¹⁷² These include Croatia, Vojvodina, Kosovo, Serbia, Macedonia, Bosnia and Herzegovina, and Montenegro.

¹⁷³ In the Federation of Bosnia and Herzegovina, for example, this was based on the Law on Sale of Apartments with Occupancy Rights, adopted in 1997.

¹⁷⁴ Article 11 of the Bosnian Law on Sale of Apartments with Occupancy Rights. As a principle, the occupancy right holder over one apartment could be only one physical person. If only one spouse concluded the Contract of Use, the other spouse in the same household automatically became occupancy right holder too. Thus, in situations where both spouses were occupancy right holders and one of them died afterwards or the other spouse stopped using the apartment for other reasons, the spouse remained the occupancy right holder.

¹⁷⁵ Article 27 of the Law on Sale of Apartments with Occupancy Right.

¹⁷⁶ Information provided by Balkans property rights expert Veljko Mikelic on May 30, 2005 by email.

to have its full social impact in preserving the rights of tenement residents, it is essential that the capacity of the Judiciary (judges, prosecutors, attorneys, lawyers) is built to understand and apply its terms properly. Moreover, an awareness campaign of the rights of tenement dwellers under this law is necessary. So far, the Government has not made much progress in this direction.¹⁷⁷

In **Mexico**, similar collective rental housing in old buildings (*vecindades*) in the historical centres exist, generally overcrowded and in a deteriorated state.¹⁷⁸

In **Scotland**, the tenancy of rented housing is usually in the name of one of the spouses, most commonly the husband, and it is the tenant who has security of tenure. A non-entitled wife can apply to the court for transfer of the tenancy to her name if she pays "just and reasonable" compensation to the husband. If the entitled spouse leaves the matrimonial home, the non-entitled wife can keep possession of the tenancy under the Rent Act 1984.¹⁷⁹

In **New York City**, tenants of rent-stabilised apartments may not transfer their lease to another person(s) without written permission from the owner, unless a right to assign is already contained in the lease.¹⁸⁰ This clause does not apply to family members. The Rent Stabilization Code provides succession rights to spouses or family members who have resided in the apartment for the qualifying periods.¹⁸¹ These family members have the right to renew the lease in their own name as fully protected rent stabilised tenants upon the death or departure of the tenant of record. The inclusion of adult lifetime partners within the definition of spouse or family member has been recognised by the Division of Housing and Community Renewal and has been upheld by the courts.¹⁸²

The **Island of Jersey** (in the United Kingdom) recognises joint tenancy. A couple who are joint tenants have equal rights to occupy the home. The general rule is that neither partner can remove the other one unless there has been violence. Any permanent solution has to be

by agreement with all parties, including the landlord. If there has been violence towards one of the parties, s/he may apply to the court for an injunction requiring the violent partner to stay away from the home. Where joint tenants hold a lease, the landlord should be notified in writing of the proposed departure of one of the tenants and her/his relinquishment of her/his tenancy.

With regard to state housing, most tenancies are in joint names, and when one of the parties moves out of the marital home, the tenancy must be assigned to the remaining partner. The Housing Department will require the departing tenant to sign papers to assign the tenancy to the remaining partner. If s/he is unwilling to do this, it is possible to get this done by legal means with the assistance of a legal adviser during proceedings for separation or divorce. Under the Separation and Maintenance Orders (Jersey) Law 1953, the Court can order a joint tenancy to be assigned to the wife, where appropriate. The Housing Department does not agree to the husband occupying the accommodation alone unless he has the child/ren of the family living with him.¹⁸³

3.9 Shared Tenure Forms in Informal Settlements

Low-income urban households often lack secure tenure to their housing. While formal titling and registration systems are more likely to be available in urban areas relative to rural areas, their services are generally not affordable, accessible, and transparent for low-income residents. In addition, low-income families in many urban areas do not have the financial means to purchase housing and are compelled to acquire it by either renting (often informally) or by occupying vacant land in or around cities. Thus, a large proportion of urban housing in most large cities in developing countries is informal in the sense that much of it is on land that has been occupied without legal title and that it is self-constructed, or consists of inner-city tenements informally rented. The basic tenure issues are

1. lack of land for the construction of housing by low income families
2. lack of security on occupied land
3. lack of security for informal renters.

Within households, women particularly lack secure rights to safety and shelter. Formal and informal property rights often only include the head of the household, thereby excluding women, making them vulnerable to

177 UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Latin America: Brazil*. Draft p. 35.

178 UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Latin America: Mexico*. Draft.p. 10.

179 Clayton, Pamela. December 1997. *Women and family law, principally in Scotland*. <http://www.helsinki.fi/science/xantippa/wle/wle42b.html>

180 Article 226-b of the Real Property Law.

181 Article 2520.6(o) of the Rent Stabilization Code.

182 New York City Rent Guidelines Board. [http://www.housingnyc.com/html/about/intro/MainFeatures\(2\).html](http://www.housingnyc.com/html/about/intro/MainFeatures(2).html)

183 Citizens Advise Bureau. 19 May 2005. *Ending relationships and housing*. <http://www.cab.org.je/PARA7>

eviction by their spouses and in-laws. While a number of programmes, both state-sponsored and those promoted by NGOs and community organisations, attempt to improve both living conditions for urban dwellers and their tenure security, they do not always include women as equal participants. It appears that community-based programmes are more sensitive to women's involvement and needs.

Brazil offers examples of attempts to improve tenure security in both informal settlements and informal lease of land.

- (1) *Urban Adverse Possession*: An individual or a group may acquire ownership over urban private property not exceeding 250 m², if: (a) they have continuously occupied the property for a minimum of five years, without legal intervention of the owner; (b) if this property is used only for themselves or their families; and (c) the occupier(s) do not own other property, whether rural or urban. To obtain ownership of the land by urban adverse possession, the occupants must make a formal legal presentation before a Judge. The rightful owner of the land has the right to contest this request at the public hearing. If the occupants fulfil the requirements set out above, they can be legally declared in possession of the land via a Court Order. *Collective adverse possession* is permitted in irregular low-income settlements and slums, where it is often impossible to identify the lands occupied by each occupant.¹⁸⁴ In this case, the occupants generally form themselves into Residents Associations registered in accordance with the law, and this civil Association submits a claim for collective adverse possession in the names of all its members. However, individual groups of irregular occupiers may also present claims. So far individual urban adverse possession has been more common than collective urban adverse possession.¹⁸⁵
- (2) *Special Concession for Use of Public Land for Housing Purposes*: The occupation of public land for housing by low-income families has gained greater security with Provisional Legal Measure Number 2,220 (4 September 2001)¹⁸⁶ that does not grant these families ownership of the land but the right to secure possession and use. The law provides that the title of special use concession

applies independently of sex or marital status, and may be individually or jointly held.¹⁸⁷ This rule allows poor women formal access to titles of special use concession, which seeks to guarantee security of tenure. The objective is to combat the social vulnerability of women and to avoid prejudices against them in the case of legal or *de facto* separation. Thus women who are irregular occupants of public lands and who qualify under this new Law may obtain possession title in their own names.¹⁸⁸

