Land in Africa: Market Asset or Secure Livelihood
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Working Group 2: Gender, Land Rights and Inheritance
Securing Women's Land Rights: Approaches, Prospects and Challenges
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Introduction

In this presentation, I will try to raise some of the issues raised in the literature about women's land interests and inheritance rights, discuss the debates and approaches emerging in the context of the ongoing land tenure reforms in countries such as Ghana, Uganda, Tanzania and the prospects for securing women's land rights. I also attempt to tackle in some cases tangentially, some of the questions raised for our deliberations by the conference organisers. These to remind us are as follows:

- How to translate constitutional provisions into reality at the ground level?
- Will increased security for women translate into increased agricultural investment and outputs?
- Is joint registration of land rights an effective means to strengthen women's position?
- What complementary measures might strengthen women's rights of access to land?
- How best to ensure the representation of women in new decentralized bodies?

This presentation draws heavily on a joint article with Anne Whitehead on Policy discourses on land tenure; and an account I wrote of Tanzania's land tenure system and ongoing research and writing on gender and land tenure issues in Ghana.

My presentation is as follows: I start with a discussion of the problem with women's land interests and inheritance. This is followed by a discussion of recent land tenure reforms in several African countries. This is then followed by a discussion of debates among gender justice activists about how to address some of the issues arising, in particular, the problematic of customary law and land titling and registration and statutory law.

1. What exactly is the problem regarding women's land interests and inheritance rights?

Women's land interests have to be situated in a larger context of problems of land tenure. Land problems in sub-Saharan Africa include growing land concentration and scarcity more or less acute in various countries and locations, competition over land use and environmental and land degradation. As well, there is growing indiscipline in land markets, indeterminate boundaries of customarily held lands, a weak land administration system, and the lack of equity in land tenure systems. Additionally, legal pluralism has a complicated impact on land tenure systems. These land tenure problems have country and intra country specificities, but which I will not detail here.

Colonial and post-colonial processes and policies have directly and indirectly shaped land tenure and its problems and with it women's interests. Anthropological work on women's interests in land has tended to argue that women did have some significant interests under customary land tenure which have been eroded by agrarian change and largely male out-migration, colonial and post-colonial processes and policies such as the codification of customary law. While various factors affected the outcomes of these processes and their implications for women's interests in land and other resources, it has been the judgement of commentators that overall, these changes were mostly detrimental to women, although not in a simple linear fashion (Mbilinyi, 1997; Odgaard, 1997).

Policies in the post-colonial era have tended not to fundamentally address the core land tenure problems of access and equity. More recently, policies under the Structural Adjustment Programme have resulted in a massive expansion of mining, commercial farming, industry and real estate. In urban areas, the expansion of private and state housing has created many problems in the buying and selling of land resulting in increasing land concentration and many land conflicts and litigation.

An important issue in all these problems is the growing differentiation in land control and questions of access and equity. A combination of state policies and agrarian change have created various forms of differentiation which have had an impact on land relations. Processes of differentiation and individualization of land rights and land shortages have resulted in the increasing concentration of land in male hands. In several countries, it has been reported that daughters are finding their inheritance rights under contestation, with erosion occurring in the process. (Odgaard 1997). On the other hand, the growing incidence of divorce, single parenthood and male labour migration and the increase in avenues of formal education meant that more women had to take responsibility for family members in the countryside. As a result many fathers were supporting daughters' claims, thus underlining the argument that inheritance goes with responsibility for the welfare of the living (Odgaard 1999; Omari and Shaidi 1992, Lusugga and Hidaya 1996).

Part of the problem was that women's rights had been determined throughout their lives by their status—as girls, as married women and as widows—and therefore, their rights and obligations were to different communities (natal and marital) at various stages in their lives. These were different from the more established and abiding rights that men had as members of one community. As well, men as clan and family elders and village leaders were often in sole charge of decisions about allocating and disposing of land.

In spite of these processes of erosion, the literature identifies some practices which have reduced women's land tenure insecurities. As well, women themselves made efforts to safeguard their rights by recourse to favourable traditional practices, and less commonly, by recourse to legal processes. Such practices include the institution of female husband and the practice of parents distributing land to daughters and sons in their lifetime as a social security device. Village authorities are also reported to be supportive of daughters' claims, although the courts have been more ambivalent (Mbilinyi 1999; Amanor, 2001; Butegwa, 1996).

