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Advancing Women's Land and Resource Rights

## **Women's Land Tenure Framework For Analysis: Inheritance**

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## How to Use This Framework

### Who Is This Framework for Analysis Designed to Help?

This framework is designed to assist anyone who is interested in understanding the complex issues associated with women's land rights--officials, grassroots organizations, international technical advisors, policymakers, development practitioners, women's rights advocates, land rights advocates, people who are developing programs to assist women farmers, people who are concerned with food security, etc.

### Examples of How This Framework for Analysis Can Be Used

**Example 1:** I am a paralegal in India, and I want to know how to argue for women's rights to inherit land.

*You will want to use this framework and answer the questions about the formal law and customary law. You will want to use the questions in this framework to think about the barriers to women inheriting land and what support there is for women to inherit land.*

**Example 2:** I am working in Northern Uganda, and I am aware that widows are frequently chased from their land. I want to know who they can go to for help.

*You will want to review this framework and specifically focus on the questions related to enforcement of rights in both the legal and customary sections. It will be especially beneficial to look at all the questions related to wives' inheritance.*

### How to Use This Framework for Analysis

This framework is intended to help you assess the current situation for women's land rights in a specific country, state, or community. This framework looks at a single question: *Can women inherit land?*

The framework is intended to help you think through *both* formal legal rights and customary rights to inherit and to help you identify what are the gaps between law and practice. For your analysis it is important to think about law and custom separately, but it is also important to identify when law and custom may overlap. For example, there are times when the formal law codifies or otherwise recognizes customs or customary rights as legitimate.

This framework should be used as a checklist. The order in which you answer these questions is not important. One law may answer many questions scattered throughout this framework for analysis. The idea is to alert you to the issues that *may* be important in a *particular setting*.

For example, the law may be the same in every community in a country, in which case only the national laws will matter. However, there are also situations where the land law may be national level law but family law is regulated at the state level. There are many different combinations for *which* law is controlling in a specific place. *Which* law controls is very important for women's land rights, for example, while a national law may call for equal property rights between men and women in a broad sense, a local law or regulation may regulate specific behaviours that mean that in practice women and men do not have equal rights to land.

Practitioners often wonder whether it is important to know what the law says if you know that most people in a particular area do not know or follow the law. Knowing what the law says and knowing the intent of the law is an important starting place for women's land rights. There are many reasons why a law may not be put into practice: perhaps the law is not followed because it is not known; maybe it is not followed because it makes no sense in a specific situation; maybe people disagree with the law.

Good laws can be used to help bring about change; policy recommendations cannot be made without first understanding the legal framework. And policy recommendations cannot be effective if they do not take into account customs – what people accept as legitimate or not. When analyzing customs, it is important to know which ones are really entrenched, and which ones are waning or changing. It can also be helpful to know if there is an underlying logic to the custom (e.g. a premise based on fairness or maintaining peace). Understanding what is feasible and possible to adapt to improve women's land tenure security is an important first step in legal and policy reforms. This framework attempts to help you think through the complexity of that question.

Some of the questions in this document will overlap with questions in other single-issue frameworks posted on this site. Duplicate questions are marked with a star (\*), so you will know that you should look at this question in relation to more than one issue.

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## Introduction to Inheritance

### The Importance of Inheritance

In many countries, especially in rural settings, inheritance is the main way people acquire land rights. Technically, inheritance occurs at the death of the holder of the property right. However, in many contexts, valuable gifts are made at other important life events such as marriage or coming of age—in some cases these gifts are considered a pre-mortem inheritance, an inheritance that occurs before the death of the property rights holder. Inheritance is sometimes called succession. Generally, in law, who inherits from the deceased's estate is determined by will of the deceased, or if a will has not been made, by law under the provisions for "intestate" succession.

In practice, in many parts of the world, wills are not the norm. Very often, inheritance rights for women and men differ, and a woman's right to inherit is more often dependent on her marital status or her relationship to a male.

This framework looks at both formal law and customary law.

