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Two Faces of Change:
The Need for a
Bi-Directional Approach
to Improve Women's Land
Rights in Plural Legal
Systems

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International Development Law Organization
Organisation Internationale de Droit du Développement

IDLO CUSTOMARY JUSTICE WORKING PAPER SERIES

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Two Faces of Change:

The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems

Amrita Kapur

EXECUTIVE SUMMARY

The complex relationship between law, land rights and customary practices is increasingly recognized as foundational to formulating successful development policies. Similarly, the essential role of women's economic participation in development and the current trend of gender discriminatory land and inheritance customary practices have prompted domestic civil society organizations in developing countries to use statutory provisions guaranteeing gender equality to improve women's land tenure security. This chapter examines the particular need for secure land rights for women in the African pluralistic development context, and the mixed results of targeting law reform as a mechanism for change. Relying on primary research conducted in Mozambique and the United Republic of Tanzania on land practices as experienced by divorced and widowed women, it evaluates strategies employed by domestic non-governmental organizations to enhance women's access to justice and land tenure security. In particular, the chapter analyses whether initiatives to disseminate and use statutory law (rather than customary law) are overcoming the lack of knowledge, application and enforcement that have previously limited the effectiveness of rights-affirming legislation. Specific and general conclusions are drawn from the data to generate recommendations for donors, governments and development institutions.

1. Introduction

A 40-year patchwork of development policies has succeeded in reducing poverty for 80 percent of the world's population, but left the remaining bottom billion — 70 percent of whom live in Africa — in development traps characterized by lower life expectancy, higher infant mortality and long-term malnutrition.¹ Land titling, registration, formalization and distribution has been a key process in the long-term strategy to promote economic growth and development. To a large extent, however, such policies and subsequent laws have been unsuccessful in pluralist legal contexts, because customary law continues to be observed by the majority of the population who live in rural communities and are largely ignorant of or unfamiliar with formal law and its institutions. Today, increasing recognition of the links between legal empowerment, poverty reduction and development has prompted greater international attention on how legal systems in developing pluralist countries operate with respect to land.

The distribution of land is a reflection of social, economic and political practices as much as it is an expression of law. In communities adhering to customary norms, decisions made by local leaders are followed as if they are law, but are in fact a product of traditional, cultural and social attitudes. Customary law has evolved in response to changing social, environmental and political circumstances to increasingly discriminate against women. This is particularly problematic given the symbiotic relationship that exists between the advancement of women and development.²

However, the internationalization of individual rights and subsequent government commitments to international human rights treaties have prompted several developing state governments to pass legislation explicitly articulating land rights, including women's land rights, in accordance with human rights principles. Contemporaneously, in response to the continuing rural disregard for formal law, international development agencies have shifted their focus to consider the operation of customary law at community levels.

The heart of the dilemma, the reason titling programs have failed in pluralist countries, and the challenge in implementing a more equitable distribution of land rights, lies in the 'catch-22' confronted by any formal approach. Any property system must be respected locally because central governments of developing countries are generally too institutionally and resource-poor to effectively administer and enforce a comprehensive property law scheme. However, traditional local structures³ are dominated by male local elites, who continue to enforce gender-discriminatory customary norms in preference to gender-neutral formal property law. The questions are then: how to ensure that the formal law will offer sufficiently secure land rights to women; and second, how to persuade or coerce local governance structures to follow formal law?

On closer inspection of the domestic context, including through primary research informing the conclusions of this chapter, domestic civil society and non-government organizations (NGOs) are using formal law rather than customary law as a tool to enhance women's land rights. By providing legal education to the rural community, training local paralegals, and establishing paralegal offices to assist women with land rights claims, domestic NGOs are attempting to change the culture and practices surrounding the distribution of land. This chapter explores why and how this approach has evolved, and whether and in what way it is succeeding. While many concepts and arguments apply with equal force across regions, examples and statistics are drawn primarily from Africa; detailed conclusions are drawn from primary research, comprising

¹ P Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can be Done About It* (2007) 7-8.

² World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, held in Nairobi, Kenya, from 15 to 26 July 1985; Annex to United Nations ECOSOC Resolution 1990/15 (24 May 1990).

³ The term "local" is used to indicate the level of governance, and the term "customary law" to indicate traditional cultural norms. Thus, local structures can be used to apply and administer formal law locally, either through existing traditional structures, or through newly created structures at the local level, including courts.

surveys of women and community leaders conducted in Mozambique and United Republic of Tanzania (hereafter "Tanzania") in early 2010.

Part 1 of this chapter describes the critical role that land plays in the process of economic development, the heightened importance of land in the African context, and the essentiality of women's economic participation to development. Part 2 describes the operation of plural legal systems, traces the traditional approach of focusing on formal laws to influence land usage, and outlines the continuing practical challenges of a law-based approach. Part 3 explores the strategies now being pursued by domestic NGOs and, based on primary research in the two case study countries, draws conclusions about the importance of legal empowerment programs in promoting gender-balanced land practices.

2. The elusive path to development

2.1 Land and economic development

The institutional arrangements under which a person gains access to land largely determines, among other things, what crops he can grow, how long he can till a particular piece of land, his rights over the fruits of his labor and his ability to undertake long term improvements on the land.⁴

Land rights, customary or formal, act both as a form of economic access to key markets and as a form of social access to non-market institutions, such as the household and community-level governance structures.⁵ In economic terms, an effective system of property rights is a public good because it encourages investment by property-holders and acts as a central element of capital and credit markets. State intervention is typically necessary to establish national systems of land administration to enforce property rights and bear the costs of providing a standardized property system.⁶ To that extent, establishing and enforcing property rights is linked to social order, and importantly, also to the perception of social order. Without a legitimate and capable government, the allocation and enforcement of rights may cause conflict when different claimants resort to competing legal, normative and coalitional enforcement mechanisms.⁷

The conventional approach to land rights, as typified by the World Bank's ideology, can be crudely summarized as follows: action must be taken to create land tenure security because increasing land tenure insecurity in most parts of the world forms an obstacle to investment and growth.⁸ In the 1980s, the World Bank addressed this issue through land titling and registration as part of its structural adjustment agenda, predicting greater security of tenure through the abolition of customary tenure. In the 1990s, it shifted its approach, conceding that, in some circumstances, customary tenure did not necessarily inhibit agricultural productivity, but nevertheless maintained its previous position that formalization and titling was ultimately the most desirable situation.⁹ Today, the World Bank recognizes that defining land rights is key to effectively using land resources, reducing poverty, promoting good governance, and ultimately, stimulating economic

⁴ G Benneh, Land tenure and agroforestry land use systems in Ghana, in J B Raintree (ed), *Land, Trees and Tenure: Proceedings of an International Workshop on Tenure Issues in Agroforestry* (1987).

⁵ World Bank, *Gender Issues and Best Practices in Land Administration Projects: A Synthesis Report*, Gender and Rural Development Thematic Group and the Land Policy and Administration Thematic Group of the World Bank (2005) 3, World Bank <http://siteresources.worldbank.org/INTARD/Resources/Gender_land_fulltxt.pdf> at 21 July 2010.

⁶ See K Deininger, *Land Policies for Growth and Poverty Reduction* (2003) 57, 117.

⁷ D Fitzpatrick, Evolution and chaos in property rights systems: the third world tragedy of contested access (2006) 115 *Yale Law Journal*, 1010.

⁸ V Stamm, 'The World Bank on Land Policies: A West African Look at the World Bank Policy Research Report' (2004) *Africa* 4, BNET <http://findarticles.com/p/articles/mi_hb3103/is_4_74/ai_n29150959/pg_4> at 21 July 2010.

⁹ A Manji, 'Capital, labour and land relations in Africa: a gender analysis of the World Bank's Policy Research Report on Land Institutions and Land Policy' (2003) 24(1) *Third World Quarterly* 97, 98.

growth.¹⁰ However, as the existence of the “bottom billion” and research on women’s land rights suggests, the recipe for successful development remains elusive.

2.2 Development in Africa

A complete understanding of the relationship between property rights and economic development is especially critical in the context of Africa. First, in most African countries, agriculture supports the survival and well-being of up to 70 percent of the population,¹¹ employs some 60 percent of the labor force, and accounts for 20 percent of merchandise exports.¹² Agriculture represents 33 percent of gross domestic product (GDP) in sub-Saharan countries, and up to 76 percent of GDP in some states.¹³ The family farm is central to the agricultural economies of most African nations; it is still regarded as highly productive and responsive to new markets and opportunities when conditions are favorable.¹⁴ Africa’s private sector is largely composed of family farms, and small- to medium-sized enterprises; in sub-Saharan Africa, over 96 percent of incomes are from a range of small-scale domestic entrepreneurial activity on family farms.¹⁵ Thus, the effects of any property rights regime are far-reaching and essential for economic prosperity.

