

# **Human rights, formalisation and women's land rights in southern and eastern Africa**

By

Ingunn Ikdahl, Anne Hellum  
Randi Kaarhus, Tor A. Benjaminsen  
Patricia Kameri-Mbote

Studies in Women's Law No. 57  
Institute of Women's Law, University of Oslo

Revised version of Noragric Report No. 26  
June 2005, Norwegian University of Life Sciences

This report is a revised version of the report published by I Ik Dahl, A Hellum, R Kaarhus and TA Benjaminsen in June 2005 as Noragric Report No. 26, ISSN 1502-8127.

The study on which this report is based, was commissioned by the Norwegian Agency of Development Cooperation (NORAD) as a joint project to the Institute of Women's Law, Faculty of Law, at the University of Oslo (UiO) – through the Norwegian Centre for Human Rights – in collaboration with Noragric.

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Ik Dahl, I., Hellum, A., Kaarhus, R., Benjaminsen, T.A., Kameri-Mbote, P.  
Human rights, formalisation and women's land rights in southern and eastern Africa  
Studies in Women's Law No. 57 (July 2005)

Institute of Women's Law  
Department of Public and International Law  
University of Oslo  
P.O. Box 6706 St. Olavs plass  
N-0130 Oslo, Norway  
Editor: Professor Anne Hellum

Internet: <http://www.jus.uio.no/ior/kvretten/english/index.html>  
ISSN: 0809-621X

## List of Contributors

Tor A Benjaminsen is Associate Professor at Noragric, Department of International Environment and Development Studies at the Norwegian University of Life Sciences (UMB). He has a PhD in Development Studies from Roskilde University (Denmark). He has extensive experience working with land tenure issues, drylands, environmental history and political ecology in a number of countries, including South Africa, Tanzania and Mali. He has produced a wide range of publications both in English, French and Norwegian.

Anne Hellum is Dr. juris and Professor of Law at the Faculty of Law at the University of Oslo. She is Director of the Institute of Women's Law and leading the Faculty research group on Rights, Culture and Society. She is a lawyer and anthropologist engaged in teaching and research on human rights and legal pluralism in Africa, Pakistan and Norway in relation to family, health, reproduction, land and water. She has been involved, since 1987, in a NORAD funded collaborative project between the University of Zimbabwe and the University of Oslo in setting up and developing a regional master program on Women's Law.

Ingunn Ikdahl is Research Fellow at the Faculty of Law at the University of Oslo. She has a law degree from the University of Oslo. As a research assistant at the Institute of Women's Law she was engaged in a research project on women's land rights in Tanzania. Her areas of teaching are international women's law, equal status law and property rights. She is daily leader of the Institute of Women's Law and sits on the editorial board of *Retfærd* (Justice) Nordic Legal Journal.

Randi Kaarhus, with a PhD in Social Anthropology from the University of Oslo, is an Associate Professor, leading a research group working in the field of *Rights, Conflicts & Resources* at Noragric – Department of International Environment and Development Studies – at the Norwegian University of Life Sciences (UMB). She has practical experience with development cooperation in Mozambique and has carried out research and consultancies in Mozambique, Malawi, Angola and Ecuador.

Dr. Patricia Kameri-Mbote, with a PhD in Law from Berkeley (USA) is Senior Lecturer in Law at the Faculty of Law of the University of Nairobi and an Advocate of the High Court of Kenya. She is the Programme Director for Africa for the International Environmental Law Research Centre, and is a member of the IUCN Commission on Environmental Law, a board member of the Advocates Coalition for Development and Environment Uganda and Women and Law in East Africa. She has consulted for many international and national agencies including the World Bank, the United Nations Development Programme, the Norwegian Agency for Development Cooperation (NORAD) and the government of Kenya. She has published widely in the field of international law, environmental and natural resources law and policy, women's rights and property rights.

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## LIST OF ACRONYMS AND ABBREVIATIONS

African Protocol on the Rights of Women	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
HRBA	human rights-based approach
ILD	Institute for Liberty and Democracy (Peru)
IMF	International Monetary Fund
MDC	Movement for Democratic Change (Zimbabwe)
NGO	non-governmental organisation
Noragric	Department of International Environment and Development Studies, Norwegian University of Life Sciences
OHCHR	Office of the United Nations High Commissioner for Human Rights
PARPA	<i>Programa de Acção para a Redução da Pobreza Absoluta 2001–2005</i> [Action Plan for the Reduction of Absolute Poverty (2001–2005) (Mozambique)]
PPA	participatory poverty assessment
PRA	participatory rural assessment
PRSP	Poverty Reduction Strategy Paper
UNDP	United Nations Development Programme
RLA	The Registered Land Act (Kenya)
WLSA	Women and Law in Southern Africa Research Project
ZANU-PF	Zimbabwe African National Union-Patriotic Front

## ACKNOWLEDGEMENTS

This study was commissioned by NORAD within the agreement between NORAD and the Norwegian Centre for Human Rights/the Institute of Women's Law at the University of Oslo and the agreement between NORAD and Noragric, the University of Life Sciences.

The team undertook two missions to Tanzania and Mozambique. We are grateful to the Norwegian embassies in Dar es Salaam, Tanzania, and Maputo, Mozambique. They provided valuable assistance in identifying and arranging meetings with relevant organisations and individuals. No trips to South Africa and Zimbabwe were needed due to previous and ongoing research. We would, however, like to thank the Norwegian Embassy in Harare, Zimbabwe for its assistance in providing materials.

The authors should especially like to thank all non-governmental organisations, researchers, lawyers and government officials in Tanzania and Mozambique who generously made time to answer our questions and provide materials for this report. A list of people and organisations consulted is included in Appendix 1.

We are grateful to Bill Derman who commented on most of the draft chapters in the report and provided fruitful advice. For valuable comments to different parts of the report we are also grateful to Bård A Andreassen, Nina Berg, Aninka Claassens, Edward Lahiff, Patricia Kameri-Mbote, Julie Stewart, Amy Tsanga and Torbjörn Östberg.

We also thank Frode Sundnes and Joanna Boddens-Hosang at Noragric, who at different points in time have assisted us in the technical matters of putting the report together and finalising it. We would also like to thank Stephen Heyns, who did an excellent job in editing the report.

The study was financed by NORAD. In addition parts of Anne Hellum's contribution was facilitated by the Faculty of Law, University of Oslo.

May 2005

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The present publication is a revised version of the report first printed as Noragric Report no. 26, ISSN 1502-8127. The major change is the inclusion of a case study of Kenya, written by Patricia Kameri-Mbote.

This revised version was funded by the Norwegian Ministry of Foreign Affairs under the research programme Bistandsrelevant kvinnerett (Development related Women's Law)

July 2005



## EXECUTIVE SUMMARY

Land is a vital resource for rural livelihoods. Establishing and clarifying land rights through formalisation has become a key issue in development policies that aim to promote more productive uses of land. This report looks at some land reform initiatives from a gendered human rights perspective. The human rights-based approach (HRBA) has a direct bearing on international and national land reform policies, facilitating gender equality through elimination of discrimination against women. The overall aim of this report is to make a contribution to the operationalisation of the HRBA.

Chapter 2 focuses on different approaches to formalisation in different historical periods to date, starting with a discussion of the concept itself. In Chapter 3 the human rights-based approach to development is developed in relation to women's land rights, while Chapter 4 is an analysis of the approach to land policy found in the 2003 World Bank report. The country studies presented in Chapters 5–9 explore to what extent international and national formalisation initiatives are consonant with international human rights standards. By way of conclusion Chapter 10 addresses some cross-cutting issues concerning the approach's efficacy and adequacy at the international, national and local levels.

### **Background and concretisation of the human rights-based approach**

The human rights based approach to development was initiated by the UN and is today gradually adopted by international and national donor agencies. There is a growing body of literature integrating development aid with human rights principles and norms. While still in the making some overall concerns and principles of this approach are:

- Recognising the mutual dependency and complementarity of sustainable human development and the different human rights
- Considering the individual as the central actor in and beneficiary of development
- Focusing on the rights of individuals rather than needs
- Setting out a legally binding framework of individual and group rights, with corresponding obligations for national governments and international community to respect, protect and fulfil these rights

The overall challenge addressed in the report is to bring the HRBA framework from the plane of abstract principles and turn it into a practical response to poor women's concerns. Cutting across the different HR conventions and recommendations from the UN treaty-monitoring bodies, we set out a framework for a gender-equal and non-discriminatory land reform/formalisation process. The overall concerns and principles developed in Chapter 3 are:

*Non-discriminatory access to land and protection of land rights.* Formal and informal laws, norms and practices that formally disadvantage women in comparison to men constitute direct discrimination (e.g. inheritance laws that deprive widows of property rights). Indirect discrimination refer to apparently gender-neutral norms that in practice favour male life situations and as such leave

women in a disadvantaged position (e.g .tenure regimes based on the assumption of household and community unity resulting in de facto inequality). Criteria and measures for distribution, formalisation and registration must be carefully assessed with a view to avoid both direct and indirect discrimination. This requires a gender impact assessment in terms of a close scrutiny of the context where the land reform or formalisation process will take place, with a view to both facts and norms.

*Standards for gender-equal and non-discriminatory land reform apply in both the public and the private sphere.* These standards cut across market, state and family land transactions. Whether land reform, formalisation or registration is based on statutory or customary, individual or communal ownership, mechanisms that protect women against direct and indirect discrimination have to be put in place.

*Equal participation and empowerment in land reform and formalisation processes.* A wide range of human rights instruments address women's rights to participate on an equal basis with men, not only formally, but as a substantive right. Affirmative action may be necessary to ensure de facto equality. Measures to empower women, such as education and information, are required to ensure real and meaningful participation.

*Monitoring and accountability in terms of due process and the rule of law.* A HRBA set out procedural requirements that have a bearing on land reform and formalisation processes. Rights must be clear and legally enforceable for individuals. Access to legal remedy must be provided in situations where rights have been violated in redistribution and registration processes. Independent institutions where decision-makers can be held accountable are required. Access to justice should be equitable and effective.

In southern and eastern Africa, contemporary formalisation initiatives, understood as increased state engagement through legal regulation and registration of land rights, both build on and seek to reform the legacy from the colonial period. Chapter 2 in this report emphasises the need to assess whether and to what extent reforms are equally beneficial for women and men. Statistics from Kenya showing that only 5-7 % of the registered rights-holders are women demonstrate how formal and informal customary laws related to land transactions in family, marriage and inheritance matters often have a spill-over effect on registration of land rights that is detrimental to women.

The HRBA sets legal limits for free market economic models. It balances the quest for more effective and productive uses of natural resources such as land and water, voiced by international actors like the IMF and the WB, against the right to life and the right to livelihood without discrimination. Chapter 4 provides analysis of the most recent (2003) World Bank policy research report in this field, *Land policies for growth and poverty*

*reduction* which seeks to integrate human rights concerns, such as gender equality and non-discrimination, within a market-based approach to development.

