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## I. Introduction & Background

### Introduction & How to Use This Guide

#### Introduction

These country-specific guides were developed using two general guides we created in the past: [Women's Land Tenure Framework for Analysis: Land Rights](#) and [Women's Land Tenure Framework for Analysis: Inheritance](#). These country specific guides do not seek to answer every question found in the other two guides; not all of the questions apply to every country. The general guides are intended to raise all possible issues. The country-specific guides use those guides as frameworks for understanding the main issues related to women's land rights in a specific country context.

The country-specific guides not only serve as an example of how one can use the general frameworks for analysis, but they also analyze the women's land rights situation in the particular country. Note that when it comes to analyzing customary law, we have selected one customary system for deeper analysis; however, this does not mean that all customary systems within this country operate the same way.

#### How to Use This Guide

In order to make these guides useful and user-friendly, when possible we have uploaded the full-text laws and articles that we cite to into the LandWise library.

The footnotes throughout this guide are all hyperlinked to full-text laws, articles or other citation information. When you hover over a footnote, the citation information will pop up in a bubble. When you click on the footnote, you will be taken to the full-text of the item the footnote is referencing.

### Background

#### Brief summary: land rights history in Tanzania/Tanganyika

Land rights in Tanzania have been forged through the country's many historical transitions. In the pre-colonial era, approximately 120 tribes determined land tenure arrangements for their members.[1] Lands were generally held communally, with chiefs, headmen and elders holding rights to the land in trust for the greater community.[2]

Under the German colonial era, from 1884 to 1916, all land was declared crown land, vested in the Empire, except for parcels that could be documented and claimed in ownership by chiefs, private individuals, and native communities. This process proved possible—in most instances—only for commercial settler farmers, and approximately 1,300,000 acres of the country's most fertile lands were alienated to foreigners during German rule.[3]

When Britain assumed trust powers over Tanzania following World War I, it declared all land public, vested under the governor's control for the use and benefit of native people. International law forbade the alienation of native land without prior consent of relevant authorities. The British government recognized rights of occupancy, which could be either granted (statutory) or deemed (title, use or occupancy deemed to belong to a native community using it in a legal manner and in accord with native laws and customs). In practice, granted rights were much stronger than deemed rights, and over 44 years approximately 3.5 million acres of land were alienated from native communities to British settlers.[4]

In the 1960s, President Julius Nyerere instituted a legal system based on African socialism, guided by the concept of *ujamaa* or "unity".[5] Under this system, radical tenure for all land in the country was vested in the government (president) on behalf of the people.[6] Customary land rights continued to exist alongside statutory systems,[7] but customary land rights were transferred from chiefs, headmen and elders to elected village councils. [8] The government encouraged collective cultivation. Some, including women, gained improved access to and security in landholdings.[9] However, by the 1990s, land tenure insecurity and prevalent land disputes necessitated a new approach to land and natural resources.[10]

In 1991, President Mwinyi established the Commission of Inquiry on Land Matters. [11] This Commission conducted widespread inquiry into perspectives on land reform, including extensive community-level meetings.[12] The Commission's Report (known as the 'Shivji' Report), published in 1993, laid the foundation for reforms embodied in the National Land Policy of 1995, and codified in the Land Act and Village Land Act of 1999, which established the country's core legislative framework for land tenure.[13] (And see the Land Regulations issued in 2001, pursuant to the Land Act, providing necessary guidelines and forms for implementing the Act.) Due in large part to the successful advocacy of women's groups in Tanzania, the National Land Policy and land laws of 1999 contain generally strong safeguards for women's land rights.

Principles of Land Governance in Tanzania, as embodied in the National Land Policy of 1995 (Section 2) and the Land Act of 1999 (Section 3):

- (1) To recognize that all land in Tanzania is public land vested in the President as trustee on behalf of all citizens;
- (2) To ensure that existing rights in land and recognized long standing occupation or use of land are clarified and secured by the law;
- (3) To facilitate an equitable distribution of and access to land by all citizens;
- (4) To regulate the amount of land that any one person or corporate body may occupy or use;
- (5) To ensure that land is used productively and that any such use complies with the principles of sustainable development;
- (6) To pay full, fair and prompt compensation to any person whose right of occupancy or long standing occupation or customary use of land is revoked or interfered with to their detriment by the State or is acquired;
- (7) To provide for an efficient, effective, economical or transparent system of land adjudication;
- (8) To enable all citizens to participate in decision making on matters connected with their occupation or use of land;
- (9) To facilitate and regulate the operation of a market in land so as to ensure that rural and urban small holders and pastoralists are not disadvantaged;
- (10) To set out rules of land law accessibly and in a manner which can be readily understood by all citizens;
- (11) To establish an independent expeditious and just system for the adjudication of land disputes which will hear and determine cases without undue delay;
- (12) To encourage the dissemination of information about land administration of information about land administration and land law through programmes of public and adult education using all forms of media;
- (13) The right of every adult woman to acquire, hold, use deal in land shall to the same extent and subject to the same restrictions be treated as a right of any adult man.[14]

## Land reforms in present-day Tanzania

The majority of the people in Tanzania today rely on land for their livelihood. Seventy-five percent of Tanzanians live in rural areas, and most are engaged in the agricultural sector. Despite strong economic growth in recent years, poverty in rural areas – where 85% of the country's poor people reside – remains widespread and acute.[15] At the same time, investment in land has increased. While the influx of capital supports the development of large-scale commercial enterprises, increasing demand for land could threaten the land tenure security of rural communities.[16] In coming years, the direction of land tenure will profoundly impact the wellbeing of the country's rural people.

While both men and women farm in Tanzania, time-use studies, economic data, census information and studies of the roles of men and women in the agricultural cycle consistently show that women are more active in agriculture than men. Men are largely responsible for cash crop farming and income-generating activities, while women take charge of food crops, help with cash crops, and provide the bulk of unpaid labor for household production. Men frequently migrate for off-farm employment, leaving women to tend cash crops alone. Even so, men nearly always control income from cash crops, even if they have been absent. Overall, men make production and labor allocation decisions, while farming fewer hours than women.[17]

Tanzania has an ambitious agenda for land and natural resource policy and legal reform. Since 1999, it has been transitioning to a legal framework that integrates aspects of customary tenure, supports the rights of women, recognizes private property rights, permits individualized control of resources in farming areas, and enables communal management of rangeland, forests and wildlife. At the same time, the new legal framework promotes private investments in land and natural resources, and foreign and domestic interest in acquiring land for large-scale investment has increased.[18]

## Legal reforms and the protection of women's rights

Despite positive developments, the agenda of policy and legal reform is not yet complete. Some allege that the current legal framework fails to effectively provide the foundation for an effective land governance system.[19] While the legal framework generally upholds women's rights to land, in rural areas

patriarchal practices predominate whereby men are *de facto* heads of households and have greater rights to land than women. [20] The law is still weak in regard to women's inheritance rights to land, and inheritance practices discriminate severely against women.[21] And, while investment in land stemming from the reforms has supported the development of commercial enterprises, the country's experience with large-scale land deals has been mixed, and small-hold farmers have often lost out.[22]

The willingness of the courts to honor and enforce the legal framework will have profound impact on the wellbeing of Tanzania's rural population, and a profound impact on women.

## Acknowledgments

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## II. Formal Framework for Women's Land Rights in Tanzania

### Overview

Both the Constitution and a number of written laws recognize women's equal rights to property. Relevant laws include: the Law of Marriage Act of 1971;[23] the Land Act of 1999 (establishing "The right of every woman to acquire, hold, use and deal with, land shall to the same extent and subject to the same restrictions be treated as a right of any man.");[24] the Village Land Act of 1999;[25] and the Mortgage Financing (Special Provisions) Act of 2008 (amending the Land Act of 1999 to require additional safeguards for spouses in the mortgage context).[26]

### The Constitution

The Constitution of 1977, [27], [28] as amended, guarantees every person the equal right to own property and declares deprivation of property unlawful, unless it is authorized by law providing for fair and adequate compensation in Article 24. The Constitution also explicitly prohibits sex-based discrimination in Article 13. The Constitution does not contain any direction related to customary laws inconsistent with women's equal rights to property (or right against discrimination).[29] However, the Village Land Act, as discussed below, covers in detail instances of conflict between customary and statutory law in regard to women's land rights.