- (3) *Concession of Real Right to Use*: This instrument for regularising public land in Brazil may be used in cases of the occupation of public or private areas, where the requirements of the *special concession for housing purposes* or *adverse possession* are not applicable or cannot be met by the occupiers. This Concession of Real Right to Use of public property can be issued individually or collectively, in cases of housing programmes and projects of social interest and such concession documents shall be obligatorily accepted as guarantees for housing financing loans. This grant includes the possibility of the conversion of the contract into a purchase contract after the resident of the common housing has fulfilled his/her obligations (if any). The relevant legislative authority can establish the criteria and procedures as to who should benefit, but must give preference to
 1. single women with children, who act as head of household,
 2. the elderly or incapacitated, and
 3. those using the conceded property predominantly for housing. In this way, right to housing is guaranteed to the people really in need of legal protection of their rights.¹⁸⁹

Many low-income families in Brazil acquire housing through the informal real-estate markets. In the majority of consolidated slums, an informal leasing market springs up as soon as a few slum dwellers occupy a large area and build shacks to lease to other low-income persons. To combat its negative effects, many land regularisation programmes (such as in the municipality of São Paulo) take the position that the actual resident is the person or

¹⁸⁴ Articles 9 and 14 of the City Statute.

¹⁸⁵ Urban adverse possession is recognized and regulated by the Urban Chapter of the Brazilian Constitution, in the Civil Code (Article 1240) and in the City Statute (Articles 9-15). UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Latin America: Brazil* Draft report.

¹⁸⁶ The special use concession for housing purposes was voted and approved by the National Congress, but vetoed by the President. The veto could not be over-ruled by the Congress, but through negotiation with political leaders the President issued a Provisional Legal Measure to establish the Special Concession under his conditions.

¹⁸⁷ According to Article 183(1) of the Brazilian Constitution, the titles of ownership and concession shall be conferred to the man or woman or both, independent of their civil status.

¹⁸⁸ UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Latin America: Brazil*. Draft report.

¹⁸⁹ The Concession on the Real Right of Use was created by Decree 271 on February 28, 1967 and is regulated by the City Statute. UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Latin America: Brazil*. Draft report.

persons entitled to the ownership documents and not the speculator or builder.¹⁹⁰

Informal leasing is also common in old buildings, which have been converted in various irregular ways for rental or lease to the low-income population. These tenement houses are usually old or semi-abandoned properties, and often present very precarious living conditions with considerable risk to health and life. They are concentrated in the central or historical regions of large cities, especially in São Paulo. Usually, the owners of these tenement properties lease them to a third party thus distancing themselves from the subsequent irregularity and informality. The prime lessee then converts the precarious property into a collective residential building as cheaply as possible and orally rents out small rooms at exorbitant rents to people with low incomes. The rents are very high taking into consideration the precarious condition of the rooms. Furthermore, the residents in the tenement houses have no security of tenure because they have no written contracts and in any case are negotiating with the prime lessee and not with the legal owner of the building.

Federal Law 8,245/91¹⁹¹ provides for the legalisation of tenure by the residents of leased collective buildings. Furthermore this Federal Law states that the residents of tenement houses have rights as tenants or subtenants of multi-family collective dwellings and considers that even an informal relationship (that is, no written contract) in these properties constitutes a tenancy or sub-lease. Residents of tenement houses may directly demand the owner to carry out the necessary repairs and reforms to make the property adequate for habitation, provided that the building has been declared to be in a precarious state by the Public Authority. It is not clear whether rental and leasing regulations protect women's rights as tenants or sub-tenants.¹⁹²

In **India**, women in urban informal settlements beginning in the 1980s have come together in community organisations to protect and improve their housing and tenure rights. For example, in Mumbai, the Mahila Milan federation of women's collectives began as an all-women group concerned with eviction from their informal and precarious housing constructed along roads, railways, and on sidewalks. Government-sponsored slum-improvement programmes have been destroying this type of housing, motivating women to organise themselves.

¹⁹⁰ Ibid.

¹⁹¹ This law covers both individual leasing for housing purposes and the leasing of collective housing such as tenement houses.

¹⁹² Supra note 270.

With the assistance of NGOs,¹⁹³ Mahila Milan (and other community organisations) has gained the skills and experience to slow down the destruction of their houses, find alternative housing sites, and lobby successfully for government services such as sanitation, education, and other infrastructural works. One of the most important activities of Mahila Milan is the savings and credit programme that offers loans to its members for housing construction and improvement, family emergencies, and productive activities.

The experience of Mahila Milan and other informal settlement organisations is indicative of the land access problem. As city government prepared to demolish their housing, it offered no alternative sites for relocation. Local and housing authorities told the families that no land was available in the city. However, exploratory visits around the city revealed that there were many vacant land sites, including some targeted for development by the city.¹⁹⁴ Community organisations and NGOs have pressured the Maharashtra state and Mumbai city governments and the World Bank to include resettlement and relocation of dislocated and evicted families in their urban improvement programmes and to provide land for the relocation of their homes. In one relocation effort in Mumbai, land in Kanjur Marg provided by the government will be formally transferred to 27 registered cooperative housing societies.¹⁹⁵ What could hopefully be expected is that, because of women's high participation in the process and their experience in creating their own organisation, they will secure property rights in their own name. The Maharashtra state government has instituted the joint registration of both spouses for housing in these types of programmes.¹⁹⁶

In **Namibia**, acquiring freehold title is a lengthy and expensive process, not accessible to low-income families living in informal urban settlements. A pilot project and new legislation has come up with a registration programme for making land rights more secure for families living in informal settlements in urban and peri-urban areas. The Flexible Land Tenure system is based on granting freehold title for a block of land to an associ-

¹⁹³ These NGOs include Society for the Promotion of Area Resource Centres (SPARC) and the National Slum Dweller's Federation (NSDF).

¹⁹⁴ National Slum Dwellers Federation. *National Slum Dwellers Federation. A Gender-Sensitive Approach to Shelter: the Work of SPARC in India*. http://nird.org.in/clic/gender_sensitive.html

¹⁹⁵ Patel, Sheela & Diana Mitlin. 2001. *The Work of SPARC, the National Slum Dwellers Federation and Mahila Milan*, (Working Paper No. 5). London: International Institute for Environment and Development (IIED).