### Common Issues

Women's rights to inherit land are affected by cultural norms and rules. For example, in cultures where land rights are passed down through men (patrilineal) and where women move to their husband's home at the time of marriage (patrilocal) a woman will rarely inherit land rights from her deceased husband

because she is considered an "outsider" to the blood line. Likewise, she may not inherit from her father, because she is no longer considered his responsibility.

In some place's daughters receive moveable property (such as money or blankets or household items) at the time of marriage, and this moveable property (often called dowry) is considered her pre-mortem inheritance from her father—her share of the family wealth. In practice, this can create a complicated situation for women, especially if the dowry is not an economic asset like land, because it means women enter their marriage at an economic disadvantage to their husbands, and thus, potentially will have unequal power in that relationship. Moreover, daughters who receive dowry from their parents are unlikely to enforce their rights to inherit other property, including land, because in their mind, this would be unfairly taking from their brothers' share of the household wealth.

In patrilineal and patrilocal cultures, one or more of the sons may be required to take care of his elderly parents and use the land and house he inherits to do so.

Wives often do not inherit from their husbands because their husbands' land belongs to his family and his relatives; sometimes the land belongs to his clan or tribe. As an outsider, wives rarely can inherit ownership rights to their husbands' land even when they have depended on that land for their livelihood for many years. Wives without sons or without any children can be vulnerable to being evicted from their homes and land.

In some cultures, fathers are more willing to go against cultural norms to ensure that their daughters are cared for, allowing them to inherit land. In other cultures, communities are sympathetic to widows' rights to remain on land. It is important to keep in mind that rarely are wives' rights and daughters' rights seen as equal.

## Analyzing the Formal Legal Structure

The legal issues affecting wives and daughters are very different and will be treated separately.

### Inheritance for Wives: Nature & Scope

- Identify which laws cover inheritance or succession of property.
  - Are different types of land treated differently (ancestral land, purchased land, “customary” land)? (This information may also be contained in a law that governs categories of land.)
  - Are there provisions for inter vivos gifts of property?
  - Does the law define who the heirs are?
  - Is a surviving wife an heir under the law?
    - What are the wife's rights? Are they the same in nature and scope as those of other heirs?
- Which law or laws cover inheritance of marital property (property that is held in common ownership or joint tenure by married couples)?
  - \*Are there different marital property regimes (under different personal laws or family laws)?

- \*If yes, is inheritance under each regime treated similarly or differently?
- \*If there is more than one marital property regime, who decides which law is applied? At what point?
  
- How is “wife” defined?

***TIP:** The definition may be in another law governing marital status or family law. Also, there may be a commonly held interpretation of the definition of wife (e.g. that it only applies to registered or formal marriages).*

- Does the law recognize all kinds of marriages (i.e. formalized/registered, customary, and religious)?
  - Are there separate inheritance laws for each type of marriage?
  
- Does the law recognize cohabitation/consensual unions/couples who put themselves forward as married?
  - If so, what are the inheritance rights for women in those relationships?
  
- What is the nature and scope of the right to inherit as a wife?
  - Is the right that is inherited limited in time or by some event (e.g. until she remarries or until her children are of the age of majority)?
  - Is it an ownership right? Or is it “ownership like” (e.g. long-term, secure use rights)?
  - Can she transfer the rights gained by inheritance, sale, bequest, gift, or otherwise?
  - Do wives have a right to a lifetime use right to any or all of the land (house, household garden, etc.)? Is land specifically mentioned?
    - How/who decides which land? What are the requirements?
  - Are different use rights (e.g. the right to collect herbs or graze animals) accounted for?
  
- Is there a right of survivorship (one spouse automatically inherits the whole of the land they hold in common ownership or joint tenure)?
  - If yes, does it only apply to married couples or to all people who have joint rights to land?
  - If it only applies to married couples, what proof of marriage is required?
  - If there is not a right of survivorship, how is inheritance of jointly held property handled?
  - Are there limits to physical partition of property in this or any other law?