### Formal statutory laws relevant to land

Key policy and legislative documents on land include: the National Land Policy of 1995; [30] the Land Act of 1999 (for general land, including urban land, and reserved land);[31] the Village Land Act of 1999 (for village land); [32] the Land Acquisition Act of 1967;[33] and the Law of Marriage Act of 1971.[34]

Tanzania has also signed onto a number of international rights conventions that uphold property rights for women and girls and, more broadly, the equal rights of women and men. It has ratified, without reservation, the following instruments: [the International Covenant on Civil and Political Rights \(ICCPR\)](#); [the International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#); [the Convention on the Elimination of All Forms of Discrimination Against Women \(CEDAW\)](#); [the Convention on the Rights of the Child \(CRC\)](#); [the African Charter on Human and Peoples' Rights](#); [the African Charter on the Rights and Welfare of the Child](#); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[35] For more information on International Agreements and How to Build a Legal Case for Women's Land Rights click [here](#).

#### Land Act (1999)

Under the Land Act of 1999, the State holds title to all land in Tanzania. [36] The President, through the Commissioner of Lands, has authority to grant a right of occupancy for up to 99 years.[37] Land is divided into three basic categories: **general land** (controlled directly by the state, and representing approximately 2% of the country's land); **village land** (mostly controlled by the villages, and representing approximately 28% of the country's land); and **reserve land** (designated by the state for national parks, game reserves, conservation areas, and public utilities). [38] General land includes most urban land.

The Land Act establishes a number of principles that help provide legal safeguards for women's land rights, including equitable distribution and access to land, participatory decision-making, and dissemination of information.[39]

The Land Act provides that, in the case of any inconsistency or conflict between the provisions of the Act and any or other law on a matter of land law, the Land Act prevails.[40] Therefore, it can be argued that any matter pertaining to land or inheritance of real property should fall under the purview of

the Land Act, as further discussed below in Part III.

### **Village Land Act (1999)**

The Village Land Act governs village land, which includes:

- Communal village land, which cannot be used for individual occupation or use;
- Land occupied or used by an individual/family/group of persons under customary law; [41] and
- Land that can be allocated by the Village Council for communal or individual occupation. [42]

Under the Act, the Village Council is legally responsible for the management of village land as a trustee managing property on behalf of the beneficiaries, the villagers. However, a Village Council is not allowed to allocate land or grant a customary right of occupancy without prior approval of the Village Assembly.[43]

The Village Land Act upholds customary rules on land, but provides that the customary rule or any action dependent on the rules shall be void to the extent to which it denies women, children or persons with disability lawful access to ownership, occupation or use of any customary land.[44]

The Village Land Act permits any individual, family unit or group of persons recognized as such under customary law to apply to the Village Council for a customary right of occupancy.[45] The Act makes special provision for divorcees who have left their spouse at least two years prior, and who were villagers prior to the marriage.[46] When family units apply, at least two persons from that unit must sign the application.[47]

The law requires that the Village Council treat all applications equally, regardless of the gender of the applicant, and forbids the Council from adopting discriminatory practices or attitudes toward women applying for a certificate of customary right of occupancy (CCRO).[48] The law further provides that the Village Adjudication Committee or officer must treat the rights of women and the rights of pastoralists to occupy use or have interest in land equally to those of men or agriculturalist.[49] Moreover, the Act prohibits villagers from assigning their right of occupancy if it would interfere with the right of any woman to occupy land under a customary right of occupancy, a derivative right or as a successor in title to the assignor.[50] In determining whether to grant a derivative right to Village Land, a Village Council must also take into account “the need to ensure that the special needs of women for land within the village [are] and will continue to be adequately met.”[51]

If someone, who holds a right of occupancy, breaches his or her duty to the land and the village, the Village Council may temporarily assign the right of the occupancy to the spouse(s) of the occupier who lives and works on the land.[52]

Although the Village Land Act did not decentralize land ownership to the village level, the Act devolves substantial authority to communities to govern village lands. Rather than to establish new local governance institutions for this purpose, the government chose to vest authority in existing village governance bodies (Village Councils and Village Assemblies). The national-level Commissioner of Lands serves as the chief authority for governance of general and reserve lands.[53]

The legal framework for women’s land rights in Tanzania is relatively strong, but neither national nor international laws providing for women’s equal property rights are often followed in practice. And for some issues, like inheritance, a body of conflicting and discriminatory law continues to exist and the lack of clarity is used to reinforce customary traditions that harm women.[54] These issues are further discussed below.

#### **Legal requirements for women’s representation in land governance institutions in Tanzania**

Tanzania has taken steps to increase the number of women represented in decision-making bodies (including those related to land). Fully leveraging this opportunity for increased women’s representation is important to fair and equitable outcomes from these bodies for women—including in allocation of customary land rights and village land use planning.[55]

The Land Act requires that the Minister of Land, Housing and Human Settlements Development must have regard for the importance of ensuring a fair gender balance in appointing members to the National Land Advisory Council.[56]

The Local Government (District Authorities) and Local Government (Urban Authorities) Acts of 1982 were amended in 2000 to establish affirmative action requirements for women in local government bodies. Women must now constitute one-third of the members of each District Council and one-fourth of the members of each Township Authority and Village Council. Women’s rights advocates hoped that this quota for women on the Village Council would help to alter land allocation practices of the Village Councils, which have frequently allocated land to male household heads. Village assemblies are comprised of all villagers aged at least 18, including both men and women, but are in practice often male-dominated.[57]

Under the Village Land Act, seven-member Village Land Councils must be comprised of at least three women. [58] The Village Council nominates members, who are approved by the Village Assembly. The Village Land Council has a minimum quorum of four members, at least two of whom must be women. The Act provides that the nine-member Village Adjudication Committees, tasked in part with safeguarding women’s interests, must be

comprised of at least four women. Five members are required for a quorum; at least two of which must be women.[59]

The Court (Land Disputes Settlements) Act of 2002 also establishes requirements for women's participation at Ward-level tribunals and appellate tribunals. In Section 11, the Act provides that each Ward-level Tribunal (the court of first instance for local land disputes) shall consist of four to eight members elected by the Ward Committee.[60] A minimum of three members must be women. In Section 14, the Act requires that every mediation includes three members of the Tribunal, of whom at least one must be a woman.[61] The Act also establishes an appellate body for the Ward Tribunals, called the District Land and Housing Tribunal. The Tribunal consists of the Chair [person] and up to seven assessors, who are appointed by the Minister. At least three of these assessors must be women.[62]

### **Quasi-statutory Law: Governmental Notices on Customary Land**

In addition to formal statutory law, Governmental Notices NG 279 and GN 436 (Customary Law Declaration Order),[63] which identify customary rules related to land, marriage and inheritance for some patrilineal communities in Tanzania, occupy an important place in jurisprudence as quasi-formal legal instruments. These Customary Law Declaration Orders, or CLDOs, only apply to districts that have signed on to them and are adopted through district councils. Although the CLDOs are not statutory law because they have not been passed by Parliament, they have force of law (in relevant Districts) because they have not been repealed by an act of Parliament.[64] The CLDOs are not applicable to matrilineal communities.[65] For purposes of this report, the substance of the CLDOs will be considered customary law, and will thus be addressed under Part III below.

## **Individual and household rights to land**

The statutory law does not limit the categories of land women can own, vis-à-vis men.

### **The Law of Marriage Act**

The Law of Marriage Act (or Uniform Marriage Act) of 1971 replaced a pluralistic legal system where Islamic, Christian, Hindu and customary laws, as well as a civil marriage regime, governed marriage and divorce. The Law of Marriage Act recognizes and applies to customary, religious and civil marriages.[66] The Act incorporates previous laws and some religious or traditional rights, but explicitly provides that it supersedes Islamic and customary law in regulating all four kinds of marriage.[67]

Valid marriage requires free consent of both parties, and a minimum age of 18 for males and 15 for females. [68] However, the law allows the courts, at their discretion based on a number of factors, to permit marriage at age 14, and the Penal Code allows for persons of African or Asiatic descent to marry or permit marriage of a girl under 12 years of age in accord with custom or religion if consummation is not intended before age 12.[69]

The law recognizes both monogamous and polygamous marriage, and requires that both be registered.[70] Non-compliance is punishable by a fine, but does not render the marriage void in the absence of registration.[71] According to Islamic law, Muslim men may take up to four wives. [72] However the Law of Marriage Act provides that in any case the first wife may object to a polygamous marriage if this would result in hardship for her or her children.[73] The Law of Marriage Act provides that women cohabitating with men for at least two years have the legal rights of wives. [74] Under the Act, bride wealth is no longer a requirement for a legal marriage.[75]

Both Islamic and customary law contradict the Law of Marriage Act on issues of bride wealth, in inheritance and other practices, as will be discussed in part III below. These differences have not been well-resolved, and as a result, discriminatory practices in inheritance remain the norm.