¹⁹⁶ Burra, Sundar & Patel, Sheela. 2001. *Norms and Standards in Urban Development: The Experience of an Urban Alliance in India*. <http://www.itdg.org/docs/shelter/S%20Burra-S%20Patel%20Case%20Study.doc>

OTHER FORMS OF SECURED TENURE

tion of families (called a Saving Scheme group). These families would then apply for either a Starter Title (permanent occupancy rights to a parcel of land anywhere in the block with transfer rights subject to group approval) or a Land-hold Title (permanent occupancy rights to a specific parcel of land with transfer rights including mortgage). Both of these titles can be upgraded to freehold title over time.

The legislation for this parallel registration system was approved by the Cabinet but has not yet been promulgated. While a pilot project has surveyed 2,000 plots for this parallel registration system, no official implementation plans have been made. If a couple chooses community of property, a starter title is held in joint tenure.¹⁹⁷ One criticism advanced regarding this programme has been the lack of clauses that protect women's rights to land such as mandatory joint registration for spouses and/or automatic inheritance rights for widows, equal inheritance rights for daughters and sons, and participation quotas for women in block decision-making bodies.¹⁹⁸

Another example of improving security for informal settlement residents is the Improvement Areas in **Zambia**. Beginning in the 1970s, a program funded by the government and the World Bank was put in place to upgrade squatter areas in urban and peri-urban areas. Under this program, an area declared by local authorities to be an Improvement Area is granted a head lease or block title. With this legal status, the area is able to receive services and infrastructure and residents are given a 30-year Occupancy Licenses which are later replaced by Council Certificates of Title (similar to a direct lease from the state).¹⁹⁹ One example of an Improvement Area in Lusaka that received donor agency assistance from the Swedish Development Assistance Organization shows that few women are obtaining property documents. Of the 1,040 Occupancy Licenses granted as of October 2003, 14% were in women's names and only 2 of the licenses were joint tenure. Over 85% of the Occupancy Licenses were in men's names.

¹⁹⁷ Section 10(8) of the Flexible Land Tenure Bill.

¹⁹⁸ UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Southern Africa: Namibia*. Draft report.

¹⁹⁹ UN-HABITAT. 2005. *Law, Land Tenure and Gender Review in Southern Africa: Zambia*. Draft report.



CHAPTER FOUR

THE ROLE OF ORGANISATIONS IN PROMOTING SHARED TENURE



4.1 Introduction

Numerous organisations deal with land rights and with gender issues, ranging from governmental agencies to informal community organisations. The number of organisations that deal with both sets of issues, however, is limited. Those that deal with land rights tend to focus on legal reform or protection of smallholder rights. Those that work with gender issues concentrate on women's civil rights, violence, and health needs, all-important issues that affect women's everyday life. A small number of organisations in each country deal with the issue of women's land and property rights.

One basic distinction among women's organisations is between those that are autonomous and independent and those that are part of another organisation, such as the women's wing of labour organisations or the women's caucus of political organisations. While the latter could be potentially more effective because of their association with the larger unit, the gender or women's issues they are concerned about are often not given priority status at the level of the "mother" organisation.

Governmental programmes that implement land titling programmes often co-ordinate their activities with national-level and local-level organisations, such as rural workers' or peasant organisations. These organisations are generally dominated and led by men who seldom have any interest in extending property rights to women. If titling programmes have an objective of entitling women, they need to work with organisations that prioritise women's rights and interests.

Organisations are structural forms generally associated with particular societal institutions²⁰⁰ (economic, legal, political, educational, communal, etc.). These specific structural forms carry out the institution's activities. Thus, we can categorise organisations according to their institutional setting, such as governmental organisations, labour organisations, legal organisations, political parties, and civil society organisations. Among the organisations that deal with gender and property rights, perhaps the most prominent ones are those associated with legal institutions. In this section, we will explore how different organisations have dealt with and promoted the issue of shared forms of tenure. We will illustrate the actions of these different organisations by presenting examples of specific organisations in different countries that have worked on joint tenure and co-tenure issues. A few ex-

amples of the failure of organisations to recognise and promote women's land rights will also be presented.

4.2 Governmental Organisations

Beginning in the 1980s, international organisations, such as agencies of the United Nations, took up the demands of the women's movement for equity and have been successful in pressuring member governments around the globe to modify laws and codes to explicitly recognise gender equality, including equity with regard to property rights. At the national level, many countries created women's offices, usually attached to ministries or the presidential office, which advocate for and promote gender equity.²⁰¹ These offices have generally dealt with basic legal rights, such as equality clauses in constitutions and civil codes, and with social services for women such as health care. At times they have also been active on other basic equity issues like property and land rights, including joint tenure. Following is the active role that one such organisation has played in south Asia.

In **Laos**, the Lao Women's Union (LWU) has been very active at both the national and local levels to promote gender equity and to ensure that women's rights are recognised and respected. Besides its national office, it has staff in provincial offices, and delegates in most communities. The Lao Women's Union also has a research office, Gender Resource Information & Development Centre (GRID) that engages in research regarding gender norms and practices in Laos. An issue that has been addressed by LWU and by GRID is women's land rights. The LWU has been participating in the land-titling programme being undertaken by the government as active members of the titling brigades at the local level. This level of involvement was motivated by a study undertaken by GRID early in the titling programme that revealed its gender bias.

In spite of very positive legal and customary conditions for recognition of women's rights in Laos, there are problems in issuing land use certificates and titles to women. A study undertaken in four sites across Laos showed that the names on land use certificates and titles did not reflect the actual landholder.²⁰² While 30% of the land was inherited by women and 18% by men, 58% of the land use certificates and titles were issued only

200 Institutions in this sense are defined as distinct frameworks of rules that society organises for doing things.

201 In Latin America, for example, almost all countries have such an office; they include: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay, and Venezuela.

202 Gender Resource Information & Development Center. 2000. *Gender and Land Documents: How Do Society's Perceptions of Gender Affect Women?* Vientiane: Gender Resource Information & Development Center (GRID).

in the husbands' names and only 16% in wives' names. In addition, both husband and wife acquired over half of the land parcels (52%) yet only 7% of these received joint certificates and titles.

Among the reasons mentioned for this discrepancy were the lack of involvement by women in the titling process, lack of knowledge about legal titles, and cultural norms that expect men to deal with public and official transactions.