Second, the importance of land is heightened by the explosive population growth and market development across the continent. Africa’s urban population increased nine-fold between 1950 and 2000, while its rural population increased by 265 percent — making it the fastest urbanizing continent in the world.¹⁶ Moreover, this growth has manifested in the form of informal settlements where land ownership is unclear.¹⁷ Consequently, competition over land has increased, fostering conflict between classes and neighbors, and within tightly-knit communities and families.¹⁸ Clarifying and enforcing these rights is therefore critical, not only because urban tenure issues are extremely complex and contestable, but also because of its broader implications for social harmony.¹⁹

In the context of African dependence on agriculture, increasing demand for land and unexplored potential for economic development, the effective legal enforcement of land rights is paramount. This is particularly so because rights to land in Africa stem from several different sources, including settlement, long occupation, government allocation, inheritance, when land is received through a gift process, and market transaction.²⁰ Similarly, property rights can be registered in various ways and at different levels, dependent on different systems of authority for their validation. Community councils, the

¹⁰ Deininger, above n 6, 11.

¹¹ R Gaway, ‘Investing in women farmers to eliminate food insecurity in southern Africa: policy-related research from Mozambique’ (2008) 16(1) *Gender and Development* 147.

¹² Food and Agriculture Organization (FAO), Technical Cooperation Department, *FAO and the New Partnership for Africa’s Development (NEPAD): A Partnership for Africa’s Agriculture*, FAO <<http://www.fao.org/docrep/005/AC735E/AC735E00.HTM>> at 21 July 2010.

¹³ J Diouf, ‘The Challenge of Agricultural Development in Africa’ (Sir John Crawford Memorial Lecture delivered at CGIAR Secretariat, Washington DC, 2 November 1989) World Bank <<http://www.worldbank.org/html/cgiar/publications/crawford/craw5.pdf>> at 21 July 2010.

¹⁴ C Toulmin, ‘Securing Land and Property Rights in sub-Saharan Africa: The Role of Local Institutions’ (2009) 26(1) *Land Use Policy* 10, 11.

¹⁵ D Spencer, ‘Will They Survive? Prospects for Small Farmers in Sub-Saharan Africa’ (paper presented at the Sustainable Food Security For All By 2020 Conference, Bonn, Germany, 4–6 September 2001) International Food Policy Research Institute <http://www.ifpri.org/2020conference/PDF/summary_spencer.pdf> at 21 July 2010.

¹⁶ United Nations Population Division, *World Urbanization Prospects: the 2003 Revision*, ST/ESA/SER.A/237, 28, United Nations <<http://www.un.org/esa/population/publications/wup2003/WUP2003Report.pdf>> at 21 July 2010.

¹⁷ T Bigg and D Satterthwaite (eds), *How to Make Poverty History: the Central Role of Local Organizations in Meeting the MDGs* (2005) 21.

¹⁸ S Berry, *No Condition is Permanent: the Social Dynamics of Agrarian Change in Sub-Saharan Africa* (1993) 639.

¹⁹ A K Tibaijuka, Conference on Land in Africa: Market Asset or Secure Livelihood (14 January 2005), UN-Habitat <<http://www.unhabitat.org/content.asp?cid=1220&catid=14&typeid=8&subMenuId=0>> at 21 July 2010.

²⁰ S Lastarria-Cornhiel, Impact of Privatization on Gender and Property Rights in Africa (1997) 25 *World Development* 1322.

patrilineal hierarchy, local governments, traditional leadership, irrigation authorities, city councils and land agencies comprise a multiplicity of structures that may give rise to inconsistencies in and ambiguity of title.²¹ Non-state governance mechanisms, commonly in the form of close-knit kinship networks applying customary traditions, predate the creation of many African states, and have evolved independently from, and often in contradiction to, state institutions.²²

Consequently, security of property rights depends on recognition of validity both by the state and the local community. Compounding this plurality of authority is the fact that most African central governments have neither the capacity nor the local knowledge to implement a fair, national land registration system,²³ resulting in only 2–10 percent of land in Africa being covered by formal tenure.²⁴ Navigating this yawning gap between legality and legitimacy is essential to effectively enforce land rights in rural areas where women are least likely to benefit from gender equality as provided for by formal law.

2.3 Women and development

Beyond its intrinsic significance, the systemic disempowerment of women is important because of the symbiotic relationship between the advancement of women and development. This disempowerment derives from the gendered discrepancy in poverty rates, the benefits flowing from increased economic participation by women, and in Africa, the dominant role women play in food production; each aspect improves only if women enjoy security in their control over and access to land used to produce food.

In the first instance, strategies for economic development and the eradication of poverty must focus on women simply because they comprise the majority of those in poverty, suffering not just from an average income of less than US\$1.25²⁵ a day, but also inadequate health, nutrition, education and lifestyle.²⁶ This “feminization of poverty” is characterized by higher numbers of women in more severe poverty than men, and the association of these two trends with rising rates of female-headed households.²⁷ Causes for this phenomenon have been variously ascribed to limits placed on female labor force participation including gender differences in access to formal employment, lack of access to credit and wage discrepancies;²⁸ several of these relate back to poor access to land.²⁹

Even with significantly deficient data,³⁰ it is still clear that the gender discrepancy of the extremely poor has deepened across decades. A study by the International Fund for Agricultural Development (IFAD) across 41 developing countries, accounting for 84 percent of the rural developing population, found that over approximately 20 years leading up to 1988, the gender discrepancy in the increase of the number of people below the poverty line was 17 percent; there was a 47 percent increase in poverty for women compared to 30 percent for men.³¹ In 2004, women still comprised 60 percent of those below the poverty line.³² Compounding this disproportionate poverty is the disempowerment experienced through the combination of precarious and underpaid

²¹ Toulmin, above n 14, 13.

²² Fitzpatrick, above n 7, 1011.

²³ Toulmin, above n 14, 10.

²⁴ Deininger, above n 6, xxi.

²⁵ The World Bank altered the benchmark figure from US\$1 to US\$1.25 to more accurately reflect the cost of living; see M Ravallion et al. Dollar a day revisited, *World Bank Policy Research Working Paper* (2008).

²⁶ See generally, United Nations International Research and Training Institute for the Advancement of Women, *Progress Report* (2004).

²⁷ J Devaki, *Women, Development and the UN: A Sixty-Year Quest for Equality and Justice* (2005) 107.

²⁸ *Ibid* 111.

²⁹ C Deere and C Ross, *Gender and the Distribution of Wealth in Developing Countries*, Research Paper 2006/115 (2006) 17.

³⁰ See Deininger, above n 6, 38 (acknowledging that poverty measured by household systematically ignores individual women and unpaid domestic work, and that poverty is not disaggregated according to sex).

³¹ M Buvinic, *Women in Poverty: A New Global Underclass* (1997) 108 *Foreign Policy* 6.

³² International Labour Organization, ‘More women are entering the global labour force than ever before, but job equality, poverty reduction remain elusive’ (Press Release, 5 March 2004), International Labour Organization <<http://www.ilo.org/public/english/region/eurpro/moscow/news/2004/womendayeng.pdf>> at 21 July 2010.

work, caring for children, and other unpaid household responsibilities. Women's lack of access to land, credit and better employment opportunities handicaps their ability to fend off poverty for themselves and their families, or to rise out of it.³³

Second, the logical corollary to the above is that the economic, political and social participation of and leadership by women is essential to development. There is growing evidence that suggests that a more equal distribution of assets, including land, leads to faster growth.³⁴ Indeed, development organizations credit the World Bank's realization of this truth as expressed in the World Development Report 2008: Oxfam notes that the critical message emerging from the report is that "gendered inequalities in access to, and participation in, markets, represent a significant constraint on increasing agricultural productivity and growth; [...] improving the terms on which women engage in markets could have significant effects on economic growth and poverty reduction."³⁵ As Muhammad Yunus found, this could be attributed to the fact that:

... compared to men who spent money more freely, women benefited their families much more. Women wanted to save and invest and create assets, unlike men who wanted to enjoy right away. Women are more self-sacrificing, they want to see their children better fed, better dressed and, as a result, the conditions of the entire community improved.³⁶

In Africa, the contribution of women's labor to the economy is already obvious — they provide up to 70 percent of agricultural labor force and produce up to 90 percent of the food crops.³⁷ If economic growth depends on broad-based participation, and secure access to natural resources is a pre-requisite for women's active participation,³⁸ then articulating well-defined property rights that enhance women's capacity to contribute to the national economy is essential for economic development. Access to land facilitates women's bargaining power within their household, as well as their representation and participation in decision-making processes at the community level.³⁹ Agarwal posits that women's ownership of land leads to improvements in their welfare, productivity, equality and empowerment.⁴⁰ That is, women's right to have control over land and what it produces diminishes their household's risk of poverty;⁴¹ increases agricultural productivity because they can be more secure that their investment in the land will be returned; is necessary for justice for them; and enhances the ability of disadvantaged women to challenge and modify existing power relationships.⁴²

These conclusions are borne out by the research: for example, a comparative analysis of Honduras and Nicaragua suggests a positive correlation between women's property rights and their overall role in the household economy: greater control over agricultural income, higher shares of business and labor market earnings, and more frequent receipt of credit. In Honduras, women with land rights in male-headed households produced higher

³³ UNDP, *Human Development to Eradicate Poverty*, Human Development Report (1997) 6 <http://hdr.undp.org/en/media/hdr_1997_en_overview.pdf> at 21 July 2010.