While the Law on Marriage Act governs all marriages and divorces, the choice of law governing inheritance is complex, and is discussed further below.

The Law of Marriage Act permits divorce.[76] Under the Act, a party seeking divorce must first apply to the appropriate Marriage Conciliatory Board, which can be the reconciliation board at the social welfare district level, the Ward Tribunal, or the BAKWATA (Islamic Council). The appropriate board then must certify a failure to reconcile between the parties prior to initiation of a divorce, and the certificate can be presented to the court.[77] To prove breakdown of the marriage before the court, parties must provide evidence of desertion, willful neglect (such as adultery or cruelty including assault, battery and other kinds of violence), voluntary separation, or that they have changed the religion to which they were subject at the time of the marriage.[78]

The Law of Marriage Act provides that married women have the right to acquire, hold and dispose of property, movable or immovable, during the course of the marriage, and the right to distribution of property earned jointly when the relationship is dissolved.[79] Property and other matrimonial assets that a woman has acquired individually belong to her. When there are two or more wives, they have equal rights and liabilities as spouses (Sections 56-63).[80]

### **Shared tenure**

The Land Act of 1999 (Part XII) provides the legal framework for shared tenure. [81] The Act recognizes two forms of shared tenure, joint occupancy and occupancy in common.[82]

Joint occupancy can only be created among spouses and exists when land as a whole is occupied jointly under a right of occupancy or lease. [83] No occupier is entitled to a separate share.[84] This means that: (a) there can be no disposition without agreement by all occupiers; (b) the joint occupiers—while alive—can only transfer their interest to the other joint occupier(s); and (c) when a joint occupier dies, interest vests in the surviving occupier (or occupiers, in which case jointly).[85]

With occupancy in common, each occupier is entitled to an undivided share in the whole. [86] The implications are that: (1) any occupier in common needs the consent in writing of the other occupier(s) before he or she can transact his or her interest to another person, but consent cannot be “unreasonably” withheld;[87] and (2) when an occupier dies, his or her share becomes part of the estate and his or her heir inherits the land. [88]

The legal presumption is that spouses hold all land that is co-occupied and used by both (or all) as occupiers in common, and the presumption of co-occupancy for spouses applies to granted rights (certificate of occupancy) and customary rights (customary certificate of occupancy).[89]

Spouses can register either form of shared tenure and each occupier is entitled to receive a copy of the certificate of title of right of occupancy. [90]

In sum, the Land Act establishes a presumption that land that is co-occupied and used by spouses is shared property, in the form of occupancy in common.[91]

Although joint occupancy is only available to spouses, joint occupancy rights are not presumed for spousal property, but must rather be registered as such. One critical important implication consequence is that under the standing presumption of occupancy in common for spouses, the share of the deceased spouse would not automatically become (by operation of the law of joint occupants) part of the surviving spouse’s estate. This would only be the case if the spouses had registered under a joint occupancy right.

Co-occupancy is not presumed, under the Land Act, to apply to land that belonged to one spouse prior to the marriage. Also, what is meant by “obtained” is not entirely clear under the Act. For example, it is not clear whether land obtained by one spouse through inheritance or gift (as opposed to payment) would also be considered to belong to both (or all) spouses as occupants in common.

Where the right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labor to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed to have acquired an interest in that land in the nature of an occupancy in common.[92] The law also provides some safeguard for spouses who do not have an interest in their dwelling house or land as occupiers in common. If a spouse (who holds land or a dwelling house for a right of occupancy in his or her name alone) undertakes to mortgage the property, the lender has a duty to inquire whether the borrower has received spousal consent, and where that disposition is an assignment or a transfer of land, the assignee or transferee is required to determine whether the spouse or spouses have consented.[93]

The Land Act provides that land occupied in common may be partitioned. [94] One or more occupiers can apply for partition, but consent from all co-owners is required.[95] The Registrar may order partition over the objections of one or more occupiers in common, but where occupiers in common are spouses or dependents, the Registrar must take into account whether the interests of all have been provided for, with a particular eye to ensuring that no spouse or the dependent is left homeless by the partition.[96] If some occupiers in common have not agreed to the partition, the Registrar may order those who requested the partition to compensate them.[97]

The Land Act provides specific safeguards for the marital home by requiring documented evidence of consent by all spouses prior to mortgage of a matrimonial home.[98] The Act also requires notice to all spouses for actions by lenders regarding mortgages.[99] The Mortgage Financing (Special Provisions) Act of 2008 amended the Land Act to provide further protections for spouses in the mortgage context. The Act establishes the mortgagor’s legal responsibility to disclose information about any spouse(s), and the mortgagee’s responsibility to take reasonable steps to verify this information.[100] A mortgagor who provides false information in regard to existence of any spouse(s) may be punished with fines or imprisonment under the law.[101]

The Law of Marriage Act prohibits one spouse from alienating his or her interest in the matrimonial home (including associated agricultural land allocated by a husband or wife to his or her spouse for exclusive use)[102] without the consent of the other spouse(s). [103] The Law of Marriage Act further provides that if one spouse alienates his or her interest in the matrimonial home in contravention to the law, the interest will be subject to the right of the non-consenting spouse to reside in the matrimonial home until (a) the marriage is dissolved; or (b) the court orders otherwise.[104] The only exception to this is if the transferee had no notice of the interest of the non-consenting spouse, and could not through reasonable due diligence have determined it.[105]

Statutory law provides a number of safeguards for spouses in the event that the spouse holding a granted or customary right of occupancy wishes to surrender that right, or abandons the property. For a granted right, the Commissioner cannot accept surrender designed to defeat a spouse’s rights to obtain or share in the land.[106]

The Village Land Act makes void any attempt to surrender customary rights of occupancy if the effect would be to deprive or harm a woman occupying the land.[107] Also, any attempt to surrender rights must be consented to in writing by any person who has an interest in the land.[108] And after a customary right has been surrendered, the Village Council must offer it to the other spouse(s) before re-granting it.[109]

In the case of abandonment, where an occupancy right holder has deserted the land for at least five years, has failed to pay rent for a minimum of two years, or has left the country without appointing a responsible steward for the land and failed to notify the Village Council, the Village Council may declare the land abandoned but only if no spouses or dependents are using the land.[110]

### **Safeguards against sex discrimination in transactions**

Tanzanian law provides for specific safeguards related to women's land rights in the context of transactions, in addition to those discussed above related to shared occupancy rights and matrimonial property. For example, the Land Act prohibits a lessor from "unreasonably" withholding a lease based on the gender of the transferee, assignee or sub-lessee.[111] The Act also directs that the "Court, in considering whether to grant an order of termination of a lease or to grant relief against such an order, shall have regard to the age, means and circumstances including the health and number of dependents of the lessee, and in particular whether a spouse of the lessee is likely to suffer undue hardship if an order were made." [112]

In the context of mortgage, the Land Act prohibits lenders from discriminating against borrowers based on sex, and establishes the Court's authority to reopen a mortgage on this ground, and to "direct the lending institution to cease its discriminatory policy with respect to granting mortgage." [113] The Act provides further remedies to spouses, women and dependents in regard to mortgage in Sections 113(3)(c), 139(1), and 142(3)(a).

### **Inheritance**

Most of the intestate inheritance laws in Tanzania discriminate against women, and are at odds with protections of women's rights established in the Constitution, land and marriage legislation. Advocates have been pushing for an updated Uniform Succession Law for decades. The Law Reform Commission began working on a draft for such a law in 1987, and submitted a draft to the Ministry of Justice in 1995 (where it was held in confidentiality until 2002).[114] The Commission has roundly criticized inheritance practices and current legislation.[115] Currently four legal systems govern inheritance: (1) the Indian Succession Act, 1865 (with application to Tanzanians of European origin, and to Christians, not of African descent); (2) the Hindu Wills Act, 1870 (with application to a relatively small number of Hindus in the country—20,000 in 2002); (3) customary law,[116] which regulates succession for "a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted," interpreted to include all Tanzanians of African descent unless they can meet one of two statutory tests; [117] and (4) Islamic Law. Approximately forty-five percent of Tanzania's population (including that of Zanzibar) is Muslim, and forty-five percent is Christian, yet for intestate disposition of property, customary law is the default regime for those of African descent under the current law.[118]

The Probate and Administration of Estates Act of 2002 funnels all Tanzanians of African descent to customary law requiring proof of intent to be covered by Islamic or Christian law.[119] This push toward customary law essentially guarantees that wives will not have a right to their husband's land, which violates the Constitution, the Law on Marriage Act and several land laws. In contrast the Indian Succession Act is gender neutral and Islamic law gives widows some inheritance rights.