These GRID findings motivated the involvement of the Lao Women's Union (LWU) in the titling process. LWU delegates from provincial and local levels have been members of the titling brigades since 1998, and they ensure that both women and men obtain information about the titling process and their legal rights, including joint titling, and that both women and men participate in the titling process.

4.3 Community Based Organisations

India's 1949 Constitution²⁰³ recognises the equal rights of women and men. Property rights, however, particularly agricultural land rights differ considerably across regions within the country because India also recognises the personal law (inheritance and marriage, divorce, separation) of its different ethnic and religious groups.²⁰⁴ These personal laws are often in conflict with the gender equity provisions of the Constitution, and with land reform legislation in some states. Several states in India, such as Madhya Pradesh and West Bengal, have promoted the joint titling of land in their land reform programmes. The state of West Bengal has implemented one of the most extensive redistributive land reforms in India since the 1950s.

Peasant organisations in West Bengal played a significant role in gaining land for redistribution to agricultural workers and sharecroppers. Women's participation in this struggle, such as the Tebhaga movement, was also an important factor in this struggle. As in many rural movements, however, once the objective of gaining land is attained, women are expected to return to their homes and re-assume their subordinate role. The weakness of the women's movement in the West Bengal case resulted

in few women having land distributed to them and in having land reform titles (*pattas*) in their name.²⁰⁵

In an attempt to rectify this situation, and at the petition of peasant women's organisations, directives were issued beginning in 1992 from the West Bengal government that land was to be allocated to women as individuals or jointly with their husbands. Local land reform offices, however, have largely ignored these directives claiming not to have knowledge of them or maintaining that it is the local planning committees (*panchayats*) at the village and district levels that draw up the list of eligible land reform beneficiaries. If these local committees do not find eligible women, local land reform officials maintain that there is little they can do. Several studies have found that even when a wife's name is included on land reform documentation, she often is not informed of the fact or of her property right to the land.²⁰⁶ In addition, her name is entered in an ambiguous manner, not making it clear whether she is included because she is a joint owner or just to help in identifying her husband.²⁰⁷

This case reveals a potentially significant problem with community organisations. The participation of local organisations in the design and implementation of state programmes has been recognised as both valuable and effective. Local organisations, however, often reflect the discriminatory biases of local spaces based on gender, ethnicity/caste, religion, and class. Local organisations, even elected ones such as the *panchayats*, generally consist of men and decisions are made based on men's discussion of local issues. Women have little if any input in these discussions, nor do they have the power to influence community organisation members. In the West Bengal case, it appears that the local land reform officials and the *panchayats* in combination have frustrated the land reforms efforts to extend legal land rights to both single and married women.

4.4 Legal Organisations

Legal organisations are generally NGOs that provide free or low-cost legal counsel and advice to resource-poor groups and persons. One mechanism for providing legal counsel that has become quite widespread among

²⁰⁵ *Patta* is a title or certificate of property rights in India. Generally, it refers to a land title or land certificate; however, it can also be used with trees, for example, such as the tree *pattas* issued to persons for trees planted through social forestry programmes.

²⁰⁶ Gupta, Jayoti. 2002. "Women Second in the Land Agenda," in *Economic and Political Weekly*, 4 May, pp. 1746-1754.

Brown, Jennifer, and Chowdhury, Sujata Das. 2002. *Women's Land Rights in West Bengal: A Field Study*. Seattle: Rural Development Institute.

²⁰⁷ Brown, Jennifer & Chowdhury, Sujata Das. 2002. *Women's Land Rights in West Bengal: A Field Study*. Seattle: Rural Development Institute.

²⁰³ Articles 14, 15, and 16.

²⁰⁴ Agarwal, Bina. 2003. "Gender and Land Rights Revisited: Exploring New Prospects via the State, Family and Markets," in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 184-224.

legal organisations is the training of paralegals, who work with communities and disadvantaged groups. Many of these legal organisations also engage in advocacy of women's land rights and in lobbying legislative bodies and state land programme officials to legally recognise women's equal land rights as well as marital property and joint ownership. These organisations also work with the public by providing education or awareness programmes. Legal aid organisations can play an important role in providing legal counsel for women attempting to have their rights to joint property recognised and in setting legal precedents. While FIDA and Women's Lawyers Associations mostly provide legal aid to women in many countries across the world, general legal aid centres also include legal aid to women. Legal organisations can also play an important role in lobbying for law reform.

In **Tanzania**, the Tanzania Women Lawyers Association (TAWLA) has played an important role in extending gender awareness regarding property rights. The Gender Land Task Force, which was coordinated by TAWLA, issued a series of recommendations for the 1999 Land Acts.²⁰⁸ Most of its recommendations were adopted, including legal awareness programmes (leaflets, posters, and radio messages in simple language), legal aid desks in villages to provide timely legal services, and gender progressive amendments such as joint tenure. Other recommendations included training of trainers, law enforcers and opinion leaders, a booklet of procedures, a training manual and the formation of a village information centre. These actions should facilitate the observance of the joint occupancy right presumption between spouses contained in the 1999 Land Act.

The principal objective of the Women's Legal Centre in **South Africa** is to remove barriers to women attaining substantive equality through advocacy and litigation. It lobbies parliament for land reform on issues affecting women's rights and conducts impact litigation on women's rights issues, including land rights.

4.5 Labour Organisations

Labour organisations (particularly rural workers' unions and peasant groups) have been active in efforts to gain land rights for landless and landpoor rural workers. While women are very active in these struggles, these organisations have often failed to recognise women as full members and to prioritise their needs and demands.

208 Freehold tenure does not exist in Tanzania; the dual land tenure system includes customary tenure (legislated by the Village Land Act (1999) and state-owned land legislated by the Land Act. Persons have right of occupancy to state-owned land, legalized with a title to the use and occupation of land.

Urban labour organisations, which generally have more active women groups within them, have not always supported rural women's demands. One major problem that women activists experience in labour and peasant organisations is the perception by these organisations, and particularly the leadership, that the struggle for and recognition of women's rights weakens the class-based demands of these organisations. There is the belief that the recognition of women's rights is a struggle for individual rights and that the organisation should focus on class-based rights. What this belief fails to perceive is that human rights are experienced at the individual level and that women as a group and as individuals are being denied their rights when gender discrimination (for example, by state law, by working places, by landlords) is not challenged.

The experience of rural women in **Brazil** with regard to their land rights within the agrarian reform process are examples of the conflictive trajectory of labour organisations as class-based organisations and women's efforts to gain effective rights, not just legal recognition, to land.