With the erosion of inheritance rights, marriage was increasingly becoming the most important source of farming land for women. The interests of spouses in each other's

lineage land are quite well established and offer some measure of security of tenure. However, the interest in land acquired through marriage is often weaker than that acquired through family membership. In addition, access to a husband's land depends on marital residence, the continued existence of the marriage, the goodwill of the spouse and the size of land he is entitled to. In situations of marital conflict or divorce, the insecurity of a wife's interest in land which belongs to her husband becomes heightened. When such women return to their family compounds, they lose out on land they farmed and developed during the marriage. This is because customary law does not recognise marital property or non-monetary contributions to the acquisition of property during marriage. Even though widows might benefit from their children's inheritance, the fact that they cannot inherit property from their husbands increases their social vulnerability and poverty. These changes in land tenure systems are occurring in spite of constitutional provisions across sub-Saharan Africa which protect women's land rights.

2. Land Tenure Reforms

Recent land tenure reform has been undertaken, or is underway, in a number of countries, including Tanzania, Uganda, Malawi, Cote d'Ivoire, Niger, Ghana and Zimbabwe, and international donors have been heavily involved in the design of these reforms. In many countries, government proposals have sparked off considerable NGO and civil society activity about land issues, which has been picked up and commented upon by international NGOs. These reforms typically involve the titling and registration of land, legislative and institutional reforms. Concerns have been expressed in several countries that the reforms could worsen the tenure uncertainties experienced by women, tenants, pastoralists and young people whose interests in land are already not very secure. In the case of women, this has resulted in advocacy to ensure that the reforms address some of their concerns in countries such as Uganda and Tanzania.

In addition to uncontroversial demands such as joint registration of land titles and the representation of women on land boards and other adjudication structures, the reforms have generated debate on questions such as how to address the problem of customary law, the use of legislation and the courts to secure women's interests and whether women's demands should tackle the larger problem of the overall thrust an approach of land reforms. It is to some of these issues that we now turn.

Customary law

The issue of customary law has arisen within the land reform debates not only because the majority of feminist scholars have held the view that customary land law has not favoured women, but because the reforms are taking place in a context of a positive re-evaluation of customary land tenure. Recent policy discussions reject land tenure reform based on making a complete break with customary systems and instead stress building on them. The World Bank and local intellectuals believe that letting the customary evolve will deliver land markets and efficient land allocation in a cost-effective and trouble-free manner. Such analysis has tended to ignore issues of equity in the outcome of the evolution of customary practices. Not surprisingly, not many land reform programmes have tackled the issue of customary law except in very specific terms such as making provisions for protecting women as occupants of customary held lands. This positive re-

evaluation of the customary raises the question of what we know about how customary processes actually work. Although there is agreement that the customary is historically constructed in form and content, is flexible and embedded in local social relations, and that conflicting claims are negotiated on the basis of series of principles and not on a series of rules, it is hard not to agree that not enough is known about customary land tenure institutions within the modern nation state (Okoth-Ogendo 2000). To explore some of the issue of the actual operation of customary laws, the issue of legal pluralism and the politics of the customary will be explored briefly.

Recent local level studies, especially those undertaken by gender specialists and feminists, have shown that the empirical relation between statutory and customary law is very far from the legal centrist model of separation. Statutory and customary law systems have been found to operate in more interconnected ways than is realised. In practice, people, including women, sustain their claims to resources by employing arguments from both the statutory and so-called customary law, the concepts and objectives from one system seem to slip quite easily to the other and that actors, including law enforcement officers, do not treat the legal ideas in the two systems as hermetically sealed off (Stewart, Griffiths 1998, 2001). A more appropriate model of legal pluralism would see them as mutually constitutive.

A related issue is that, apart from the content of a set of interests, the processes by which interests and claims are made and secured are also critical. A very important limitation on customary systems delivering gender justice lies in these decision-making processes and negotiations and their intersection with rural power relations. Land claims are socially embedded not only in the sense that the network of social relations gives rise to interlinked claims and obligations, but also in the sense that the processes of allocation and adjudication are themselves socially embedded (Mackenzie's study of a Kikuyu area in Kenya, 1993). This point is also raised in relation to titling and registration in that it has been argued that once registered titles become an issue, local social relations emerge more clearly as sites of gender power, albeit not ones in which women are simply passive victims, unable to negotiate, bargain and contest sometimes successfully.