³⁴ K Deininger and L Squire, Economic growth and income inequality: re-examining the links (1997) *Finance and Development* 40-41, noting a possible explanation for this phenomenon is that the effects of inequality in asset ownership are transmitted through financial markets.

³⁵ R Holmes and R Slater, Measuring progress on gender and agriculture in the 1982 and 2008 World Development Reports (2008) 16(1) *Gender & Development* 37.

³⁶ I Tharoor, interview with Muhammed Yunus, Time.com (13 October 2006), Time <<http://www.time.com/time/world/article/0,8599,1546100,00.html>> at 21 July 2010.

³⁷ FAO, 'Gender and Access to Land' (2002) 4 *FAO Land Tenure Studies*, FAO <<http://www.fao.org/DOCREP/005/Y4308E/Y4308E00.HTM>> at 21 July 2010.

³⁸ P Koskinen, 'To own or to be owned: women and land rights in rural Tanzania' (2002) *Human Rights and Development Yale Book* 145, 149.

³⁹ FAO, *A Gender Perspective on Land Rights*, <<ftp://ftp.fao.org/docrep/fao/007/y3495e/y3495e00.pdf>> at 21 July 2010; Deere & Ross, above n 29, 3.

⁴⁰ See generally, B Agarwal, *Bargaining and Gender Relations: Within and Beyond the Household* (1997) 3(1) *Feminist Economics*.

⁴¹ B Agarwal, 'Gender, Property and Land Rights: Bridging a Critical Gap in Economic Analysis and Policy' in K D Askin and D M Koenig (eds), *Women and International Human Rights Law* (1999), 854.

⁴² B Agarwal, *A Field of One's Own* (1994), 39.

incomes through their own microenterprises than women without land rights. In Nicaragua, the share of crop and livestock income was higher for women with land rights in male-headed households compared to wives with no land rights.⁴³ Given the above conclusions, the enjoyment of secure property rights by women is essential for development, and a necessary focus for any broad development strategy. Conversely, the endemic gender discrimination in customary practices relating to control over land precludes the broader society's enjoyment of the benefits flowing from women's economic participation through the secure cultivation of their land.

3. Land rights in plural legal systems

3.1 Customary land law

The colonial legacy of plural systems of law comprising customary, religious and statutory systems within one state legal system still exists in many countries. The role of customary law varies between and within countries in its content and form, regulating diverse aspects of life, including family relations and the distribution of property. Customary rules are not static but continually evolving in response to cultural interactions, population pressures, socio-economic change and political processes.⁴⁴ With respect to land, one universal underlying distinction is between control of land based on some type of recognized possession (customary or formal, temporary or permanent), and access to land, which usually includes some decision-making power over the production process, products and use of land, but not ownership or possession.⁴⁵ Another general difference in land distribution trends is that resources (forests, water and grazing land) are allocated to the community, and agricultural land to individual households.⁴⁶ Since there is generally no further unclaimed land around inhabited areas, agricultural land is now acquired through inter-household (sale or borrowing) or inter-generational (inheritance or gift) transfers, inheritance being the most common type of transfer.⁴⁷

Customarily, control of land is determined largely by gender and class dynamics within the community; for instance, inheritance transfers generally preclude allocation and transfer of land to women, whether they occur within a patrilineal or matrilineal system. In patrilineal communities, property devolves through the male line from father to son; in matrilineal communities, property devolves through the mother's line and is generally owned and controlled by men but women tend to have greater rights than in patrilineal societies.⁴⁸ For example, there may be no inheritance rights for women in either system, but a daughter who stays in her birth matrilineal community may receive a small piece of family land as a gift from her father, to bequeath to whomever she wishes. Additionally, women in matrilineal societies often retain cultivation rights on their birth family's land after marriage, provided that they remain in their community. If a woman marries outside of the community, upon return to her birth community she is able to reclaim her cultivation rights: these rights are not generally granted in patrilineal societies.⁴⁹ Both systems require the husband to provide arable land to his wife to farm, which is generally used to grow food crops for the family in contrast to the husband's cash crops. Importantly, upon divorce or separation, a woman loses cultivation rights to her husband's land, and can only reclaim them in a matrilineal system if she returns to her matrilineal birth community.⁵⁰ Both tenure systems are structured to enable communities to take care of themselves; while women possess only secondary rights, in circumstances

⁴³ See generally E Katz and J Chamorro, 'Gender, Land rights and the household economy in rural Nicaragua and Honduras' (paper presented at the Annual Conference of the Latin American and Caribbean Economics Association, Puebla, Mexico, 9-11 October 2002).

⁴⁴ Toulmin, above n 14, 14.

⁴⁵ Lastarria-Cornhiel, above n 20, 1318.

⁴⁶ C Toulmin and J Quan, *Evolving Land Rights, Tenure and Policy in Sub-Saharan Africa* in C Toulmin and J Quan (eds), *Evolving Land Rights, Policy and Tenure* (2000) 21-22.

⁴⁷ Lastarria-Cornhiel, above n 20, 1319, 1322.

⁴⁸ L Cotula (ed), *Changes in 'customary' land tenure systems in Africa* (2007), 11.

⁴⁹ Lastarria-Cornhiel, above n 20, 1324.

⁵⁰ *Ibid* 1321.

of sufficient land supply, they nonetheless retain the means and access to land to maintain their family.

While formal laws are prone to being ignored or conspicuously unenforced in African communities relying on a parallel customary system, customary laws are particularly susceptible to contested interpretations in situations of increased land scarcity, leading to conflict, discrepancies with formal systems, and weak state enforcement capacity.⁵¹ The commercialization of agriculture and land, restructuring programs, urbanization and AIDS have further weakened customary systems, increased individualization of rights, and released the family and community from traditional obligations to certain members, such as women.⁵²

Contemporary deprivation of women's land rights results from the current land scarcity, conflict-driven and socially transformative challenges facing traditional communities. In responding to these existential threats to traditional structures, the typical response of customary leaders has been to tighten customary governance mechanisms or enhance exclusionary rights through a process of collective consensus — which typically excludes women.⁵³ Indeed, mounting pressures to protect the clan system attributable to increased land scarcity have caused local leaders to further constrain women's access to land through renegotiation of both formal and informal traditional relationships.⁵⁴ Many customary systems have come to entrench discrimination and exclusion along status, age or gender lines, or worse, have manipulated traditional rules to consolidate legal entitlements and the subsequent economic advantages in the hands of a few customary chiefs.⁵⁵

For example, Tanzanian widows who had historically been allowed to stay on their husbands' land were, immediately prior to the introduction of the Land Laws,⁵⁶ increasingly dispossessed of that land as it increased in value.⁵⁷ In Kenya, loss of property after a husband's death is reported to be frequent, and in Uganda, widows often experience harassment and "property grabbing" attempts by their husband's relatives.⁵⁸ Current rates of land ownership by women reflect these disturbing trends: for example, only 5 percent of Kenyan women own land in their own names; in Cameroon, the figure is less than 10 percent; and in Ghana, 10 percent. In Lesotho and Swaziland, women were considered legal minors until 2006 and 2005, respectively.⁵⁹

Customary practices in the two case study countries, Mozambique and Tanzania, demonstrate the complex interrelationships between various legal systems. Both are governed by statutory law, customary law and religious law, which overlap to varying degrees. In Mozambique, community courts have existed since colonial times to deal with civil disputes and small crimes, and although they are formally recognized in the Constitution, they are *not* part of the formal justice system. Accordingly, community courts receive no financial or material assistance from the government or judicial courts, and there is no right of appeal of community court decisions to the district courts. They do not comprise legally trained individuals bound to apply the law, but rather local elders elected by the community who generally try mediation and/or conciliation, or make

⁵¹ Deininger, above n 6, 35.

⁵² See T Nhlapo, Law versus culture: Ownership of freehold land in Swaziland, in A Armstrong (ed) *Women and Law in Southern Africa* (1987) 35-55.

⁵³ Fitzpatrick, above n 7, 1029.

⁵⁴ A M Tripp, Women's movements, customary law, and land rights in Uganda (2004)7 *African Studies Quarterly* 1, 2.

⁵⁵ Toulmin, above n 14, 14.

⁵⁶ See Part 2.2 for a comprehensive description of the Tanzanian Land Laws enacted in 1999.

⁵⁷ K Izumi, 'Liberalisation, Gender and the Land Question in Sub-Saharan Africa' (1999)7(3) *Gender and Development* 9-18.

⁵⁸ See W Bikaako and J Ssenkumba, 'Gender, Land and Rights: Contemporary contestations in law, policy and practice in Uganda' in L M Wanyeki (ed), *Women and Land in Africa* (2003) 233-277; Human Rights Watch, *Double Standards: Women's property violations in Kenya* (2003), Human Rights Watch <<http://www.hrw.org/en/news/2003/04/29/womens-property-rights-violations-kenya>> at 21 July 2010.