Brazil is the most recent country in Latin America to implement a redistributive land reform. After decades of rural struggle between landowners and the state, on the one hand, and landless and landpoor rural workers, on the other, agrarian reform was finally initiated in 1985.²⁰⁹ During the first years, most of the re-distributed land consisted of estates already occupied by rural families organised into peasant groups. In the early 1990s, the agrarian reform effort slowed considerably, picking up again in the mid-1990s with the Cardoso government. In contrast to most other countries, at this time the implementation of agrarian reform in Brazil was delegated to state governments instead of the national government.²¹⁰ The language of the agrarian reform legislation and the procedures followed by the agrarian reform agency (INCRA) was to adjudicate land to the household head. As a result, as of 1996 only 12.6% of agrarian reform beneficiaries were women.²¹¹

At the same time, however, efforts were undertaken by various organisations, including labour organisations, to legally recognize women's rights to land. In the 1988 constitutional convention, the national agricultural workers' union (CONTAG) together with the governmental

209 An attempt to implement land reform in the early 1960s resulted in a 20-year military dictatorship.

210 India is another country where land reform implementation is done at the state/province level within the parameters of the national land reform program.

211 Guivant, Julia S. 2003. *Agrarian Change, Gender and Land Rights: A Brazilian Case Study* (Social Policy and Development Programme Paper No. 14). Geneva: UNRISD.

women's office (CNDM) lobbied strongly for inclusion of an article (Article 189) in the new Constitution that would recognize women's rights to agrarian reform land, including joint ownership. The joint titling of land to couples is optional, however, not mandatory. During the early 1990s, the two main labour organisations, CONTAG and CUT, called for the inclusion of women's names on agrarian reform certificates and titles; neither organisation, however, made this issue a principal priority.²¹²

The number of women who have received legal rights, whether as individual or joint titles, has remained low.²¹³ One reason is that the agrarian reform agency did not modify nor change its norms and procedures in the identification of beneficiaries nor in the issuing of certificates and titling.²¹⁴ In addition, there was little institutional, political, or grassroots pressure for INCRA to recognize women as legitimate agrarian reform beneficiaries or their rights to joint ownership. The rural labour organisations and the peasant organisations pressuring for land redistribution (MSN), including the women's wings of these organisations, failed to follow up on the opening that the constitution gave rural women. In part this was due to the low priority given women's land rights, and other gender issues, by the leadership of these organisations. And in part it was due to women's struggle with other crucial issues such as their recognition (by both labour organisations and the state) of their status as workers and of their workers' rights.²¹⁵

According to Deere, a decade after legal recognition of joint ownership, the national leadership of CONTAG finally took up the recommendations of its women's

commission and, at its Seventh National Congress in 1998, approved the specific demand that the names of both spouses be included in the land registry.²¹⁶ Over the next few years, CONTAG participated in a number of national women's events such as International Women's Day on 8 March 2000 and the Marcha das Margaridas in August of that same year. As a result, INCRA President, Orlando Muniz, finally acknowledged the legal norm of joint property established in the 1988 constitution by announcing on 9 August 2000 that it would change its titling procedures in order to include the names of both spouses on property documentation.²¹⁷

4.6 Non-governmental Organisations

Many of the organisations we have reviewed in this section are non-governmental organisations (NGOs). In this section, however, we would like to highlight the indirect but instrumental role that an NGO, implementing a development project, can play in promoting women's legal land rights. In 1992, **Honduras** passed an "agricultural modernisation" law which in effect ended the agrarian reform process begun in the early 1970s and facilitated land market transactions. This legislation also established a programme for the purchase and titling of occupied public land by smallholders; these lands were to be adjudicated without bias to women and men and could be jointly titled to a couple. Joint titling was only optional, however, available only if a couple requested it. Because of women's subordinate status in Honduras and the lack of information regarding the joint titling option among rural women, very few joint titles were issued during the first few years of the titling programme.²¹⁸ While there were numerous rural women's organisations in Honduras, there was minimal coordination among them, making it particularly difficult for them to influence state policy and titling procedures.²¹⁹

212 Deere, Carmen Diana. 2003. "Women's Land Rights and Rural Social Movements in the Brazilian Agrarian Reform," in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 257-288.

213 No official gender-disaggregated data are available for the period after 1996. Some preliminary data for several states cited by Deere indicate that not only has the number of beneficiaries increased significantly, but also the proportion of women beneficiaries has increased. Deere, Carmen Diana. 2003. "Women's Land Rights and Rural Social Movements in the Brazilian Agrarian Reform," in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 257-288.

214 For example, until 2000, the agrarian reform registration form (*cadastro*) did not have space for writing in the names of two persons. INCRA also insisted on naming men as beneficiaries – if a woman applied, INCRA officials would ask the whereabouts of the spouse, and in the absence of a spouse they would try to grant beneficiary status to a son.

215 Labour and peasant organisations were struggling with the state in the late 1980s and until the mid-1990s as government attempted to reduce recently-won demands such as land re-distribution efforts and workers' rights, including recognition of rural women as agricultural workers with full rights to workers' benefits.

Deere, Carmen Diana. 2003. "Women's Land Rights and Rural Social Movements in the Brazilian Agrarian Reform," in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 257-288.

Deere, Carmen Diana & Leon, Magdalena. 2001. *Empowering Women: Land and Property Rights in Latin America*. Pittsburgh: University of Pittsburgh Press.

Guivant, Julia S. 2003. *Agrarian Change, Gender and Land Rights: A Brazilian Case Study* (Social Policy and Development Programme Paper No. 14). Geneva: UNRISD.

216 Deere, Carmen Diana. 2003. "Women's Land Rights and Rural Social Movements in the Brazilian Agrarian Reform," in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 257-288.

217 Deere, Carmen Diana. 2003. "Women's Land Rights and Rural Social Movements in the Brazilian Agrarian Reform," in *Journal of Agrarian Change*, Vol. 3, Nos. 1-2 (January & April), pp. 257-288.

218 Deere and Leon report that between September 1995 and May 1997 (21 months) only 26 titles for 689 hectares were jointly titled. Deere, Carmen Diana & Leon, Magdalena. 2000. *Who Owns the Land? Gender and Land Titling Programs in Latin America*. Paper prepared for the X World Congress of Rural Sociology, Rio de Janeiro, 30 July – 5 August 2000.

219 According to Deere and Leon, a network organisation was finally formed in 1997, the Red Nacional de Mujeres Rurales de Honduras, but it was unable to lobby successfully on this politically difficult issue. Deere, Carmen Diana & Leon, Magdalena. 2000. *Who Owns the Land? Gender and Land Titling Programs in Latin America*. Paper prepared for the X World Congress of Rural Sociology, Rio de Janeiro, 30 July – 5 August 2000.

