

# CONNECTING RIGHTS TO REALITY: A PROGRESSIVE FRAMEWORK OF CORE LEGAL PROTECTIONS FOR

## *Women's Property Rights*

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**T**he world now demands that countries guarantee women's property rights as a key strategy toward achieving gender equality and empowering women more broadly – as stipulated by Millennium Development Goal 3. Laws to protect women's property rights exist in most countries, and governments are adopting new laws every day. In practice, however, many women still find that they cannot realize their rights.

This disconnect between rights and reality stems primarily from the fact that property rights belong to no one legal arena. Legally, property rights are fixed through various, and sometimes contradictory, bodies of law, ranging from constitutional and land titling law to marital and divorce law. Property rights also are defined through a mix of customary and religious laws. These multiple legal frameworks can create contradictions and confusion in what women's rights are and which ones should be recognized. Moreover, many of these rules continue to reinforce gender inequities.

Experts agree that the harmonization of laws across different statutes is a crucial step toward strengthening women's property rights. That said, little is known about the current state of women's property rights in developing countries and the progress countries are making toward guaranteeing these rights. As such, ICRW undertook a global scan of legislation in 102 countries in Africa, Asia (including the Caucasus), the Pacific, Latin America and the Caribbean. The project sought to document:

- What are the various components of current laws that work to protect women's rights?
- What lessons can be learned about how countries are fitting the different legal pieces together toward protecting and fulfilling women's property rights?

The findings allowed ICRW to develop a progressive legal framework of 12 elements for protecting women's property rights and to use this framework to assess countries' current legal systems.

The results are encouraging. Most countries have taken the crucial first step by constitutionally guaranteeing equal protection for women and men and women's right to own property. And several countries, particularly post-conflict countries, have begun to build equality provisions into statutes regulating inheritance, land and tenure reform, women's access to marital property, or divorce and spousal succession. Still, only a handful of countries have made substantial progress toward instituting a comprehensive framework of provisions that codify women's rights and protect these rights in reality.

### BACKGROUND

International consensus is now well-established around the central role of women's ability to own, inherit and control property in achieving economic development, equity and empowerment. International treaties and conventions, notably the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of



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## SOURCES AND METHODOLOGY

Some previous efforts have been made to document progress toward the protection of women's property rights. For example, the 2000 Progress of the World's Women report from the United Nations Development Fund for Women (UNIFEM) examined national governments' constitutional provisions for gender equality and nondiscrimination. Other publications examine legislative frameworks in specific regions or across a specific set of countries. These include a review of 10 sub-Saharan countries by the Centre for Housing Rights and Evictions (COHRE) and a review of four eastern African countries by the U.N. Habitat Centre. Human Rights Watch and the Food and Agriculture Organization (FAO) of the United Nations have published case studies of legislative frameworks of countries including Kenya, Uganda, Zambia and Zimbabwe.

ICRW built upon these and other resources to compile a database of relevant laws in 102 countries: 51 across the different regions of Africa, 30 from Asia (including the Caucasus region), and 21 from Latin America and the Caribbean. The assessment covered countries' constitutions; civil codes and other laws governing family, personal, marital and succession matters; and land and agrarian laws. Due to limitations of time and resources, the information was largely obtained from secondary sources. Therefore, care needs to be exercised in drawing comparisons, since it is possible that a country may have legal provisions that have not been addressed in the secondary literature. Nevertheless, by establishing a framework of core legal protections for women's property rights, the study is able to broadly gauge the adequacy of a country's legal protections.

Discrimination against Women; and the International Covenant on Civil and Political Rights, include provisions governing women's right to property. Constitutions throughout the world forbid discrimination based on sex, and several guarantee women and men equal rights and protection under the law. Many new laws and reforms of existing laws have taken measures aimed specifically at expanding or enhancing women's property rights.

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

treaties equivalent to or superior to domestic law, thereby providing a clear invitation for judges to render decisions based on international law provisions. Cambodia specifically commits itself to recognizing international law governing women's and children's rights.

The formal legislative framework also may influence decisions based on customary law. ICRW research in India has shown that the underlying threat of formal legal action helps mediation processes on women's property rights, both within families and in the larger community (Swaminathan et al. 2007). Other research indicates that where multiple legal frameworks exist, women often use them creatively to gain the most favorable outcome. For example, when men manipulate custom, women may take recourse from statutory law. On the other hand, when women face threat of access to land by more powerful women in the household compound or community, they prefer to appeal to customary bodies (Verma 2007, Mackenzie 2003).

Formal laws thus are important both in their own right and in establishing a normative framework that gives women options in negotiating customary law and practices.

**TABLE 1. 12 INGREDIENTS OF A PROGRESSIVE LEGAL FRAMEWORK**

CONSTITUTIONAL GUARANTEES	
1.	Constitutional guarantee of equal protection between men and women, regardless of marital status.
2.	Recognition of women's right to own and control separate property.
INHERITANCE LAW	
3.	Guarantee that sons and daughters inherit equally under intestate law.
LAND AND TENURE REFORM	
4.	Recognition of women as direct beneficiaries and eligible for land, regardless of marital status.
5.	Joint titling for spouses and consensual union partners.
MARITAL PROPERTY LAW	
6.	Provision for all three marital regimes (separate, joint, full community of property), with full community of property as the default regime.
7.	Joint administration of marital property.
8.	Joint titling of major assets, including land and house, requiring the consent of both spouses to effect a mortgage, lease or sale. Lack of documentation to the contrary would cause assets to be presumed joint in the case of married persons.
9.	Consensual and customary unions (including polygamous) would have the same rights as couples married in civil unions.
10.	Provisions regarding the equal division of joint marital property.
11.	Intestate succession laws provide spouses a share of the estate, including marital home.
12.	Testamentary freedom restricted to guarantee spouses a portion of their deceased partner's estate, including marital home.