### **The country studies**

To operationalise the HRBA, Chapters 5-9 examine women's human rights, land reform and formalisation of land rights in Tanzania, Mozambique, South Africa, Zimbabwe and Kenya. The country studies look into the role of both economic and legal mechanisms at the international level, such as Poverty Reduction Strategy Papers (PRSPs) and human rights reporting systems. In the country studies we also examine efforts of national governments, law and policy makers, the judiciary and civil society to secure women's land rights on an equal basis with men.

#### *Tanzania:*

The current land legislation of Tanzania was enacted in 1999 after a long process of consultation and debate. It includes provisions specifically aimed at strengthening the situation of women, while recognising customary law and existing rights. Tanzania's strong civil society participated in the debates preceding the legislation, and has also used litigation as a strategy to strengthen women's land rights. The relationship between statutory law and gender-specific customary law and practices remains a crucial issue for women. In general, the 1999 legislation can be seen as a delicate balancing act. On the one hand, it decentralises power to local bodies and builds upon existing institutions, customary norms and rights. On the other, it attempts to erode the influence of discriminatory practices and strengthen the position of women rather than reinforcing existing inequalities. While the slow pace of implementation makes it hard to draw conclusions about the success of this process, the Tanzanian legal model can at least serve as an example of efforts to integrate women's rights issues into legislation aimed at the formalisation of land rights. However, gendered perspectives have become less visible in debates on land law in Tanzania after the legislation was enacted. One of the aims of the land reform was to facilitate a market for land rights and the use of land as collateral. This idea is supported by the World Bank, international donors and Hernando de Soto's Institute for Liberty and Democracy. In this picture women's land rights seem to be sidelined, even though NGOs continue to spread information on the rights of women entailed in the new Acts, and efforts to change discriminatory inheritance law continue.

#### *Mozambique:*

The present Land Law was enacted by the Mozambican Parliament in 1997, after a process of consultation and debate involving civil society organisations, professionals and academics. According to the law, men and women have equal rights to land. The 1997 Land Law also recognises customary rights, as long as they do not contradict the Constitution. This implies that rural land rights often belong to communities rather than individuals, and the law provides for formalisation of communal rights through a delimitation and registration process. Women's and men's rights to land through inheritance or after divorce are, in part, addressed in the new Family Law enacted in August 2004. The key issues of debate in the preparation of the new Family Law have

primarily been related to codification of different forms of marriage and the principles of equality of men and women contracting marriage and in the family. Present-day debates on land rights revolve around the practices of implementation of the 1997 Land Law; if there is a need for further formalisation in the form of privatisation of land; how to deal with de facto emerging land markets; and how to deal with land grabbing on the part of the rich and powerful. The debate on land rights and the debate on the Family Law have, however, basically been two separate debates. With the enactment of the new Family Law, the legal framework for women's equal rights to land in Mozambique is basically in place. In practice, however, structural, cultural and material constraints are still likely to limit women's access and control of land and other resources. The current legislation is a type of hybrid, through its recognition of both customary and statutory rights. Still, there is a lack of knowledge on how the present multiple and hybrid laws and practices actually impact on women's rights to and access to land. The current focus on facilitating market mechanisms in the field of land rights does not adequately take into account concerns and questions related to ways women actually access land, for example, through inheritance. Crucial issues in the future will be how women's interests are represented in the local and national reconstruction of 'customary rules and practices', and the actual participation of women in the implementation of the Land Law; but also to what extent women will in practice be able to claim the formal rights defined in the legislation.

#### *South Africa:*

The 1996 Constitution of South Africa seeks to balance the protection of existing property rights against a mandate for land reform based on three pillars: redistribution, restitution and tenure reform. While the government's policy is committed to gender equality, land reform has mainly been concerned with the racially skewed ownership of land. In general, there is a disjuncture between policy ambitions and how gender issues are treated in practice. The Communal Land Rights Act of 2004 has been widely criticised because it places the responsibility for land administration with 'traditional councils' and thereby revamping the tribal authorities that controlled land under apartheid. There are fears that this will further marginalise women and have severe consequences for women's access to land. Farm workers on commercial farms have generally poor tenure security, despite the Extension of Security of Tenure Act of 1997. In addition, women on farms tend not to be recognised as occupiers in their own right, but are seen as 'secondary occupiers' who can be evicted on the basis of the eviction of their spouses. However, there is also some good news regarding women's access to land in South Africa. While the recent Bhe Constitutional Court case illustrates tensions between customary laws and the non-discrimination principle, it also demonstrates the potential of legal rights as a means to support women in their struggle for land.

#### *Zimbabwe:*

Land distribution, access to land and secure tenure have been issues since Zimbabwe became independent in 1980. The government of Zimbabwe has signed and ratified a wide range of international and regional human rights instruments that require legal, economic, social and organisational measures to facilitate pro-poor and gender equal land reform be taken. Yet a series of discriminatory laws and practices have been maintained,

effectively impeding equal land rights both before and after the fast tracked redistribution of land that started in 2000. Security of tenure in relation to private, communal and resettlement land has not been identified as an issue in the Governments 1980s resettlement programme or under fast track. No legislation has been put in place securing the rights of the beneficiaries in relation to distribution and participation as required by international law. While fast track has been legitimised *ex post facto* through constitutional and legal changes, it has involved a series of human rights abuses towards farm workers, those who were dispossessed of land, and members of opposition political groups. Women belonging in virtually all groups have been subjected to double discrimination – first as women, and secondly, as women within these groups. Access to agricultural input, water, health and education is, as pointed out by the Uteete Commission in Zimbabwe, of particular importance for the poorest of the poor, for single, widowed and divorced women with dependants. While there are great inequalities between women from different political and social groups in the redistribution of land and access to productive infrastructure, women in all groups lack secure tenure. This is due to lack of political will on the part of the government to change the Constitution in order to make unlawful unequal family law regimes that have a spill-over effect on land transactions in the public sphere. Although secure tenure does not rely solely on the law – the institutional and the infrastructural set-up are also critical – appropriate laws are a basic condition for an entitlement-based land regime. Most importantly, the Zimbabwean case shows that access to land, unless combined with political will to provide infrastructure, is not in itself a sufficient condition to improve the position of poor women.

*Kenya:*

While Kenya has committed to the gender equality through international law, the Constitution contains a tension between this principle and the exemptions made for certain laws affecting women's rights. Women's ownership of property in marriage has been object of court cases on issues such as married women's capability to hold property, the valuation of non-monetary contribution to matrimonial assets, and co-habitation without marriage, offering a multifaceted picture of the legal situation of women and the role of courts in supporting them. As regards land tenure in Kenya, colonialism and the Torrens title system had profound effects on existing customary tenure systems, although it never succeed in replacing these. Formalisation of land rights in Kenya, actualised within a very patriarchal setting, has resulted in the exclusion of women from ownership of land which is a key resource for both subsistence and economic activities. Current legislation establishes three main classes of land tenure: individual, governmental and group ownership, which all show weaknesses when it comes to respecting and protecting women's right to land. The ongoing national land policy formulation process seems to show more interest in gender issues and the constitutional review provides a framework for consideration of women's land rights. Yet, the case of Kenya raises the important question of whether "formalising the informal" is the best way to provide for women's rights to land. The subjugation of customary rights and their systematic replacement with modern norms on tenure has not resulted in the obliterating of those norms, suggesting that formalising informality is not an easy task in a social context where informal norms are sometimes perceived to be more binding than formal ones.

## **Conclusion:**

In the light of the HRBA framework developed in Chapter 3, Chapter 10 in this report analyses how women's land rights are dealt with in national laws and policies, human rights reporting systems, PRSPs, national donor policies and the World Bank's policy in Tanzania, Mozambique, South Africa, Zimbabwe and Kenya.

At the international level, the CEDAW Committee is the human rights treaty body that has given the most extensive attention to equal land rights for women. General Recommendation no. 21 on equality in marriage and family relations deals with both moveable and immovable property. Women's land rights have been addressed in the CEDAW Committee's critical comments to the Tanzanian, Zimbabwean and South African country reports (Mozambique has not yet reported). The UN Human Rights Committee has over the years dealt with individual cases that have strengthened the protection of women's property rights under international law.

The 2003 World Bank report is clearly based on an economic argument, making women's equal economic efficiency the rationale for equal treatment. However, the report makes no suggestions for measures to strengthen women's relatively weak position compared to men in order to alleviate poverty. The added value of the human rights-based development approach is that it constitutes a legally binding framework of individual and group rights with corresponding legal obligations for national governments and international community to respect, protect and fulfil these rights. The HRBA standards have to be met even if the outcomes may be more expensive or less productive, economically speaking. As such, it sets legal limitations to free market economic models. HRBA implies that the dignity, integrity and equality of individuals is an end in itself and not a means towards an end such as economic growth.

National law and policy makers have often been slow and sometimes reluctant in responding to women's quest for secure tenure. The extent of the fulfilment of women's right to access and participation on a non-discriminatory basis varies. None of the land reforms in the five countries are fully in consonance with HRBA standards. We find the Land Acts of Tanzania and Mozambique to come closest. The Tanzanian Land Acts strengthen women's access to land through an approach combining recognition of existing customary use with a non-discrimination clause. Mozambique's land reform process, with the enactment of the Land Law of 1997 and the final enactment of the new Family Law in 2004, provides another example of a strong push towards equal land rights coming from civil society and women's organisations. The proposed Kenyan Constitution sets a template for land reform in consonance with the HRBA requirements, and the ongoing land policy formulation process points at gender issues as an area that must be addressed. South Africa is yet another example of civil society mobilisation of human rights resources to promote gender equal land reform, but the South African Communal Land Rights Act falls short of CEDAW and the African Protocol on the Rights of Women. The Zimbabwean case demonstrates the limits of the human rights-based approach in a situation where the government resists human rights as a Western dictate that undermines African values.

The country studies also demonstrate the importance of an independent judiciary to guarantee women's human rights in situations where the legislative body of government does not follow up its obligations – undertaken through international conventions – to eradicate discrimination through legislation. In Kenya, courts have resorted to the English Married Women's Property Act of 1882 to give women a right to acquire and hold property, also to parties married under customary law. The efficacy of judicial activism as a means of implementing women's human rights is dependent on the dominant legal culture, an independent judiciary, and the existence of a civil society that has the human, legal and economic resources to challenge laws, policies and practices. Rural women in all the countries under study have little protection due to lack of access to court and lawyers.

Addressing the relationship between principles and practice the report shows a complex and uneven process of socio-legal change. In many instances discriminatory customary practices overrule equal rights-based statutory laws. Yet research from Tanzania, South Africa and Zimbabwe also demonstrates the capacity of customary law to change in response to changing social, economic and legal conditions. The Zimbabwe case shows how research documenting changing inheritance practices in the 1990s led to law reform that promoted equal inheritance rights for daughters and widows. The Tanzanian and Mozambican land tenure reforms are examples of legal models that incorporate customary practices, while at the same time putting in place mechanisms that provide women with protection from discrimination. Furthermore, empirical research over the last years has indicated that land rights, especially in rural communities, are closely related to livelihoods. How to secure traditional and informal rights to livelihood now appears as a challenge that must be addressed at a time when formalisation of property rights to land is gaining momentum. How the land tenure reforms that have been initiated in Tanzania and Mozambique, and with regard to the South African Communal Land Rights Act, will work out in practice is too early to assess. There is a great need for further research that describes and analyses the practice of the local institutions tasked with distribution, registration and resolution of disputes under the new land tenure acts.

