



Women and Land in Eastern Europe and Central Asia

by

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I. Introduction

Ensuring that women have independent and secure rights to farmland is an important component of eliminating poverty and increasing economic productivity.¹ This is true for three general reasons. First, women are often the primary food producers for a household, working their household farm plots while their husbands work for collective farms or in industry. Secure tenure of the land they work provides women with the incentives they need to make the best investment and management decisions with their land and production inputs.² Second, women often bear the brunt of poverty;³ increasing women's access to resources goes directly to relieving poverty's effects. Third, women are often responsible for the nutrition and primary health care needs of children; increasing women's productivity facilitates a distribution of income to meeting children's basic needs.

In addition to increasing productivity and reducing poverty, securing land tenure for women may have two additional benefits: reducing environmental degradation and reducing economic pressures to have children. Insecure tenure for women, coupled with restricted access to resources conditioned on secure tenure (i.e., resources from cooperatives, credit providers and other support services), can contribute to environmental degradation because women farmers are unlikely or unable to invest in soil enrichment, terracing or other environmental practices to protect land. Finally, insecure tenure may have an indirect effect on population levels by providing increased motivation for women to have larger families in hopes of achieving economic security (via secure land rights) through sons.⁴

¹ Rekha Mehra, *Gender in Community Development and Resource Management*, in *WOMEN AT THE CENTER* 145, 149 (Gay Young, Vidyamali Samarasinghe & Ken Kusterer eds., 1993); Magdalena Leon, *Colombian Agricultural Policies and the Debate on Policies Toward Rural Women*, in *RURAL WOMEN AND STATE POLICY* 84, 89 (Carmen Diana Deere and Magdalena Leon eds., 1987); see generally Bina Agarwal, *A FIELD OF ONE'S OWN* (Cambridge University Press 1994); *AGRICULTURE, WOMEN AND LAND: THE AFRICAN EXPERIENCE* (Jean Davison ed., 1988).

² Farmers, male or female, who have secure rights of access to land are more likely to make productivity-enhancing investments in their land. *Id.* at 14. Insecure tenure, on the other hand, undermines productivity by discouraging long-term investment. Insecure tenure and restrictions on access to land have a profound impact on women's productivity because women farmers without legally-recognized land rights often lack access to cooperatives, credit providers and other support services and resources. Megan McCloskey, Tim Hanstad & Michelle Van Leeuwen, *Rural Women and Land*, in *RURAL LAND IN CHINA: A COMPARATIVE PERSPECTIVE* (produced for the UNDP, February 13, 1998; pending publication by the China Institute for Reform and Development, 1999).

³ In 1988, sixty percent of the world's rural population living below the poverty line were women. Mayra Buvinic, *Women in Poverty: a New Global Underclass*, *FOREIGN POLICY* 38 (September 22, 1997). That number was a forty-seven percent increase from data collected in 1970. Unfortunately those numbers appear to be rising. A 1996 UNDP Human Development Report indicates that women represent a much larger percentage of the world's poor than believed, and identified the "feminization of poverty" as a global trend. *Id.*

⁴ Mehra, *supra* note 1.

While agricultural land reforms in Eastern European and Central Asian countries (the ECA) appear to have increased many small farmers' access to secure tenure rights, the effect these reforms have had on rural women has gone largely unstudied. This is true even though the effectiveness of land reform toward meeting the underlying goals of increased agricultural productivity and decreased rural poverty depends in large part on its effect on women's access to land. Women's access to land in turn depends on whether the legal framework adopted during land reform supports or discourages it. Although women in the ECA generally have access to land, their rights to land are often inferior to the rights of men, and they have inferior access to the land market.

Before discussing existing restrictions on land rights for women in ECA countries, it is useful to clarify how land rights are understood. In the context of the present discussion, land rights have been defined as "legally and socially recognizable claims that are enforceable by external authorities such as village-based institutions or the nation state."⁵ This definition includes multiple elements that are important to understanding the significance of gender in a system of land rights. Rights must be not only legally but socially recognized and not merely recognized but also enforceable. Both distinctions are important to an analysis of women's access to the land market. Those legal rights which have the most impact on women in ECA countries are the ones related to intra-household issues, primarily women's right to land when the family structure changes through divorce, incapacity or abandonment of a spouse, death of a spouse, death of parents, or childbirth.

This paper will address both legal impediments to women's access to land and potential solutions. The first section will discuss legal impediments to women's access to land in Eastern European and Central Asian countries, including country-specific examples of both problematic laws and laws that attempt to address the problem being discussed. The second section discusses three legal institutions (community property laws, concurrent rights to land, and land inheritance systems) adopted by developed market economies to help ensure women's access to land. Finally, a checklist will match legal impediments to women's access to land in the ECA with potential solutions found both within and from outside of the ECA.