⁵⁹ J Mulama, *Women hold the key to food security*, Development Africa (2004) <<http://ipsnews.net/africa/interna.asp?idnews=23170>> at 21 July 2010.

decisions according to "equity, good sense and justice".⁶⁰ In practice, this results in the continuing application of customary law as it is understood by the local leaders at the time, which often focuses on women's duties rather than women's rights.⁶¹

Customary law in Mozambique is practiced in both matrilineal (in the north) and patrilineal (in the south) forms. In recent history, customary practices across both systems have prevented women from owning their land because control rights are vested with her husband or maternal uncles or nephews.⁶² Despite the 1975 government denunciation of customary law as "backward and superstitious", customary norms are still adhered to, particularly in relation to inheritance rights, the division of labor and gender power dynamics.⁶³

In Tanzania, issues such as inheritance are traditionally governed by religious or customary law, while other areas are explicitly governed by statute law. Customary law was formally recognized as a source of law in 1961 by the *Judicature and Application of Laws Act 1961 (JALA)*, but only to the extent that it does not conflict with statutory law (section 9). Unfortunately, the codification of customary law in the *Customary Law (Declaration) Order 1963*⁶⁴ prevents women and girls from being granted any right of inheritance to clan property and stipulates that all immovable property shall revert to a deceased husband's family when the widow dies or remarries.⁶⁵ Patrilineal customary law governs 80 percent of the population, with the remaining 20 percent comprising matrilineal communities. Neither permits women to inherit land, and the norm of allowing widows to remain on their family land varies across communities.⁶⁶ Right to occupancy is generally through "family transfers" or direct allocations by the state.⁶⁷ Given the malleability of customary law, its tendency to favor those who already possess power and authority, and its consequent gender discriminatory impacts, it is not surprising that the universalization and individualization of human rights have prompted governments and civil society to focus on formal law as the mechanism to promote gender equality.

3.2 Law reform as a mechanism for change

Both colonial and post-colonial government interventions have concentrated on legislative reform to shape land management practices, including efforts to codify customs. Regrettably, these customs, sourced from the local elites in communities, tended to distort the content of customary law and create a gap between practices on the ground and in the courts.⁶⁸ This situation typically entrenched gender discriminatory practices in formal law.

Against this backdrop, many African governments have subsequently enshrined gender equality or prohibited gender discrimination in their Constitutions, and passed legislation relating to land and other socio-economic opportunities explicitly protecting women's rights. For example, the Constitutions of Burkina Faso, Ghana, Mozambique, Rwanda, South Africa, Tanzania and Uganda all prohibit discrimination on the basis of sex.⁶⁹ Each

⁶⁰ P Raina, 'Republic of Mozambique – Legal System and Research', *Globalex – Hauser Global Law School Program* <<http://www.nyulawglobal.org/globalex/mozambique.htm> - [1.3_The_Courts](#)> at 21 July 2010.

⁶¹ Save the Children, *Denied Our Rights* (2009) 21.

<http://www.oxfam.org.uk/resources/learning/landrights/downloads/children_womens_property_inheritance_rights_mozambique.pdf> at 21 July 2010.

⁶² R Waterhouse, 'Women's Land Rights in Post-War Mozambique', in UN Development Fund for Women (UNIFEM), *Women's Land and Property Rights in Situations of Conflict and Reconstruction* (2001) UNHCR <<http://www.unhcr.org/refworld/docid/46cadad90.html>> at 21 July 2010.

⁶³ UNIFEM interview with Ismael Ossemame, Vice-President of the National Peasants' Union of Mozambique (UNAC) (1996), cited in *Ibid*.

⁶⁴ *The Local Customary Law Declaration Order of 1963*, Government Notice No. 436, 1963.

⁶⁵ M K Rwebangira, *The Legal status of women and poverty in Tanzania*, Research Report 100 (1996), 25.

⁶⁶ *Ibid*.

⁶⁷ Koskinen, above n 38, 175.

⁶⁸ Cotula, above n 48, 31; T Bennet, *Human Rights and African Customary Law* (1995) 64.

⁶⁹ Article 1, Constitution of Burkina Faso; Article 34(5) Constitution of the Republic of Ghana; Article 35, Constitution of the Republic of Mozambique; Article 11, Constitution of the Republic of Rwanda, Section 9(3), Constitution of the Republic of South Africa; Article 13, Constitution of the United Republic of Tanzania; Articles 31(2), 32(1), 33, Constitution of the Republic of Uganda.

of these countries have also passed legislation protecting gender equality across a range of activities, including political participation, property ownership, education and employment opportunities. Most importantly, the Constitutions generally stipulate that in the case of contradictory provisions between any other laws and the Constitution, the Constitution prevails.

3.2.1 Mozambique

In Mozambique, prior to 1997, land disputes required written evidence to substantiate claims of land use. Most rural farmers, especially women, did not have access to written contracts and over 70 percent of women in Mozambique could not read or write. Moreover, bureaucratic processes and a scarcity of courts and legal advice in rural areas made access to the justice system complicated.⁷⁰ Today over 70 percent of the population is governed in accordance with customary law, which varies significantly between and within different areas, but in many instances discriminates against women. In particular, customary law regulating land use and ownership provides that women's access to resources, including land, depends on her relationship by kin or marriage to male relatives. Accordingly, when a married woman's relationship with her husband ends through death or divorce, male relatives acquire control over land, which increasingly involves dispossessing the women of land and all its assets.

The formal law has evolved to be explicitly protective of women's rights, and land tenure security specifically. Article 36 of the 1990 Constitution provides that men and women are equal under the law in all aspects of political, economic, social and cultural life. It also provides that the State "shall recognize and guarantee" the rights of private ownership of property (art 82) and of inheritance (art 83). The Constitution acknowledges the plurality of legal systems that co-exist in Mozambique, to the extent that they do not conflict with the fundamental values and principles of the Constitution (art 4). In the event of any conflict, all other law is subordinate to the Constitution (art 2).

Chapter III of the *Land Law 1997*⁷¹ establishes women's equal right to land use and benefit (art 10), and to inherit (art 16):

Article 10(1): National individual and corporate persons, men and women, as well as local communities may be holders of the right of land use and benefit.

Article 16(1): The right of land use and benefit may be transferred by inheritance, without distinction by gender...

This law was considered a major breakthrough because it combined formal and customary law. In addition to the traditional recognition of written documents in land usage cases, it recognized customary tenure systems and the rights of people who had occupied land for over 10 years in good faith.⁷² It also established procedures for the delimitation and registration of community land rights to be implemented through a village lands registration regime with minimal funding because it built on existing community structures and relied on a large number of volunteers who were trained as paralegal guides.⁷³

However, its usefulness to women was severely limited because it only recognized

⁷⁰ L Maveneka, *Mozambique's Family Law Passes* (2004), Oxfam America
<http://www.oxfamamerica.org/newsandpublications/news_updates/archive2004/art6728.html> at 21 July 2010.

⁷¹ *Land Law of 1 October 1997*, English translation provided by MozLegal Lda
<<http://www.doingbusiness.org/documents/LawLibrary/Mozambique-Land-Law-Legislation.pdf>> at 21 July 2010.

⁷² Occupation in the belief that no one else had rights to the occupied land could be regarded as legally belonging to the occupier; however, women struggle in practice to enforce this right. See Waterhouse, above n 62, 50.

⁷³ Toulmin & Quan, above n 46, 15.

marriages registered within the formal system, estimated to cover 10 percent of the Mozambican population. This was subsequently remedied by the *Family Law 2004*, which defines three forms of marriage: civil, religious and traditional (art 16). To be recognized under Mozambican law, religious and traditional marriages must also meet the requirements of civil law marriages (arts 18, 24, 75). The law stipulates that the husband and wife administer the marital property equally and can freely dispose of the property, although disposal of common property requires consent in certain circumstances (arts 102–103); recognizes cohabitation of a year or longer between a man and a woman as a marriage; provides that wives are entitled to inherit the property of their husbands; and establishes a rebuttable presumption that the wife has contributed (non-monetarily, generally) to the marriage so that upon divorce, marital assets are to be equitably divided between the two parties. One additional issue not dealt with is that of polygamous marriage, which is not recognized by the *Family Law 2004* (arts 16(2), 30(1)(c)) but covers approximately one third of all Mozambican women.⁷⁴

Succession and inheritance are known in Mozambique as descent and distribution; both are governed by the Succession Chapter of the Portuguese *Civil Code 1966*, which is based on a patrilineal system of inheritance (for example, arts 2079 and 2080 give preference to male heirs over female heirs) and is currently under review by the Government because of its inconsistency with the *Family Law 2004* and Constitution. The Committee on the Elimination of Discrimination Against Women (CEDAW) noted in June 2007 that “discriminatory provisions still exist in several areas of Mozambique law including in ... laws governing inheritance rights.”⁷⁵

3.2.2 Tanzania

Similarly, in Tanzania rights granted under formal law are far more progressive than those under customary law. The Constitution accords “equal opportunities to men and women alike” in principle (article 9(g)), and pursuant to an amendment passed in 2000, sex or gender as grounds for discrimination are included in article 13(1). There is no explicit guarantee that women have a right to property; rather, every person is entitled to own property (art 24), which constructively includes women. Importantly, any law conflicting with provisions of the Constitution is void (art 64(5)).