## PROGRESSIVE FRAMEWORK: CORE LEGAL PROTECTIONS FOR WOMEN'S PROPERTY RIGHTS

The ICRW assessment of current laws determined that 12 elements are needed to construct a progressive legal framework that lays the ground for women's equal property rights (see Table 1). Other elements also are important to ensuring women's property rights and are explored in this report. The 12 elements, however, represent a legal core and foundation from which countries may start to promote and protect women's property rights.

### Constitutional Guarantees Underlying Property Rights

A country's constitution can provide a crucial foundation for the realization of women's property and inheritance rights. Incorporating norms of equality and anti-discrimination in a constitution has the effect of embedding them in all other statutory law, and even in customary and religious law if so provided. However, constitutional declarations on equality and discrimination alone are not sufficient to ensure women's property rights, since guidance on how these norms should be applied to mediate women's and men's access to property is generally provided by civil and land law.

A constitution may specifically provide for women's right to own and control property; prohibit discrimination based on sex or gender; guarantee equality before the law; or guarantee equal rights between men and women. Among the different provisions, the guarantee of equal rights for men and women has the most far-reaching implications, particularly when it specifically guarantees equal rights for men and women both within and outside of marriage. Provisions for equal rights and responsibilities of spouses imply that a spouse's right to property upon dissolution of a marriage (through either death or divorce) should be the same regardless of sex. Equality of rights and responsibilities further indicates that both spouses have the same rights to administer joint marital property or their separate individual property.

Most countries in Africa, Asia and Latin America have adopted constitutional provisions that aim to eliminate gender discrimination and enhance equity. Notably progressive are the constitutions of Cambodia, Cuba, Ecuador, Eritrea, Ethiopia, Guyana, Malawi, Rwanda, Uganda, Uruguay and Vietnam. Regional progress in adopting other provisions of a progressive legal framework remain uneven (see Charts 1, 2 and 3).

*Women’s right to own and control property*

Of all the countries examined in the study, 57 countries recognize women’s right to own and control their separate property, providing a critical foundation for realizing women’s access to property.

*Prohibition of discrimination based on sex or gender*

At least 22 African countries, 14 Latin American countries and nine countries in Asia specifically prohibit discrimination based on sex. Notably, some also obligate the government to take measures to eliminate discrimination against women specifically. These include Cambodia, Chad, Republic of the

Congo (Congo), the Democratic Republic of Congo (D.R. Congo), Ecuador and Ethiopia. Malawi and South Africa prohibit discrimination based on sex and marital status.

*Guaranteed equal protection before the law*

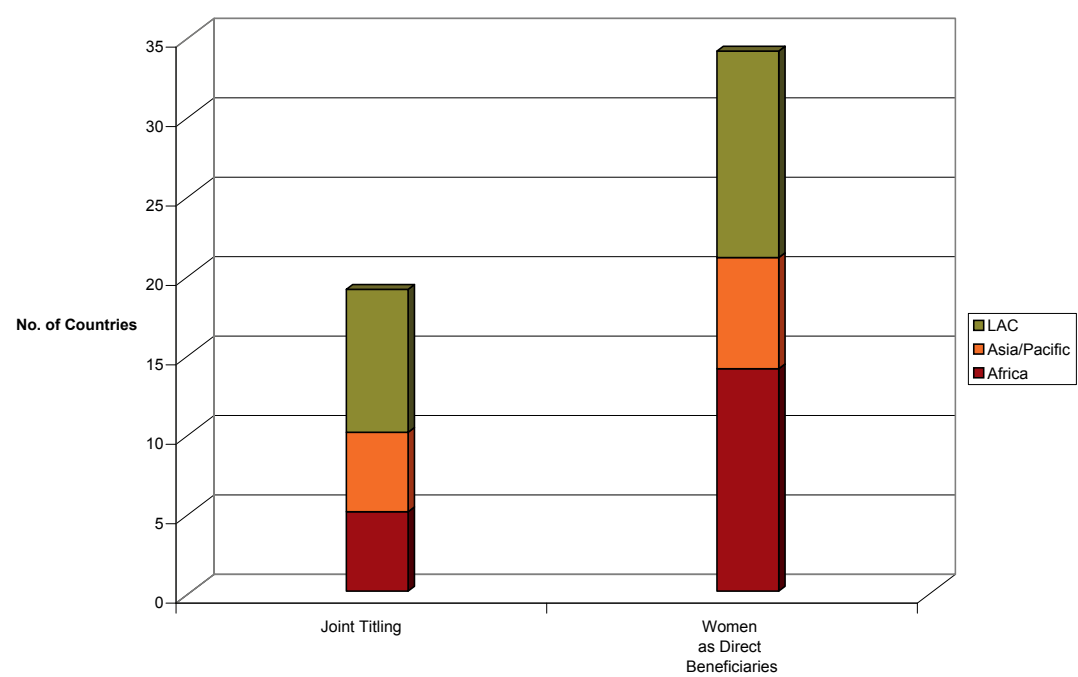
The vast majority of nations provide for equality of citizens or their equal protection before the law, with some explicitly specifying equality or equal protection regardless of sex (Benin, Burundi, Congo, D.R. Congo, Djibouti, Gabon, Guinea Bissau, Niger and Togo) or making specific reference to equality between men and women (Argentina, Ecuador, Nicaragua and the Philippines).