Following is a discussion of potential legal impediments to women's rights to agricultural land, both as they relate to access to the land market and to other land issues.

⁵ Rekha Mehra, WOMEN, LAND, AND SUSTAINABLE DEVELOPMENT 4 (International Center for Research on Women Working Paper No. 1, 1995); See generally Bina Agarwal, *supra* note 1 (1994).

II. Legal Issues Regarding Women's Rights to Agricultural Land in ECA Countries

A. Issuance and Registration of Land Titles or other Legal Documents

Land rights in Eastern European and Central Asian countries are often legally described in terms of a household as a unit. This is true, for example, in the Kyrgyz Republic⁶ and Uzbekistan.⁷ When the household is the legal unit, a woman's land use rights are generally associated with her marital status. Land titles or other documents are issued on a household basis and only the head of household is listed on the document and/or in the register. A head of household is almost always the eldest man in the house; a woman's only access to land is through her spouse. Even where women and other household members technically share a part-interest with the head of the household, failure to require recognition of all part-owners on formal registration documents leaves these interests unprotected. Several problems with this arrangement derive from the fact that the other household members, particularly adult women who have legitimate rights to the land, are not named on the legal documents:⁸

1. The male head of household may be able to execute a transaction with the land without notifying other family members, thereby depriving them of the transaction proceeds as well as participation in the decision.
2. The male head of household could leave the household. During his absence, the other family members would not have the legal right or ability to rent or mortgage land or otherwise participate in the land market, thereby depriving these members of the household of the means for making the land produce income for them.
3. The rights of those farm members who are not formally listed in the register are unclear.
4. In the event of divorce, the husband is more likely to receive the land, even when this land is a household plot the woman has cultivated to produce sustenance for herself and her children.

In the Kyrgyz Republic, "family" land is registered only under the head of the household, who may also hold superior underlying land rights to other family members. Kyrgyz law provides that only one land share certificate is issued per family. The

⁶ Regulations of the Government of the Kyrgyz Republic "On the Procedure for Determining Citizens' Land Shares and for Issuance of Certificates Containing Land Share Use Right," Adopted by Resolution of the Government of the Kyrgyz Republic No. 632 (August 22, 1994).

⁷ Law of the Republic of Uzbekistan "On Land" (June 20, 1990) (*as amended*).

⁸ Custom and cultural traditions may mitigate these concerns. However, formal protection of all family members' rights become increasingly important in a functioning land market.

amount of land the family receives is calculated by multiplying the number of family members (including children) by the amount of the established area for a single land share.⁹ It is unclear under Kyrgyz law whether individual members have a right to withdraw their land share, or sell or lease their land share. It is also unclear whether the head of the family, in whose name the certificate is registered, has more rights to the land than his spouse or children.

The current registration procedure in the Kyrgyz Republic provides that the entry in the registration book should list the name of the head of the family and the number of family members, but does not require the registrar to document the names of the family members who hold a land share represented by the certificate.¹⁰ Those members who are not listed lack secure legal rights to the land even if under customary law they are protected. In a transaction between the head of the family and a third party, the registered entry would only give notice to the third party of the number of family members that must consent, but no indication of who they are.

Kazak laws provide for equal underlying land ownership rights by wives and husbands, but fail to protect these rights by requiring both parties' names on registration documents or providing for equal management rights. While one draft of the Land Code provides that property acquired during marriage will be held in common joint ownership, it does not provide for registration of that property in both owners' names. The Land Code does not establish co-management of the marital property. The household is the legal unit, with the head of the household controlling land transactions.¹¹

The law in Russia encourages women's access to land through individually-issued land share certificates, but fails to protect these interests once individual shares are converted to peasant farm enterprises. Russian law provides that individuals, not households, receive land shares, and that land share certificates are registered individually.¹² Such a legal provision provides formal protection of individual, female land shareholders. However, Russian law provides that peasant farms are held in joint

⁹ Regulation of the Government of the Kyrgyz Republic "On the Procedure for Determining Citizens' Land Shares and for Issuance of Certificates Containing Land Share Use Rights," *adopted by* Resolution No. 632 (August 22, 1994). (In Chui *Oblast*, a land share certificate has been issued to every family member, but the Ministry of Agriculture and Water Resources does not recognize these certificates.)

¹⁰ *Id.*

¹¹ Steven E. Hendrix, *Legislative Reform of Property Ownership in Kazakhstan*, 15 DEVELOPMENT POLICY REVIEW 159,164 (June 1996). There is a current Law "On Land" adopted by Presidential Decree in December 1995.