Women's land rights advocates in Tanzania emphasize the importance of will writing practices, as wills that safeguard the rights and interests of female heirs are legally enforceable, and have proven a good way to protect the interests of widows, orphans and others. In addition, wills are the only absolute proof of the deceased's intent, as required by the statutory tests to avoid application of customary law by the courts.

When a person dies intestate, a legally designated person must be chosen to distribute the deceased's assets, and becomes the "administrator" of the estate. General statutory law requires that the nearest male relative of the deceased serve as the estate's administrator for "small" estates, valued at 10,000 shillings or less.[120] Only when the estate is very small (valued at less than 1,000 shillings) may the surviving spouse distribute it. However, few estates would be valued so low. When the estate is not "small", the law sets out a gender neutral system for appointing an administrator, but this often results in the exclusion of women in practice. In the case of larger estates, the administrator may be "any person who, according to the rules for the distribution of the estate... would be entitled to the whole or any part of such deceased's estate." However, in the case of conflict, the court "shall take into account greater and immediate interests in the deceased's estate in priority to lesser or more remote interests." Under the existing regime, the likelihood that a woman will have the greatest share in the estate is minute.[121]

Although Islamic law does not facially discriminate against women in the administration of estates, it operates to exclude women in practice. Islamic law does not specify procedure for selecting administrators. However, a Muslim widow must remain in mourning for 120 days, during which she is confined to her home and may not participate in public activities.[122]

The next section summarizes key provisions of the Indian Succession Act of 1865, and Islamic laws on inheritance. Customary rules and practices will be covered in Part III below. The Hindu Wills Act of 1870 will not be further discussed because of its limited application.

#### **1. Inheritance under Formal Law: The Indian Succession Act of 1865**

The Indian Succession Act of 1865 is the primary statute governing inheritance in Tanzania, and applies to Christians and Tanzanian residents of

European origin.[123] Nothing in the Act prohibits its application to Christians who are of African origin, but customary law generally governs inheritance issues for an African person.[124]

The Act applies to inheritance of both movable and immovable property, if both are located in the same physical space. [125]

Only land that is held individually or by household, rather than communally, may be inherited.

The Act provides that the spouse and/or kin inherit in intestacy or per the valid will of the deceased. [126] According to the Act, the amount of land that a spouse will inherit if her/his spouse dies intestate depends on whether (s)he leaves lineal descendants or not. If (s)he has lineal descendants, the spouse is entitled to one-third of the estate, while the descendants are entitled to two-thirds. If (s)he has left relatives but no lineal descendants, the spouse is entitled to one-half of the estate, and the relatives to the other half.[127] If the deceased leaves no relatives, his/her estate goes entirely to his spouse. If there is no spouse, the deceased's estate goes to the lineal descendants or other relatives. There is no distinction made between males or females who die intestate.[128]

If there are lineal descendants, the part of the estate going to them is divided equally among children, regardless of sex. If there are no lineal descendants, the deceased's parents and siblings share half of the estate.[129]

The Land Act of 1999 establishes rules for joint ownership, that may affect the statutory right of a wife to her husband's estate (e.g., if the spouses had registered their land as joint tenants prior to the death, the deceased's share would automatically, by law, transfer to the surviving spouse).[130]

Under the Indian Succession Act, a spouse inherits the same rights to the land as were held by the deceased spouse. [131]

The District Courts have original jurisdiction over cases arising under the Indian Succession Act.

## 2. Inheritance under Islamic Law

Under Islamic law, Muslim men are able to take up to four wives. Polygamy among Muslim households is the norm in Tanzania.

The Quran provides for succession through will or intestacy, although only one-third of the estate may pass through a will. [132] The rest must be distributed per intestacy rules established in the Quran, which assigns fixed inheritance shares to particular heirs including the surviving husband or wife, father, mother and children.[133] Male heirs are generally entitled to twice the share of equivalent female heirs. [134] If a deceased husband leaves either a wife (or wives) and children, the wife/wives are entitled to a total of one-eighth of the estate. If the husband leaves no children, the wife/wives are entitled to a total of one-fourth of the estate. Multiple wives share the total amount allocated to a wife or wives (either one-eighth or one-fourth).[135]

As noted above, the Land Act provides that, in the case of any inconsistency or conflict between the provisions of the Act and any or other law on a matter of land law, the Land Act prevails. Both the application of Islamic law on inheritance (as well as customary law) can be challenged on the ground that it violates both the Constitution and the Land Act.[136]

### Compulsory Acquisition

The Constitution allows for the State to compulsorily acquire property for a list of broadly defined public purposes, including "enabling any other thing to be done which promotes, or preserves the national interest in general." [137] The Land Acquisition Act of 1967 and the Land Act of 1999 govern compulsory acquisition. Both include "development of agricultural land" as valid public purposes for the State to acquire land compulsorily, leaving the door open for wide application of the state's acquisition authority in the face of increased commercial interest in land investment in Tanzania.[138]

To compulsorily acquire land, the state must compensate any landholder with a valid right to the land, defined broadly in the Land Act as "any person whose right of occupancy or recognized long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State..." [139] However the Land Acquisition Act of 1967 and the Land Act define compensation differently; the 1967 Act limits compensation to "unexhausted improvements" to the land, the 1999 Act provides for a multi-faceted basis for compensation.[140] It is not clear which definition of compensation currently governs, although recent litigation on this point affirmed (on technical grounds) the government's ability to pay the lesser amount required under the Land Acquisition Act.[141] The Land Acquisition Act does not provide any specific protection for women or spouses, however the broad definition of "valid right" could be helpful to women as it includes both a right of occupancy and also any recognized long-standing occupation or customary use. Under the Land Act as well, a spouse would have a presumed right of shared occupancy whether or not her name is recorded, and could also prove contribution to land clearly held as separate property by her husband. Monetary compensation, rather than land in-kind, is the norm, leaving open the possibility that families will be worse off than they were before, and in some cases landless.[142]

## Enforcement

The Village Land Act, Part V, addresses resolution of local-level land-based disputes. The Act requires that each village establish a Village Land Council

to mediate disputes and assist parties in finding solutions to issues regarding village land. As stated above, three of the seven members of the Village Council must be women, and a quorum requires at least two women (out of four members total) on village land issues.[143] Use of the Village Land Council's mediation services is optional, and parties who reject the mediation outcome will be referred to the court with appropriate jurisdiction.[144] These are listed in the Land Act as Village Land Councils, Ward Tribunals, the District Land and Housing Tribunals, the High Court, and the Court of Appeal.[145]

### III. Customary Framework(s) for Women's Land and Property Rights in Tanzania

#### Customary Tenure

Customary law is recognized by communities as "having the force of law," and may be either written or unwritten. In Tanzania the law has consistently held that it governs all people of African origin, unless they can prove otherwise, regardless of their religious affiliation.[146] However, customary rules are not legally valid if they violate the constitutional and legal mandates for gender equality. In practice, customary rules generally apply whether or not they violate statutory norms.[147]

#### Marital Practices

Marriage in Tanzania, by custom, is generally patrilocal and patrilineal. A minority of communities (approximately 20%) follow matrilineal marriage practices.[148] Polygamy is the norm, and there is no maximum limit on the number of wives a man may take.

Some of the country's patrilineal marriage and inheritance practices have been restated in the Local Customary Law (Declaration) Order (No. 4) of 1963.[149] As noted in Part II above, this instrument has the force of statute in Districts where it has been approved, and where it has not been superseded by statutory law. The application of customary law, as restated, varies greatly depending on the discretion of the judge and the geographic region.[150] Additional locally-recognized rules (including those of matrilineal communities) are valid so long as they can be proven in court. [151] In some cases, these practices have been found to support women's rights to inheritance to a greater extent than indicated in the general codification.[152]

#### Inheritance and Marriage Customs of Matrilineal Communities

Approximately 20 percent of communities in Tanzania follow matrilineal and matrilineal marriage practices. These include the Makonde, Yao, Makua, Luguru, and Mwera communities, among others.[153] A belt of the southern part of Tanzania is comprised of predominantly matrilineal communities.[154] Local Customary Law (Declaration) Order, 1963, only applies to patrilineal communities, but the unmodified customary law remains in force for matrilineal communities.[155] The communities are normally formed in proximity to a man who is often the eldest brother of the sisters. This "uncle" plays an important role as the leader of the family in the matrilineal system.