***TIP:** This may mean that if there is not a right of survivorship and that a widow will have a share in property with other heirs, which can impact her rights to transfer or her decision-making on the land she has inherited.*

### Inheritance for Wives: Intestate Succession

Note on marital property: If there is more than one marital property regime (or family law) that applies in the context, an analysis of each of these laws will be required, and that will also require answering each of the below questions for each law.

- What do the intestate inheritance provisions say about wives' inheritance?
  - If wives inherit, what land is included? What is not? Is the family home included?
  - What percentage of a husband's property do wives inherit if she has children?
  - What percentage of a husband's property do wives inherit if she has no children?
  - Are there any procedures which must be followed to ensure inheritance provisions apply? For example, must the death be registered, and death certificate received?
  - Are the intestate provisions for spouses triggered only when there is a formal marriage?

If yes:

- What constitutes a formal (statutory) marriage?
- What documents are required for proof of marriage?
- What documents are required to register a marriage (birth certificates, residency certificates, etc.)?

If no:

- What other types of marriages trigger the intestate law (e.g. customary or religious)?
- What is required for proof of these marriages?
- Can a wife be disinherited completely by will?
  - If no, what is the mandatory set aside for wives?
  - If yes, are there any other protections for her (e.g. use of family home until she dies or remarries)?
- Can use rights be transferred by inheritance?

### Inheritance for Wives: Polygamy

Note on marital property: If more than one marital property regime (or family law) is applicable, an analysis of each of these laws will be required and you will need to answer each of the below questions for each law.

- \*Is polygamy legal?

**TIP:** If the law does not state that polygamy is legal it may be presumed or interpreted by reference to the context. For example, if the law recognizes customary marriages as legitimate, and everyone knows that polygamy is permitted under customary law, then it can be said that polygamy is “legal” for customary marriages, noting that this may not mean that it is also legal for formal marriages.

- \*If yes, is it legal under all laws or only certain laws (for Muslims or customary marriages, etc.)?
  - \*Is there a limit to the number of wives a husband can have? Are there any other limitations?
  - Are there provisions in the inheritance law for more than one wife?
  - If yes, how is land (or other property) divided between the wives? Is land referred to specifically?
  - Are there provisions related to the children of more than one wife?
- If yes, how is land (or other property) divided between the children? Is land referred to specifically?

### Inheritance for Daughters

- What do the intestate inheritance provisions say about daughters’ inheritance? Do daughters have a right to inherit?
  - Are daughters and sons both considered heirs by law? Are they heirs of the same order?
- If yes, do daughters and sons have an equal right to inherit property? Does this apply to movable and immovable property?
  - Do the intestate provisions specifically mention a daughter’s right to inherit land? o Are a daughter’s rights to inherit affected by her marital status or a by a change in her marital status?
  - What are the rights to inherit of a daughter from a subsequent wife in a polygamous relationship?
- Limitations on a daughter’s inheritance:
  - Is there any type of land a daughter cannot inherit (e.g. ancestral land)?
  - Are there any limits to the size of land that can be physically partitioned? (Note: this would not just be in the inheritance law—also check the land law or other laws)
  - What does the law say about distribution of resources, and rights to those resources, if land cannot be physically partitioned?
  - Can children (either males or females) be completely disinherited by will or by law (intestate)?
    - If yes, are there specific grounds?



- Is there a mandatory set aside for children (meaning that they cannot be fully disinherited by will)?
- If yes, what portion of the inheritance must be set aside?
  
- Are their provisions for inter vivos gifts to daughters and sons?
  - If yes, does this impact or relate back to inheritance in any way?
  
- Is dowry or bride price prohibited by law? If there is no prohibition, does the law attempt to restrict or otherwise regulate the practice(s)?

### Inheritance Transfers

- What process is required to legally recognize the transfer of land rights that occur via inheritance? Are any documents such as a land title, deed or certificate required? Is a death certificate required?
  