*Guaranteed equal rights between men and women*

Guarantees of equal rights for men and women are less common, with the exception of the Asian region. Interestingly, in many parts of Asia constitutional declarations of equal rights between men and women (or regardless of sex) appear to be more common than prohibitions of discrimination. Equal rights are mandated in the constitutions of Azerbaijan,

**CHART 1: LAND AND TENURE REFORM**

LAND AND TENURE REFORM ARE OPPORTUNITIES TO AFFORD AND PROTECT WOMEN’S PROPERTY RIGHTS. KEY PROVISIONS ARE JOINT TITLING AND WOMEN AS DIRECT BENEFICIARIES OF PROPERTY. LATIN AMERICAN COUNTRIES HAVE GONE FARTHEST IN MAKING THESE CHANGES.



Note: This chart includes only countries for which ICRW was able to obtain secondary information related to each statutory provision. As a result, some countries may have a provision in place, yet not be represented in this graph.

Cambodia, China, Indonesia, Kiribati, Laos, Papua New Guinea and Vietnam. Several also specifically include reference to economic and family rights.

In the North African countries examined,<sup>1</sup> Egypt and Morocco guarantee gender equality of rights, and these rights are qualified as *public* rights and *political* rights, respectively. This public-political distinction has the effect of excluding rights under family law, including those related to property and inheritance. In sub-Saharan Africa, the constitutions of Ethiopia, Namibia,<sup>2</sup> Rwanda and Uganda guarantee spouses' equal rights both during marriage and in the event of its dissolution, while Angola guarantees women equal rights with men in the family, and Burkina Faso prohibits discrimination in the marriage. In Latin America, such provisions are found in Ecuador's constitution and Brazil's 2002 civil code.

### Inheritance Law

Because women are often financially or practically unable to purchase land, housing and other major assets in their own right, inheritance is an important way for women to obtain property (COHRE, 2000). Laws governing the disposition of property when the deceased has not left a will (intestate laws) are particularly important in poor rural areas where will writing is not common.

#### *Equal inheritance rights for sons and daughters*

A significant number of the countries studied (23 in Africa, 11 in Asia and 19 in Latin America) have

progressive intestate laws guaranteeing that sons and daughters inherit equally. However, intestate succession laws in many other sub-Saharan African countries refer generally to the inheritance rights of "children" and make no specifications about gender equality.

Perhaps the best-known example of legal discrimination between the inheritance rights of daughters and sons is found in countries in Africa and Asia that codify or defer to Islamic Shariah law to govern Muslims. Algerian law, for example, assigns daughters one-third of their father's estate, while sons receive two-thirds. Although radical change to succession law governing Muslims has been resisted, some countries have been successful in adapting Shariah to better serve daughters' interests. Tunisia permits only daughters to inherit the entirety of their parents' estate rather than devolving it to paternal uncles; in addition, should a daughter predecease her father, her children are entitled to inheritance. Recent reforms to the Moroccan family code likewise entitle the grandchildren of daughters to inherit equally with the grandchildren of sons.

Only a few countries in Asia have clear provisions on daughters' inheritance rights. Intestate inheritance laws in Laos, the Philippines and Vietnam as well as most of Central Asia provide for all children to inherit equally, explicitly or implicitly regardless of sex, and for children to inherit equal shares with surviving spouses and, in many cases, parents.

### COULD POST-CONFLICT COUNTRIES PROVIDE WOMEN GREATER PROPERTY PROTECTION?

Many of the countries making the most significant progress in establishing legal protections for women's property are in post-conflict countries, according to ICRW's global scan of 102 countries in Africa, Asia (including the Caucasus), the Pacific, Latin America and the Caribbean.

Though this finding is preliminary and needs further exploration, it suggests that countries rebuilding their social institutions or which are influenced by international donor demands may provide opportunities to push women's property rights forward. Perhaps most important, it points to the need to harmonize laws across different sectors because in many countries with rich legal histories, even if they adopt more progressive laws, these legal instruments may contradict – or be undermined – by earlier legal provisions.

<sup>1</sup> Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia

<sup>2</sup> In Namibia, the constitutional right only applies to civil marriages and does not extend to marriages under customary law.

**TABLE 2. MARITAL PROPERTY REGIMES**

REGIME	ALSO KNOWN AS	DESCRIPTION
SEPARATION OF PROPERTY	“Out of community of property”	All property acquired by the spouses prior to and during their marriage remains the separate property of the spouse who acquires it.
FULL COMMUNITY OF PROPERTY	“In community of property”	Assets and income brought into the marriage and acquired during the marriage become joint property of the couple.
PARTIAL COMMUNITY OF PROPERTY	“Limited community of property”	Assets acquired by each spouse prior to the marriage are regarded as separate property, and those acquired after marriage, along with the income earned during marriage by each spouse, are regarded as joint property. Many countries recognize gifts and inheritances granted to only one of the spouses after the marriage as separate property. Moreover, income earned on separate property assets during the marriage also may be regarded as joint.

Most Latin American countries grant all children – boys and girls – equal inheritance rights under their civil codes. However, some countries, including the Dominican Republic, Honduras, Mexico, Paraguay and Venezuela, exclude land from these provisions. Instead, under agrarian law, land may be allocated to a single heir or daughters, and spouses may be excluded from land inheritance. Although such laws tend to be gender-neutral, tradition favors inheritance by eldest sons.

**Land and Tenure Reform**

Another important means by which women can acquire property is through land and tenure reform, where the government grants land rights to citizens. To protect women’s property rights, these policies should recognize women as direct beneficiaries, irrespective of marital status. Further, when land is granted to a married couple, titles should be provided jointly in the names of both spouses – not limited to the male head-of-household.