On the other hand, a Uganda (S. Kigesi) case study suggests that letting local levels systems just muddle along will not protect women's land claims as economic change unfolds. In those historical periods and regions where there was land abundance and where land tenure was not such an issue, the absence of women's voices may not have affected their access to land. However, these inequalities in power relations in rural societies, played out in a modern context, are the mechanism by which women lose claims to land as individualised proprietorship evolves. This implies that the rural customary cannot be left to muddle along without widening the gap between men's and women's land access. It is necessary self-consciously to manage change to produce greater gender justice with respect to resource allocation for rural women.

Customary law itself as a term has been challenged on a number of grounds- that it suggests an unchanging timeless entity, it is used in the context of Structural Adjustment Programmes s to legitimise marketisation and liberalisation, it masks contemporary power relations and is used to justify inequalities. Thus customary practices - as institutions, as social relations and as discourses - are sites where, on the whole, men have more power than women. Rural African societies are, of course, and were very varied and particularly in the extent of economic and political inequality. Even

the most egalitarian societies have been shown to contain significant relations of inequality based in gender and generation.

Constitutions, Statutory Law, Titling and Registration

Constitutional provisions serve as an important justification for trying to improve women's interests in the context of reforms. How the constitution is used largely depends on which strategies are adopted within a country for securing women's rights. However, constitutional provisions themselves require scrutiny. As well, processes which challenge the constitutionality of laws and practices or re-examine the constitution itself in the light of its principles raise questions about the use of the courts and state processes. Some feminist lawyers have brought out some very critical limitations in the use of law to produce gender equity. In the first place there is a problem of access. Time and again, the point has been made about women's distance from legal processes and their inability to access the courts. This is underlined by how celebrated the cases of the few women who do go to the courts become. While Wambui Otieno and Unity Dow are 'household' names within international and African feminist circles and are referred to over and over again by academics commenting on women and the law in Africa, it is important to keep in mind their minority status. There is also the question of the legitimacy of local level legal fora. Women have been reported as saying they need ways of resolving disputes which are accepted by male relatives and members of the community (Odgaad 2000, Leonard and Toulmin 2000).

A second set of limitations is that formal legal cultures and institutions are not themselves women friendly, despite their supposed impartiality and neutrality. Worldwide, women and feminist lawyers have exposed gender bias in legal cultures and the law, criticising not just lawmakers and legal practitioners, but many legal concepts. One of the paradoxical features of Africa's legal cultures and law is that some of the gender bias in formal law arises precisely from the construction of 'lawyers customary law'. As well, women's claims under modern legal systems in African states are undermined when men argue that their positions are contrary to 'custom'. The language of custom here is being used politically in national level discourses to undermine the legitimacy of women's claims within modern legal frameworks using a rights discourse (Stewart 1996). This leaves feminist lawyers and women litigants little room for manoeuvre.

A final limitation of the law is that some of the tenets of the formal discourses of law and legality, such as formal equality and individual rights, do not sit easily within customary practices that are embedded in social relations. More than that, those principles, when applied to conflict adjudication or law making, may lead to outcomes that ignore social relations. This is especially important when we consider that there is a case being made for codification by both the World Bank Land Policy Division and independent land policy advocates and that the World Bank is currently involved in some pilot codification projects. Whether codification can (or under which circumstances it will), protect women's socially embedded land claims is one of the issues of current debate between women's groups in Zimbabwe (Whitehead 2001b).

Women in Africa have many reasons to be disillusioned with the state. Many have a history of resisting women's demands and there is a poor record of women's participation in government and in politics at national and local levels. Recent

manoeuvring around Uganda's new land legislation is instructive. Highly effective lobbying and alliance building strategies by Uganda women's groups and lawyers resulted in a spousal co-ownership clause being included in the draft land legislation. Despite assurances that this clause would be passed, the final late night parliamentary sittings passed the new land law without these clauses. This clause has not been reinstated to this day.

However, the dangers that we have identified in the turn to the customary suggest that we should not ignore the state as a source of equity for women in relation to land issues, a point made more generally by Stewart (1996). Rural African women will not find it easier to make claims within a climate of anti-state discourses. It is true that the many states lack legitimacy in Africa and that women find it difficult to get justice in male dominated states, but the answer is democratic reform and state accountability, particularly with respect to women's political interests and voices, not a flight into the customary.