Traditionally, in the community's matrilineal system, the husband in a newly married couple comes to the village of his wife to live with her family, after receiving approval from the family and maternal uncle, and in some cases, giving bride wealth to the wife's kin (the bride wealth given in matrilineal communities is generally more symbolic in nature than those in patrilineal communities). These villages are composed of related groups of women, living with their spouses, unlike a patrilocal community where the village would be composed of related men and their spouses. In addition, divorce is more common in matrilineal communities, and a bride wealth must be repaid upon divorcing.[156] Upon divorce in the Luguru clan, for example, children are retained by the mother, and the husband leaves with nothing. Similarly, if the mother dies, the children are usually cared for by a maternal uncle, not the father.

Traditionally, in the case of the Luguru community, if a man is married to more than one woman, the wives would each live on the land within their own communities, and he would visit each of them.[157] However, this has changed in recent years, and polygamous men and their wives began to live all together, forcing some of the women to leave their community of lineage.[158]

The inheritance of property also follows maternal relationships, but the details of these customs are relatively unknown and vary. [159] To an extent, the communities remain disadvantaged because the unwritten customary laws applicable to their communities must be proven in a court as a question of fact whenever the customary law of the matrilineal community is invoked.[160] For example, in matrilineal communities, nephews inherit land, whereas in a patrilineal community sons would inherit the land. Yet, women still do not have the same inheritance rights as the men in either scenario.[161] Women are generally given access to land through a male relative, and although she does not have a right to inherit, a daughter who stays in her matrilineal community may receive a small piece of land from the family, and she may give that land away to whomever she chooses. In the case of the Luguru community, in recent years there has been a greater shift towards a more patrilineal policy of inheritance.

In addition to cases of abandonment or transfer of land by the head of household (discussed above), women become vulnerable to losing access and rights to their land in the context of divorce or death of their husband. As a general rule under customary law in Tanzania, a divorced woman will lose access to land and her family is required to pay back the bride price.[162] "This rule continues to be widely applied, in contradiction to the Law of Marriage Act of 1971, which stipulates that bride prices are no longer required for a marriage to be legal, and which provides for division of matrimonial assets on divorce." [163] Although the legal framework in Tanzania provides women with a right to property earned jointly upon dissolution of a marriage,[164] in practice this does not often play out.

Women may also lose rights to customary land upon death of the husband, as customary law discriminates heavily against women's inheritance, and eviction of widows by in-laws is common.[165] Also, the fact that customary marriages are not subject to registration leaves women at higher risk of losing their land upon death or divorce.[166]

## Inheritance

Customary rules on inheritance vary across Tanzania, depending on ethnic community. In almost every case, however, customary systems of inheritance operates contra the statutory protections for women expressed in Constitution (discrimination based on sex), the 1995 National Land Policy (customary rules govern inheritance, unless these rules are “contrary to the constitution and principles of natural justice”), and the land acts of 1999 (customary law is void to the extent it discriminates against women’s “lawful access to ownership, occupancy or use of land”).<sup>[167]</sup> The High Court, in the landmark case *Ephraim v. Pastory* (1990), decried customary restrictions on women’s rights to inherit clan land as “oppressive and unjust laws of the past.”<sup>[168]</sup>

### **Inheritance and Marriage Customs of Patrilineal Communities**

As mentioned above, upon marriage in a patrilineal society, the wife will move to the community of the husband. In a polygamous home, generally each wife and her children have their own home and land, and operate as a separate economic unit, although in some households wives share housekeeping and farming duties.<sup>[169]</sup>

Customary laws of inheritance that apply to patrilineal communities tend to disproportionately favor the male heirs of the family. <sup>[170]</sup> In patrilineal systems, individuals belong to her or his father’s lineage, and the lines of inheritance of property follow the male bloodline. If there are male heirs, customary law prevents women from inheriting land for fear that they would transfer the land outside of the family by marriage.<sup>[171]</sup> The customary law also ensures that widowed women do not have a residual right to their family’s land.<sup>[172]</sup>

The Local Customary Law (Declaration) (No.4) Order, codified the customary law and specifically states that inheritance follows the patrilineal side.<sup>[173]</sup> Most patrilineal communities’ rules of inheritance have been codified, although there are some unwritten customary rules that may be proven as an issue of fact in court. The Order also provides that women may inherit land, with the exception of clan land.<sup>[174]</sup> The women may use the clan land, but cannot sell it. Additionally, a woman may inherit the land in the event that there are no men in the clan.<sup>[175]</sup> Some patrilineal communities discourage inheritance of land by daughters because daughters are expected to move away once they marry.<sup>[176]</sup> Some of these communities include Bahaya, Maasai, Chagga, Pare and Sambia peoples.<sup>[177]</sup>

According to the codified customary law, in polygamous families, the first male child of a man’s most senior wife is the first heir. Daughters may inherit to a certain extent, based on degrees specified below.<sup>[178]</sup>

A widow has the “choice,” after her husband dies, of marrying one of the deceased’s relatives. If she refuses, her family does not have to repay the bride price and she may return to her own relatives.<sup>[179]</sup> This usually means, in practice, that a widow who refuses to marry her husband’s relative is evicted and dispossessed.<sup>[180]</sup> Property grabbing from widows, eviction of widows, and widow inheritance are reportedly common. <sup>[181]</sup>

According to Local Customary Law (Declaration) Order No. 4 of 1963, a widow with no children has the right to half of the property she acquired during the course of her marriage, minus any debts of the deceased.<sup>[182]</sup> This entitlement is rarely if ever realized in practice, however. <sup>[183]</sup>

A widow’s inherited rights are only valid so long as she does not marry outside of the husband’s family.<sup>[184]</sup> So long as land is available in the widow’s natal village, she is usually able to return there to live.

Under customary law, there are three “degrees,” or “tiers” for inheritance to lineal descendants, as follows:

- (1) First degree heirs: Usually the first son from the first house is the heir in first degree. He inherits first, receiving the largest share of the estate.
- (2) Second degree heirs: Usually all other sons are considered second degree heirs. They inherit the next largest share (after the first degree heirs), with older sons receiving more than younger brothers.
- (3) Third degree heirs: Usually daughters are considered third degree heirs. They inherit a smaller share yet, with older daughters receiving more than younger sisters. If the deceased had no sons, the first daughter of the first house becomes first degree heir. However no female child may fully inherit clan land, but may inherit only the rights to use it without selling it during her lifetime.<sup>[185]</sup>

If a deceased man has no lineal descendants, his brothers are considered first and second degree heirs, and his father, paternal uncles and aunts, and wife are considered to be third degree heirs.<sup>[186]</sup>

Under the rules prescribed above, no share of the deceased’s estate goes to a widow so long as survivors include relatives of the deceased’s clan. A surviving husband cannot, likewise, inherit from his deceased wife’s estate, unless she has no children or family members.<sup>[187]</sup>

Intervivos gifts are allowed, and are accounted for in distributing the estate after death. It is not clear whether custom allows a husband, while alive, to distribute to his wife any part of the estate.<sup>[188]</sup>

If daughters, wives, or any other women inherit, they generally only inherit lifetime use rights to immovable property, and can only sell the property if there are no male family members. Males, on the other hand, inherit property absolutely.<sup>[189]</sup> The High Court has ruled that customs prohibiting females

from selling clan land are “discriminatory, unconstitutional and in violation of Tanzania’s international human rights obligations.”<sup>[190]</sup> The High Court’s ruling rendered unconstitutional the provisions of the Local Customary Law (Declaration) Order that prohibit “women from selling clan land.” The Order has been neither amended nor repealed, however, and so protections for women created by the 1989 case can be realized only by those who challenge the customary rule in court.<sup>[191]</sup>

Commentators have noted that the customary rule limiting women’s inheritance of immovable property to a lifetime use right violates the Constitution, international human rights law, Part IV of the Law of Marriage Act, no. 5 of 1971, and also the 1999 Land Acts. These laws all recognize women’s equal right to acquire, own and dispose of property.<sup>[192]</sup>

In the past, the oldest male child was usually responsible for taking care of his widowed mother, thus justifying his greater share of the inheritance. <sup>[193]</sup> However in practice, daughters are increasingly taking charge of their parents’ care. According to the Law Reform Commission, “nowadays daughters ...be they married or unmarried, appear to play a more leading role in caring for their aging parents than is the case with sons.”<sup>[194]</sup>