*Women as direct beneficiaries of land reform*

In Ethiopia, women and men, regardless of marital status, are eligible for land allocations. Married

couples also may acquire and register land jointly. This statute provides a shelter particularly for female-headed households, which constitute nearly 30 percent in the southern Tigray region.<sup>3</sup> Eritrea, too, awards all persons who farm an individual right to agricultural land regardless of their sex or marital status. Property rights in Eritrea are governed by customary law as well as by contemporary state laws that aim to promote equal rights.

*Joint titling of land*

Latin American countries have gone farthest in incorporating joint titling of agricultural land into agrarian law. At least five have made joint titling compulsory for land granted by the state to married and consensual union couples. Nicaragua not only mandates joint titling of land, but also recognizes joint titles, even if issued in the name of only the household head. El Salvador does not provide for joint titling, but because it presumes that all assets of a married couple are jointly owned, all land belonging to married persons is presumed joint. Others, such as Brazil, Ecuador and Peru, only have gone as far as making joint titling of agrarian reform land optional. Honduras passed land law making joint titling

<sup>3</sup> “Unequal access to natural resources”. FAO. June 27, 2006. FAO Newsroom. (<http://www.fao.org/newsroom/en/news/2006/1000342/index.html>), Oct. 19, 2007.

## THE GOAL: A COMPLETE MARITAL PROPERTY FRAMEWORK

Few countries have established the most favorable marital property framework: One where the default regime is full community of property, with joint administration of marital property mandated and accompanied by strong consent requirements, and where unions other than civil marriages are recognized.

Ethiopia has gone the furthest, having partial or full community of property as the default regime, presuming joint property unless otherwise documented, requiring joint administration of marital property with spousal consent, and recognizing alternative unions as long as they have been registered and have endured at least three years. Kyrgyzstan, Rwanda and Vietnam also have relatively progressive frameworks, except that they do not presume joint property or recognize alternative unions. Among the Latin American countries examined, only El Salvador specifies full community of property as the default regime. El Salvador also requires joint administration and recognizes alternative unions; however, ICRW's review did not find information on whether laws were in place to protect spouses in the event of the sale or mortgage of property.

At least 11 other Latin American countries, as well as nine countries in Asia and four in Africa, prescribe partial community of property as the default regime. Zambia also prescribes the partial

community of property regime, but assets such as the marital home can be accorded exclusively to the husband (UN-Habitat, 2005f). The majority of countries in Africa and Asia have no default regime, either not addressing the issue at all or requiring that the couple elect a regime when registering the marriage.

### DIVORCE AND SPOUSAL INHERITANCE OR SUCCESSION

Finally, protection of married women's property rights requires sensitive provisions governing women's right to property after a marriage ends through divorce, separation or death. These provisions not only ensure women's security in the dissolution of marriage, but they also have implications for women's access to independent land rights; inheritance remains the primary means by which women acquire land (Baranyi, et al, 2004).

Divorce laws should specify the equal division of joint marital property, with careful consideration to ensuring that women married within separation of property regimes are not therefore denied all property rights. Succession laws should guarantee spouses a share of their deceased partner's estate, including the marital home, whether or not the partner left a will. In both cases, as with marital property laws, it is crucial that customary, consensual and religious unions be recognized and regulated by the same statutes as civil unions.

mandatory in 1991, but amended the law a year later to render joint titling optional. Mexico's 1992 tenure reform, which awarded titles and stronger private rights to smallholders occupying agrarian reform land, made no provisions for joint titling.

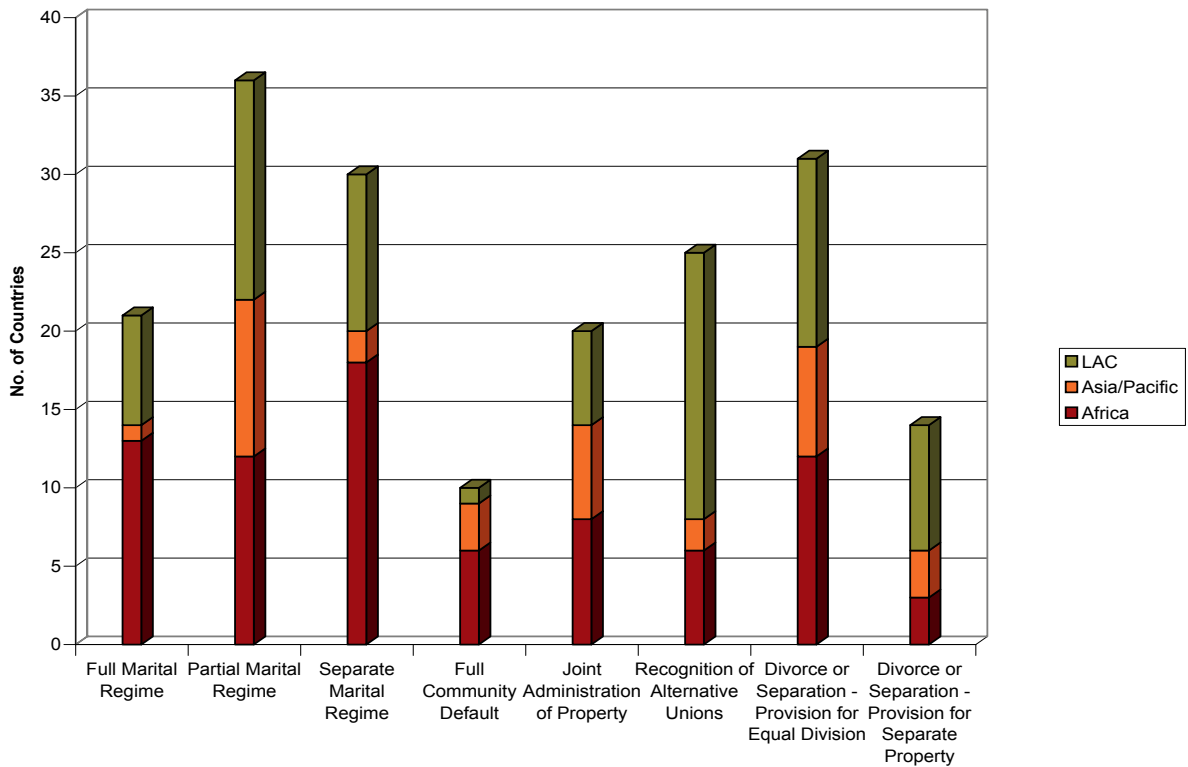
Requisite joint titling of land is rare in Africa, with only Mozambique mandating it in the case of couples married in community of property. In its 1999