Legislation regarding property ownership was passed in 1999: the *Land Act 1999* governs land other than village land, the management of land, settlement of disputes and related matters;⁷⁶ and the *Village Land Act 1999*⁷⁷ provides for the management and administration of land in villages. This continues the dual system of land tenure developed under colonial rule, whereby there are statutory or granted rights as well as customary rights of occupancy, the difference being that customary land rights are no longer deemed but are now also granted.⁷⁸ The intentional consequence of this arrangement is that, since most land is “village land”, authority over land tenure continues to be vested in the existing and well-established village governance machinery.⁷⁹ This is reflected in the venues for resolving local land conflicts: village land is vested in the Village Assembly, and the Village Council administers the land through the authority of the Village Assembly.⁸⁰

Both Acts explicitly articulate that women’s rights “to acquire, hold, use, deal with and

⁷⁴ Schroth & Martinez, ‘The Law on Property Grabbing 3: Property and Inheritance Rights of HIV/AIDS Widows and Orphans – The Law of Mozambique and the Standards of International Law’, *Proceedings of 10th Annual IAABD Conference* (2009) 519.

⁷⁵ CEDAW Committee, *Concluding Comments on Thirty-eighth Session*, 11 June 2007. CEDAW/C/MAOZ/CO/2, paragraph 12.

⁷⁶ Act No. 4 of 1999.

⁷⁷ Act No. 5 of 1999.

⁷⁸ M Benschop, *Rights and Reality: Are Women’s Equal Rights to Land, Housing and Property Implemented in East Africa?* (2002) 99.

⁷⁹ Koskinen, above n 38, 176.

⁸⁰ G Sundet, *The 1999 Land Act and the Village Land Act: A technical analysis of the practical implications of the Acts* (2005), FAO <http://www.fao.org/fileadmin/templates/nr/images/resources/pdf_documents/kagera/tanzania/1999_land_act_and_village_land_act.rtf> at 21 July 2010.

transmit land" are identical to men's rights.⁸¹ Section 3(2) of the *Land Act 1999* provides women with the same rights to land as men and requires land co-ownership by married couples.⁸² Similarly, when matrimonial land is registered, it is presumed to be held by spouses as occupiers in common,⁸³ with land security guaranteed by the spouse's contribution or labor in the productivity, upkeep and improvement of the land (even if land is registered to only one of the spouses).⁸⁴ In addition, a spouse cannot transfer, mortgage, sell, lease or give away land that is under co-occupancy without the other spouse's explicit consent, even if the land is registered in only one spouse's name.⁸⁵ The *Village Land Act 1999* protects existing rights in land, which *de facto*, excludes women, who never owned land under customary law.⁸⁶ However, it also prohibits discrimination against women in the application of customary law.⁸⁷

A third critical piece of legislation affecting women's ability to own and inherit land is the *Law of Marriage Act 1971* (LMA) (applicable only in mainland Tanganyika),⁸⁸ which was designed to integrate existing marriage laws under Muslim, Christian, Hindu and customary law, while retaining religious solemnization and the legality of polygamy. The LMA explicitly supersedes Islamic and customary laws,⁸⁹ and grants women the enjoyment of equal rights to acquire, hold and dispose of property (section 56). However, if property is acquired in the name of one spouse, it is assumed to belong to that person only (section 60(a)); if it is both names, the assumption is that they have an equal interest in the property (section 60(b)). Section 114 requires the court to have regard for whether the spouse's domestic service amounts to such efforts and contributions that entitle her (as it is invariably the woman) to a share of the property upon divorce. Neither the husband nor wife may unilaterally transfer rights in the matrimonial home without the other person's consent.⁹⁰ Controversially, the LMA also creates a rebuttable presumption of marriage if a couple has cohabited for a period of two years "in such circumstances as to have acquired the reputation of being husband and wife".⁹¹

With respect to inheritance, Tanzania is governed by three different bodies of law — customary, statutory and Islamic. Where conflicts arise between the different legal regimes, the courts employ two tests: the "mode of life" and the "intention of the deceased" tests. In deciding which law should be applied, the "mode of life" test considers whether the deceased was part of a community where the customary law is widely accepted and applied. The "intention of the deceased" test considers statements and deeds of the deceased that could have indicated his/her preference.⁹² In practice, customary law is assumed to apply unless proven otherwise in rural areas; for African Muslims, the intention of the deceased is determinative.

3.3 Current challenges in using formal law to promote change

The effectiveness of statutory law in African pluralist legal systems commonly suffers from some obvious shortcomings: lack of knowledge, lack of application and lack of enforcement. The first two obstacles are attributable to socio-economic and logistical factors affecting numbers of lawyers, levels of legal training, levels of community legal education, and community perceptions of the relevance and authority of statutory law. Lack of enforcement is an unfortunate reflection of the lack of financial, human and

⁸¹ *Land Act 1999* and *Village Land Act 1999*, section 3(2).

⁸² Tripp, above n 54, 6.

⁸³ *Land Act 1999*, section 161(1).

⁸⁴ *Land Act 1999*, section 161(2).

⁸⁵ *Land Act 1999*.

⁸⁶ Koskinen, above n 38, 176 (at footnote 176).

⁸⁷ *Village Land Act 1999*, section 20(2).

⁸⁸ J S Read, 'A Milestone in the Integration of Personal Laws: the New Law of Marriage and Divorce in Tanzania' (1972) *Journal of African Law* 16, 19.

⁸⁹ Second schedule of the *Law of Marriage Act 1971*.

⁹⁰ Section 59(2).

⁹¹ Section 160(1).

⁹² *George Kumwenda v Fidelis Nyirenda* (1981) T.L.R. 22; *Abdullah Shamte v Mussa* (1972) H.D.C 283.

logistical resources required for a central government to effectively guarantee rights in practice in rural areas. Indeed, the World Bank has conceded that “formal law that requires gender equity in property rights is mostly ineffective in the face of customary law that does not recognize equitable property rights for men and women”, and that “land legislation may conflict with family or personal law”.⁹³

Gender discriminatory customary practices are not constitutionally or statutorily valid, but persist because of power imbalances between the sexes within communities and ignorance about women’s legal rights. It is therefore not surprising that statutory provisions have limited efficacy in improving the gender equitability of land management practices. Inadequate educational initiatives have undermined rural communities’ awareness and exercise of their improved rights, as well as the effectiveness of institutional processes.⁹⁴ Local justice is usually delivered through male elders in forums to which women have no access. This perpetuates land security problems faced by widows upon their husbands’ deaths.⁹⁵ Consequently, while *prima facie* women have the same individual formal land rights as males, women who separate from their husbands or become widows often lose not only their customary, but also their statutory access and cultivation rights.⁹⁶ Moreover, because they enter the formal system “with no property, little cash income, minimal political power and a family to support”,⁹⁷ women are systematically disempowered in obtaining land rights.

The ‘catch-22’ situation that emerges is whereby central governments lack the capacity and enforcement mechanisms to fulfill the promises expressed by laws protecting gender equality,⁹⁸ and are therefore reliant on local community structures for the administration of women’s property rights, yet, the local elites dispensing ‘justice’ rurally are precisely the people (typically older males)⁹⁹ who continue to apply gender discriminatory customary practices in contradiction to the Constitution. Local elites are sufficiently empowered to administer the formal titling regime that protects women’s land rights, but are reluctant to because they perceive it as a system that will erode their own land-oriented power base. Progressive statutory provisions are not enforced because of “women’s lack of awareness and power, resistance from male relations, the fear of sanctions and the lack of political will on the part of the government”.¹⁰⁰ Certainly, national governments often face both a lack of political will and of practical capacity in fulfilling their enforcement responsibilities.

Entrenched discriminatory attitudes and practices present continuing challenges to a coherent gender-sensitive legal system in pluralist countries, which are only gradually being confronted and navigated. Some of the international literature re-examines customary land tenure institutions in the modern state, concluding that the interactions between different pluralist legal orders are critical for women’s land claims.¹⁰¹ This approach acknowledges the continuing failures of formal law to deliver the gender equality it promises, and the social embeddedness of land claims necessitating an

⁹³ World Bank, above n 5, xi.

⁹⁴ Sjaastad & Cousins, ‘Formalisation of land rights in the South: An overview’ (2008) 26 *Land Use Policy* 3, 7.

⁹⁵ S F Joireman, ‘The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law’ (2008) 36(7) *World Development* 1233, 1240. Additional complications not canvassed in this chapter include: the increasing incidence of HIV/AIDS, which, due to high medical costs, can cause families to lose land, tenure and employment, and disproportionately exacerbates welfare challenges for women because of the stigma and discrimination following the death of a husband to AIDS; and the issue of ‘purification’ of a widow, whereby a relative of the husband has sexual intercourse with her and then takes on the responsibility of caring for the family.

⁹⁶ Lastarria-Cornhiel, above n 20, 1325.

⁹⁷ *Ibid* 1326.

⁹⁸ Toumlin, above n 14, 10.

⁹⁹ P Kameri-Mbote, ‘Gender Considerations in Constitution-Making: engendering Women’s Rights in the Legal Process’ (2003) *University of Nairobi Law Journal* 1, 16-17.

¹⁰⁰ F Butegwa, ‘Women’s Legal Right of Access to Agricultural Resources in Africa: A Preliminary Inquiry Women’s Access to Land in Africa’ (1991) 8 *Third World Legal Studies* 45, 57.