Given the foregoing discussion about customary and statutory laws, it has been argued that the issues facing women, in terms of law and their rights, is not whether to choose statutory or customary law, but how to maximize their claims under either, or both (Stewart 1996). The question for gender policy advocates is what stance on the issue of the complex relation between the customary and statutory, as discourses and practices, can best underwrite these claims?

The main problem is that women have too little political voice at all the decision making levels that are implied by the land question: in local level management systems; within the formal law and also within the government and civil society itself. Using indigenous institutions is also open to potential abuses of power, and the operation of the 'new or modified' institutions does not take place in a vacuum, but depends on the way in which local and indeed national power relations feed into the new structures. Moving to community-based management and dispute settlement systems does not necessarily undermine these power relations. However, the potential for making new or modified local level institutions a site of greater gender equity is suggested by a recent study by Odanga-Mwaka. She found that Masaka Resistance Council courts were somewhat more progressive on gender issues than other local legal fora. She attributes this firstly, to the stipulation that one third of the members should be women and secondly to the position adopted on gender issues by the Museveni government. There needs to be explicit discussion about how new functions for existing local level institutions, or new local level land management systems will ensure that women's land use claims are not systematically undermined.

3. Will women's land rights result in efficiency?

Some feminists have argued that because of the serious problems facing African economies, governments cannot afford not to utilise all available resources so they need to put other incentives in place to ensure equitable access to land. One such incentive, as the arguments goes would be the promotion of a more gender neutral system of land ownership and control so that women who are the lynchpin of small holder agriculture can have the power to make production choices. In the absence of this, many women are

unable or unwilling to risk investing in long-term agriculture ventures or cash crop growing. (Butegwa, ibid, p. 46; see also Himonga and Munachonga, 1991 pp 60-61; Karanja, 1991 and Knowles, 1991). This issue of efficiency is not proven empirically. As well, efficiency itself is contested in social science, particularly within the livelihoods approaches. Until such time that it is, it seems to be a more reasonable strategy to focus on issues of equity and discrimination and the rewriting of customary law rules.

4. The broader context of land reforms

The discussions around women's interests in the context of land reforms raised the issue of the breadth and depth of approaches to women's interests in land, i.e. whether to focus solely on gender equality or take also into account more general issues which could undermine women's gains. The implication here was that the law reforms had to be judged by multiple criteria, that is women's interests were best served by simultaneously addressing broader local and community interests as well as gender discrimination. Within such an approach, commentators have suggested that the Land Acts of Tanzania have been a setback for local communities in spite of what women have gained. As Mbilinyi notes, 'the irony is that whereas women's rights to land e.g. as wives seem to be protected under the new Village Land Law, their rights as members of communities are at risk given the liberalization principles and the administrative structure established' (Mbilinyi 1999, 5). Similar concerns have been voiced in relation to land tenure reforms in Ghana, that as designed, they were likely to hurt the interests of groups with insecure land interests (Wily and Hammond, 2001).

Not all women's advocates shared this dim view of liberalization. Some of the most influential groups in the GTLF supported the liberalization in land markets, land titling and registration as creating opportunities for women to purchase land on their own account and have it registered in their own name to be inherited by their descendants.

5. Concluding issues

In conclusion, I would like to raise the following as matters of concern:

1. Continuing debates about whether women have anything to complain about in terms of their land interests, and therefore the main recommendation being that studies are needed even though pilots are in place- Ghana. These disagreements lie in differences in the use of concepts such as access, standards considered acceptable and therefore the conclusions drawn from findings, the character matrilineal system of inheritance, reading of the statistics. They also arise from different attitudes to gender ideologies and the differences between theory and practice, the different weights given to the views of respondents etc.
2. Agreement that there is a problem, but disagreement about how to remedy it- Shivji and the women's rights activists (hard law or soft law approach). Differences in strategy- focusing simply on women's rights or situating them in the context of the larger reforms and their implications.

3. Whether codification can (or under which circumstances it will), protect women's socially embedded land claims is one of the issues in current debates between women's groups in Zimbabwe about codification (Whitehead 2001).
4. Whether the titling and registration being put forward under current land tenure reforms is different enough from the old to avoid the pitfalls.