On the background of the blurred boundaries between state law and various forms of customary law, we find it virtually impossible to come to a conclusion regarding whether state law or customary law provides better protection for women's land rights. In this report we point to strengths and weaknesses of both statutory and customary systems. The added values of the human rights based approach is that it cuts across these divisions. Whether land reform, formalisation or registration is based on statutory or customary, individual or communal ownership, mechanisms that protect women against direct and indirect discrimination have to be put in place.

Neither laws prohibiting discrimination nor redistribution of land is in itself sufficient to secure substantive equality. Research referred to in the country studies indicates that the lack of measures that counterbalance male dominance results in poor access to information among women, thus constraining their participation and the exercise of their rights in land programmes carried out by both state and civil society. To ensure the ability

of married, single, divorced and widowed women to register, secure and use their land on an equal footing with men, long-term political and economic commitment is required, not only involving rights education, but also access to agricultural inputs. To facilitate the development of pro-poor and gender sensitive land policies a human rights-based approach must be linked to agricultural policies and extension services. This speaks to the indivisibility of civil and political, social and economic rights, and solidarity rights such as the right to development, as an integrated whole.



## 1. INTRODUCTION

Land is a vital resource for rural livelihoods. Rural livelihoods are a key concern today as post-colonial countries in southern and eastern Africa propose changes in their natural resource policies and practices, including the regulation of land rights. These changes have been prompted by international, as well as national and local initiatives. Among the aims and values of these policies and reform initiatives are to:

- promote fairer and more equitable distribution of natural resources in order to facilitate civil order, peace and economic growth
- redress the history of racial, ethnic, social and gendered inequality in ownership and access to land
- promote more productive uses of land through instituting and clarifying rights to land through formalisation
- decentralise government functions to lower levels.

This report looks at some of these international and national land reform initiatives from a gendered human rights perspective. In the last few years, there has been a growing interest in how to integrate human rights in development policies and programmes. An overall concern is to ensure that all persons benefit on an equal basis from development policies, plans and programmes. Independent and effective land rights for women have been identified by researchers and policy makers as vitally important for family welfare, food security, gender equality, empowerment, economic efficiency and poverty alleviation (Agarwal 1994, 2002). Unequal ownership and control of land is a critical factor which creates and maintains differences between women and men in relation to economic well-being, social status and empowerment. In Kenya for example, less than 5 % of the holders of land titles are women (Kameri-Mbote & Mubuu 2002). In spite of their legally disadvantaged position, African women produce 60–80% of the continent's food (FAO). The World Bank policy research report *Land policies for growth and poverty reduction* points to evidence that increased control by women over land and other assets could have 'a strong and immediate effect on the welfare of the next generation and on the level and pace at which human and physical capital are accumulated' (WB 2003:38).

How the human rights-based approach to development (HRBA) overlaps, conflicts, supplements and modifies the market based approach to both land and water is demonstrated in this report. Stressing the cross-cutting nature of human rights, the United Nations Development Programme (UNDP) has integrated human rights in recent reformulations of international development policies. The Johannesburg Declaration of 2002, which followed up the UN Secretary General's initiative on Water, Energy, Health, Agriculture and Biodiversity (WEHAB), is also adopting this approach<sup>1</sup>. These initiatives have been further followed up by the Office of the UN High Commissioner for Human

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1 'The Johannesburg Declaration on Sustainable Development', adopted 4 September 2002 at the World Summit on Sustainable Development.

Rights (OCHCR) in the ‘Draft Guidelines on a Human Rights Approach to Poverty Reduction’ (OHCHR 2002).

Establishing and clarifying land rights through formalisation has become a key issue in development policies which aim to promote more productive uses of land. The World Bank’s 2003 report on land policies is an important document in this context. The report reflects the emerging consensus among researchers and policy makers about the potential of a range of tenurial systems grouped under the notion ‘customary land tenure’ to meet the needs of local users (Whitehead & Tsikata 2003). A related approach is the formalisation approach presented by Hernando de Soto and the Institute for Liberty and Democracy (ILD) in Peru that sets out to formalise the property of the poor to promote economic growth. In this report we address the implications of the unitary household/community model, assuming common interest and equal power relations, which underlies these formalisation approaches. Their potential to secure women’s land rights is discussed in the light of the human rights-based approach to development.

A contested issue in contemporary policy discourse on women’s land rights in sub-Saharan Africa is the capacity of customary systems of land tenure to secure women’s land rights through evolution, and whether state-law intervention is necessary (Lastarria-Cornhiel 1997; Odgaard 1999; Whitehead & Tsikata 2003; Kameri-Mbote and Mubuu 2004). In this report we point to strengths and weaknesses of both statutory and customary systems. Rather than seeing state-law and customary law as distinct and opposing systems, we explore how women’s access to land and tenure security is affected by the interaction of the two systems. An overall issue is how women, regardless of the form of tenure, may be protected against the indirect discrimination that often is a consequence of gender and context-insensitive land laws, policies and practices.

Current international and national laws and policies addressing ‘formalisation’ or ‘secure land rights’ are clearly related to the human rights based approach to development. The application of a HRBA has a direct bearing on international and national land reform policies, facilitating gender equality through the elimination of direct and indirect discrimination. The non-discrimination principle, embedded in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>2</sup> and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (hereafter referred to as ‘the African Protocol on the Rights of Women’,<sup>3</sup> applies in both the public and the private sphere. It cuts across market, state and family land transactions. It places a duty on nation states and international development agencies to respect, protect and fulfil the right to resources that are necessary for livelihoods, such as food, water, housing, health and education. It sets standards that apply to land reform regardless of legal or tenurial form. Whether land reform is based on statutory or customary,

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2 ‘The UN Convention on the Elimination of All Forms of Discrimination against Women’, adopted 18 December 1979, entered into force 3 September 1981.

3 ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’, adopted by the Assembly of the African Union 11 July 2003.

individual or communal ownership, mechanisms that protect women against direct and indirect discrimination have to be put in place.

The human rights based approach is still in the making. Its implications for land reform have not yet been addressed from a livelihood or a gender perspective. The aim of the report is to make a contribution to the concretisation and operationalisation of the HRBA. Towards this end we set out a framework to examine women's human rights, land reform and formalisation of land rights in Kenya, Tanzania, Mozambique, Zimbabwe and South Africa, all countries that have ratified CEDAW. The country studies look into the role of both economic and legal mechanisms at the international level, such as Poverty Reduction Strategy Papers (PRSPs)<sup>4</sup> and human rights reporting systems. In the country studies we also examine efforts of national governments, law and policy makers, the judiciary and civil society to secure women's land rights on an equal basis with men. Our observations of these interacting and intersecting international, national and local processes give rise to some reflections on the strengths and weaknesses of the HRBA in supporting and promoting women's land rights in different social, economic and political contexts and settings.

The report is primarily a desk study. It is based on a review of human rights instruments, human rights literature, general recommendations of human rights committees, and national reports to international monitoring agencies. At the national level, PRSPs, constitutions, legislation, land tenure commissions, court cases, legal literature and social science research looking into land reform and gender justice in the countries of concern have been reviewed. The team has also carried out one-week fact-finding missions to Tanzania and Mozambique. The case studies from Kenya, South Africa and Zimbabwe are based on the experiences of the team members involved in teaching and research co-operation with institutions in these countries.

Chapter 2 of this report focuses on different approaches to formalisation in different historical periods to date, starting with a discussion of the concept itself. In Chapter 3 the human rights-based approach to development is described in relation to women's land rights, while Chapter 4 is an analysis of the approach to land policy found in the 2003 World Bank report. The country studies presented in Chapters 5–9 explore to what extent international and national formalisation initiatives are consonant with international human rights standards. By way of conclusion, Chapter 10 addresses some cross-cutting issues concerning the approach's efficacy and adequacy at the international, national and local levels.

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4 A PRSP (Poverty Reduction Strategy Paper) is formally a tripartite agreement between the International Monetary Fund, the World Bank, and a government seeking debt relief under the Heavily Indebted Poor Countries (HIPC) initiative. It provides a forum for policy dialogue and international conditionality in all countries receiving concessional lending from these international funding institutions.

## 2. FORMALISATION OF LAND RIGHTS

This chapter deals with formalisation of land rights in sub-Saharan Africa in different historical and political periods. Processes of formalisation of land rights have all along had a strong international element. In the colonial era the push came from the colonial powers. Today economic institutions like the World Bank are among the most influential actors. For practical purposes, we use the term ‘formalisation’ to describe the process of increased state engagement in terms of legal regulation and registration of land rights. A contested issue in contemporary policy discourse on women’s land rights in sub-Saharan Africa is the capacity of customary systems of land tenure to secure women’s land rights through evolution, and whether state-law intervention is necessary. Rather than seeing state law and customary law as distinct and opposing systems, we demonstrate the need for research exploring how women’s access to land is affected by the interaction of the two systems.

### 2.1 Defining ‘formalisation’ of land rights

The term ‘formalisation’ is, ironically, an unclear concept. Originally ‘formal’ comes from the Latin *formalis*, which means ‘precise/explicit/clear’. Hence, to formalise would mean to make something clearer and more explicit.

In current literature on land rights in Africa the term ‘formal’ is usually and implicitly associated with official and written documents. According to this understanding, to ‘formalise’ would be to make official. For instance, a recent book on informality in urban Africa presents ‘informality’ as something that is extra-legal and non-registered (Tranberg Hansen & Vaa 2002). Likewise, according to Bruce (1998) a formal tenure system is a tenure system that is ‘created by statute’.

This understanding of the term formalisation leads to an overall focus on the state both in terms of state law and state policy. In the area of land use and access to natural resources, states attempt to simplify and standardise local tenure systems and rules regarding transfer of rights, trying to make them ‘legible’. Projects of simplification and legibility are, according to Scott (1998), typical for modern states. Examples of such processes are:

...as disparate as the creation of permanent last names, the standardization of weights and measures, the establishment of cadastral surveys and population registers, the invention of freehold tenure, the standardization of language and legal discourse... In each case, officials took exceptionally complex, illegible, and local social practices, such as land tenure customs, and created a standard grid whereby it could be centrally recorded and monitored. (Scott 1998:2)

Formalisation is thus often seen as a shift from ‘informal’ to ‘formal’ norms, from oral to written, from extra-legal to legal or from unofficial to official. Such a dichotomous approach has been criticised because it does not grasp the complex and uneven process whereby state law and local norms and practices intersect and interact (Moore 1978; Bentzon et al. 1998; Griffiths 1997, 2002). Cleaver (2003:13) questions the ‘dichotomous

classifications of institutions as either formal or informal, traditional or modern', while admitting that 'it is difficult to find alternative labels without reproducing false polarisations'. Obtaining a formal title to land is often a cumbersome and costly process, beyond the reach of most rural poor. Instead, what has been termed 'informal formalisation' is characterised by combining operations issuing from the repertoire of contract, documents and market exchange with operations stemming from customs and interpersonal relationships as they are dynamically lived in local society (Benjaminsen & Lund 2003).