One serious impediment to spousal justice under customary law is the practice of appointing a male administrator to the deceased husband’s estate. <sup>[195]</sup> The role of the administrator under probate law is to help distribute the deceased’s assets. However this role is often confused with that of a beneficiary, and in practice the administrator may take for himself the majority of the estate’s assets.<sup>[196]</sup> Most customary systems call for the deceased’s father or other male relative to be the administrator.<sup>[197]</sup>

## Enforcement

If Customary or Islamic law applies to an inheritance case, Primary Courts officially have original jurisdiction. However under customary systems the Clan Councils usually handle inheritance issues first, and they only go to the Primary Court in the event that one of the parties appeals the Council’s ruling.<sup>[198]</sup> The Primary Court may send women back to the Clan Council if they have by-passed it in the first instance. <sup>[199]</sup> The Courts may also call upon Clan elders to give evidence, and lean toward the position supported by the Clan. On the other hand, the Courts have been known to appoint administrators, who benefit from the deceased’s estate rather than the widow and her children.<sup>[200]</sup> Clan Councils usually honor wills, but if they conflict with customary norms, the Council may have a difficult time with disputes that arise from family members’ protests. In this case, the Clan Council has authority to “order a variation of the Will.”<sup>[201]</sup>

The Village Land Councils are tasked with dispute resolution for cases involving village lands (see discussion above). However the Village Land Act provides that disputes regarding customary rights of occupancy (e.g., those involving succession or inheritance) shall be determined based on customary law.<sup>[202]</sup>

## IV. Endnotes & Citations

### Endnotes & Citations

<sup>1</sup>*Tanzania Land Policy and Genesis of Land Reform Sub-Component of Private Sector Competitiveness Project*, National Land Use Planning Commission 1 (on file with Landesa).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *USAID Country Profile: Tanzania, Property Rights and Resource Governance*, USAID (2011), at 1–2, [hereinafter *Tanzania Profile*].

<sup>6</sup> Tanzania Land Policy and Genesis, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; Ingunn Ikdahl et al., *Human Rights, Formalisation and Women’s Land Rights in Southern and Eastern Africa*, 57 *Stud. in Women’s L.* 1, 36–37 (2005),

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 37.

<sup>12</sup> Marjolein Benschop, *Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa?* (2002), at 106.

<sup>13</sup> *Id.* The Shivji report identified a number of key concerns with the land administration system. For example, the authors found that vesting of radical title in the President undermined tenure security through uncontrolled evictions and acquisitions. It also contributed to protracted control over land by the executive, as well as undue (monopolistic) presidential influence over land governance and administration. Continued bureaucracy over allocation, use and development of land was found a critical problem to the majority of the people. In addition, authors cited a lack of transparency, public oversight accountability, abuse of power and corruption in land transactions. R.W. Tenga and J.M. Kironde, *Study of Policy, Legal and Institutional Issues Related to land in the SAGCOT Project Area* (2012), at 110 [draft report, on file with Landesa].

<sup>14</sup> Tanzania Land Policy and Genesis, *supra* note 1

<sup>15</sup> International Fund for Agricultural Development (IFAD), *Rural Poverty in Tanzania*, Rural Poverty Portal, <http://www.ruralpovertyportal.org/country/home/tags/tanzania> (last visited June 17, 2014).

<sup>16</sup> Fred Nelson, Emmanuel Sulle & Edward Lekaita. *Land Grabbing and Political Transformation in Tanzania*. Paper presented at the International Conference on Global Land Grabbing II, Oct. 17-19, 2012, organized by the Land Deal Politics Initiative, Cornell University, Ithica, New York.

<sup>17</sup> EPAR Brief No. 134: Gender and Agriculture in Tanzania by M. K. Leavens & C. L. Anderson (2011).

<sup>18</sup> *Tanzania Profile*, *supra* note 5 at 1-2.

<sup>19</sup> Ik Dahl, *supra* note 9, at 38–40; *Tanzania Profile*, *supra* note 5.

<sup>20</sup> See generally Tamar Ezer, *Inheritance Law in Tanzania: the Impoverishment of Widows and Daughters*, 7 *Geo. J. Gender & L.* 599, (2006). See also Benschop, *supra* note 12, at 123; *USAID Issue Brief: Land Tenure, Property Rights, and Gender, Challenges and Approaches for Strengthening Women's Land Tenure and Property Rights*, USAID (2013), [hereafter *USAID Issue Brief*].

<sup>21</sup> Ezer, *supra* note 20, at 601; Ik Dahl, *supra* note 9, at 40.

<sup>22</sup> Orton Kiishweko. 2012. *Tanzania Takes Major Steps Towards Curbing Land "Grabs."* The Guardian Development Network.

<sup>23</sup> *Law of Marriage Act (1971)*, at §56, 65, 114.

<sup>24</sup> *Land Act (1999)*, at §3(2).

<sup>25</sup> *Village Land Act (1999)*, at §3(2).

<sup>26</sup> *Mortgage Financing (Special Provisions) Act of 2008 (2008)*.

<sup>27</sup> The Constitution is currently under review in Tanzania, with the goal of a national referendum to adopt a new constitution by the end of 2014. *Tanzania to Have New Constitution in 2014: Kikwete*, News of the South (Jan. 14, 2014), <http://newsouth.com/tanzania-to-have-new-constitution-in-2014-kikwete/>. At the time this guide was written, the second proposed constitutional draft did not specifically address land issues, despite advocacy efforts by multiple stakeholder groups within the country for a new chapter on land. *Id.*

<sup>28</sup> *Constitution of the United Republic of Tanzania (1977)*.

<sup>29</sup> Redress to a violation of equal rights or protection lies with the High Court, which is not accessible by most people, and particularly not to most rural women. And when the High Court does determine that rights have been violated, the specified remedy is not individual damages, but rather to give the state (or agency against which the charge is rendered) the opportunity to rectify the offending law or action. Until this happens (or a period of time stated given by the Court expires) the discriminatory law remains on the books. Benschop, *supra* note 12, at 104.

<sup>30</sup> *National Land Policy (1995)*.

<sup>31</sup> *Land Act*, *supra* note 24.

<sup>32</sup> *Village Land Act*, *supra* note 25.

<sup>33</sup> *Land Acquisition Act (1967)*.

<sup>34</sup> Law of Marriage Act, *supra* note 23.

<sup>35</sup> Ezer, *supra* note 20, at 629; Ikdahl, *supra* note 9, at 40.

<sup>36</sup> Land Act, *supra* note 24, at §4(1).

<sup>37</sup> *Id.* at §32(1).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at §31.

<sup>40</sup> *Id.* at §181.

<sup>41</sup> Both customary and granted rights of occupancy have equal status and effect under the law. Village Land Act, *supra* note 25, at §18. There is no specified maximum term for customary rights of occupancy. Benschop, *supra* note 12, at 110.

<sup>42</sup> Benschop, *supra* note 12, at 115, citing Village Land Act (1999), at §12(1).

<sup>43</sup> Benschop, *supra* note 12, at 105, referring to the Village Land Act (1999).

<sup>44</sup> Village Land Act, *supra* note 25, at §20(2).

<sup>45</sup> *Id.* at §22.

<sup>46</sup> *Id.* at §22(1), (2).

<sup>47</sup> *Id.* at §22(3)(ii)(b).

<sup>48</sup> *Id.* at §23(2)(c).

<sup>49</sup> *Id.* at §57(3).

<sup>50</sup> *Id.* at §30(4)(b).

<sup>51</sup> *Id.* at §33(1)(d).

<sup>52</sup> *Id.* at §43 (9).

<sup>53</sup> See Benschop, *supra* note 12, at 109; Tanzania Profile, *supra* note 5.

<sup>54</sup> Ezer, *supra* note 20, at 604; Ikdahl, *supra* note 9, at 39–40.

<sup>55</sup> Carpano, F. 2010. *Strengthening Women's Access to Land: the Tanzanian Experience of the Sustainable Rangeland Management Project*. IFAD report., at 12-13, further providing that the Village Land Use Planning process in Tanzania provides tools and space for women to participate fully and defend their interests.

<sup>56</sup> Land Act, *supra* note 24, at §17(2).

<sup>57</sup> Benschop, *supra* note 12, at 105.

<sup>58</sup> Village Land Act, *supra* note 25, at §60(2), (9).

<sup>59</sup> *Id.* at §53(2).

<sup>60</sup> The Courts (Land Disputes Settlements) Act (2002), §11.

<sup>61</sup> *Id.* at §14.