¹⁰¹ A Whitehead and D Tsikata, ‘Policy Discourses on Women’s Land Rights in Sub-Saharan Africa’ in S Razavi (ed), *Agrarian Change, Gender and Land Rights* (2003) 67, 94-5; H W O Okoth-Ogendo, ‘Legislative approaches to customary tenure and tenure reform in East Africa’ in C Toulmin and J Quan (eds), above n 46.

engagement with customary structures.¹⁰²

In contrast to this mutually constitutive model of legal pluralism,¹⁰³ a burgeoning community of domestic NGOs is undertaking a range of initiatives promoting women's awareness and exercise of their rights under statutory law. These lawyers believe that women's land rights will be better secured through statutory law reform than through allowing and encouraging customary law to evolve.¹⁰⁴ Lawyers place emphasis on different approaches, which include legal training, land redistribution, titling registration, the education of officials, special loan facilities for women, and quotas to ensure that women are represented on decision-making bodies.¹⁰⁵ Gender specialists have advocated for the use of paralegals at the local level to promote women's rights with support from the NGO community.¹⁰⁶

Whatever the focus, there are tangible and continuing positive results from advocacy that utilizes statutory provisions: women have successfully formed informal groups, associations, or cooperatives to secure their rights, and protect or acquire more land in various contexts.¹⁰⁷ For example, in Burkina Faso, Ghana, Mozambique, Uganda and Tanzania, women lawyer associations and civil society groups have advocated for women's property rights, educating the populace, bringing test cases to court and promoting the application of laws that protect women's property.¹⁰⁸ The logical enquiry following these success stories is: are NGO initiatives that disseminate and utilize statutory law leading to changing practices with respect to women's land tenure security in rural communities? More specifically, in reference to the three major obstacles outlined at the start of this section, are these NGO initiatives overcoming the lack of knowledge, of application and of enforcement, that have previously prevented the efficacy of statutory law in protecting women's land rights?

3.4 Country case studies

To accurately assess whether current NGO strategies are effective, the statutory legal framework must be sufficiently progressive and explicit with respect to gender equality, land and/or property ownership, and if possible, family and inheritance law. Mozambique and Tanzania were selected as target countries for this research because the land reforms explicitly promote gender equality: for example, a 2005 study of five countries with progressive land laws (Tanzania, Mozambique, South Africa, Zimbabwe and Kenya) found that the land legislation of Mozambique and Tanzania were closest to meeting human rights-based approach standards.¹⁰⁹ Second, a sound indicator of the extent of change as a result of statutory law and NGO activities is the experiences of women most likely to experience gender discriminatory land practices in rural communities. For both countries, these women were identified to be divorced women and widows because their relationship to the man through which access to property is granted under customary law has been severed. For divorced women, the issue is one of retaining control over some of the land as a result of the marriage partnership, whereas for widows, the issue is one of inheritance; both involve practices traditionally considered to be properly administered under customary law.

3.4.1 Mozambique

In Mozambique, a 2007 survey of 15 institutions involved in providing legal support to the poor and 104 individuals across various districts was organized by the United Nations Commission on Legal Empowerment of the Poor, with the objective of contributing to a

¹⁰² Whitehead and Tsikata, above n 101, 102.

¹⁰³ Ibid 93.

¹⁰⁴ Ibid 92.

¹⁰⁵ See generally Ibid.

¹⁰⁶ A Varley, Gender and Property Formalization: Conventional and Alternative Approaches (2007) 35(10) *World Development* 1739, 1749.

¹⁰⁷ See Lastarria-Cornhiel, above n 20, 1327.

¹⁰⁸ See Joireman, above n 95, 1241.

¹⁰⁹ I Ik Dahl, A Hellum, R Kaarhus, T A Benjaminsen, P Kameri-Mbote, *Human rights, formalization and women's land rights in southern and eastern Africa* (2005) xiv.

national consultation process with a specific focus on property rights.¹¹⁰ It identified a number of difficulties encountered by the poor, particularly those related to the defense of their property rights, including: weak access to justice due to lack of legal knowledge; low levels of schooling and literacy; difficult access to institutions defending them and their property; cultural habits negatively influencing property transfer rights upon death; and weak institutional capacity to provide them with legal support.¹¹¹

The study confirmed that many widows and their children are dispossessed of their inheritance and that 95 percent of interviewees resorted first to neighborhood, district and traditional leaders as a response to such dispossession. However, 92 percent of respondents in rural areas stated they would comply with the decision made by local structures — taking a case to court was a very rare phenomenon.¹¹² The report concluded by highlighting four areas of change that were needed to overcome the obstacles faced by the poor in protecting their property rights: education in and dissemination of property rights; facilitation of access to registration; inter-sectoral strengthening and coordination; and reinforcement of policies.¹¹³

Another survey of 384 individuals¹¹⁴ conducted across six provinces by Save the Children in April 2007 found that, according to 80 percent of the interviewees, land would be inherited according to the gender of the heir. This was despite the fact that some 52 percent of widows and women heads-of-households knew about the laws establishing gender equality, as did 48 percent of the men and 68 percent of the justice officials.¹¹⁵ The report identified the central problem regarding inheritance as:

... widows and orphans do not have easy access to the existing institutions and instruments of justice or to the support of law enforcement agencies and officers to protect them and their rights. This problem is particularly acute in rural areas because of inadequate judicial infrastructure, lack of information, poor levels of literacy and stronger, more rigid community traditions.¹¹⁶

The recommendations included sensitization of the community, coordination and strengthening of NGOs, other key supporting activities (literacy classes, paralegal training, and support for income-generating activities), law enforcement and victim support, and documentation and advocacy.¹¹⁷ Accordingly, several organizations are providing legal assistance and legal education on women's rights, including the Association for Women in Legal Careers (AMMCJ), the Rural Association for Mutual Assistance (ORAM) and the Association of Women, Law and Development (MULEIDE).

3.4.2 Tanzania

In Tanzania, customary law has evolved over the years and has been shaped by other legal developments, including a Bill of Rights introduced in 1988. Despite progressive and explicit statutory provisions, it remains the law closest to the people, especially in rural Tanzania, and continues to feature practices, norms and tradition-driven perceptions of rights that hinder women's ability to be allocated land as independent individuals.¹¹⁸ Specifically, land rights are still "viewed in light of a woman's marital status, and women

¹¹⁰ Elsa Alfai, 'Legal Empowerment of the Poor: Defending Property Rights' (2007) 1 <http://www.undp.org/legalempowerment/reports/.../19_4_Property_Rights.pdf> at 22 July 2010.

¹¹¹ Ibid 5.

¹¹² Ibid 14, 17.

¹¹³ Ibid 25.

¹¹⁴ The survey pool consisted of 40 percent orphans and vulnerable children, 20 percent widows and/or women heads of households, 15 percent individuals from among the general population, 15 percent people caring for orphans, and 10 percent justice officials. Save the Children, *Denied Our Rights: Children, Women and Inheritance in Mozambique* (2007) 14, Save the Children <<http://www.savethechildren.org.uk/en/docs/denied-our-rights.pdf>> at 21 July 2010.

¹¹⁵ Ibid 8.

¹¹⁶ Ibid 14.

¹¹⁷ Ibid 17-19.

¹¹⁸ R Odgaard, 'Scrambling for Land in Tanzania: Process of Formalisation and Legitimation of land Rights', (2002) 14(2) *The European Journal of Development Research* 71, 82.

are required to obtain their husband's consent".¹¹⁹ For example, the Constitutional prohibition of discrimination based on sex or religion is not enforced in cases of customary inheritance. Similarly, despite the existence of provisions in the LMA on property rights for women, their application depends on the status and wishes of the head of the household,¹²⁰ a reflection of the inconsistent and often ineffective implementation of the LMA.¹²¹

As described above, in both patrilineal and matrilineal communities, customary law precludes women from inheriting land, even following their husbands' deaths. Moreover, as the LMA does not cover inheritance, it does not explicitly supersede these practices. Despite their illegality due to their inconsistency with the Constitution, this makes little difference in practice: several cases on appeal to the High Court have simply been referred back to clan councils or local customary elites.¹²² On the other hand, the High Court has opined that customary laws should be modified to meet the requirements of equality and the human rights standards of the Constitution and international law.¹²³ It has also determined that "[f]emales, just like males, can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like."¹²⁴ For example, in *Joseph Sindo v Pasaka Mkondola*,¹²⁵ the High Court granted a female petitioner an equitable share of the couple's jointly acquired assets although they were not married. Of course, the challenge is disseminating such decisions throughout rural communities practicing customary law — which based on the factual survey above, has not yet occurred.

The Law Reform Commission subsequently targeted the treatment of marital property as an area of reform. It noted that women are denied shares in properties, or blamed for causing marital breakdown and required to repay dowry under various customary laws. The Commission recommended that the references to customary law be struck from the LMA's provisions on marital property.¹²⁶ In a similar vein, a study commissioned by the Ministry of Community Development, Women's Affairs and Children, and carried out by the Tanzania Women Lawyer's Association (TWLA), found:

female-headed households were largely excluded from access to land by customary arrangements. Women were poorly represented in village and district decision-making structures pertaining to land administration and were disadvantaged in dispute resolution institutions because of corruption, prejudice, and poor representation. Women surveyed were enthusiastic about titling because it allowed them the possibility for co-ownership of family land. The survey found that women preferred statutory courts over traditional courts because their decisions were binding. Women favored full land rights, including the right to bequeath land, and demanded greater education in land rights.¹²⁷

Consistent with these results, NGOs in Tanzania are also targeting judicial courts, which apply statutory law as the preferred venue for improving land tenure security for women, particularly following the death of their husband or divorce. In 2004, a Gender and Poverty Program promoting equal land rights was established across six regions in the

¹¹⁹ Koskinen, above n 38, 177.