¹² Resolution of the Government of the Russian Federation No. 86 "On the Procedure for Reorganization of Collective and State Farms" (December 29, 1991). Resolution No. 86 established the rights of members of collective farms, workers on state farms, and pensioners to receive land shares and property shares.

ownership and registered under the head of household.¹³ The 1991 Law on the Peasant Farm does not require that all members of a farm family list their names on the application to register the farm.¹⁴ Article 7 does state that the number of able-bodied members of the farm family must be indicated, but this provision was later invalidated.¹⁵

In contrast to the laws in the Kyrgyz Republic, Kazakhstan, and Russia, Czech Republic law provides that any object that was acquired by either spouse during their marriage, with several exceptions, is presumed to be held in undivided joint ownership.¹⁶ The exceptions include: (1) property that was received by one of the spouses through gift or inheritance; (2) property that serves the personal needs or occupational needs of one of the spouses; or (3) property that was returned based on restitution legislation. Spouses may agree to extend or restrict the scope of their legally defined undivided ownership, but if this agreement regards real estate, the agreement must be in writing and registered in the real estate cadastre.¹⁷ In any case, the agreement must be in the form of a notarial record (deed).¹⁸ In this way, law in the Czech Republic differs from that in Russia or Kazakhstan, which provides for joint ownership of marital property but neglects to require any form of written protection for all joint-owners' shares. Both spouses in the Czech Republic are entitled to use and enjoy all property that is in their undivided co-ownership.¹⁹

B. Separation of Commonly Held Property

Even in a legal system providing for joint ownership of marital property (including land), problems may arise with exceptions to the joint-ownership rule. Examples include provisions allocating property to separate ownership if one spouse uses it for his entrepreneurial endeavors or occupational needs. Czech Republic law, for example, contains several areas of potential concern regarding marital property. First, if one spouse wants to start a business with property that is in undivided co-ownership, the spouse who is the entrepreneur must obtain the consent of the other spouse. If permission is received, the court will terminate the co-ownership of the spouses.²⁰

¹³ CIVIL CODE OF THE RUSSIAN FEDERATION [hereinafter RF Civil Code] art. 257(1) establishes that peasant farms will belong to the members by right of joint ownership unless otherwise established by law or contract.

¹⁴ R.S.F.S.R. "Law on the Peasant Farm" (*as amended* Jan. 5, 1991).

¹⁵ Decree of the Presidential of the Russian Federation No. 2287, "On Bringing the Land Legislation of the Russian Federation into Conformity with the Constitution" (December 24, 1993).

¹⁶ CIVIL CODE OF THE CZECH REPUBLIC sec. 143. [hereinafter Czech Civil Code].

¹⁷ *Id.* sec. 143(a).

¹⁸ *Id.*

¹⁹ *Id.* sec. 144.

²⁰ *Id.* sec. 148(a).

Second, property that serves the personal needs or occupational needs of one of the spouses is presumed to be individually owned, not jointly owned.²¹

Both the provision which excepts from joint ownership property used to start a business and the provision which excepts from joint ownership property that involves the occupational needs of one of the spouses may affect women's rights to agricultural land and other sources of livelihood. The first provision allows a male head of household to take over sole control and ownership of land held in undivided co-ownership by starting a "family farm" on it in his name, and obtaining his wife's consent to use the land for this purpose. In regard to the second provision, the male head of a family farm (and a court) may view his wife's work as non-farm work because her duties revolve more directly around the home and children. The property used for the farm (including the land) would then be considered to serve the occupational needs of only the husband, as the "head of the farm." In case of divorce, the woman's livelihood may be taken from her if the land and non-land property are not considered to be joint property.

One possible means of protecting women's access to land used for family farms in countries such as the Czech Republic would be to provide in law or legal regulations that for a family business (including a farm), the legal presumption is that both spouses hold the land and property in joint ownership unless the spouses otherwise specify in writing. The signature of both spouses should be required for such a contract.

Another potential impediment under Czech law relates to the division of property once there has been a divorce or the co-ownership is dissolved. If an undivided co-ownership is dissolved, either the parties must reach agreement as to division of the property or the court will settle the division of the property if either party petitions the court. If no settlement has been reached (by the parties or the court) within three years, then movable property will be divided according to whether the property has been used by one spouse exclusively. All other movable and immovable property will be held in divided co-ownership (common share ownership), and the shares of each co-owner will be equal.²² Again this provision may discriminate against women who, while married, did not use certain farm tools, namely mechanized tools. The husband, for example, may have used a tractor (movable property) exclusively. If the woman's share of the property includes much less expensive tools, she will be at a great disadvantage in starting a new farm or continuing to farm. One means of improving women's access to valuable farm equipment upon divorce would be to adopt a legal presumption that family business property will be divided equally between the spouses.