In the Guayape valley of Honduras, a rural development project²²⁰ funded by Canadian CIDA began operation in 1991. In its first phase (1991-1995), the project focused on diversifying and stabilising agricultural production in the valley, mainly through irrigation and technical innovation. This phase gave some limited support to land titling, mainly to facilitate borrowing for farm improvements; 90% of the titles were issued solely in the name of the man with only 10% to couples.

The project's second phase (1996 to 2001) focused on the development of a replicable model for sustainable natural resource management. Experience in the earlier phase made it clear to NGO staff that completing the titling process was important for all aspects of the valley's sustainable socio-economic development and for setting up the basis for investments in agriculture and natural resources management and conservation. The NGO also realised that the project's success depended on the participation of both spouses within a household and that couples had a better credit re-payment debt. In the second phase, therefore, couples with joint titles were given preferential status for credit. In this way, the NGO promoted the option of joint title in the Guayape valley. Through a combination of innovative agreements and initiatives between the NGO and government agencies involved in the titling process, the number of titles issued to women more than doubled compared to other regions in Honduras.²²¹ By the year 2000, women were included on 56% of titles that were issued for 2,500 parcels covering almost 20,000 hectares; 36% were issued to couples, 20% to women only, and 44% to men only.²²²

4.7 Network Organisations and Coalitions

Often, a number of organisations from different institutions will band together into a network or a coalition to promote legislative action on land rights or women's rights. In Tanzania, for example, the Gender Land Task Force is an umbrella association for civil society groups that advocated gender progressive amendments to the Land Act and undertook awareness raising throughout the country with booklets in local languages such as Kiswahili and with

workshops.²²³ Grouping together gives a coalition more political strength for lobbying and advocacy actions than each individual organisation could have. They can also draw upon different constituencies, thus giving the movement for women's land rights broader legitimacy.

There are also cross-country regional networks that are active in promoting women's equal land rights. In Africa, for example, there are *Landnet* in eastern and western Africa, *Women and Law in Development in Africa (Wildaf)*, and *Women and Law in Southern Africa (WLSA)*. These regional networks provide country organisations with information and support to lobby for inclusion of women's rights in land legislation. Wildaf is also active at lobbying African countries to ratify the Women's Rights Protocol to the African Charter on Human and Peoples' Rights. Networking organisations have mostly focused on legislative reform that recognises women's land rights. The *Huairou Commission* is a global umbrella organisation of six grassroots women's networks, which raises awareness of the innovative practices that grassroots women are applying on the ground (for example through documentation of best practices in their Grassroots Women International Academy). It is strong in networking and exchanging information among its members. Some of its members also lobby for law and policy reform, among others on issues related to women's security of tenure.

In **Zimbabwe**, the Women's Coalition made up of 30 organisations, was formed to make sure that women's issues and needs were included in the on-going constitutional reform process. Among the issues they have identified are (a) women's and men's equal rights in owning and utilising land and (b) joint ownership of land and housing acquired by couples.

One recent and well-known campaign for legal recognition of women's land rights was the effort by the **Uganda** Women's Network (UWONET) and the Uganda Land Alliance (ULA) in 2000 to include a joint-ownership amendment to the 1998 Land Act. The ULA was formed in May 1995 as a consortium of 40 local and international NGOs lobbying for fair land laws. Its main mandate is to advocate for pro-poor laws and policies on land. The ULA advocated for joint tenure by discussing this issue both with policy makers and with the general public. They also carried out research and produced a video documentary with the voices of poor women. UWONET is an advocacy and lobbying coalition of National Women's NGOs, institutions and individuals founded in 1993. UWONET

220 The Guayape Valley Agricultural Development Project covers 220,000 hectares, of which 93,000 hectares make up the broad valley of the Guayape River.

221 Information on titles issued at the national scale show that between 1996 and 2000, 25% of total titles were issued to women. Secretaría de Agricultura y Ganadería. 2000. *Memoria Foro Nacional: Hacia la titulación de tierras rurales con enfoque de género*. Tegucigalpa: Secretaría de Agricultura y Ganadería.

222 Secretaría de Agricultura y Ganadería. 2000. *Memoria Foro Nacional: Hacia la titulación de tierras rurales con enfoque de género*. Tegucigalpa: Secretaría de Agricultura y Ganadería.

223 UN-HABITAT. 2002. *Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa?* pp. 108-113.

focuses on policy advocacy, networking, civic education, training, research, information collection, packaging and exchange, and advocacy and lobbying. They organised workshops, marches and a media campaign, and petitioned the President of Uganda, the Parliament, and the Minister of Lands.

Although the 1995 Constitution contains clauses that guarantee equal land rights to everyone regardless of gender or marital status,²²⁴ the fact that most of the land in Uganda is held under patrilineal customary tenure systems means that very few women inherit land, the principal means for accessing land under customary tenure.²²⁵ Another consequence of patrilineal tenure practice is that even land acquired by husband and wife is deemed to belong to the husband – wives have no customary claim to that land if, for example, they become divorced or their husband dies.

The women's movement in Uganda campaigned that the Land Act should protect women's rights to marital property by including a co-ownership clause. The lobbying in Parliament for inclusion of this clause was spearheaded by UWONET and ULA. Other activities were also carried out by other organisations such as the production and dissemination of information and educational materials for the public, the media, and Parliament members. Legal organisations such as the Uganda Association for Women Lawyers (FIDA-Uganda) conducted legal education workshops and seminars. The ULA also conducted focus groups throughout Uganda as well as carrying out surveys in order to collect women's attitudes regarding land rights.²²⁶ Although the co-ownership clause was passed by parliament, opponents to the clause were able to utilise parliamentary technicalities to drop it from the final set of approved amendments.²²⁷ Attempts to get beyond the technicalities, including a direct appeal to the President, were futile. Parliamentary and governmental opposition to the clause, based on claims that customary tenure systems would disintegrate and that families would be destroyed, prevailed. While spousal co-ownership was not legalised,

Parliament did pass a "security of occupancy on family land" in June 2003 (new sections 39 and 40 of the 1998 Land Act). This amendment gives wives and husbands the right to have access and live on family land (defined as the ordinary residence of a family). This proscribes the alienation of family land by one spouse without the consent of the other.

In **Peru**, a network of mostly rural NGOs and women's peasant organisations organised a series of events in the mid-1990s to influence the methodology and procedures of Peru's rural titling programme in favour of recognising rural women's legal property rights. Peru's 1984 Civil Code recognised women's and men's equality, including family rights and responsibilities. Spouses of consensual unions also attained the same status as those of civil marriages. As a result, the marital property regime is applied to both types of unions: civil marriage and consensual unions. In Peru, marital property consists of those goods and assets acquired by the couple during their marriage.²²⁸ All these rights were re-confirmed in the 1993 Constitution.