tenure reforms, Tanzania incorporated mandatory co-registration that can be overridden only if the certificate of occupancy contains a statement authorizing one spouse to assume the rights.

Asia, India, Laos and Vietnam require joint titling of all registered land, while Vietnam extends the joint registration requirement to all registered family assets. Redistributed land in the Philippines and

## CHART 2: MARITAL PROPERTY LAW

GUARANTEEING WOMEN'S PROPERTY RIGHTS BROADLY IS NOT ENOUGH. THESE RIGHTS ALSO MUST BE PROTECTED THROUGH MARITAL LEGAL REGIMES. THAT SAID, MARITAL PROPERTY PROVISIONS CAN BE COMPLEX AND VARY SIGNIFICANTLY ACROSS REGIONS AND COUNTRIES.



Note: This chart includes only countries for which ICRW was able to obtain secondary information related to each statutory provision. As a result, some countries may have a provision in place, yet not be represented in this graph.

decollectivized land in Kyrgyzstan are subject to joint titling and registration.

### Marital Property Law

Statutory guarantees of women's rights to own and control property independently are distinct from rights married women have over property that they own jointly with their husbands. To protect women's property rights, married women must be guaranteed a say in how marital assets and income are used. In addition, it is important that laws governing marital property apply not only to civil unions, but also to customary, religious and consensual unions, including polygamous marriages.

#### *Full community of property as the default regime*

There are three possible regimes for establishing legal ownership of property within marriage: separation of property; full community of property; and partial community of property (see Table 2).

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

#### *Joint administration of marital property*

Joint administration ensures that both spouses have a voice in crucial transactions, such as the decision to sell or mortgage property. However, if the husband



is acting as the sole administrator of joint marital property (either by law or *de facto*), partial or full separation of property may provide women with greater protection, because any assets they brought into marriage belong solely to them and thus are outside the husband's legal control.<sup>4</sup>

#### *Joint titling with required spousal consent*

Similarly, marital assets, including land and housing, should be jointly titled and the consent of both spouses required to sell, lease or mortgage these assets. In case of lack of documentation to the contrary, assets should be presumed joint. If joint titling and required spousal consent are not legally required (or if this legislation is not enforced), full community of property leaves wives vulnerable to their husbands transferring not only those assets acquired by the couple during the marriage, but

also any property she may have had before she was married.

#### *Protection for women in customary or religious marriages*

It is important that law on marital regimes apply not only to civil marriages, but also to customary or religious unions. In Africa, while customary law often provides for the protection of wives, men generally owe their first loyalties to their extended natal families. The status of a wife as a family member is often ambiguous, and she may not be considered entitled to the assets of the family, particularly immovable assets such as land or the marital home (COHRE, 2004). Similarly, in Asia, the custom of patrilocal marriage is used as justification for women's exclusion from immovable property ownership.

## PROGRESSIVE LEGAL FRAMEWORK MAY NOT BE ENOUGH IN SOUTH AFRICA

A progressive legal framework is crucial to helping women protect their property rights. However, as seen in South Africa, a progressive framework alone is not enough to ensure that women's property rights are valued and respected. The broader culture also must change to help interpret and enforce these laws.

South Africa has two key elements of a progressive legal framework for women: a strong constitutional right to equality of men and women, and recognition of customary marriages. A woman's right to equality is broadly protected as a human right in the country's bill of rights. It also is stipulated in Section 9 of the constitution, which sets out the various components of that equality, including positive measures to achieve equality and ensure equal enjoyment of all rights and freedoms, and language that prevents and prohibits unfair discrimination.

The 1998 Recognition of Customary Marriages Act takes these rights one step further by protecting women who marry and acquire property outside of

the formal legal structure. Specifically, the act affords women who marry through customary means the same legal standing as women in civil law marriages (Bronstein, 2000; Bonthuys and Pieterse, 2000).