A related issue under Czech law is that the court may dissolve co-ownership during the marriage if one person petitions the court for "important reasons," particularly if the court finds that further continuation of co-ownership would be "inconsistent with

²¹ *Id.* sec. 143(a).

²² *Id.* sec. 149

proper morals.”²³ This language is very vague and gives the court enormous discretion. Either party should have the legal right to partition jointly owned property and withdraw land and property in kind for any reason.

Under Romanian law, if a divorced couple decides to physically separate, all assets must be divided equally. The house or apartment must usually be sold, with the proceeds divided equally. Unfortunately, there is a severe housing shortage in Romania, and the strict requirements of the community property law often place a divorced couple in a situation where they must continue to live together because neither can afford to leave and purchase other housing with only half of the proceeds from their common house.²⁴ This problem, of course, arises with farm housing as well as non-farm housing.

C. Withdrawal from Peasant Farms

In several countries, legal provisions provide that members of peasant farms may not withdraw land and non-land property in kind when they withdraw from a peasant farm. The person withdrawing from the farm has a right to receive monetary compensation commensurate with her participatory share, but no land or other property. Both Russia and the Kyrgyz Republic have such a provision in the Civil Code.²⁵ Although the terms of these provisions are gender-neutral, they carry a particular burden for women in instances such as divorce, when the woman may want to withdraw a plot of land to farm separately from her husband.

Regulations on minimum land plot size can have the same effect as prohibitions on withdrawal of land in kind. In the Kyrgyz Republic, for example, the minimum landholding requirement is five hectares of arable land (an amount that is often larger than one family’s land share).²⁶ In a related, but much more egregious provision, Moldovan law at one point required that those who wished to claim land shares in-kind and leave a collective farm, had to have enough land shares to amount to a so-called “minimum rotation area” (farmed by an average of 60 land share holders). The Moldovan Constitutional Court declared this provision unconstitutional in April 1996.²⁷

²³ *Id.* sec. 148(2).

²⁴ Nicki Negrau, Symposium, *The Status of Women in New Market Economies: Living in Post-Communist Romania*, 12 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 117, 131-32 (Fall, 1996).

²⁵ RF Civil Code, *supra* note 13, art. 258; CIVIL CODE OF THE KYRGYZ REPUBLIC, art. 278. [hereinafter Kyrgyz Civil Code].

²⁶ Decree of the President of the Kyrgyz Republic “On Measures for Further Development and State Support of Land And Agrarian Reform in the Kyrgyz Republic” (November 3, 1995). This decree reduced still higher minimum-size requirements which had previously been in effect.

²⁷ UNITED STATES DEPARTMENT OF STATE, MOLDOVA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 (Department of State Human Rights Country Reports, February 1997).

Such requirements for minimum land holdings may prevent women who wish to leave a peasant farm enterprise from continuing to farm.

D. Land Transactions

Although some form of consent is generally required for disposition of property held in common ownership in ECA countries, written or formalized consent by both property owners may not be specified. Requiring written consent more adequately protects married women who are less likely than their husbands to initiate land transactions. Moreover, requiring written consent by both owners-in-common more adequately protects the interests of an innocent third party; otherwise the non-signing owner could later attempt to invalidate the transaction by claiming she did not give the requisite (informal) consent.

Articles 246 and 247 of the Russian Civil Code provide that the possession, use, and disposition of property held in common ownership (common share or common joint ownership) will be effectuated by an agreement of all participants. However, written agreement or formal consent is not required.

Article 272 of the Kyrgyz Civil Code requires consent for disposition of property held in joint ownership, but does not require written consent.

The Czech Republic Civil Code provides that routine matters concerning things jointly owned may be handled by either spouse (only spouses can hold land in joint ownership), but that in other matters, consent of both spouses is required. Without consent of both spouses, the act is legally invalid. Written consent is not required.²⁸

Section 149(a) of the Czech Republic Civil Code does provide for written agreement when two spouses contract regarding use and disposition of real estate in the following circumstances: (1) if an agreement between two spouses is reached regarding extending or restricting the scope of their legally defined undivided co-ownership or on the management of their joint property; or (2) if an agreement is reached regarding settlement of their undivided property upon dissolution of their marriage. The written agreement must be registered in the real estate cadastre.

The issue of requiring consent, but not requiring written consent, appears in many draft laws Rural Development Institute has reviewed, including draft land codes, draft mortgage laws, and draft laws on turnover of agricultural land.

E. Inheritance of Land

Not all ECA countries have formal rules on inheritance. In some countries, customary law is followed, and in Central Asia, Islamic law may be a factor. Under

²⁸ Czech Civil Code, *supra* note 16, sec. 145.