While recognising that the terms 'formal/informal' and 'formalisation' are problematic, for practical purposes, we use these terms to describe the process of increased state engagement in terms of legal regulation and registration of land rights. To come to grips with the way in which women's access to and protection of land is affected by formalisation in terms of formal regulation we pay attention to the complex interplay between formal and informal norms and practices. In practice, women's access to land and the protection of their land rights is affected by a wide range of norms. State law and state institutions are not the sole regulatory forces (Moore 1978). Local communities have the capacity to generate and enforce their own internal norms in response to changing legal, social and economic conditions. Sometimes these locally generated norms are so strong that they overrule or modify state law.

In practice, the interaction between state law and local norms affect women's land rights in different ways. In some instances, discriminatory customary laws, which were formalised in the colonial era, have been modified through local practices as people adapt to changing legal, social and economic circumstances. Research has demonstrated how property is transferred to daughters or widows in contexts where the formal customary law does not recognise their equal inheritance rights (WLSA Zimbabwe 1994; WLSA Lesotho 1994; Odgaard 1999, 2003). Research has shown how the practice of land reform, which is gender-neutral on paper, is dominated by informal norms that favour men. In spite of legal reforms or case law that strengthen women's inheritance rights, 'property grabbing' by the husband's relatives is still a widespread phenomenon in southern and eastern Africa (WLSA Zimbabwe 1994).

## **2.2 A historical glance at formalisation of land rights in Africa**

Formalisation of land rights is not a new phenomenon in Africa. The attempts of states to regulate land rights started in the colonial era and have been continued by governments throughout the post-colonial era. The process has encompassed formalisation of rules regarding both the status of customary African land tenure systems<sup>5</sup> and rules guiding transfer of rights between Africans through marriage, divorce, inheritance or other means.

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<sup>5</sup> According to Bruce (1998), land tenure means the terms on which something is held: the rights and obligations of the holder. A land tenure system is all the types of tenure recognised by a national and/or local system of law taken together.

Colonial-era state regulation was generally based on a distinction between law and custom, law being the metropolitan written rules, while the mostly unwritten norms of the native populations were considered to be ‘customs’. The dichotomous perception of law and custom ascribed civilising qualities and state power to Western law; and persistence and tradition to custom (Merry 1988; Griffiths 2002). When recognising customary law as part of state law, the indigenous rules were rationalised through state court interpretation and written codification to fit the format of metropolitan state law. Thus, the so-called ‘state-court customary law’ was not identical to the law as practised on the ground, the ‘living customary law’ (Woodman 1988). And while the colonial administration inculcated the dichotomy of modern versus customary, new norms were created through the mutual influence between the written general law, state-sanctioned customary law, and people’s local practices (Bentzon et al. 1998:34–9).

Most of the colonial states introduced legislation at an early stage to regulate the use of and access to forests, pastures, wildlife and water in Africa. These regulations ranged from expropriation and eviction of local people through various forms of nationalisation and exclusion, systems of permits and concessions, to the delegation of control to local chiefs who represented the ‘natives’ (Berry 1993; Chanock 1985; Mamdani 1996; Mann & Roberts 1991; McAuslan 2000; Moore 1986; Okoth-Ogendo 1989). In some countries, the colonial land policies also attempted to introduce national registration of land rights as private property.<sup>6</sup>

These colonial statutory regimes established that native land did not have status as private property. They also established local authorities, in terms of chiefs, and empowered them to allocate land between natives. As regards the principles applying to the most common form of land transfers between Africans, marriage and inheritance, most colonial constitutions established that in family and personal matters the customary laws of the indigenous population applied.

Women’s land rights in southern and eastern Africa must thus be understood in the light of the colonial legacy of ‘plural systems of law’ characterised by the existence of plural customary and religious systems within one hegemonic legal system, the state legal system (Bentzon et al. 1998:33). The so-called state court customary law was developed through a mixture of the rulings of local male chiefs, white colonial administrators, colonial courts, anthropological monographs on African customary laws, and textbooks written by colonial administrators (Woodman 1988). A common feature of this formalised customary law, as developed in different parts of Africa, was its discriminatory character. It was usually established that African women were minors under the guardianship of fathers, husbands or elder brothers. Hence, women were

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<sup>6</sup> Under Portuguese colonial rule in present-day Mozambique, scattered initiatives to codify customary rights can be identified from the mid-19th century onwards. In 1946 a project intended to systematise and develop these initiatives into a coherent legal document was presented under the name of *Projecto Definitivo do Estatuto do Direito Privado dos Indígenas da Colónia de Moçambique*, but was actually never implemented (Negrão 2003:229).

excluded from the formal decision-making process concerning allocation and transfer of land between Africans, while male chiefs were empowered. The formalised customary marriage and divorce rules established that the husband, through his marital power, held property on behalf of the family. In the event of divorce, it was held that women were entitled to keep what was seen as her property: mainly the bride price, often in terms of cattle (in patrilineal groups) and cooking utensils. As regards women's access to land in the event of death, it was held that daughters did not inherit on an equal basis with brothers, and that widows could not inherit. Martin Chanock's research (1985) has shown that rather than having a substantive and fixed content, these customary principles were developed by chiefs and colonial administrators as a vehicle for legitimating colonial rule on the one hand, and social and economic control of gender and age relationships on the other.

### **2.3 Formalisation and the private/ public divide**

It appears that a private/ public dichotomy underlies regulation of land from the colonial era up to present time. The status of African land tenure systems has been seen as a matter between the state and the different population groups. Transfer of land in terms of distribution, expropriation or sale has been defined as a 'public' matter regulated by state-law and state institutions. Transfer of land within the native group, especially within the clan and the family, has seen as an internal 'native' or 'private' matter to be regulated by customary law and customary authorities.

This dichotomy is reflected both in land reform policies and in the different bodies of literature dealing with formalisation of land rights. One stream of literature has focused on formalisation in terms of individualisation, titling and registration of land rights. A central theme in this literature has been the relationship between land markets and communal and individual ownership (Roth & Bruce 1994; Murphree 1991; Rukuni 1994). Another body of scholarship addresses conflicts within the community regarding control and access to land along gender lines (Griffiths 1997; Whitehead & Tsikata 2003; Nyamu-Musembi 2002; Lastarria-Cornhiel 1997; WLSA Zimbabwe 1994, 1997). An overall focus is formalisation of informal rules concerning inheritance, marriage and divorce. What is seen as being at stake here is differences regarding power and resources within the group, as well as the relationship between the family, the state and the market.

There is an ongoing movement towards convergence between these two paths. The aim of this report is to contribute to this integrated perspective, cutting across the public/ private distinction so as to make women's concerns visible in the ongoing national and international law and policy-making processes.

#### **2.3.1 The public/ private divide in post-colonial land reform**

The unmaking of the colonial legal inheritance, in terms of dual systems of property, personal and family laws have been important issues since the former colonies in southern and eastern Africa became independent. However, family law and land tenure reform have, by and large, been seen as separate issues. The country studies in this report

encompassing Tanzania, Mozambique, Zimbabwe and South Africa illustrate how the private/ public dichotomy is being reproduced in various ways in contemporary land reform policies. The following examples demonstrate how this divide affects the possibilities of having a gender equal land reform.

In Zimbabwe, the Commission of Enquiry into Appropriate Agricultural Land Tenure Systems (the Rukuni Commission) was appointed by the President in 1993. The commission's recommendations as to how agricultural production could be increased in communal and resettlement areas included legally secure tenure, improved credit and financial services, access to water and comprehensive agricultural support institutions (Rukuni 1994). As will be shown in the Zimbabwe case, the commission, while making a number of recommendations about securing tenure in communal and resettlement areas, did not noticeably address women's tenurial concerns nor directly respond to presentations made to it by women's groups. The Commission reinforced the public/private dichotomy underlying Zimbabwe's land regime by leaving out transfer of land within the family in the event of marriage, divorce and death (Hellum & Derman 2004a).

The land reform programme in South Africa has mainly been concerned with the racially skewed ownership of land. The beneficiaries of the programme are therefore defined primarily in terms of race. However, the government also recognises that past policies have led to skewed gender relations in terms of access to productive resources. The right to secure tenure, the right to equality and the right to culture are all embedded in the Constitution, but how these issues can be harmonised is a site of contention between government, civil society and the judiciary. Central in the current reform debate is the government's wish to build on the power of traditional authorities to achieve rural development. The Communal Land Rights Act has been severely criticised, especially for its anticipated negative consequences for women's access to land and their participation in land management. Once it comes into effect, the Act will open up the opportunity to register individual title deeds within the communal areas through the registration of existing rights. It is feared that this will strengthen and reinforce the situation entrenched by the inherited colonial regime which conferred primary rights on men, and only secondary and derivative rights on women.

The recent Tanzanian land legislation takes important steps to bridge the public/private dichotomy originating from the colonial era. The two land Acts that were passed by Parliament in 1999<sup>7</sup> combine two overall objectives: to provide for more secure tenure for all, and to facilitate the operation of a market in land rights. Towards this end village authorities have been empowered to issue certificates of customary title on the basis of local customary law, provided it does not come into conflict with the prohibition of gender discrimination.<sup>8</sup> Yet, the Local Customary Law Order (Declaration), which neither provides daughters nor widows with equal inheritance rights to those of sons and widowers, has been upheld (Mtengeti-Migiro 1991; WLEA 1993). In what can be seen as

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7 The Land Act, No. 4 of 1999, and the Village Land Act, No. 5 of 1999.

8 For more detailed information on the Village Land Act, see Alden Wily (2003).



a continuation of the private/ public dichotomy, the Presidential Commission of 1991 interpreted its mandate as not covering issues of succession law, and therefore not issues of women's rights to land (Manji 1998).

In Mozambique, the Land Law enacted in 1997 states that men and women shall have equal rights to land, and the principle of non-discrimination also applies with regard to formal individual titles. Along the same lines, the new Family Law passed in 2004, recognises equal rights for men and women both in society and the household or family. However, how and the extent to which the recent legislation will impact on women's rights and access to land through inheritance, especially in rural areas, will depend on – among other things – the dissemination of knowledge about women's rights according to the new legislation. An increasing focus on facilitating market mechanisms does not really take into account the question of how women actually access land, through inheritance or other – negotiated – mechanisms and relationships.

Chapter 7 of the Kenyan Draft Constitution, as adopted by the National Constitutional Conference on 15 March 2004, provides a framework on which to build a national land policy. The Draft Constitution articulates the principle of gender equality with regard to access, ownership and control of benefits of land and other resources, in inheritance and the administration and management of estates and other properties. The state is required to ensure both equitable access to land and associated resources and security of land rights for all land holders, users and occupiers provides, and may serve as the basis for protecting women's rights to agricultural and other land that they occupy without ownership rights. According to Article 77, Chapter 7, the Government shall define and keep constantly under review a national land policy ensuring the following principles:

- (a) equitable access to land and associated resources;
- (b) security of land rights for all land holders, users and occupiers in good faith;
- (c) sustainable and productive management of land resources;
- (d) transparent and cost effective administration of land;
- (e) sound conservation and protection of ecologically sensitive areas;
- (f) the discouragement of customs and practices that discriminate against the access of women to land; and
- (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this constitution.