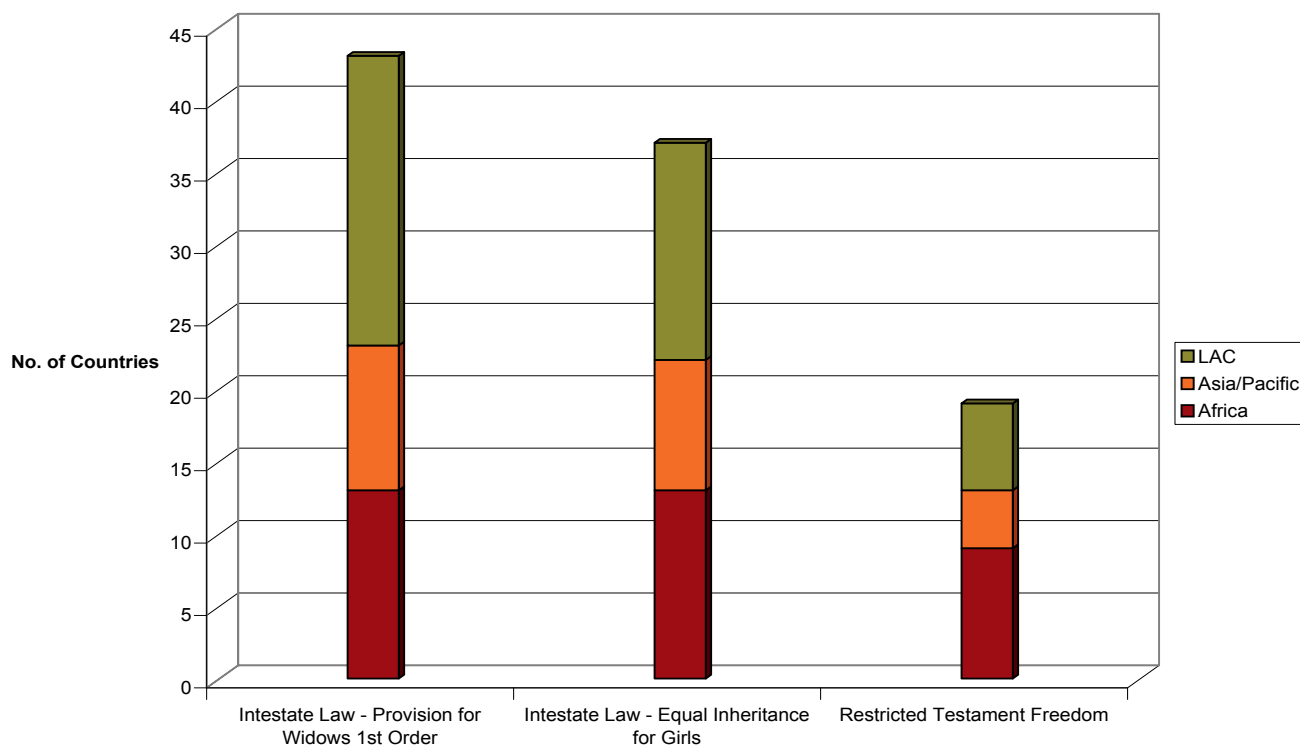
Despite these protections, case law – where the courts interpret and apply broader constitutional laws – can undermine women's property rights in practice. The case of *Jordan v. the State*, for example, suggests that the courts can limit the application of the equality right by stipulating requirements, such as context and dignity measures, which make it easier to decide rulings that ignore or impede women's property rights (Albertyn and Goldblatt, 1998). Such requirements also allow courts to ignore the reality of women's lives, e.g., women ostracized from their families – and lose all property – because their husbands die of AIDS-related illnesses.

SOURCE: CATHERINE ALBERTYN. "WOMEN'S RIGHTS." CENTRE FOR APPLIED LEGAL STUDIES, AUGUST 2004.

<sup>4</sup> This provision assumes that husbands cannot exert marital power over their wives and therefore manage their separate property.

### CHART 3: INHERITANCE, SUCCESSION LAWS

WOMEN’S AND GIRLS’ RIGHTS TO INHERIT PROPERTY GREATLY AFFECT THEIR ABILITY TO PROVIDE FOR THEMSELVES AND THEIR FAMILIES, ESPECIALLY WHEN A CRISIS HITS. COUNTRIES IN LATIN AMERICA HAVE MADE THE MOST SIGNIFICANT GAINS FOR BOTH WIDOWS AND GIRLS, THOUGH MUCH MORE NEEDS TO BE DONE BOTH THERE AND IN OTHER REGIONS.



Note: This chart includes only countries for which ICRW was able to obtain secondary information related to each statutory provision. As a result, some countries may have a provision in place, yet not be represented in this graph.

Most countries appear to exclude customary marriages from statutes regulating property entitlements. In Africa, civil law does apply to customary marriages in Ethiopia, Mozambique, Rwanda, Senegal, South Africa, Uganda and Zimbabwe – but only when the marriages are registered. Botswana and Nigeria recognize customary marriages that are registered, but exclude them from coverage under marital property and inheritance laws. Similarly, several countries in Asia and North Africa (e.g., Bangladesh, Egypt, India, Indonesia and the Philippines) recognize religious marriages, but allow religious laws – which often discriminate against women – to dictate property rights within these marriages. Vietnam took a positive step forward in 2000 by amending its Marriage and Family Act to decriminalize alternative unions such as customary marriages.

Similar to customary marriages, polygamy and consensual unions also need to be recognized by legal

marital regimes. Polygamy is prohibited in Botswana, Rwanda and Tunisia, and highly restricted in Morocco, and so women who marry into these arrangements have no legal protection. In Mozambique, polygamy is neither sanctioned nor outlawed, but a man may only register one wife, thereby excluding additional wives from property entitlements. Although customary marriages and polygamy are recognized in Ghana, statutory law on marital property does not apply to these marriages. Kenya, South Africa, Zambia and Zimbabwe recognize the inheritance rights of multiple wives.

Many countries in Latin America recognize consensual unions as covered by marital property laws (at least 18 of those examined), with exceptions such as Chile, Dominican Republic and Peru. However, typically the couple must formally register those unions, an uncommon practice especially for rural couples (Deere and Leon, 2001). Colombia is unusual in that the union must only be stated, not registered

(Giovarelli, 2006). Legal recognition of consensual unions is virtually absent in Africa and Asia, with only Ethiopia, Mozambique and the Philippines according them recognition.