Islamic law as practiced in some countries, daughters might only inherit half as much as sons.²⁹

In Uzbekistan, although article 46 of the constitution states that men and women have equal rights, in practice and under customary law women might not inherit agricultural land. In some cases, families with no sons receive less land from the collective farms because under customary law, land is not passed to daughters.³⁰ Without formal rules regarding inheritance or land distribution, individuals who control land (collective farm leaders and local government officials) are free to inequitably distribute land based on informal rules.

Formal inheritance rules are provided in the Civil Code of the Czech Republic. A person may inherit by operation of law or through a will or both. If a spouse inherits by operation of law, he or she will inherit half of the property and the children will equally divide the other half of the property.³¹ Male and female children are treated equally under the law.³² If a person inherits through a will, minor descendants must receive at least as much as constitutes their intestate share³³ in the estate, and adult descendants must receive at least as much as constitutes half of their intestate share in the estate.³⁴ The requirement that minor children must receive at least their intestate share could cause fragmentation of land and limit the amount of land the surviving spouse receives.

III. Approaches to Women's Legal Access to Land in Countries with Developed Market Economies

The purpose of this section is to discuss three legal systems adopted by countries with developed market economies to address women's access to land. Please refer to the final checklist following this section for a more detailed discussion of how these approaches could be used to address the impediments to women's access to land in Eastern Europe and Central Asia raised in the previous section.

²⁹ Catherine Besteman, *Access to Land*, in GENDER AND AGRICULTURAL DEVELOPMENT 18, 24 (Helen Kreider Henerson & Ellen Hansen eds., 1995).

³⁰ During field research conducted in Uzbekistan, collective farm leaders stated directly that they took the gender of children in a family into account when determining the size of land allotments a family would receive.

³¹ Czech Civil Code *supra* note 16, secs. 473-74.

³² *Id.* sec. 473(1).

³³ The intestate share is the share that would have been received by operation of law in the absence of a will.

³⁴ Czech Civil Code *supra* note 16, sec. 479.

A. Community Property Laws

The European civil law has devised a system of marital property known as community property that reflects an effort to give stronger property rights to women in marital relationships.³⁵ France, Germany,³⁶ and Italy³⁷ have community property laws. The system has also been adopted in nine U.S. states.³⁸ Several countries in Eastern Europe have also developed community property systems.³⁹ Underlying community property is the philosophical premise that husband and wife are equal. Together in marriage they form a kind of marital partnership analogous to a legal business partnership. The fundamental legal characteristic of this system is the categorization of all property, including land, as either "separate" property or "community" property.

Each spouse may own property in his or her individual right, called "separate" property. Generally, all property acquired by either spouse before marriage, along with property acquired by one spouse after marriage by either gift or inheritance, is that spouse's separate property. Each spouse has the full power to manage and dispose of his or her separate property.

All property acquired by either spouse during marriage, which is not by gift or inheritance, is "community" property. Thus, all earnings by either spouse during marriage and all assets acquired with such earnings, form part of the community property.

In the United States, all community property states now vest equal powers of management and disposition in each spouse, except that one spouse alone may have enhanced powers of management when the other spouse leaves, disappears, or becomes incompetent to act as a property manager.⁴⁰ Both spouses must participate in

³⁵ For a detailed discussion of community property in the United States, see GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 381-89 (1996).

³⁶ NIGEL FOSTER, GERMAN LEGAL SYSTEM & LAWS 308 (2d ed. 1996).

³⁷ CIVIL CODE OF ITALY app. B (8).

³⁸ The nine states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE WESTERN RESERVE LAW REVIEW 83, 183 (1994).

³⁹ Romania, the Czech Republic, and Bulgaria have community property systems. Emily Stoper & Emilia Laneva, *Symposium: The Status of Women in New Market Economies: Democratization and Women's Employment Policy in Post-Communist Bulgaria*, 12 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 9 (Fall, 1996).

⁴⁰ Nelson, *supra* note 35, at 385.

and provide written consent to transactions when they involve land, household necessities, and other specified assets.⁴¹

Some states in the U.S.⁴² require the "equal division" of community property upon marital dissolution, meaning that the judge is required to "substantially," but not "mathematically," split the property in half.⁴³ Other states have "equitable division" systems, which allow the judge more leeway in awarding the community property.⁴⁴

France also characterizes property as "separate" property or "community" property. Included in separate property are professional tools, and property that "by its nature" belongs to one or the other spouse. Specific marriage contracts are allowed, and these contracts can expand or diminish what constitutes community property.