### **2.3.2 The spill-over effect on formalisation**

As already mentioned, colonial land policies in some countries attempted to introduce national registration of lands as private property. The Belgians started land registration in Belgian Congo in 1886, the Germans established a *Grundbuch* in Togo in 1888, the French introduced a system of land registration in Madagascar in 1897, and the British designed the *mailo* system in Uganda in 1900 (Shipton 1989).

Looking at the general experiences of the effects of registration of individual titles across the African continent, Shipton (1989) notes some commonalities. Firstly, titles have been

registered almost exclusively in the names of males. Secondly, wealthier and more powerful people have been able to use their knowledge and influence to receive larger and better holdings than others. Thirdly, land registers have gone out of date within one or two decades, as original holders have died, and as people have not informed the authorities about transfers, successions, subdivisions, or plot shifts.

The most well-known and well documented process of formalisation of land tenure systems was that of Kenya, which started with the Swynnerton plan of 1954 and continued after independence. As regards the impact of registration on women, Shipton (1989) suggests that only 7% of the registered right-holders in this privatisation programme were women. The Native Lands Registration Ordinance of 1959 gave the holder of the absolute proprietorship to land the power to use, abuse and dispose of her rights as she pleases subject to minimum restrictions. Registration freed the registered proprietor from claims of other parties. The provisions of the Act were gender neutral. However, right from the beginning, registration was bound to exclude most women from acquiring titles to land since they only had rights of use while men retained those of allocation. The tenure reform process only took into consideration the rights of people who had land and not the landless or those who had rights that did not amount to ownership. In most cases families designated one of themselves, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person would have to deal with the land once so registered. According to the registration statute, a right of occupation at customary law would only be protected if noted on the register, which many families did not bother to do, for they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had at custom. The Native Lands Registration Ordinance weakened the position of women, in that registration was been monopolised by men, and a large proportion of women did not therefore have title to land. Registration conferred certain powers which strengthened men's economic power, while women lacking title to land were disempowered. Cases of family representatives seeking to evict the other family members from the family land escalated under this act.<sup>9</sup> In spite of a general improvement of the legal status of women in Kenya in recent years, research suggests that discriminatory customary norms still have a spill-over effect on titling and registration of land (Nyamu-Musembi 2002; Whitehead & Tsikata 2003).

## **2.4 International actors and formalisation**

According to our working definition above, formalisation is the business of governments. In practice the impetus for change comes from both international and national sources. The processes of formalisation of land rights have had a strong international element all along. In the colonial era the push came from the colonial powers. In the post-colonial era, international economic institutions such as the international donor community, the UN and the World Bank have become influential actors. The views of the World Bank, as

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<sup>9</sup> See Obiero V. Opiyo (1972) East African Law Reports 227; Muguthu V. Muguthu Civil Case No. 377 of 1968 (Unreported) and Esiroyo V. Esiroyo (1973) East African Law Reports 388.

expressed in the 2003 report *Land policies for growth and poverty reduction*, are analysed in more detail in Chapter 4.

In recent years, the international human rights community has become a significant actor on the arena of international development. A clear trend in human rights law is strengthened protection of the property rights of women and indigenous people (Ik Dahl 2001). This trend has been ascribed to the women's movement and to the use by indigenous peoples' organisations of the international human rights arena (Merry 1997, 2001). The relationship between existing human rights standards, the protection of women's land use and different forms of formalisation will be analysed in the following chapters of this report. In this section, we will give a brief overview of another approach to formalisation of land rights that forms part of the international development discourse.

Among the actors on the international scene is the Peruvian economist Hernando de Soto and his Institute for Liberty and Democracy. In 2000, de Soto published the book *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else* (de Soto 2000), which has received worldwide attention, especially among politicians and development officials. We have decided to give attention to the de Soto approach because of the Norwegian Government's decision to support the 'Program to Formalize the Assets of the Poor of Tanzania and Strengthen the Rule of Law' (ILD 2004).

According to de Soto, the main cause of poverty is that the poor lack access to formal property rights. Hence, poverty is created and maintained by the fact that the majority of poor people are kept in the informal sector outside the legal property system of Western capitalism. Poor people are seen as 'heroic entrepreneurs' who are caught in an impasse because of lack of recognition by the formal system. The proposed solution is to formalise all informal businesses and *de facto* use of land both in informal settlements and in general. This is expected to give the poor the possibility of using their property as collateral to obtain loans in banks and to use these funds for further investments.

De Soto proposes a four-stage approach to transform 'dead capital' into 'live capital': 1. Diagnosis; 2. Reform Design; 3. Implementation; 4. Capital Formation and Good Governance. The main objectives of the Diagnosis stage are to define, map out, and assess the extralegal sector in the country as well as to determine the costs of extralegality and of formalisation. The methods to be used in this phase are described as 'extensive consultation and participation with all those knowledgeable of the extralegal sector' combined with 'rigorous data collection and comprehensive analysis' (ILD 2004).

The main objectives of the Reform Design stage are to integrate the informal property arrangements identified into a single system that defines all property rights and that promotes the formation of capital. Hence, this stage concerns institutional reform, streamlining of public administration and modernisation of information systems (de Soto 2002). The Implementation phase will implement the designed reforms. It entails establishing the designed systems for institutional reform in order to carry out the

registration process in practice. The last stage is about connecting the newly established legalised property to larger national and international markets. It is anticipated that this will lead to the creation of capital and the generation of additional wealth (ILD 2004). This would, among other things, include setting up credit and mortgage systems.

De Soto's general project corresponds to Scott's (1998) analytic representation of how modern states tend to operate. It implies an attempt at simplifying and standardising the complexities of existing informal or customary tenure arrangements, as well as making these arrangements legible to the state bureaucracy. This might explain some of the attraction of de Soto's ideas among politicians and policy-makers.

De Soto's clear and well articulated message, including the four steps in the formalisation process, can be seen as a 'blueprint' for development. It has appealed to many Third World leaders and development aid politicians and administrators. However, by early 2005, only the first two stages have been carried out in a few countries, and only Peru has any experience with the Implementation phase. Since this is the critical phase where the practicalities of the approach will be tested, debates and criticism of de Soto's approach have so far mostly been based on knowledge of earlier formalisation and privatisation programmes, as well as empirical knowledge of concrete tenure systems and anticipated consequences of formalisation of these systems.

## **2.5 Women's land rights, power and resources: Some emerging issues**

Whether the formalisation of informal property relations will be equally beneficial for everyone within groups and communities is an open question. In his review of de Soto 2000, Franz von Benda-Beckmann has pointed to the opportunities formalisation of property rights offers for the new elites and middle class who are in a position to take advantage of the legal system (Benda-Beckmann 2003). How international, regional, national and local laws, norms and values come together to situate individuals' and groups' claims to resources in processes of formalisation ought to be understood in the light of power and power relationships. The gendered position of women in differing economic, social and political contexts requires an examination of the power of women to negotiate in these processes (Griffiths, forthcoming 2006). Pauline Peters (2004) has, on the basis of a wide range of empirical studies, argued that unequal power relations in terms of class, age and gender have far-reaching implications for the ways in which land rights are negotiated. She asks whether and how the intended economic effect of formalisation programmes can be achieved without reinforcing existing inequalities.

This report focuses on how the human rights-based approach addresses unequal power relations in terms of skewed access to information, decision-making processes and distribution of material resources. Chapter 3 outlines human rights standards that the state, regardless of what kind of formalisation programme it embarks on, must follow to ensure that women are treated on an equal basis with men in accordance with the state's international obligations. In Chapter 4 we will briefly analyse the most recent World Bank report on land policies in the light of the HRBA framework. The country studies of

Kenya, Tanzania, Mozambique, Zimbabwe and South Africa examine existing formalisation and redistribution programmes in the light of these international human rights standards.

### **3. WOMEN'S LAND RIGHTS: A HUMAN RIGHTS-BASED APPROACH**

Land is linked to rural livelihoods and human rights in a multitude of ways. Cutting across the civil and political and the social, cultural and economic rights, in this chapter we set out a human rights framework that has a bearing on women's land rights in land reform, policy and practice. The main elements are:

- non-discriminatory access to land and independent protection of existing access
- a right to participation in reform processes and in management and distribution of natural resources
- establishment of mechanisms of accountability of duty-bearers and rule of law and due process for right- holders

#### **3.1 Background for a HRBA and its relevance for equal land rights**

The UN Charter of 1945 sees human rights and economic and social development as closely interrelated.<sup>10</sup> It commits the UN to promote both 'with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' (art 55). The preamble to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) links law and development stating that 'the full and complete development of a country, the welfare of the world and the course of peace require maximum participation of women on equal terms with men in all fields'.<sup>11</sup> In 1986, the United Nations General Assembly adopted the Declaration on the Right to Development. It emphasises that development policies and processes shall enable states to fulfil their obligations under international human rights treaties.<sup>12</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the African Union in 2003 strengthens the legal status of the principle of gender equality in relation to the right to development embedded in the Charter (hereafter referred to as 'the African Protocol on the Rights of Women') (Banda 2004).<sup>13</sup>

To temper the impact of free-market forces that over the years have reinforced unequal distribution of resources and created poverty there is a growing tendency to use human rights as an international and national tool of development (Frankovits 2005). The Beijing

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10 'The Charter of the United Nations', signed on 26 June 1945

11 'The UN Convention on the Elimination of All Forms of Discrimination against Women', adopted 18 December 1979, entered into force 3 September 1981

12 'The Declaration on the Right to Development', UN General Assembly resolution 41/128 of 4 December 1986

13 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', adopted by the Assembly of the African Union 11 July 2003.

Declaration and Platform of Action of 1995 stated that the human rights of women, as embedded in CEDAW, should be integrated in all areas of development.<sup>14</sup> In order to integrate human rights into development planning, the Secretary-General of the UN called for mainstreaming of human rights across the entire UN system in 1997. As a follow up, in 1998 the United Nations Development Programme issued a policy paper entitled 'Integrating human rights with sustainable development' (UNDP 1998) in which it views human rights and sustainable development as being inextricably linked. In a statement on poverty of 10 May 2001, the UN Committee on Economic, Social and Cultural Rights considered poverty as a multi-dimensional denial of human rights and strongly advocated a human rights approach to poverty reduction:

Anti-poverty policies are more likely to be effective, sustainable, inclusive, equitable and meaningful to those living in poverty if they are based upon international human rights.<sup>15</sup>

In 2002 the OHCHR published 'the Draft Guidelines: A Human Rights Based Approach to Poverty' (OHCHR 2002, hereinafter referred to as the Draft Guidelines). The aim of the guidelines is to assist in the interpretation of international human rights law, and policy-making at national and international levels in translating human rights norms into equitable and pro-poor policies.