In 1993, Peru began implementation of a rural titling programme (Programa Especial de Titulación de Tierras, PETT) with two main objectives: to title the land adjudicated to farm workers and peasants during the agrarian reform of the 1970s and to regularise the rights of smallholders who occupied land without legal title. The language of the titling program is gender neutral in the sense that gender is not mentioned as a requirement of eligibility for title. The titling programme, however, did not consider the cultural constraints that women, particularly rural women, may face in having their names included on land titles.²²⁹ In addition, titling programme officials did not receive any gender-awareness training, neither at the ministerial and programme level nor at the ground implementation level. This gender neutrality is also found in the titling documentation: the information obtained regarding beneficiary characteristics does not include gender. As a result of neglecting the gender implications of ignoring women's cultural constraints as well as the patriarchal attitudes of titling officials, anecdotal evidence seems to indicate that the large majority of titleholders are men and that spouses are not being included in title documents. Interviews with titling officials revealed that men were not being asked their marital status so as to include their spouses in the title.

224 Rugadya et al. also provide information on the marriage clauses of the 1995 Constitution that provide equal rights to women and men within marriage. Rugadya, Margaret, Esther Obaikol, & Herbert Kamusiime. 2004. *Gender and the Land Reform Process in Uganda: Assessing Gains and Losses for Women in Uganda* (Land Research Series No. 2). Kampala: Associates for Development.

225 Under patrilineal practices, daughters do not inherit land from their father because they join their husbands' clan and community when they marry; neither do these women inherit land from their husbands because the husband's family does not consider daughters-in-law to be full clan members.

226 Tripp, Aili Mari. 2004. "Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda" in *African Studies Quarterly*, Vol. 7, No. 4 (online). <http://www.africa.ufl.edu/asq/v7/v7i4a1.htm>

227 This incredible story of the backroom political manoeuvring that resulted in the "lost clause" is well told in Matembe, Miria. 2002. *Maria Matembe: Gender, Politics, and Constitution Making in Uganda*. Kampala: Fountain Publishers.

228 Property owned by the individual prior to marriage (whether civil or consensual) and property inherited by a spouse during marriage are not considered marital property and remain the property of the individual.

229 Higher levels of illiteracy, lower Spanish-language skills, and lack of personal identification documents.

And when women applied for title, they were asked about their husbands and their sons.²³⁰

In 1996, under the umbrella of the “Red Nacional de la Mujer Rural”,²³¹ a national forum of 130 peasant leaders presented a series of demands with regard to the PETT titling programme. Among them was that titles be issued to both spouses (whether by civil marriage or consensual union), that sale contracts of land purchased by women be recognised as legal for title purposes, and that inheritance of land be equally divided among all sons and daughters.²³² The “Red Nacional de la Mujer Rural” also brought attention to the fact that women were not being targeted in the informational and educational campaigns organised by PETT. In 1997, the “Red Nacional de la Mujer Rural” began a national campaign demanding joint titling of marital property and began to pressure PETT officials to adopt norms and procedures to ensure the joint titling of spouses.²³³ The “Red Nacional de la Mujer Rural” together with CEPES, a rural research centre, also organised a series of regional meetings around the country with women peasant organisations and with the regional PETT agency highlighting the productive role of women in agriculture, the importance of land rights for women, the participation of women in the titling process, and the need for gender-sensitivity training for titling officials.²³⁴

In Brazil, Colombia and Guatemala, different networks of NGOs are supporting the training and capacity-building of grassroots women from many different urban and rural communities in order for them to become “Community Lawyers”, familiar with the existing national housing legislation and able to guide and counsel other women (and men) from their communities, on their housing rights and how they can “use” the existing laws to ensure their full right to adequate housing. A Practical Guide for “Community Lawyers” is being published by UN-HABITAT – Regional Office for Latin America and the Caribbean in 2005.²³⁵

230 Deere, Carmen Diana & Leon, Magdalena. 1998. *Reforma agraria y contrarreforma en el Perú: hacia un análisis de género*. Lima: Ediciones Flora Tristan.

231 The Red Nacional de la Mujer Rural is a programme of the feminist NGO Centro de la Mujer Peruana Flora Tristan.

232 Deere, Carmen Diana & Leon, Magdalena. 1998. *Reforma agraria y contrarreforma en el Perú: hacia un análisis de género*. Lima: Ediciones Flora Tristan.

233 Fernández, Blanca; Trigoso, María Amelia; Del Castillo, Laureano; Becerra, William; Arias, Pedro; Pozo, Katherine & Aragón, Karla. 2000. *Campaña Por una titulación de tierras con equidad: una experiencia para compartir*. Lima: Flora Tristan.

234 *Ibid.*

235 Information provided by Catalina Trujillo, UN-HABITAT Regional Office for Latin America and the Caribbean, August 2005.

CHAPTER FIVE

CONCLUSIONS



CONCLUSIONS

Women's rights to ownership, use, and control over land are generally affected by their family status as daughter, wife, widow, or mother. Compulsory joint ownership in formal law for married women or for women living in consensual unions provides women with some protection against being left without land or a home when her relationship with her husband breaks down either due to divorce, abandonment, polygamy, or death. While separate property provides women with the most power and control over their own land, when women do not customarily inherit or purchase land, separate property can favour males. When joint tenure is not compulsory for married couples or those living in consensual unions, women rarely have equal right to land and housing.

Even when joint tenure is compulsory under formal law, customary or religious law that does not recognise joint tenure frequently trumps written law. Moreover, if land is held in joint tenure under the civil law, but is not registered as such, women may not exercise their rights to this land because it would require a court investigation and order. When courts are involved, women also stand to lose to customary law interpretations of their relationship or right to land or housing.

Compulsory joint tenure is most common in the civil law countries of Western and Eastern Europe, and the former Spanish colonies of Latin America. Even so, it has only been recently that many of these countries have eliminated the provision that the male head of household manages the marital community property. Common law countries generally have a default property regime of separate property for married couples because historically, property was vested in the husband and the wife's identity was subsumed into his. Many African and Asian countries have inherited the common law system of separate property, although generally a couple can choose joint tenure. African countries with pluralistic legal systems often have conflicting formal and customary law. Customary law has, in the past, been more viable than formal law and has generally not favoured joint tenure for married couples. Several countries in Africa, however, are moving away from customary law that disadvantages women toward a more equitable property system.