Until 1985, French husbands had a disproportionate amount of management power over community property.⁴⁵ When the law was changed in 1985, it was decided that requiring both spouses to act together when disposing of property would be too cumbersome, so the French government gave each spouse the power to administer and dispose of community property by acting alone.⁴⁶

However, if the property is necessary for a profession, the spouse practicing that profession has an exclusive administrative right over that property. Moreover, the signature of both spouses is necessary for the sale or lease of land. French law provides four means of enforcing the fair and equitable management of community property. First, either spouse may be liable to the other for damages for mismanagement of the community property.⁴⁷ (Note, however, that either spouse may dispose of community property represented by his or her earnings, after contributing to the household expenses.⁴⁸) Second, if either spouse jeopardizes the family's best interest in the course of property management, the trial court can forbid the remiss spouse from disposing of community property in the absence of the consent of the

⁴¹ *Id.* Texas is the exception to the full management powers rule because it only allocates each spouse management over property that each would own if single.

⁴² The states are: California, Louisiana, and New Mexico.

⁴³ Nelson, *supra* note 35, at 387. This system allows the judge some discretion in determining what "substantially equal" division of property means.

⁴⁴ "Equitable division" states are: Arizona, Idaho, Nevada, Texas, and Washington. Wisconsin was not included in either category.

⁴⁵ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 120 (1989).

⁴⁶ CIVIL CODE OF FRANCE art. 1421.

⁴⁷ *Id.*

⁴⁸ *Id.* art. 1423.

other.⁴⁹ Third, a spouse may also seek a court order that allows him or her to exercise the property administration powers of the other.⁵⁰ Fourth, neither spouse may dispose of the "rights which assure the family's lodging and furniture" without the other spouse's consent.⁵¹

Under French law, no one may be forced to remain in joint ownership, and division of the jointly owned property through partition may always be obtained, unless there have been delays of partition through judgment of the court or agreement of the parties. A court may suspend partition for two years at the most if immediate realization will cause depreciation of the value of the undivided property or if one of the co-owners can begin an agricultural operation only at the end of a period of time.⁵²

The principles of community property apply in Germany provided that they are specified in a contract or covenant of marriage that is certified by a notary.⁵³ Under such an agreement, all property either owned or acquired becomes joint marital property.⁵⁴ Some property can never be designated as joint, such as individual claims or personal rights, and other property can be subject to a reservation, or *Vorbehaltsgut*, made at the time of the agreement, designating it as separate property.⁵⁵

In Germany, if a designation of community property is not made and the marriage ends by divorce or annulment, the "equalization of assets" occurs, which requires the division between the spouses of the total increase in assets⁵⁶ or acquisitions realized during the course of the marriage. In this case, therefore, community-property-like rules are applied as a matter of law, and no notarized contract between the parties is required.

⁴⁹ Glendon, *supra* note 45, at 122.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² CIVIL CODE OF FRANCE art. 815.

⁵³ Brashier, *supra* note 38, at 308. Community of property in Germany is called *Guetergemeinschaft*. Community property rights may be contracted for in Germany, but are not the presumption.

⁵⁴ *Id.*

⁵⁵ *Id.* A separation of property, or *Guetertrennung*, may also be made where, at the time of covenant, it is agreed and notarized that the property will remain separate and that there will be no "equalization of assets" in the case of divorce.

⁵⁶ Pursuant to *Zugewinnngemeinschaft*, the value of gifts, inheritances, and premarital assets from the property to be shared (as long as their origin can be traced to premarital acquisition) is excluded from marital asset status. Glendon, *supra* note 39, at 132.

Under Italian law, all property purchased after marriage is considered community property, unless both spouses agree otherwise in writing signed by a notary.⁵⁷

The Japanese Civil Code provides that there are three types of spousal property: (1) property acquired before marriage, which is each spouse's separate property; (2) property acquired during marriage in each spouse's own name, such as salary or business income, and inheritances and gifts, which is also separate property; and (3) property that cannot be proved to belong to either spouse individually, which is presumed to be community property.⁵⁸ However, courts have held that the husband (normally the spouse with more income) has a duty of support, and wives can make claims against property after divorce.⁵⁹ This system relies heavily on the court for an equitable distribution of property and appears to significantly disadvantage women.