#### *Equal division of joint property following divorce*

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

Divorced or separated women are especially vulnerable in countries like Kenya, where the courts are free to apply discriminatory customary law when making property and maintenance determinations. Malawi also allows the determination to be made by courts, but law guides courts to establish fairness of property division based on the means of the husband and needs of the children. Divorce is illegal in the Philippines, but in the event of separation, courts determine property division based on determinations of the parties' guilt. In Chile, divorce is also illegal, and it is additionally unclear what claims women have if they separate from their husbands. China has a new progressive law in which a divorced rural woman has the right to retain a share of household land in her ex-husband's village, unless she acquires land in her natal village or another community where she establishes residence.

#### *Right to a share of a deceased spouse's estate*

Many countries recognize women's right to inherit a portion of a deceased husband's estate, but the share due to wives can be insignificant if they are not accorded first-order priority among all potential beneficiaries. Women's succession rights are

particularly tenuous in countries that recognize separation of property as the default regime. For example, in Kenya, marital property can be kept separate with conditions. Wives lack legal ownership over any assets their husbands brought into the marriage or acquired during it. After her husband dies, a widow has the right to use but not control her deceased partner's assets. Zimbabwe has adopted a gender-neutral law that guarantees surviving spouses ownership of the matrimonial home while the remainder of the estate is divided between them and the children. In both countries, a widow left out of her husband's will must appeal to the courts for a maintenance provision.

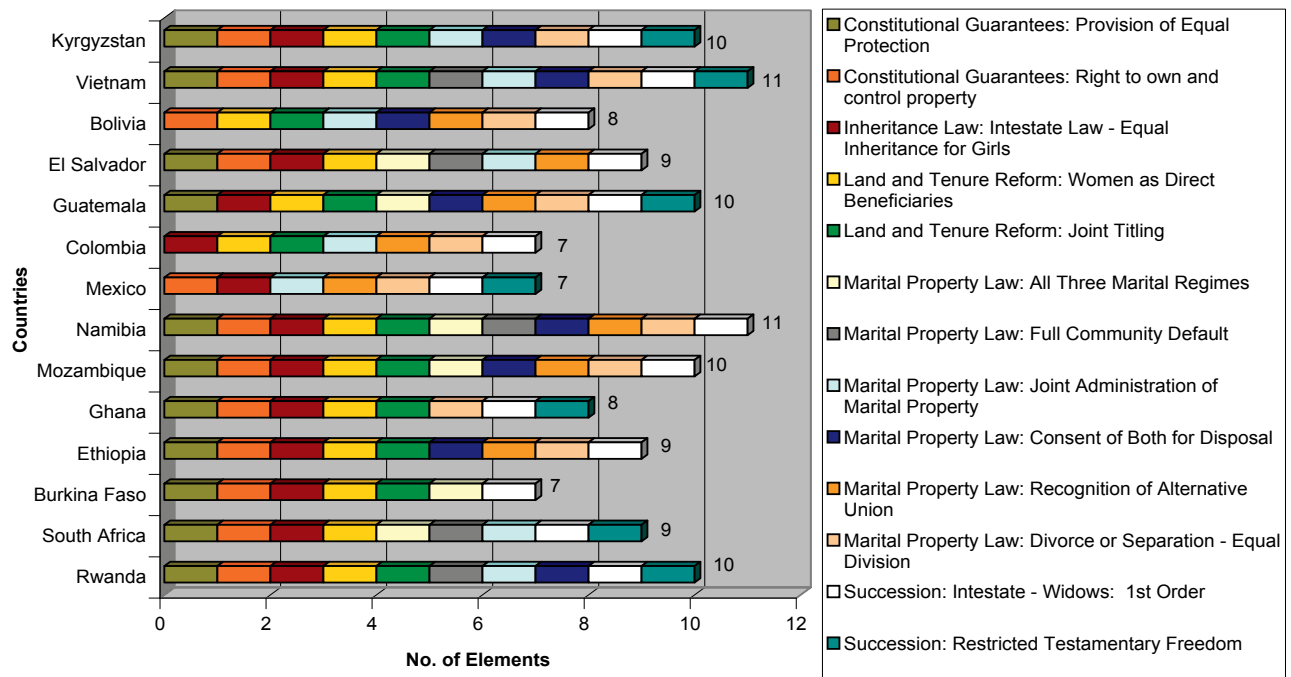
Intestate provisions in China, India and some Central Asian countries require widows to share equally in the estate with children and the mother of the deceased. Partial community of property is the sole or default regime in these countries such that half of the joint marital property remains with the widow and does not form part of the deceased's estate.

Inheritance rights for widows are much more favorable in Latin America. In almost every country examined, partial community of property is the default marital regime, and intestate law guarantees widows a share of the deceased's estate.<sup>5</sup> In Bolivia, El Salvador, Colombia, Chile, Ecuador and Peru, if the deceased has left no will, the estate is divided equally among the surviving spouse and children. Guatemala, Guyana, Mexico, Panama and Uruguay, however, allow widows to claim maintenance and support only when they demonstrate economic need, and in Mexico maintenance is forfeited if a woman remarries.