<sup>62</sup> *Id.* at §26.

<sup>63</sup> [Local Customary Law \(Declaration\) \(No. 4\) Order, GN 436/1963](#). Hereafter [*Local Customary Law*].

<sup>64</sup> Some specific parts of the CLDO have been superseded by statutory law, however. For example, section 9(3A) of the Law of Marriage Act of 1971 referring to the Judicature and Application of Laws Act excludes CLDO applicability to Islamic and Customary Law on issues provided for in the Law of Marriage Act. Naseku Kisambu, Head-Research and Policy Department, Tanzanian Women Lawyers Association, e-mail correspondence on July 11, 2014, Head- Research and Publicity Department, TANZANIAN WOMEN LAWYERS ASSOCIATION. (on file with Landesa). It can also be argued that both the Constitution (provisions on gender equality) and Land Act implicitly supersede the Government Notices (and Islamic Law) on matters regarding inheritance. (As noted above, the Land Act provides that, in the case of any inconsistency or conflict between the provisions of the Act and any or other law on the matter of land law, the Land Act prevails. §192.) However as a practical matter the courts continue to apply both the Government Notices and Islamic Law to inheritance cases. Naseku Kisambu, Written comments to draft guide report on April 14, 2014 (on file with Landesa).

<sup>65</sup> Approximately 80 percent of Tanzania communities are considered patrilineal, though traditional matrilineal communities have increasingly transitioned to patrilineal custom as ethnic intermarriage, migration, urbanization and other demographic changes become more prevalent. Matrilineal customs are less well known and rules are not codified in a similar way to the rules of patrilineal customs.

<sup>66</sup> [Law of Marriage Act](#), *supra* note 23.

<sup>67</sup> [Benschop](#), *supra* note 12, at 124, *citing* Magdalena Rwebangira, *Research Report No. 100: The Legal Status of Women and Poverty in Tanzania*, Nordiska Afrikainstitutet (1996).

<sup>68</sup> [Law of Marriage Act](#), *supra* note 23, at §38.

<sup>69</sup> Hunton & Williams. 2004. *Customary and Islamic Law and its Future Development in Tanzania*, Legalbrief Africa, Issue No. 107. <http://www.legalbrief.co.za/article.php?story=20041128143334824>; [Benschop](#), *supra* note 12, at 125, footnote 447.

<sup>70</sup> [Law of Marriage Act](#), *supra* note 23.

<sup>71</sup> *Id.* at §41, 43–55.

<sup>72</sup> [Ezer](#), *supra* note 20, at 625.

<sup>73</sup> [Law of Marriage Act](#), *supra* note 23, at §20.

<sup>74</sup> *Id.* at §160.

<sup>75</sup> *Id.* at §41.

<sup>76</sup> *Id.* at §49–51.

<sup>77</sup> [Benschop](#), *supra* note 12, at 125.

<sup>78</sup> *Id.* at footnote 450; Naseku Kisambu, *Written comments to draft guide report on April 14, 2014*, Head- Research and Publicity Department, Tanzanian Women Lawyers Association. (on file with Landesa).

<sup>79</sup> [Law of Marriage Act](#), *supra* note 23, at §56–58.

<sup>80</sup> *Id.* at §56–63.

<sup>81</sup> Note that the following section draws from [Benschop](#), *supra* note 12, at 111–13.

<sup>82</sup> [Land Act](#), *supra* note 24, at §159(1).

<sup>83</sup> *Id.* at §159(8).

<sup>84</sup> *Id.* at §159(4).

<sup>85</sup> *Id.* at §159(4)(a–c); [Benschop](#), *supra* note 12, at 111.

<sup>86</sup> *Id.* at §159.

<sup>87</sup> *Id.* at §159(6).

<sup>88</sup> *Id.* at §159(3)(b), (5).

<sup>89</sup> *Id.* at §161(1), (2).

<sup>90</sup> *Id.* at §160(1).

<sup>91</sup> There appears to be a drafter's error in Section 161(1). In addition, two different versions of the final Land Act are circulating electronically, and interpretation of Section 161(1) would in large part depend on which of the versions is the correct one. In this guide, authors have relied on the version of the Act available on the web site of Tanzania's Ministry of Lands, Housing and Human Settlements ([http://www.ardhi.go.tz/index.php?option=com\\_phocadownload&view=category&id=12:Lands%20Administration&Itemid=336](http://www.ardhi.go.tz/index.php?option=com_phocadownload&view=category&id=12:Lands%20Administration&Itemid=336)). However, another version of the Act is available at web sites such as <http://www.dlist-asclme.org/sites/default/files/doclib/view8.pdf>. This version contains different text in Section 161(1) that would indicate drafters' intent to establish a presumption that spouses hold land acquired during a marriage for the use and occupation of both spouses in **joint tenancy** rather than in tenancy in common. This would have very important and positive implications on women's land rights, especially upon death of the husband. If there is any question whether this version is officially acceptable in Tanzania, practitioners could argue for application of a presumption of joint occupancy for spouses. Compare §161(1) in version posted by Ministry of Lands, Housing and Human Settlements with that posted elsewhere. The Ministry version provides: "Where a spouse obtains land under a right of occupancy for the co-occupation and use of both spouses, or where there is more than one wife, all spouses, there shall be a presumption that, unless a provision in the certificate of occupancy or certificate of customary occupancy clearly states that one spouse is taking the right of occupancy in his or her name only or that the spouses are taking the land as occupiers in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted in the manner stated in this subsection, **the Registrar shall register the spouses as occupiers in common.**"

In the Version of the Land Act posted elsewhere electronically, the final phrase of Section 161(1) provides: "the Registrar shall register the spouses as **joint occupiers** accordingly." This change in the last provision would lead to a logistical interpretation of the Section in favor of presumed joint occupancy for spousal property.)

<sup>92</sup> *Land Act*, *supra* note 24, at § 161(2).

<sup>93</sup> *Id.* at § 161(3).

<sup>94</sup> *Id.* at §162.

<sup>95</sup> *Id.* at §161(3).

<sup>96</sup> *Id.* at 162(3)(e).

<sup>97</sup> *Id.* at §162(3), (9)(e)(f)(i).

<sup>98</sup> *Id.* at §112(3)(a).

<sup>99</sup> *Id.* at §114(4), 138(2)(b).

<sup>100</sup> *Mortgage Financing (Special Provisions) Act*, *supra* note 26, at §8.

<sup>101</sup> *Id.*, amending §114 of the Land Act.

<sup>102</sup> *Law of Marriage Act*, *supra* note 23, at Part I (a).

<sup>103</sup> *Id.* at §59(1).

<sup>104</sup> *Id.* at §59(2).

<sup>105</sup> *Id.*

<sup>106</sup> *Land Act*, *supra* note 24, at §42(2)(f).

<sup>107</sup> *Village Land Act*, *supra* note 25, at §35(2).

<sup>108</sup> *Id.* at §35(7)(c)(i).

<sup>109</sup> *Id.* at §36.

<sup>110</sup> *Id.* at §45.

<sup>111</sup> *Land Act*, *supra* note 24, at §93(2).

<sup>112</sup> *Id.* at §108(1)(h)(iii).

<sup>113</sup> *Id.* at §141, 142(1)(d)(ii).

<sup>114</sup> *Ezer*, *supra* note 20, at 604; *Benschop*, *supra* note 12, at 134, *citing* Tanzania NGOs Shadow report on CEDAW, submitted to the CEDAW Committee in June 1998.

<sup>115</sup> *Id.* at 603, *citing* the Law Reform Commission of Tanzania (1994).

<sup>116</sup> *Id.* at footnote 26. “Customary law is codified in two Government Notices: GN 279 and GN 436, which only apply to certain districts and only cover patrilineal communities. Eighty percent of Tanzanian communities are patrilineal and the remaining twenty percent are matrilineal. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 21.”

<sup>117</sup> *Id.* at 607. These two tests are: “it is apparent, from the nature of any relevant act or transaction, manner of life or business, that the matter is . . . to be regulated otherwise than by customary law,” or “that the deceased professed Islam or Christianity and “written or oral declarations . . . or his acts or manner of life [reveal] that he intended his estate to be administered (607).” According to *Ezer* at footnote 33, “although this test is found in the section governing small estates, case law has extended its application to all estates. LAW REFORM COMMISSION REPORT ON SUCCESSION/INHERITANCE, *supra* note 17, at 28 (*citing* *Re Estate of the late Suleman Kusundwa*, [1965] E.A. 247).”