The HRBA overlaps and supplements other development theories and policies seeking to balance liberalist and welfarist values and concerns in the striving towards pro-poor and gender-equal sustainable development. Like the human development approach, greatly influenced by the economist Amartya Sen and the philosopher Martha Nussbaum, it emphasises human agency, capability and entitlements as core factors in poverty alleviation, equality and development. The so called capabilities approach sets international standards for measuring development in terms of quality of life adapted by UNDP (Sen 1992, 1999; Nussbaum 2000). The HRBA translates capabilities into a legally binding framework where entitlements are defined as rights with corresponding legal obligations for national governments and the international community to respect, protect and fulfil these rights (Nowak 2005).

There is a growing body of literature integrating development aid with human rights (Hauserman 1998; Sengupta et al. 2003; Frankovits 2005; Nowak 2005). The overall challenge is to bring this general framework down from the plane of abstract principles and turn it into a practical response to poor people's concerns on the ground. This challenge has been taken up by scholars who have brought knowledge about poor people's management of natural resources in dialogue with overall human rights principles such as the right to livelihood on a non-discriminatory basis (Hellum 2001; Hellum & Derman 2001, 2004a; Ikdahl 2001, forthcoming 2005; Koskinen 2005).

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14 'The Beijing Declaration and Platform for Action' adopted at the Fourth World Conference on Women 15 September 1995. A/CONF.177/20

15 UN Committee on Economic, Social and Cultural Rights: 'Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights', UN doc. E/C.12/2001/10

The overall goal of Norwegian development aid is to contribute to the eradication of poverty by improving economic, social and political conditions in developing countries. The promotion of human rights and women's rights are related primary concerns.<sup>16</sup> Through the Strategy for Women and Gender Equality in Development Co-operation of the Norwegian Ministry of Foreign Affairs of the human rights-based framework has been defined as follows:

The overriding objective of Norwegian Development Co-operation policy is to contribute towards an improvement in economic, social and political conditions in developing countries, within the framework of sustainable development. To achieve this objective, one of the five main areas targeted is the promotion of equal rights and opportunities for women and men in all areas of society. It is not enough for development assistance to apply to individual projects directed towards women. Equal rights and opportunities for women and men must be integrated into all aspects of development co-operation (Norway 1997:1).

The Norwegian Handbook in Human Rights Assessment (NORAD 2001:14–5) points to access to legally secure land as a vital resource for individual and community development:

To be an active subject for development requires that the person controls resources that can be used, such as capital, labour and knowledge. In predominantly agrarian societies this often includes access to land (legally secured by land tenure) or the shared right to use communal land. Frequently, the assurance of economic and social rights may take place within the household, or some form of wider kinship alliances.

### **3.2 Core HRBA principles for development and poverty reduction**

The HRBA is still in the making. Some common concerns and principles of UN bodies, national governments, development agencies, international economic institutions and development scholars are:<sup>17</sup>

- HRBA recognises *the mutual dependency and complementarity* of sustainable human development and social, economic, cultural, civil and political rights and solidarity rights.
- The individual, with his or her capacity to pursue personal, social, political and economic goals, is both the central actor in development, and the central

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16 See for example NORAD 1999, NORAD 2001, Norway 1997, Norway 1999 and Norway 2004.

17 The plan of implementation from the World Summit on Sustainable Development in Johannesburg 2002 reflects the general consensus of heads of state. It is proclaimed that 'Peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all.' (Section 5). For the consensus among the UN organs, see UN 2003.



beneficiary of development.<sup>18</sup> *Human agency, capabilities and entitlements* are core factors in poverty reduction and development.

- Individuals have *rights, not only needs or capabilities*. HRBA constitutes a legally binding framework of individual and group rights with corresponding legal obligations for national governments and international community to respect, protect and fulfil these rights.
- The *equal worth and integrity of all persons form the basis for development policies and practices*. The dignity, integrity and equality of individuals is an end in itself and not a means towards an end, such as economic growth.
- HRBA sets legal limitations to free market economic models. It balances the quest for more effective and productive uses of natural resources such as land and waters, voiced by international actors like the International Monetary Fund (IMF) and the World Bank, against the right to life and the right to livelihood without discrimination.
- HRBA sets a framework for bilateral and multilateral development co-operation by constituting *common political and legal ground* in terms of human rights ratified by both donor and aids recipient governments. Basic principles and values embedded in human rights covenants ratified by the partner countries in development co-operation should inform the aims, means and expected outcomes of any project or policy.
- While the state is the principal duty-bearer under international law, the international community at large also has a responsibility. Monitoring and accountability procedures must extend to global actors, such as the donor community, intergovernmental organisations, international economic institutions like the World Bank, international NGOs and trans-national corporations.

In a statement on poverty released on 10 May 2001, the UN Committee on Economic, Social and Cultural Rights considered poverty as a multi-dimensional denial of human rights and, therefore, strongly advocated a human rights approach to poverty eradication. At the Vienna Conference on Human Rights in 1993, the international community agreed that the ‘existence of widespread extreme poverty inhibits the effective enjoyment of human rights’.<sup>19</sup> The Draft Guidelines of the High Commissioner for Human Rights define the relationship between poverty and human rights in the following terms:

Non-fulfilment of human rights would count as poverty when it meets the following two conditions:

- The human rights involved must be those that correspond to the capabilities that are considered basic by a given society.
- Inadequate command over economic resources must play a role in the causal chain leading to the non-fulfilment of human rights. (OHCHR 2002)

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<sup>18</sup> This is similar to the capability approach to development, as advocated by the economist Amartya Sen (Sen 1992, 1999) and the philosopher Martha Nussbaum (Nussbaum 2000).

<sup>19</sup> Vienna Declaration and Plan of Action, 1993, para. 14

Due to significant gender inequalities within the family and the household, using the unitarian household model to define poverty is problematic. By focusing on women's right to participate and structure their lives through access to productive resources as individuals, the HRBA disaggregates women's poverty from the poverty of larger units of analysis.

The OHCHR Draft Guidelines, which also have a bearing on women's land rights, set out the following framework to advance the goal of poverty reduction (OHCHR 2002:42–4):

- a. by urging speedy adoption of a poverty reduction strategy, underpinned by human rights, as a matter of legal obligation;
- b. by broadening the scope of poverty reduction strategies so as to address the structures of discrimination that generate and sustain poverty;
- c. by urging the expansion of civil and political rights, which can play a crucial instrumental role in advancing the cause of poverty reduction;
- d. by confirming that economic, social and cultural rights are binding international human rights, not just programmatic aspirations;
- e. by adding legitimacy to the demand for ensuring meaningful participation of the poor in decision-making processes;
- f. by cautioning against retrogression and non-fulfilment of minimum core obligations in the name of making trade-offs; and
- g. by creating and strengthening the institutions through which policy-makers can be held accountable for their actions.

### **3.3 HRBA, equality and land reform**

Although the right to land and the right to development have not found expression in international law as human rights in a strict legal sense, equitable management and distribution of natural resources give rise to a wide range of human rights issues (Hellum & Derman 2001, 2004a; Ikdahl 2001, forthcoming 2006; Lindstrøm 2001; Koskinen 2005). Land is linked to rural livelihoods in a multitude of ways. It is important for life, food, housing and health. It is central for status and identity and is a source of cash for consumption. In practice, access to land is affected by factors such as gender, ethnicity, and social and economic status.

Just and secure access to land is affected by the whole array of civil and political, social and economic and solidarity rights. These are the *civil and political rights*, including the right to participation in public and political life and decision-making, and the right to protection of property. The *social, cultural and economic rights*, including the right to an adequate living standard,<sup>20</sup> requires that everyone shall enjoy the necessary subsistence

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20 Covenant on Economic, Social and Cultural Rights art 11, Universal Declaration of Human Rights art 25.

rights and are also relevant for access to and protection of land (Eide 2001). The right to livelihood is inextricably linked to the rights to food,<sup>21</sup> water,<sup>22</sup> health<sup>23</sup> and housing.<sup>24</sup> The so-called *solidarity rights*, such as the right to development and the right to environment, also have a bearing on people's access to land. Of paramount importance in regard to all these dimensions of the right to land is *the principle of equality and non-discrimination*. These rights constitute an interrelated and indivisible whole, setting standards that have a bearing on land reform in terms of non-discriminatory principles of distribution, and the establishment of secure tenure on an equal basis.

The non-discrimination principle is embedded in all the main human rights documents, including the Universal Declaration of Human Rights (UDHR),<sup>25</sup> the Covenant on Civil and Political Rights (CCPR),<sup>26</sup> the Covenant on Economic, Social and Cultural Rights (CESCR)<sup>27</sup>, the African Charter on Human and Peoples' Rights (AfCHPR)<sup>28</sup> and the CEDAW. Article 26 of the CCPR establishes a general and independent protection against discrimination and protects such women's rights as the right to land and property on a non-discriminatory basis.

CEDAW explicitly states the state obligation to ensure equal treatment between men and women in land and agrarian reform, including land resettlement schemes (art 14).<sup>29</sup> In General Recommendation No. 21, the CEDAW Committee emphasises how rights to property are critical for women's 'ability to earn a livelihood and provide adequate housing and nutrition for herself and for her family'.<sup>30</sup> When land reform aims at facilitating the use of land as security to obtain credit, it is relevant that in Article 13 and Article 14(2)g, CEDAW establishes their right to:

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21 General Comment no. 12 by the UN Committee on Economic, Social and Cultural Rights: 'The right to adequate food' (1999), E/C.12/1999/5.

22 General Comment no. 15 by the UN Committee on Economic, Social and Cultural Rights: 'The right to water' (2002), E/C.12/2002/11.

23 General Comment no. 14 by the UN Committee on Economic, Social and Cultural Rights: 'The right to the highest attainable standard of health' (2000), E/C.12/2000/4.

24 General Comment no. 4 by the UN Committee on Economic, Social and Cultural Rights: 'The right to adequate housing' (1991), E/1992/23

25 'The Universal Declaration of Human Rights', adopted by UN General Assembly resolution 217 A (III) of 10 December 1948. Article 2.

26 'The International Covenant on Civil and Political Rights', adopted 16 December 1966, entered into force 23 March 1976. Articles 2, 3 and 26.

27 'The International Covenant on Economic, Social and Cultural Rights', adopted 16 December 1966, entered into force 3 January 1976. See Articles 2 and 3.

28 'The African Charter on Human and Peoples' Rights', adopted 27 June 1981, entered into force 21 October 1986. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). See Article 2.

29 For the implications of article 14 of CEDAW with regard to land and water reform in countries like Tanzania, South Africa and Zimbabwe see Hvidsten 2000, Lindstrøm 2001, Ikdahl 2001, Hellum 2001, Hellum and Derman 2001 and Hellum and Derman 2004a.

30 General Recommendation no. 21 from the CEDAW Committee (1994) 'Equality in marriage and family relations', paragraph 26.

...have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in resettlement schemes.

Article 16 of CEDAW obliges states parties to establish equal property rights for women in relation to marriage, divorce and death.<sup>31</sup> It implies that land reform will have to address unequal access and protection of land related to discriminatory customary family laws and practices.