¹²⁰ Legalbrief Africa, *Customary & Islamic Law and its Future Development in Tanzania* (2004) 107, Legal Brief <<http://www.legalbrief.co.za/article.php?story=20041128143334824>> at 21 July 2010.

¹²¹ M Benschop, above n 78, 125.

¹²² See e.g. *Saidi Kasisi v Melensiana Kasisi*; cited without further reference in B T Nyanduga and C Manning, *Guide to Tanzanian Legal System and Legal Research* 28 <<http://www.nyulawglobal.org/globalex/tanzania.htm>> at 21 July 2010.

¹²³ K Tomaševski, *Women and Human Rights* (1993), 132.

¹²⁴ C M Peter, 'Enforcement Fundamental Rights and Freedoms: The Case of Tanzania (1995) 3(1), *African Yearbook of International Law* 81, 91.

¹²⁵ *Joseph Sindo v Pasaka Mkondola*, High Court Civ. App. 132 (1991) (Tanzania).

¹²⁶ Tanzanian Law Reform Commission, Report of the Commission on the Law of Succession/Inheritance, (1995) 10 <http://www.lrct.or.tz/documents/Law_of_succession_prelims.pdf> at 22 July 2010; see also M J Calaguas et al., *Legal Pluralism and Women's Rights: A study in postcolonial Tanzania*, (2007) 16 *Columbia Journal of Gender and Law* 471, 507.

¹²⁷ Tripp, above n 54, 10.

country by the Law and Human Rights Centre (LHRC), the Women’s Legal Aid Centre (WLAC), the Women Advancement Trust (WAT), the Tanzanian Women Lawyer’s Association (TAWLA), and ENVIROCARE. In each region, a program comprised of a baseline survey, a needs assessment, training, workshops/seminars, and interactive activities was conducted to identify issues requiring future intervention.

The resulting recommendations included: further training, public education seminars and radio programs to raise awareness of the legislation; adequate distribution of reading and reference material; increased attention to legal education; provision of sufficient support to women to allow them to assert their rights; and government follow-up at the village level to ensure implementation of the legislation.¹²⁸ WLAC was the most active of these organizations in implementing the program, and continues to maintain 22 paralegal units in various regions.¹²⁹ However, to date, no evaluation of the effects of legal education and provision of paralegal services has been conducted.

4. The path forward

4.1 Evaluating current strategies

The primary research forming the basis for this chapter examined whether and how NGO efforts are influencing the likelihood that women will be dispossessed after divorce or the death of their husband. Specifically, the goal was to determine whether and how laws protecting women’s land rights are more effective when combined with the provision of community legal education and legal services. The prediction was that statutory (top-down) interventions aimed at enhancing women’s tenure security have greater impact in modifying customary norms and practices when they are complemented with bottom-up legal empowerment programs to improve legal awareness and accessibility to legal remedies.

In each country (Mozambique and Tanzania), surveys were administered to divorced or widowed women and community leaders in three villages where paralegals had been trained on legal rights related to land and to help resolve conflicts (“paralegal villages”); in three villages in which there was an established paralegal office with trained paralegals working under the supervision of a qualified lawyer (“office villages”); and in three villages in which there were no legal education or paralegal services available (“control villages”).¹³⁰ Partner organizations were selected on the basis of specialization or coverage of land-related rights, the provision of paralegal services and access to women in rural communities. Despite logistical and methodological challenges,¹³¹ the data

¹²⁸ LHRC, WLAC, TAWLA, WAT, ENVIROCARE, *Report on the Facts and Lessons Learnt from the Ground* (2004) 6-14.

¹²⁹ Meeting between A Kapur and S Jullu, Executive Director of WLAC (Dar es Salaam, Tanzania, 1 March 2010).

¹³⁰ Surveys were administered in nine villages in Tanzania and eight villages in Mozambique to at least ten women who had been either divorced or widowed since 2004. The surveys inquired into their experiences after separation or upon widowhood — specifically, whether they had been permitted to continue living on the marital property, and if not, what, if anything, they did in response to the dispossession. A different survey was administered to the community leader in each village to assess knowledge, attitudes and practices regarding land distribution following divorce or upon widowhood within their communities. The data collected through the surveys comprised primarily quantitative information, but included some qualitative information.

¹³¹ The initial challenge was two-fold: to identify organizations targeting customary law practices as part of their strategy to improve women’s land rights, and to communicate a partnership proposal that would assess the impact of these efforts. A limitation intrinsic to the study’s methodology was its focus on quantitative data, which required much higher numbers of participants to yield meaningful results, and compounded the challenges associated with the limited time to gather data in each country. It also exacerbated any logistical challenges encountered by the partner organizations: for example, AMMCJ was not able to organize data collection from a third control village, which undermined the robustness of the statistical analysis and inferences drawn from data in Mozambique. The integrity of the data would not have been as affected if the focus were on qualitative information — while the sample size would have been smaller, conclusions and trends could have been inferred from descriptive answers. It was predictably difficult to access the target group — divorced or widowed women in rural communities of two developing countries. Compounding the customary or

obtained through surveys suggested definitive trends and a complex interplay of various social and economic contextual factors; both allow inferences that could prove useful for a range of stakeholders in developing countries with plural legal systems.

4.2 Research-based conclusions

There are some overall trends across both countries worth noting at the outset, which provide a general framework and some preliminary insights. The first encouraging pattern is that formal court decisions were, without exception, in favor of women's land rights claims following dispossession upon divorce or widowhood. While a number of court decisions are still pending in Mozambique, those that have been delivered resoundingly reinforce women's rights to inherit land when their husband dies, and women presumptively receive half the assets upon divorce, including land. This not only bodes well for the high number of cases awaiting decisions, but also for the consistency in application of the law in the formal justice system. However, the small sample size of NGO-assisted land claims in court makes it difficult to conclude with certainty that this trend applies universally across formal courts. If it can be assumed that judicial officers, who are trained in gender equality and land rights, are uniformly applying the relevant statutory law, this is encouraging for both domestic civil society and development agencies and donors. For example, given the prerequisite of paralegal assistance for women to take land claims to court (discussed in depth below), increasing support for this type of NGO assistance should yield consistently positive results in cases of dispossession.

Second, compliance with court orders remains a challenge in rural communities. Regardless of the reason, the implication is that increasing compliance with court orders depends on better communication of the decision to the relevant parties, and a commitment to enforcement by local authorities including leaders and police. Given women's general inherent lack of influence within their local communities, there is an important role for NGOs to play in notifying police and community leaders of court decisions, and their obligations to ensure adherence to them. Strengthening relationships and information sharing between civil society and enforcement authorities through seminars and networks could enhance awareness of binding court orders and the sense of responsibility to see them executed.

Third, there was a strong preference among women in villages without paralegal services for formal courts over community structures. This could be read as an indication of dissatisfaction with their experiences with customary procedures and their negative results, and a general perception that formal courts are fair and follow the law.

Community leaders across the two countries had knowledge, to varying degrees, of the relevant laws and acknowledged the benefit of women controlling land. Contrasting with their knowledge was their striking failure to resolve land conflicts in favor of women claimants, including those who went on to obtain court judgments in their favor. Three of the four exceptions to this disappointing trend (out of the 25 women who asked their community leader for a resolution) occurred in a community where the leader was a woman who was knowledgeable about and committed to enforcing gender equality, including in land disputes. Two important conclusions follow from this: first, consistent with the literature, despite their knowledge of legislation, community leaders tend to ignore the law in resolving land disputes within the communities; and second, the presence of NGOs and their capacity to assist with land rights claims is even more important because community leaders should not be expected to apply their knowledge of formal law.

traditional disadvantages these women experience are logistical challenges created by their physical circumstances — limited or complete lack of access to electricity, telecommunication services and other social facilities. For example, women's attendance often depended on them being identified and deemed eligible by the community leader or by another woman already participating in the surveys; that is, attendance resulted through an informal word-of-mouth process dependent on the knowledge of the community leader, or other community members, about the marital and property status of women in the community. This method did not guarantee that the participating women were a representative sample of the community.

Finally, although paralegal services attempted mediation as the first method for resolving conflicts brought to them by widows and divorced women, they were generally unsuccessful. Resistance to paralegal mediation by husbands or husbands' families is likely a reflection of the prevalence of contemporary practices of customary norms, as reinforced by local community leaders. Thus, an approach using law as a tool to coerce behavioral change seems a necessary precursor to a softening of position by adverse individual parties. Accordingly, at this preliminary stage, a sustained focus on strengthening NGO expertise in dissemination, education, legal drafting and practice is likely to be more impactful than diverting resources into mediation. Moreover, cases of dispossessed widows and divorcees tend to legally favor the woman; using mediation, which is often reserved for legally complicated situations or situations in which all parties are legally at fault, is unlikely to be as effective in promoting women's land rights as unequivocal public court judgments explicitly referring to and reliant on statutory law.