- How is a transfer of land rights by inheritance documented? Are transfers of land rights by inheritance registered?
  - If so, where? Is this different for intestate and testate inheritance?
  
- What is the process required to formalize an inherited right to land? —where do people go, what is required for proof, etc.?
  
- Which court or forum (informal or formal) has jurisdiction to hear inheritance disputes?
  
- Does the law recognize decisions by non-formal customary or religious courts/dispute resolution bodies on inheritance disputes?

### Enforcement

- What forums have statutory jurisdiction to hear inheritance related property or land rights cases? (e.g. formal courts, courts of special jurisdiction, traditional dispute resolution actors recognized for certain cases, etc.)
  
- If there are multiple legal systems that deal with marital property, what is the process for determining which law and adjudicative body applies?
  
- Do women and men have equal rights to decide which law or adjudicative body applies?

- Are there barriers or disadvantages to women accessing the formal system of adjudication?  
I.e. fees, assumption of literacy (does something need to be written), identification documents, etc.

## Analyzing the Customary Framework

Customs can vary from community to community within a country.

### Customary Land Tenure Structure

- Is land held by individual families, is it held communally, or both?
- Who is considered the “owner” of the land?
- Who makes decisions about how the land is allocated, managed, or used in the household? In the community?
- If land is owned communally but is allocated to individual households for their use, what is the nature and scope of the rights for the individual household?
- Can those rights be transferred by inheritance (or otherwise)?
- Are there different rights for people within the household? I.e., is the male household head presumed to be the manager of the land?
- If land is held communally, who is ultimately responsible for land distribution? Are women in that group?

### Marital Practices

- \*Is matrilineal or patrilineal inheritance the custom?
- \*Is the marriage custom matrilocal or patrilocal?
- \*Is polygamy practiced?
  - \*If yes, do wives live separately or together with their husbands? Does each wife live in her own house, or is there another arrangement?
  - \*Does each wife have her own piece of land allocated for her use or does she share with the other wives?
  - \*Are there any restrictions on polygamy (number of wives, etc.)?
- Is bride price or dowry exchanged at the time of marriage?

- If yes, is this considered a daughter's pre-mortem inheritance?
- If yes, who receives the marital gift? (Possible recipients include daughter, son, parents of daughter, or parents of son.)
- If yes, who has control over the marital gift once it is received?
- If yes, does the family ever sell land to provide this marriage gift?

### Widows

- Do widows remain on their deceased husbands' land/ house?
  - If yes, are there any limitations to this (e.g. widows can only remain on the land/house until the time she remarries or until her children are of the age of majority or are married)?
  - If yes, is a portion of her land ever taken from her?
  - Is the custom to reclaim unused land rather than let her lease the land?
  - Does it matter what her husband died from?
  - If yes, can she stay on the land until she dies?
  - What if a woman does not have children? Does this change anything?
  - What if she does not have sons?
  - What if she is not the first wife?
- If wives do not remain on their husband's property, where do they go?
- If polygamy is legal, how are the land and house(s) divided among the wives?
- Who decides who gets what if there is no will?
- Does the division of property depend on the number and gender of the wives' children?
- If polygamy is not legal, how are the land and house(s) divided among wives?
- Who is usually responsible for taking care of widows?
  - If a specific child is responsible for taking care of a widow or widows, what does that child usually inherit?
  - Does the husband's land go directly to the caretaker child or other children?
  - If a specific child is responsible for taking care of a widow or widows, but there is no child to fill that role, what happens?

*Example:* If it's usually the eldest son, what happens if a family only has daughters?

- Do widows have use rights to the land where they live until they die or re-marry?
- What status do widows have in the community?
- What ceremonies must be practiced when a husband dies?
- Is there wife inheritance? Are there other expectations for the widow?