The African Protocol on the Rights of Women substantiates further the principle of non-discrimination in relation to land and food security. In addressing the right to sustainable development, Article 19c obliges states parties to 'promote women's access to control over productive resources such as land and guarantee their right to property'. Addressing the right to food security, Article 15a obliges states parties to take appropriate measures to 'provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food'.

### **3.4 The Convention on the Elimination of All Forms of Discrimination against Women**

CEDAW has been ratified by more than 170 states. It is a socio-legal tool which within a single and unified framework is intended to help women fit into development processes in all parts of the world. Article 1 defines discrimination in the following way:

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

On the basis of a predominantly non-discriminatory approach, the Women's Convention sets out to ensure the right of every woman to political participation (Articles 7–8), education (Article 10), work (Article 11), the right to health (Article 12), to credit facilities (Article 13) and to equality in marriage and divorce (Article 16).

To address the legal, social and economic structures at the root of women's weak position in law and society, the Article 2 affirms the state obligation to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women'. It requires states parties to undertake constitutional, legislative and socio-economic reform aiming at the elimination of women in both the public and the private sphere.

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31 See General Recommendation no. 21 by the CEDAW Committee: 'Equality in marriage and family relations' (1994), A/49/38.

Article 17 establishes the Committee on the Elimination of Discrimination against Women. It is the UN body which monitors the compliance of states parties to the convention. The states parties are obliged to submit a report on the 'legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions present in the Convention and on the progress in this respect' (Article 18). Pursuant to Article 21 of the Convention the CEDAW Committee can 'make suggestions and general recommendations based on the examination of reports and information received from the States Parties'. The CEDAW Committee has issued 25 general recommendations so far. None of the recommendations specifically address the rural women's rights which are embedded in Article 14.

### **3.5 Non-discriminatory access to and protection of land rights**

CEDAW and the African Protocol on the Rights of Women establish a general protection against discrimination and an explicit protection in relation to land reform.<sup>32</sup>

#### **3.5.1 Protection against direct discrimination**

Article 1 of CEDAW prohibits discrimination, whether direct or indirect. Statutes, customs and practices that explicitly treat men and women differently constitute direct discrimination. While most countries in southern and eastern Africa have ratified CEDAW without reservation, a series of formally discriminatory customary and statutory laws barring equal land rights for women, particularly in relation to marriage, divorce and inheritance, are still in force. The CEDAW Committee has, both in its general recommendations and in its comments to state reports, called for reform of marriage and inheritance law to ensure equal land rights.

In its comments to South Africa's initial report to CEDAW in 1998, the Committee expressed concern that:<sup>33</sup>

...in spite of the legal measures put in place, *de facto* implementation of such laws and policies have yet to be achieved in many areas. It also notes with concern the continuing recognition of customary and religious laws and their adverse effect on the inheritance rights and land rights of women and women's rights in family relations. (Paragraph 117)

The Committee recommended that:

...the Government complete, as a matter of priority, the adoption of legislation as well as ensure its effective implementation in order that women's *de jure* and *de facto* equality be guaranteed. It also recommends that a uniform family code in conformity with the Convention be prepared in

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32 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted 21 December 1965, entered into force 4 January 1969, does the same as regards racial discrimination.

33 CEDAW A/53/38/Rev.1(1998).

which unequal inheritance rights, land rights and polygamy are addressed, with the aim of abolishing them. (Paragraph 118)

An example of direct discrimination is the Zimbabwean state court customary law which is to the effect that the husband, by virtue of his matrimonial power, is the one who disposes of assets on behalf of the family when property is held jointly, including, most importantly, land. The husband's matrimonial power has barred married women's access to credit and has led to highly unequal divisions of landed property in the event of divorce. In the *Jenah v. Nyemba* case<sup>34</sup>, the Supreme Court ruled that under African law and custom, property acquired during a marriage, becomes the husband's, whether acquired by him or his wife. When Zimbabwe presented its first report on the progress of implementation the CEDAW Committee commented on the spill-over effect of these underlying normative structures on women's status in general and on land rights in particular. The Committee rejected the notion that the human rights situation could be assessed from a state-law perspective without considering the role played by socio-cultural attitudes and customary practices, and found that the state should facilitate changes in these:

Although the national laws guaranteed the equal status of women, the continued existence of and adherence to customary laws perpetuated discrimination against women, particularly in the context of the family. The Committee notes with dissatisfaction that prevailing traditional and socio-cultural attitudes towards women contribute to the perpetuation of negative images of women, which impedes on their emancipation.<sup>35</sup>

A similar provision can be found in the Kenyan Transfer of Property Act, which limits the rights of a married woman to own property individually.

In addition to the issue of matrimonial power, another example of direct discrimination is inheritance laws stating that widows cannot inherit their husbands, or making the eldest son the heir. According to Article 21 of the African Protocol on the Rights of Women, a widow has the right to an 'equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house'. When the CEDAW Committee in 1998 examined Tanzania's 2<sup>nd</sup> and 3<sup>rd</sup> periodic reports, it addressed the situation of rural women with reference to customary law. Further improvements were required as to the ability of rural women to inherit land and property on an equal basis with men.<sup>36</sup>

Equal protection of land and property rights requires non-discriminatory titling and registration practices. The Zimbabwean registration regime is directly discriminatory. According to the Deeds Registry Act of 1996, spouses may register property jointly. Yet

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34 *Jenah v. Nyemba* (1986) ZLR [Zimbabwe Law Reports] 138.

35 Concluding observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe, A/53/38, 14 May 1998.

36 Concluding observations on the United Republic of Tanzania, CEDAW/C/1990/II/L.1/Add. 5.

the Act constitutes a contravention of the CEDAW by demanding that a woman who wants to register property is assisted by her husband when ‘executing any deed or document required so to be registered’.<sup>37</sup> There has been a long-standing call for joint registration of title and joint permits in resettlement schemes in order to obtain secure tenure for women. According to Vice President Msika, the Zimbabwean Government must always take black Zimbabwean culture into account in its land policies. Although the Deeds Registry Act allows joint registration of property, Vice President Msika has stated that such a practice would not be pursued by the fast track programme because it undermines customary values.<sup>38</sup>

### **3.5.2 Protection against indirect discrimination**

In spite of the constitutional and legislative measures put in place to eradicate formal discrimination, *de facto* implementation of such laws and policies have yet to be achieved in many areas. In practice, the increasingly unified and gender-neutral body of law which puts individual women on an equal footing with men co-exists with gendered practices, norms and values on the ground. People’s use and access to land is highly gendered. Furthermore, resources such as time, money, land and power are unevenly distributed between men and women. As a result, the implementation of apparently gender-neutral laws, policies and programmes often results in large groups of female land users being worse-off than their male counterparts.

Situations where gender-neutral laws and policies have different effects for women and men constitute indirect discrimination. Indirect discrimination is prohibited by CEDAW (Article 1) which defines ‘discrimination against women’ as any distinction, exclusion or restriction made on the basis of sex which has the effect’ of impairing the human rights of women. Thus, to point out indirect discrimination, one must pay attention to the situation on the ground that may cause discriminatory effects. The following examples illustrates how indirect discrimination can occur, and refers to relevant human right provisions.

#### **a) Gender-neutral norms favouring male life situations**

As described in the chapter on formalisation of land rights, access to and rights to land in Africa is mediated through multiple and interacting sets of formal and informal norms and institutions. In many instances gender-neutral laws are grounded on norms, values or practices that favour male life situations. This implies that laws which at face value are gender-neutral can have an inherent gender bias which results in *de facto* discrimination.

#### **Biased criteria of property acquisition**

One example of gender bias is marriage and divorce laws which provide that the property has been acquired by the spouse who has paid for the property. While cash-crop agriculture tends to be controlled by men, women provide for their families through

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37 Deeds Registry Act 1996, Art.15.1.

38 Public meeting in Harare arranged by the Women and Land Lobby Group in 2000.

produce from hand-irrigated vegetable gardens and from common pool resources that are obtained free of charge. A distinction between domestic and productive use of land may lead to indirect discrimination against women.

CEDAW deals explicitly with this problem stating that ‘States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetarised sectors of the economy’ (Article 14(1)). In General Recommendation 21, the CEDAW Committee clearly states that financial and non-financial contributions to property ‘should be accorded the same weight’, and the woman should be consulted when property owned by the parties is disposed of.<sup>39</sup> In a similar way, the African Protocol on the Rights of Women states in Article 13(h) on economic and welfare rights that states parties shall ‘take the necessary measures to recognize the economic value of the work of women in the home’.

During the recent decades, both legislation and Supreme Court practice in several countries in southern and eastern Africa has moved towards co-ownership between husband and wife, regardless of how the property was acquired, especially in case of divorce (Ncube 1989). In most African countries, judges have the discretion to decide how the property will be divided between the spouses. Studies of local court practice show how gendered norms regarding the ‘moral character’ of men and women often work to women’s disadvantage (Hellum 1999:311). However, recent case law from Kenya illustrates recognition of the wife’s contribution to acquisition of matrimonial property.

### **Biased principles of registration and individualisation**

Reforms that provide for the establishment of individual title deeds within the communal areas through the registration of existing rights may in practice reinforce existing inequalities in the protection of land rights. As demonstrated in the previous chapter, gender bias in the formalisation and codification of local land use has resulted in a body of official customary laws that discriminate against women. The context in which the reform should take place must be carefully examined to identify criteria for registration that will not generally favour men over women, and thus constitute indirect discrimination.

How access to and rights to land are locally obtained is an important factor. In southern and eastern Africa, land rights are socially embedded and both women and men base their access to land largely upon their social relations. In patrilineal groups (which constitute the majority), a woman’s access to land is often based upon her position as wife, sister, daughter, sister-in-law, or mother, that is, through her relationship to a man. Although conditions vary, what many women in these multiple relationships have in common is that their right to access land is often seen as subsidiary to the man’s right. To ensure *de*

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<sup>39</sup> General Recommendation no. 21 from the CEDAW Committee (1994) ‘Equality in marriage and family relations’, Paragraphs 31-32.



*facto* equality to gain and keep land rights, typically female ways of obtaining access to land (in patrilineal groups based on the marital relationship) must be changed to be on an equal footing with male ways (based on a natal family relationship).

South Africa's Communal Land Rights Act is an example of a mode of formalisation that is contested on the basis of the non-discrimination principle. In a written opinion on the legislation when it was still at the Bill stage, the South African Commission on Gender Equality<sup>40</sup> concluded that the Bill did not give priority to the constitutional obligation of the state to respect, protect and promote the right to gender equality (CGE 2003) because it opens up the way for the establishment of individual title deeds within the communal areas through the registration of existing rights. The commission argued that the Bill contravened the equality principle in the Constitution because it:

- a) strengthens and reinforces the results of a discriminatory system which has conferred primary rights on men, and only secondary and derivative rights on women; b) does not protect women against the exercise of wide-ranging discretionary powers in a manner which discriminates against them; c) does not direct decision-makers to give proper weight to the positive constitutional obligation to promote equality; d) does not explicitly prohibit practices which discriminate against women.