Inheritance of land is in some cases dealt with separately under land law, rather than under civil laws governing succession. Ghana, Kenya and Rwanda, as well as the Dominican Republic, exclude women from inheriting ancestral land altogether. Efforts to inject greater gender equity into agrarian reform have led Colombia, Cuba, Ecuador, Guatemala and Honduras to guarantee widows the right to inherit land, or at least agrarian reform land, when their spouse dies intestate. In Nicaragua, mandatory joint titling of land (thereby excluding land from the separation of property regime), combined with intestate provisions

<sup>5</sup> Partial community of property and intestate inheritance by widows of the deceased's share of marital property is also the framework for Guatemala and Mexico.

CHART 4: SELECT COUNTRIES WITH ELEMENTS OF A PROGRESSIVE LEGAL FRAMEWORK<sup>6</sup>



for the surviving spouse to inherit the deceased’s share of marital property, ensures that widows are entitled to inherit agrarian reform land.

*Restrictions on testamentary freedom*

To protect women, some countries have imposed limits on testamentary freedom (a person’s right to determine disposition of his or her property after death). Full testamentary freedom can compromise the right of widows to inherit a share of the deceased husband’s estate. In Latin America, most countries limit the testamentary freedom of spouses by requiring that the surviving partner inherit some portion of the estate. However, only 15 countries studied in Africa and nine in Asia have testamentary restrictions. Malawi is one African country that is aggressive in limiting testamentary freedom, guaranteeing 50 percent of the deceased’s estate to widows and children.

South Africa is an example of a highly progressive inheritance regime. Surviving spouses married under the default full community or partial community property regimes inherit the entirety of joint marital property, including the homestead. If there are no living children, the widow inherits the full estate. A

widow is entitled to maintenance and support even if not provided for in her husband’s will.

*Succession for women in religious and customary marriages*

Women in customary or religious marriages may not enjoy statutory inheritance protections, even where these protections exist. For example, in Lesotho, Malawi, Nigeria and Rwanda, where most married women are in customary rather than civil unions, statutory law on inheritance does not apply to customary unions. Additionally, widows lose all or part of their inheritance if they remarry.

Several countries in northern Africa, sub-Saharan Africa and Southeast Asia recognize Shariah law on inheritance rights, either at the country level or limited to Muslim populations. Shariah presents a mixed picture for women. A widow with living children typically receives an eighth of her deceased spouse’s estate under a separate marital property regime. The advantage of Shariah for women is that a wife cannot be disinherited, because testamentary freedom is restricted to one-third of the estate.

India has three separate codes for succession: one governing Hindus; one governing Muslims in

<sup>6</sup> THE CHART DOES NOT CAPTURE THE QUALITY OF A PARTICULAR PROVISION OR ITS EFFECTIVENESS IN HELPING WOMEN REALIZE THEIR PROPERTY RIGHTS. FURTHER, A COUNTRY MAY HAVE SEVERAL OF THESE PROVISIONS IN PLACE BUT AT THE SAME TIME UNDERMINE PROPERTY RIGHTS WITH PROVISIONS ALONG ANOTHER DIMENSION OF THE STATUTORY FRAMEWORK.

accordance with Shariah; and one pertaining to Christians, Jews and Parsis. Hindu women marry under a separation of property regime and can be disinherited in their husbands' wills, leaving them with nothing but their own property, often no more than their dowries – primarily jewelry, furniture and utensils.

## **PUTTING THE LEGAL PIECES TOGETHER: WHAT CAN WE LEARN?**

Only a handful of countries have built relatively progressive legal frameworks based on the 12 elements for women's property rights. Among the 102 countries examined in this study, just 14 countries had seven or more progressive provisions (see Chart 4<sup>6</sup>).

Even in the case of the 14 countries that have several elements of the progressive legal framework, it is important to consider crucial legal gaps or even contradictory provisions in other aspects of law. For example, in Kyrgyzstan the provision of intestate succession, which gives women the first share to property in inheritance cases, is limited to disabled widows. Or in South Africa, the recognition of women's right to land as part of the gender policy is partially contradicted by the new land policy of distributing land to farmers who can demonstrate commercial viability.

Statutory law is constantly evolving. New laws and acts may undermine provisions or create greater confusion by not clarifying emerging contradictions in statutory law. For example, Rwanda's 1999 matrimonial and succession law states that women and men have equal rights as kin, but is not explicit about what should happen in cases of divorce or widowhood. This law is then referenced for the provision on women's equal access to land in Rwanda's 2005 land law. In other words, the gaps in the old law are not resolved, and the issue of inheritance rights for women remains ambiguous

(Verma 2007). In Uganda, an extremely progressive consent clause included in the Land Act of 1998 is today under threat. Bankers regard the clause as an impediment to the flow of market transactions and may attempt to negate it as part of a new mortgage bill (ibid). Attention to harmonization of laws across different sectors is crucial to ensure the efficacy of an overall gender progressive legislative framework.

## **CONCLUSION**

Women's property and inheritance rights provide a solid foundation for active participation of women in the development process of their countries. During the past several years, governments have made great strides in ensuring these rights through constitutional provisions and statutory law. However, many countries still lack a comprehensive progressive statutory framework that addresses women's legal property rights across various legal sectors, including marital and divorce law, land titling, and religious and customary laws.

The coexistence of potentially contradictory statutory provisions undermines the effectiveness of the formal legal framework to protect women's rights in many developing countries. Establishing specific legal protections is a solid first step, but governments also must ensure that the various provisions are in sync with each other. Moreover, countries rarely translate the political will demonstrated to pass new laws into clear and focused strategies that ensure effective implementation.

Progress is being made. By building on the progressive legal framework presented in this ICRW research, it is hoped that policy-makers, government leaders, nongovernmental organizations and other stakeholders can build a stronger system for women to realize and fulfill their property rights.

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