### Enforcement

- Do women know their rights?
- What is the basic system for resolving inheritance disputes?
  - Formal court?
  - Tribal or customary court?
  - Elders?
- Are women able to access all enforcement institutions?
- What are the barriers women face in resolving disputes?
  - Possible barriers include: costs associated with dispute resolution, location and hours of dispute resolution or enforcement bodies, comfort dealing with these systems, social barriers, complexity of paperwork requirements, etc.
- Where do women usually go when they have a inheritance land dispute? Why?
- Which dispute resolution actors know women's rights? Which dispute resolution actors support women's rights?
- How are inheritance disputes resolved by custom?
- Do both women and men bring inheritance complaints?
- Are there any customary barriers to women going to court, government offices, or informal dispute resolution bodies?

### Children's Inheritance

- Are daughters and sons both considered heirs? Do daughters and sons inherit land rights equally?
  - If not, who usually inherits land—daughters or sons?
- Does birth order matter?
- For polygamous families, does order of marriage of the mothers affect inheritance? • For those children who do not inherit land, do they inherit other property?
- Do unmarried women (single, divorced, or widowed) inherit land from their fathers if they are living at home?
  - Does it matter if they are never married versus have had a relationship that ended?
  - Does it matter if they are not living at home?

## Glossary

**BRIDEPRICE:** Money, property, or services paid by a groom or his family to the family of the bride.

**COMMON OWNERSHIP:** A form of shared tenure (defined below). More than one person or organization owns land or other property—each person owns a portion of the whole, divided equally unless otherwise stated.

**CONSENSUAL UNION:** Two people who choose to live together as if they were married, but their relationship is not recognized legally.

**CUSTOMARY RIGHTS:** Rights acquired by custom and recognized by all inhabitants of a particular place.

**DOWRY:** Money, goods, land or other possessions that a woman brings into a marriage with her; very often paid by her family and sometimes paid to the groom's family.

**FAMILY LAW:** A body or collection of laws dealing with matters related to the family; i.e., marriage, divorce, child custody.

**HEIR:** Any individual that inherits property by will or by law.

**INTESTATE:** When a person has died without a written or oral record of how and to whom his/her assets should be divided.

**INTER VIVOS GIFT:** A gift made during the owner's life.

**JOINT TENURE:** A form of shared tenure (defined below). More than one person or organization owns or has rights to land or other property—each person has the right to use and control the whole of the property, undivided.

**LEGAL RIGHTS:** A power, privilege, demand, or claim possessed by a particular person by virtue of law.

**MARITAL PROPERTY:** All property or other assets belonging to both spouses.

**MARITAL PROPERTY REGIME:** Rules governing the ownership and ways of managing property of the couple during marriage and when they separate or divorce.

**MATRILENIAL:** Tracing descent through the maternal line.

**MATRILOCAL:** Located at or centered around the residence of the wife's family or people.

**PATRILINEAL:** Tracing descent through the paternal line.

**PATRILOCAL:** Located at or centered around the residence of the husband's family or people.

**PERSONAL LAW:** A body or collection of laws dealing with an individual and his or her family.

**PERSONAL PROPERTY:** Moveable property (not land) owned by an individual.

**POLYGAMY:** A marriage that includes more than two partners.

**RIGHT OF SURVIVORSHIP:** The right of a surviving joint tenant to take ownership of a deceased joint tenant's share of the property. No will is required to transfer the property to the joint tenant.

**SHARED TENURE:** The broad category of rights to land and housing shared by two or more people. Shared tenure can be formal or informal. Formal shared tenure conventionally refers to co-ownership or co-lease rights. Shared tenure also includes land and/or housing which is owned, leased or occupied in shares by larger groups, such as through family tenure, community titling, women's groups and co-operatives, or by couples who each hold a portion of property together, but which do not necessarily constitute equal shares to this property.

**SUCCESSION:** The right and transmission of the rights and obligations of the deceased to his/her heirs.

**USE RIGHT:** Legal right to use land for any specified period of time without legal ownership of land.

**WIFE INHERITANCE:** A relative of a deceased husband marries the widow. Wife inheritance is also known as widow inheritance, bride inheritance, and levirate marriage.