B. Concurrent Rights to Land

In the United States, aside from community property, the legal system recognizes three basic forms of concurrent ownership of land: joint tenancy, tenancy in common, and tenancy by the entireties.⁶⁰ Each of these forms of ownership provides some degree of protection to women co-owners. Importantly, all co-owners under any of these three forms are listed by name on the registration documents (deed). All forms of common ownership require that each person have an equal right to possess the whole land parcel. Land held in any of these concurrent forms of ownership may be partitioned into separate parcels for each owner upon the request of any of the co-owners. In the absence of voluntary agreement by the co-owners as to how to divide the property, a co-owner may petition the court to accomplish the division.⁶¹

Tenancy in common occurs when two or more people own the same or different percentage interests in the same plot or share of land.⁶² All common owners have the right to possess the whole property subject to the other owners' right to possession. For this reason, common owners (or "tenants in common") are considered to hold undivided interests in the entire property. When one tenant in common sells his or her share to a third party, the buyer "steps into the shoes" of the seller and becomes a tenant in common with the other tenants in common. When a tenant in common dies, his or her interest in the land passes to his or her heirs or devisees.

⁵⁷ Danilo Agostini, Rural Land Law in Italy (May 1998) (unpublished manuscript on file with the Rural Development Institute).

⁵⁸ CIVIL CODE OF JAPAN art. 762, pars. 1, 2.

⁵⁹ *Id.*

⁶⁰ See R. CUNNINGHAM ET AL, THE LAW ON PROPERTY 187-99 (2d ed. 1993).

⁶¹ *Id.*

⁶² The following discussion of common and joint ownership is adapted from Jon W. Bruce & James W. Ely, CASES AND MATERIALS ON MODERN PROPERTY LAW 287 (3rd Ed., 1994).

Joint tenancy occurs only when the co-tenants acquire identical interests in the land at the same time and from the same instrument. The primary difference between tenancy in common and joint tenancy is a “right of survival” in joint tenancy, which entitles the remaining joint tenants to enlarge their shares proportionately when one of the joint tenants dies. The joint tenant who lives the longest becomes the sole owner of the land. Joint tenants may, however, transfer their interests to a third party, thereby severing the joint tenancy. When this happens, the new transferee and the remaining joint tenants own the land as tenants in common.

Tenancy by the entireties refers to joint ownership of land by married couples, and may only be converted to tenancy in common by a divorce. (In some states the land converts to joint tenancy upon divorce and in other states the land converts to tenancy in common.)⁶³

C. Inheritance of Land

Most countries with developed land markets have developed avenues through inheritance laws to protect one spouse’s interest in land upon death of the other spouse. In the United States, if land is held in joint tenancy or tenancy by the entireties, upon the death of one of the co-owners the surviving tenant becomes the sole owner of the entire estate. In contrast, tenants in common have no such mutual right of survivorship. Rather, the interests of each are subject to separate testamentary disposition upon death, and in the absence of a will are inheritable by the separate heirs of each tenant in common.⁶⁴

In all community property jurisdictions in the United States, each spouse has statutory power to dispose by will of all his or her separate property and one-half of the community property.⁶⁵ If a spouse dies intestate, in some states all of the community property passes to the surviving spouse.⁶⁶

In Germany, if one spouse dies intestate, the remaining partner is entitled to between one-half and all of the acquisitions realized during the marriage, depending on the number of descendants or other survivors entitled to share in the estate.⁶⁷

In France, if there is no will, half of the community property must go to the spouse and half is passed by succession. One quarter of the half that is passed to the

⁶³ Cunningham, *supra* note 61.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ WASHINGTON REVISED CODE sec. 11.04.015(1)(a) (1997).

⁶⁷ Glendon, *supra* note 45, at 249.

children is given to the surviving spouse in life tenancy.⁶⁸ For agricultural land, the surviving spouse or an heir can continue farming and can obtain the entire farm, even if the farm exceeds her portion of the testate or intestate estate, if she had been farming prior to the death of the testator. The surviving spouse or other heir must pay the other beneficiaries an amount equal in value to their share of the farm.⁶⁹

One further note regarding inheritance. None of the countries surveyed appear to have specific language mandating that male children and female children inherit equally (*i.e.* a forced share in a will). Such a provision, despite good intentions, could be detrimental to a family. For example, in Brazil at the death of the parents, the law mandates that land must be divided equally among sons and daughters. A will providing otherwise without the written consent of the heirs is invalid.⁷⁰ This provision has proven problematic because land has been divided into plots too small for subsistence farming in Southern Brazil. Another problem with this provision for equal division between sons and daughters arises from the fact that, under customary law, only one child is responsible for his parents. If, because of the equal division rule, this child does not have a future right to a reasonable share of the land owned by the parents, he is less likely to be able to care for his parents and more likely to need to go to the city to find adequate work for his family.⁷¹

IV. Checklist of Potential Legal Impediments and Solutions

Following is a list of potential impediments to women's participation in the ownership use and disposition of land in ECA countries. Following each impediment are potential solutions identified from developed market economies. The potential solutions must, of course, be viewed within the context of each country's general legal and institutional framework as well as the country's customary law. Not all solutions will be appropriate for every country.