In Mozambique, the presence of a paralegal office coincided with: every dispossessed woman challenging their dispossession; a preliminary appeal to the community leadership, which generally failed to satisfactorily resolve the situation; women unanimously turning from community leaders to the paralegal service; and an emerging trend whereby women bypassed their community leaders and sought legal advice directly. Women in villages with paralegals only generally (all but one) challenged their dispossession in some way; only a few sought legal advice after their community leader failed to resolve their case; and even fewer women took their case to court. These differences are not surprising: the paralegals in each village educated, trained and provided advice to women, but were extremely limited in their capacity to assist with drafting claim documents for court submission. Thus, while women's social attitudes and behavior have changed in these villages, they did not have the support, expertise and therefore capacity to take their claims to a formal venue.

Mozambican women in villages with paralegals and paralegal offices preferred community courts in stark contrast to the women in the control villages, who preferred formal courts; their reasons highlight the dilemma underlying the present inquiry. Community structures have a greater capacity to be responsive, adaptive and accessible — it is the content of their decisions that is problematic. All of the reasons cited in support of community courts relate to the process, not the substance, of the decisions made, and for those who preferred the courts, it was on grounds related to enforceability of decisions and the absence of corruption. This combination of reasons reinforces the ultimate goal — that land rights conflicts be resolved at the local level consistent with gender-neutral legislation.

In Tanzania, the significantly greater impact of a paralegal office compared to paralegals only was similarly obvious. The largest difference between women in villages with a paralegal office and women in villages with paralegals only (no paralegal office) or no services was in the rate of seeking advice and resolution from the community leader. The higher rate of refusal to accept dispossession is predicated both on knowledge of rights and a willingness to protect them. Women in paralegal villages explained that the patriarchal culture was the reason for not approaching their community leader. This suggests that the stronger and more visible the presence of NGOs, the more likely women are to consider challenging the existing patriarchal culture; i.e. the knowledge of an established legal service to assist them with taking claims to the formal court emboldens and empowers women to take the first step of challenging their dispossession. Their preference to approach their community leader to do this underscores the conclusion of the previous paragraph — that women would prefer their problems to be resolved according to the law at a community level, rather than resorting to formal legal mechanisms. The role of the NGOs, therefore, may be most critical and greatest at this point in time when formal law is required to coerce changes in behavior. The long-term hope is that NGO efforts ultimately increase universal understanding and acceptance of women's land rights, which sees disputes resolved satisfactorily within communities without the need to resort to courts.

Overall, there are some interesting cross-country comparisons that further illustrate the importance and nature of the role of NGOs in this context. First, Tanzanian women had a markedly higher knowledge of and preference for formal court systems across all three conditions, which implies higher levels of understanding about rights, awareness of the functioning and role of the court, and knowledge of decisions made according to the law. Therefore, it can be fairly concluded that NGO efforts in disseminating laws to the population and in educating them about the law and how to use it are correlated with a preference for (and therefore an increased likelihood of accessing) formal courts.

Conversely, Mozambican women had a stronger preference for community courts, i.e. traditional structures. This may be due to a combination of: ignorance of the formal law, lack of familiarity or understanding of the operation of formal law and courts, lack of faith in the efficacy, relevance and/or wisdom of the formal court, or merely an attachment to locally applied norms. The cross-country comparison is useful in this case: since Tanzanian women were more likely to be permitted to stay on their land, it is obvious that the preference of Mozambican women is not due to better, more rights-protective practices with respect to women's control over land. It also confirms that legal dissemination and education are critical precursors to any civil society intervention; women who do not feel familiar with or comfortable about the formal justice system are unlikely to approach NGOs for assistance in accessing its courts.

Consistent with the above differences, it can reasonably be concluded that knowledge, application and compliance with respect to women's land rights are inextricably linked to the relative prevalence, capacity and expertise of civil society organizations educating communities and providing legal assistance to women. The reasons for these trends are multiple, complex and interrelated; they are likely to canvas the nature, age and level of dissemination of the laws, differences in customary practices and their development, and the capacity of NGOs and government agencies to educate and facilitate the exercise of women's rights.

4.3 Broader conclusions and recommendations

There are a number of broader conclusions to be drawn from the cross-country comparative research, which could be useful for development agencies, policy makers and domestic NGOs focused on women's rights. First and foundationally, customary law, as interpreted and applied by informal community structures, does not universally result in divorcees or widows being entirely dispossessed; rather, they are in an inherently precarious situation in which their ability to continue to control and use land is entirely dependent on family attitudes and circumstances. The value of replacing customary practices with practices consistent with statutory law is the removal of uncertainty in land tenure for these women, the conceptual separation of their individual rights from their relationships to family members, and the impartial consistency with which their rights will be recognized in formal courts.

Second, even if it is established that community leaders who have traditionally followed customary law in determining land-related conflicts involving widows or divorced women know the relevant statutory law, it should not be assumed that they will apply the provisions in their favor. Conversely, formal courts appear to consistently apply statutory provisions in favor of dispossessed widow and divorcee claimants. Accordingly, for the systematic and impartial application of statutory law that may conflict with customary norms, formal courts are the preferred venue for claims. Both legal knowledge and the presence of a paralegal are necessary for women to challenge their dispossession. Since there is no established culture of, practice of, or capacity for self-represented litigation, without legal and material assistance in taking claims to court, legal knowledge alone cannot be assumed to encourage women to challenge their dispossession.

Third, the continuing challenges in achieving compliance with court orders suggest that if community and customary practices are inconsistent with the law, a formal judgment

does not necessarily change behavior or even promote adherence to the law. Rather, the law, in the form of both statutes and court judgments is a tool that can be used by NGOs to increase general awareness of women's rights and garner support from enforcement authorities, which appears necessary to coerce obedience from relevant parties. Mediation as an alternative to court-generated resolutions to land-related conflicts is possible but unlikely in these matters. The pressing difficulty facing successful women claimants is a lack of compliance with court orders by the opposing party, and a lack of will within communities to ensure that they are enforced. Women's confidence that court orders will be obeyed may be affected according to the levels of their compliance, which may in turn affect the population's perception of the efficacy and benefit of formal courts compared to community structures.

Legal dissemination, education and assistance through NGOs appear to be coaxing change in communities and encouraging women to challenge their dispossession, both within their communities and through formal structures. This, combined with the discrepancy between legal knowledge levels and decisions in land disputes by community leaders, suggest that NGOs are a better target group to further catalyze change in rural community land practices with respect to women. The current research also gives rise to a number of recommendations for donors, development agencies, governments and other stakeholders if this approach of supporting NGO efforts founded on statutory provisions is continued.

To address the outstanding issue of lack of compliance, directing resources (financial, human, material and intellectual) towards developing effective enforcement mechanisms is critical to coercing judgment-compliant behavior in the short term, and increasing universal adherence to statutory law in rural communities in the long term. Nonetheless, in recognition of their continuing important role and the ultimate goal of law-abiding resolutions within communities, community leaders must continue to be a focus for the dissemination of laws and education seminars. Training provided to them on how formal laws work in practice, the legal services available to ensure that rights are defended, and the consequences of non-compliance with the law may be necessary additions to existing educational programs on the substance of the law.

Given the significant differences between villages with and without paralegal offices, an increased focus on establishing paralegal offices with permanent staff to assist in drafting and filing claims in court is likely to improve women's likelihood of challenging dispossession, approaching a legal service, taking their claim to court, and thereby (given the likely judgment in their favor) succeeding in having their rights recognized.

While clearly educated and observant of applicable statutory laws, judges of formal courts need to continue to be trained on gender-related provisions, the related challenges in their application in rural communities, and the range of enforcement mechanisms at their disposal when issuing court orders.

Finally, dissemination to the broader population, including community leaders, needs to explicitly disentangle the individual rights that widows and divorced women possess under law from their status and relationships within their family. For example, education seminars could emphasize that it is not the need to raise and care for children or grandchildren that gives rise to the right to either stay on the land or keep half the land, but the fact that wives, under the law, are also entitled to keep property, including land.

To fully assess which and to what extent variables contribute to legal knowledge, women's exercise of their land rights, favorable court decisions and levels of compliance, it would be useful to conduct comparable research in other countries with similarly progressive legislative provisions. Such research may reinforce the current findings: governments, donors, NGOs and policymakers might find that financial, human and advocacy resources bring greater achievements in women's land rights and economic development if they are directed towards community legal education and the provision of accessible services to advance land rights claims in formal courts.

The established literature and current research suggest that the advantage of formal courts for disadvantaged women is its consistent application of statutory provisions in favor of gender equality, its impartiality in deciding land claims, and its increasing accessibility in areas where NGOs provide legal assistance. Women's experiences in Mozambique and Tanzania suggest that the latter is perhaps the most important: without accessible legal advice and assistance, even the best and most progressive statutory land laws have little chance of changing community perceptions and practices in land distribution so that they recognize and sufficiently protect women's land rights.