<sup>118</sup> *Id.* at 605.

<sup>119</sup> *Probate and Administration of Estates Act*, § 88(1)(a), TANZ. LAWS [CAP 352, R.E. 2002].

<sup>120</sup> *Id.* at §87(1).

<sup>121</sup> *Ezer*, *supra* note 20, at 618.

<sup>122</sup> *Id.*

<sup>123</sup> *Indian Succession Act (1865)*.

<sup>124</sup> *Ezer*, *supra* note 20, at 606–08; *Benschop*, *supra* note 12, at 127, *citing* to Magdalena Rwebangira, *Research Report No. 100*.

<sup>125</sup> *Id.*

<sup>126</sup> *Indian Succession Act (1865)*, §26.

<sup>127</sup> *Id.* at §27.

<sup>128</sup> *Id.* at §43.

<sup>129</sup> *Id.* at §28.

<sup>130</sup> *Land Act*, *supra* note 24, at Part XII.

<sup>131</sup> *See Indian Succession Act (1865)*, Parts IV, V.

<sup>132</sup> *Benschop*, *supra* note 12, at 132.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

- <sup>136</sup> Hunton & Williams, *supra* note 69.
- <sup>137</sup> Constitution, *supra* note 28, at Art. 32(2).
- <sup>138</sup> Land Acquisition Act (1967), at §4(1)(a); Land Act (1999), at §4(1).
- <sup>139</sup> Land Act (1999), at §3.
- <sup>140</sup> Tenga & Kironde, *supra* note 13, at 57, 59 et seq. Under the Land Act, at § 3, the state must pay: (1) the market value of real property; (2) transport allowance; (3) loss of profits or accommodations; (4) cost of acquiring or getting subject land; (5) disturbance allowance; (6) any other cost, loss or capital expenditure incurred in development of land; (7) interest at market rate in the case of delays (defined as failure to pay within 6 months of valuation). *See id.* at 59.
- <sup>141</sup> Abdon Rwegasira, *Land as a Human Right: A History of Land Law and Practice in Tanzania* (2012) at 208.
- <sup>142</sup> J.M. Lusugga Kironde. 2009. *Improving Land Sector Governance in Africa: the Case of Tanzania*. Paper prepared for the Workshop on Land Governance in Support of the MDGs: Responding to New Challenges, Washington D.C., March 9-10, 2009.
- <sup>143</sup> Village Land Act, *supra* note 25, at §61(1), (2).
- <sup>144</sup> *Id.*
- <sup>145</sup> Land Act, *supra* note 24, at §167(1).
- <sup>146</sup> Benschop, *supra* note 12, at 128, *citing* to the Interpretation of Laws and General Clauses Act, 1972 (Cap. 1), §2(1).
- <sup>147</sup> *Id.*; Hunton & Williams, *supra* note 69; Carpano, *supra* note 55, at 8.
- <sup>148</sup> Benschop, *supra* note 12, at 128.
- <sup>149</sup> Ik Dahl, *supra* note 9, at 39.
- <sup>150</sup> Ezer, *supra* note 20, at 614.
- <sup>151</sup> Benschop, *supra* note 12, at 128, *citing* GN 463/1963 (Tanz.). An estimated 80 percent of Tanzanian communities follow patrilineal marriage customs, with 20 percent following matrilineal customs. Ik Dahl, *supra* note 9, at 39, footnote 55. Matrilineal custom in Tanzania are not generally well-known. There is a gradual transition to from matrilineal to patrilineal tradition over time. (Benschop, at 128 and 131.)
- <sup>152</sup> Ik Dahl, *supra* note 9, at 40.
- <sup>153</sup> Kefa M. Otiso, *Culture and Customs of Tanzania* (Greenwood 2013). at 146.
- <sup>154</sup> Omari, C.K., *The Family in Tanzania*, 21 *International Journal of Sociology of the Family* (1991) at 55, 61.
- <sup>155</sup> Magdalena Rwebangira, *Research Report No. 100: The Legal Status of Women and Poverty in Tanzania*, Nordiska Afrikainstitutet (1996).
- <sup>156</sup> Rita Liljeström et al., *The Pubescent Girl: Past and Present*. Chelewa, Chelewa: The Dilemma of Teenage Girls (Zubeida Tumbo-Masabo & Rita Liljeström ed., 1994) at 35.
- <sup>157</sup> *Islamic Family Law in a Changing World: A Global Resource Book* (Abdullahi A An-Na'im ed., Zed Books Ltd 2002) at 47-48.
- <sup>158</sup> *Id.*
- <sup>159</sup> Benschop, *supra* note 12, at 128.
- <sup>160</sup> Magdalena Rwebangira & M.C. Mukogoye, *The Law of Inheritance in Tanzania: A Status Report* (1995).
- <sup>161</sup> Stephane Dondeyne et al., *Changing Land Tenure Regimes in a Matrilineal Village of South Eastern Tanzania*, *J. of Soc. Dev. in Afr.*, Jan. 2003. [pdf on file with Landesat]
- <sup>162</sup> Benschop, *supra* note 12, at 126.

- 163 *Id.*
- 164 See generally *Law of Marriage Act*, *supra* note 23; *Land Act*, *supra* note 24.
- 165 *Id.*
- 166 Yefred Myenzi. 2009. *Women Land Rights in Tanzania. Paper prepared by HAKIARDHI for presentation at the workshop organized by Mzumbe University DSM Campus, Jan. 10, 2009.*
- 167 Ezer, *supra* note 20, at 402; Benschop, *supra* note 12, at 133.
- 168 *Id.* The case challenges the Haya traditional inheritance practices, as reflected in Customary Law Declaration Order on inheritance (1963), para. 20. (“Women can inherit, except for clan land, which they may receive in usufruct but may not sell.”) Ephraim v Pastory (2001) AHRLR 236 (TzHC 1990), High Court of Tanzania at Mwanza, 22 February 1990 (Civil Appeal no 70 of 1989).
- 169 Marjorie J. Mbilinyi, *The State of Women in Tanzania*, 6 *Can. J. Afr. Stud.* (2013) at 371, 372.
- 170 Amanda Ellis et al., *Gender and Economic Growth in Tanzania: Creating Opportunities for Women* (2007) at 53.
- 171 *Id.*
- 172 *Id.*
- 173 *Local Customary Law*, *supra* note 63, at Schedule 2.
- 174 *Id.*
- 175 *Id.*
- 176 Kempster, Erin. *Focus on Land in Africa Brief, Tanzania: Gender and Land Rights Debate in Tanzania*, Landesa (August 2011).
- 177 *Id.*
- 178 *Local Customary Law*, *supra* note 63, at Schedule 2.
- 179 *Id.*; Benschop, *supra* note 12, at 129.
- 180 *Id.*
- 181 Ezer, *supra* note 20, at 610–11.
- 182 *Local Customary Law*, *supra* note 63, at Rule 77(1).
- 183 Benschop, *supra* note 12, at 129.
- 184 *Id.* at 610.
- 185 *Local Customary Law*, *supra* note 63; Ezer, *supra* note 20, at 612–14; Benschop, *supra* note 12, at 128, *citing* Magdalena Rwebangira & M.C. Mukogoye, *The Law of Inheritance in Tanzania: A Status Report* (1995).
- 186 Ezer, *supra* note 20, at 612–14.
- 187 Benschop, *supra* note 12, at 129, *citing* Local Customary Law (Declaration) (No.4) Order of 1963, Rule 27.
- 188 *Id.*
- 189 Ezer, *supra* note 20, at 610–12; Benschop, *supra* note 12, at 128, *citing* Local Customary Law (Declaration) Order, Rule 20.
- 190 Ephraim v Pastory, *supra* note 168; Benschop, *supra* note 12, at 128.

- 191 *Id.*
- 192 National Land Policy (1995); Law Reform Commission Report on Inheritance (1995); Ezer, *supra* note 20, at 606; Benschop, *supra* note 12, at 129.
- 193 Ezer, *supra* note 20, at 609, *citing* to GN 436, note 2, R. 27.
- 194 *Id.* at 631, *citing* the Law Reform Commission Report on Inheritance, at 29.
- 195 *Id.* at 617-21.
- 196 *Id.* at 620.
- 197 *Id.*
- 198 Benschop, *supra* note 12, at 133.
- 199 *Id.*, *citing* Rwebangira & Mukogoye, at 20.
- 200 *Id.*, *citing* Judge J.L. Mwalusanya.
- 201 *Id.*
- 202 Village Land Act, *supra* note 25, at §20(1).

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