Potential Impediment: Laws fail to clarify rights to land of family members other than the "head of the household," or laws allow only the head of the household to make management decisions about land.

Laws allocating land and land management rights only to the head of the household often deprive women of any independent legal access to land and important land use decisions.

⁶⁸ Isabelle Couturier, Rural Land Law in France (May 1998) (unpublished manuscript on file with the Rural Development Institute).

⁶⁹ CIVIL CODE OF FRANCE art. 832.

⁷⁰ INEKE VAN HALSEMA, HOUSEWIVES IN THE FIELD: POWER, CULTURE AND GENDER IN A SOUTH-BRAZILIAN VILLAGE 100, 128 (CELDIA, 1991).

⁷¹ FRANS PAPMA, CONTESTING THE HOUSEHOLD ESTATE: SOUTHERN BRAZILIAN PEASANTS AND MODERN AGRICULTURE 26 (CEDLA 1992).

Potential Solutions:

- Include community property law in the legal framework, which would establish by law that all property acquired, not by gift or inheritance, by either spouse during marriage is "community" property, and that both spouses have equal rights to manage this property.
- Provide in law for co-management and equal power over concurrently owned property. Each spouse can use and enjoy all property in co-ownership. One spouse alone might be provided with enhanced powers of management when the other spouse leaves, disappears, or becomes incompetent to act as a property manager.
- Enforce fair and equitable property management of co-owned property by providing that either spouse may be liable to the other for mismanagement of the property or allow recourse to the courts if either spouse jeopardizes the family's best interest in the course of property management.

Potential Impediment: Land titles or other legal documents are issued or registered on a household basis.

Often women who have legitimate rights to land are not named on the legal documents and therefore their legal rights are unclear.

Potential Solution

- Require in law that all adult members of a household who hold land in common ownership be listed in the register.

Potential Impediment: Family businesses, including family farms, may not be considered to be in co-ownership of both spouses.

Provisions that exclude from the community property or common share property any property used by one spouse for his occupational needs may disregard the wife's contribution to the family business or farm.

Potential Solution

- Provide in law that when there is a family business or family farm, the legal presumption will be that the farm or business is held in common ownership to be divided equally upon separation.

Potential Impediment: Members of a peasant farm are unable to leave the farm with land and property in-kind.

Women may not be able to leave family farms with capital assets in the event of a divorce.

Potential Solutions

- Give departing members of a peasant farm the legal option of receiving their share of land and other assets in kind.
- Establish a legal rule that provides that spouses may always divide land held in common ownership regardless of minimum land size requirements.

Potential Impediment: Division of property at the time of divorce may make it economically difficult for one or both spouses to function independently.

When property is divided according to whether it has been used by one spouse exclusively, women may receive less valuable property. In most countries men tend to use larger and more expensive farm machinery than women. Women who do not receive a fair share of farm property will have a difficult time maintaining their livelihood.

Potential Solution

- Establish a legal presumption that family business and family farm property will be divided so that each spouse will receive a mandatory minimum share of the total estate or of all immovable property. Permit the mandatory minimum share presumption to be overridden only with the written consent of each spouse.

Potential Impediment: Written consent is not required for land transactions when land is held in common ownership.

Legal rules require consent for land transactions when land is held in common ownership, but formalized written consent is not specified, weakening the effect of the requirement.

Potential Solutions

- Legally require that both spouses consent in writing for all transactions (lease, sale, mortgage) which involve land, household necessities, and other specified assets.

- Give both spouses equal legal rights to community property by requiring the signatures of both spouses to transfer or encumber community property.
- In all cases of common ownership (not only community property) require written consent by all common owners to transfer or encumber land.

Potential Impediment: Rules regarding inheritance of land may be inadequate or conflicting.

Lack of formal rules regarding inheritance of land may lead to an inequitable distribution of land between males and females.

Potential Solutions

- Establish by law a default inheritance provision, which provides that upon death, each spouse may pass all his or her separate property and one-half of the community property or co-owned property through a will, with the other half going to the surviving spouse. If the spouse dies without a will, all community property or co-owned property might be transferred to the surviving spouse.
- Adopt legal inheritance rules that do not on their face require gender equality or gender preference, but rather allow individuals to choose how to distribute their property. At the same time, adopt statutory rules providing a "forced" minimum share for spouses.
- Enact legal rules for distribution of land previously owned by state or collective farms that require land to be distributed equally to all members of the state or collective farms, and if children of members also qualify for distribution, equally to all children.
- Establish a legal rule that a spouse or descendant who has been farming the land that is passed through inheritance can acquire the whole farm as against the non-farming beneficiaries, but must pay the other beneficiaries an amount equal to the value of their share of the farm.