In addition to joint ownership between spouses, there are other types of shared tenure ranging from communal property (such as those found in many customary tenure systems) to corporate ownership with formal legislation, formal legal recognition, and registered by-laws. The informal and illegal tenure types that the majority of the urban and rural poor have available to them are part of a continuum (from illegal to informal to formal) that

characterises tenure systems. This continuum includes perceived *de facto* secure tenure at one end, through adverse possession and occupancy rights, to lease and ownership at the other end, whether this is group or individual tenure. As we reviewed a number of shared tenure forms (such as communal, family, cooperative, and shared rental), we found that women's rights to land and other immovable property within these different forms varies considerably depending on family and lineage structures, the strength of customary norms and practices, observed and enforced legislation, and active organization on the part of women. As in joint tenure, customary norms and practices seem to exclude women from enjoying property rights with the exception of some matrilineal societies and some family tenure forms.

Property should be viewed in the context of the whole family and the distribution of wealth within the family. However, as land becomes more valuable and moveable property less valuable, a system that once may have been equitable and functional under customary law may no longer be equitable. Property systems must be reviewed in the present context for their impact on women and adjusted as necessary through formal law, case law, education, and training.

CHAPTER SIX

RECOMMENDATIONS



The recommendations we offer as part of this paper relate to the legal framework for women's rights and specifically joint tenure, the gender-sensitive procedures for implementation of land and housing programmes, and the monitoring and evaluation of such programmes.

6.1 Legal Recommendations

While formal law that recognises women's rights to land and property is fundamentally necessary to ensure that women are not disenfranchised, formal legal rights are mostly ineffective if customary law does not recognise equitable property rights for men and women. That is to say, while it is necessary that formal law requires equity in property relations, it is not sufficient and is often only a first step. Because of these cultural norms and practices, some legislative and social changes may be more readily accepted than others by both men and women, and part of an effective process is to talk to women to understand what legal rights are most valuable to them.

Gender-neutral language in land legislation may in reality not be gender neutral because of the cultural understanding of the word used. For example, head of household, while gender neutral, most often means men in a cultural context. Language, particularly in the regulations written to implement land and housing laws, should not refer to one head of household but rather to women and men, to both spouses. A land reform programme, for example, where state land distributed to households is understood to include both women and men and/or require that both their names listed on the title, can be extremely effective, even in the face of customs to the contrary.

Another recommendation is that land and housing legislation may conflict with family or personal laws that deal with inheritance, marriage, and marital property. Both sets of legislation must be reviewed for their impact on women. Family law is rarely considered as part of land and housing legislation and of titling and registration laws and programmes, and yet family law has the biggest impact on women's right to use or own property.

When land is passed through ancestral lines that exclude women, women may be more likely to gain rights to land within a marriage, and provisions mandating joint titling of marital property will provide the best protection for women. This is especially true in patrilineal and/or patrilocal societies. While a number of countries have joint titling as an option, it appears that optional joint titling is simply ignored; joint titling of marital property needs to be mandatory for it to be effectively implemented.

Related to marital property is marriage. In many instances rural women are not legally married although they are married under customary or religious law. Legal rules that require joint titling for conjugal couples, whether they are legally married or not, can be an effective solution to this issue. If there is no recognition of consensual unions or it is problematic, the use of co-ownership titles or other co-tenure certificates is an option.

6.2 Implementation of Land and Housing Programmes

There are several recommendations that can guide the implementation of land and housing programmes to ensure that women's rights are not ignored on the ground. First of all, field research needs to be conducted to identify all property rights holders within a household in both rural and urban areas and among different ethnic groups. This information should be included in the design of the land or housing programme.

Secondly, during the recording of rights, the rules and procedures should ensure that the process and forms allow for including or indicating more than one property right holder.

And thirdly, both of these previous recommendations will result in recognition of women's rights if education and gender training for participating populations and the officials implementing the programmes are included in land and housing programmes. Gender training and the inclusion of women's rights in informational campaigns are necessary for both men and women to know what their rights are and how to participate fully in the programme. Officials who do not know what women's rights are and are not aware of the importance of recognising them will not take the effort to seek out women and make certain that they are not being disenfranchised. Thus gender training of land and housing officials is necessary as well.

Lastly, but not least in importance, is the involvement of civil society, of community groups, social organisations, and NGOs. Civil society organisations are crucial at different levels and stages of land and housing programmes. The pressure of social organisations to legally recognise women's land and property rights has resulted in important reforms of land, family, inheritance, and housing laws. Oversight by women's organisations and other gender-aware organisations are also useful for ensuring that the laws are implemented. Also, as we saw, the involvement of community and social organisations as well as NGOs in the implementation of land and hous-

ing programmes can facilitate the inclusion and participation of women in the programme and the recognition of women's property rights.

6.3 Monitoring and Evaluation

Our last set of recommendations refers to the monitoring and evaluation of land and housing programmes with regard to women's rights. In order to monitor the extent to which gender-specific programme objectives are being met, to carry out mid-stream implementation adjustments, and more generally to evaluate the gender-specific impacts of a given programme, it is essential that projects maintain gender-disaggregated databases and carry out periodic data collection at different levels.

At the programme level, information on programme participation and benefits should be disaggregated by gender, including programme personnel statistics, attendance at public information and training sessions, as well as issuance of legal titles and land certificates. At the community level, key informant interviews and focus groups of beneficiaries can provide qualitative feedback to community groups and programme officials and managers regarding the perception of programme impact and women's and men's satisfaction with the implementation of the programme.

Land and housing programmes should also administer a baseline household survey to collect gender-disaggregated information, and at least one mid-term and one end-of-programme household survey to be able to track gender-specific changes against the baseline data. If designed properly, such information can allow for mid-stream modifications in the programme if needed and for the quantitative assessment of the impact of the programme on women effective property rights, women's economic opportunities, and intra-household bargaining power.



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While independent forms of land and housing tenure may provide most security of tenure, the reality for the majority of women is that they cannot afford such independent access and that secure tenure depends on their relations with husbands, fathers and other male relatives. Joint or shared tenure options, such as community of property, co-ownership of family land, family tenure, collective land rights for informal settlement dwellers, women's groups accessing land and housing, provide different levels of secure tenure for women in law and practice. This publication provides a global overview of marital property and co-ownership rights, both in legislation and in practice, while also seeking to map out more innovative forms of co-tenure that may benefit women

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UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME
P.O. Box 30030, GPO Nairobi 00100, KENYA
Telephone: 254-20-7623120; Fax: 254-20-7624266/7 (Central Office)
E-mail: infohabitat@unhabitat.org; Website: <http://www.unhabitat.org>