Unlike the South African Communal Land Rights Act, the Tanzanian and Mozambican land tenure reforms are based on legal models that incorporate customary practices while at the same time putting in place mechanisms to protect against discrimination.

#### **b) Tenure regimes based on the assumption of household and community unity**

All the countries studied have taken steps to formalise various forms of community-based land ownership. The unitarian household and community models, which are based on the assumption of common interest and equal power relations, have to varying degrees, been used in these initiatives. Common property regimes have been questioned in the light of empirical research uncovering significant differences regarding the distribution of power and resources within local communities. Where the village or the clan/lineage is given the right to allocate and administer land, there is always a danger that local patriarchal customs and practices will be reinforced if land is allocated to the husband on behalf of the family. Such a practice does not sit well with CEDAW's emphasis on protecting women's rights to land and property as independent rights. Independent rights are important for collateral for credit, a requirement for participation in co-operative organisations and as such income-generating activities and social and economic development (Koskinen 2005).

The non-discrimination principle requires that communal land tenure systems must include measures aimed at ensuring that all individuals within the group have the same tenure security in the event of marriage, divorce or death. The customary land holding systems of indigenous peoples or ethnic groups do not exempt the state from this

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40 An independent organ of state established under the Constitution.

obligation. The equal right to participation in land distribution and management institutions is, as pointed out in the next section, an important measure to ensure equal land rights under common property systems.

### **3.6 Equal participation and empowerment**

As day-to-day managers of land and water and providers of food, women's participation in natural resource management is seen as contributing to more just, effective and locally appropriate uses of resources. Provisions regulating matters such as the distribution, allocation, use and management of land are often broad or vague, thus leaving much room for the discretion of decision-making bodies. This calls for participation of those concerned, if the equal rights to access and protection of land is to be realised (Whitehead & Tsikata 2003).

From a human rights perspective, participation in development processes is a right. The OHCHR Draft Guidelines emphasise the demand for ensuring meaningful participation of the poor in decision-making processes (OHCHR 2002:42–4). Participation rights are also important ensuring that land and related resources are managed and distributed by institutions that are representative and accountable.

There is a wide range of human right provisions addressing *women's right to participation*. CEDAW obliges states parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and be eligible for election to all publicly elected bodies (Article 7). The state must ensure that rural women have a right to participate in the elaboration and implementation of development planning at all levels, as well as a right to participate in all community activities (Article 14(2)a). The African Protocol on the Rights of Women embodies women's right to participation in political and decision-making processes (Article 9) and establishes an obligation to ensure 'equal participation of women in the judiciary and law enforcement organs' (Article 8e). In addition, participation rights are central in the right to development in Article 19c, which states that the 'participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programs' shall be ensured. In the Southern African Development Community Gender and Development Declaration (SADC 1997), heads of state or government laid the political foundation for the implementation of women's participation rights by committing themselves to take measures to ensure 30% representation of women in all political decision-making structures by 2005.

A formal right to participate is not in itself sufficient. The state parties are obliged to ensure a *de facto equal right* to participate. To ensure real equality, Article 4.1 of CEDAW states that: 'Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention'. This article is important, in that it may be applied to ensure women's participation in the national and local institutions that are involved with land management and allocation, as well as introducing gender-

sensitive criteria for resource allocation. Such ‘affirmative action’ represents measures that may be taken to enhance *de facto* equality. Although affirmative action is not obligatory, the CEDAW Committee has, on a number of occasions, recommended that states parties make use of it. A number of countries have incorporated such measures in their national constitutions, including South Africa, Namibia and Uganda. Affirmative action was also included in the Draft Constitution of the Constitutional Commission in Zimbabwe. The Tanzanian Village Land Act of 1999 establishes quotas for women’s participation in land registration and dispute resolution. The Village Land Council, which will serve as the Land Manager of the village and as the first instance for dispute settlement, must have at least three female members out of a total of seven persons.<sup>41</sup>

Education and information are important measures for the right to participation to imply actual *empowerment*. Real participation requires knowledge about decision-making processes as well as the laws and policies to be made. The obligation to take such measures is embedded in Article 2 of CEDAW, which sets out the content and outreach of the state obligation to respect, protect and fulfil women’s right to equality. The African Protocol on the Rights of Women states that educational measures shall be taken to ensure that women are aware of their rights (Article 8c). The CEDAW Committee, when considering in 1998 South Africa’s initial report, emphasised that:<sup>42</sup>

...vulnerable groups of women, especially rural women, require specific measures to empower them to overcome the constraints of poverty, low levels of education and literacy, high unemployment and high fertility rates. It notes the need for rural women to ensure their participation in land reform programmes.

### **3.7 Monitoring and accountability: Due process and the rule of law**

Access to legal remedies, procedures and institutions is important for establishing and protecting land rights. In relation to land reform, the state is obliged to create and strengthen the institutions through which decision-makers can be held accountable for their actions. Individuals must be given rights which are legally enforceable through national mechanisms such as courts, complaint procedures and so on, and accessible institutions that can enforce these rights effectively should be set up.

Due process in a narrow legal sense is associated with the right to legal remedy. According to Article 8 of the Universal Declaration of Human Rights, everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him or her by the constitution or by law. The African Charter of Human and Peoples’ Rights states: ‘Every individual shall have the right to have his cause heard,’ including ‘the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws,

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41 Section 60(2). When a Village Adjudication Committee is established to investigate owners and boundaries, and to recommend on registration of these rights, at least four of a maximum of nine members shall be women (Section 53(2)).

42 CEDAW A/53/38/Rev.1 (1998) Para 135.

regulations and customs in force' (Article 7). The right to remedy is also embedded in Article 14 of the Covenant on Economic, Social and Cultural Rights.

CEDAW and the African Protocol on the Rights of Women require due process in a wider sense by emphasising that access to justice should be equitable and effective. CEDAW obliges parties 'to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection against any act of discrimination' (Article 2(c)). Article 8 of the African Protocol on the Rights of Women aims at ensuring that women's access to justice is put into practice. Article 8(d) places an obligation on state parties to ensure that 'law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights'.

An example of a highly contested institutional setup in terms of women's right to freedom from discrimination in land matters is the South African Communal Land Rights Act. The Commission on Gender Equality concluded that the Communal Land Rights Bill did not give effect to the constitutional obligation of the state to respect, protect and promote the right to gender equality. The consequences of giving traditional chiefs power hold land on behalf of the community were described as follows:

...(e) places key administrative powers in the hands of bodies (i) in which women are in permanent minority; (ii) which in the past have been primary agents of discrimination in relation to land administration allocation; and (iii) which are not accountable to the people affected in the ordinary democratic manner (CGE 2003).

### **3.8 Main standards for gender equal land reform**

The human rights based approach to development establishes a set of standards for gender-equal land reform. Whichever model the state chooses for formalisation and registration of land rights, the prohibition of discrimination in international law such as CEDAW implies an obligation to carefully assess the chosen criteria and measures so that women are not disfavoured, whether directly due to their sex, or indirectly due to such factors as tradition and gender stereotypes. This requires a close scrutiny of the context where the formalisation will take place, both in terms of facts and norms. The main standards can be expressed as follows:

- Clear criteria for redistribution that do not discriminate directly or indirectly must be put in place.
- Clear criteria for recognition, registration and protection of informal rights which are neither directly nor indirectly discriminatory must be put in place.
- Land reform must transcend the public/ private divide to encompass land transactions through both family and market relations.
- The equal participation of women at all levels of policy- and decision-making must be ensured.

- Educational measures must be taken to ensure that decision-makers and users at all levels are aware of their rights and obligations.
- Transparent, representative and accountable land institutions with appeals to an independent court need to be established.

## 4. A MARKET-BASED APPROACH TO LAND RIGHTS

To situate the human rights based approach presented in Chapter 3 within other development discourses, we will relate and contrast it to the currently dominant market-based approach to development.<sup>43</sup> The market-based and human rights-based approaches are complementing, supplementing and, to a certain extent, coming into conflict with each other. Human rights treaty bodies are recommending that the international financial institutions, notably the International Monetary Fund, the World Bank, the African Development Bank and others should take human rights into account in their lending policies, credit agreements, structural adjustment programmes and other development projects. In this chapter we will briefly discuss the market-based approach to land rights proposed by the World Bank, focusing on the most recent policy research report: *Land policies for growth and poverty reduction* (WB 2003). The overall theme is whether and how pro-poor gender equitable land tenure systems, as required by the HRBA standards, can be achieved within this modified neo-liberal economic framework.

### 4.1 *The World Bank report on land policies*

The World Bank is usually seen as the most influential and most competent representative of market-based – often called neo-liberal – approaches in the field of economic development. The 2003 World Bank policy research report *Land policies for growth and poverty reduction* (WB 2003) must be considered not only to be a standard reference document, it is also a document that will set standards for land policies in relation to the World Bank's future lending and project support programmes. In this section we will discuss the report's perspectives on land rights, formalisation and women's rights. The 2003 report presents a somewhat modified World Bank approach compared to earlier policy papers, representing an evolving perspective on land and property. As such, it illustrates the strengths and weaknesses of the currently dominant market-based approach to development in facilitating pro-poor gender-equitable land policies.

A basic assumption of the report, and its actual starting point is that land is a 'key asset for the rural and urban poor' (WB 2003:xvii). The concept of key *asset* in this context reflects an understanding of *access* to land combined with the ability to make *productive use* of the land is what is 'critical to poor people' (WB 2003:1). In this perspective land is seen as a key asset in household's livelihood strategies, including strategies for coping with risk.

The report's focus is specifically directed at *land policies*, in order to:

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43 The term 'market-based approach' here refers to the role of the market model as a general basis for the argumentation of the approach, an approach which is also referred to as a 'neo-liberal approach' in the literature. It does not refer specifically to land markets.

...strengthen the effectiveness of land policy in support of development and poverty reduction by setting out the results of recent research in a way that is accessible to a wide audience (WB 2003:ix).

The report gives a broad, and in many ways impressively comprehensive, overview of research on land rights and principles for land policies, including references to a range of 'operational experience' from concrete policy interventions.

Throughout the report, the need for taking the specific conditions in different countries and historical situations into account is emphasised when it comes to formulating policy advice. It is recognised that in the past, such policy advice was often based on (mis)conceptions – or a lack of knowledge – especially concerning the potential of customary tenure arrangements. Without taking the specific historical and social conditions into account, tenure arrangements were characterised as 'backward' and 'economically inferior' (WB 2003:62). On this basis, past policy advice published in *Land reform: Sector policy paper* (WB 1975), gave support to the subdivision of commons in order to establish individual/private ownership to land ('freehold').

It is now recognised that, especially in Africa, the results of this policy advice on land tenure reform have been far from satisfactory. Instead of promoting economic growth, this advice has according to the more recent report (WB 2003:62), contributed to a continued division between 'backward' and 'modern' forms of land tenure, with a negative impact on poverty reduction.

The 2003 report states that policy advice on land rights based on an ideal world of perfect markets<sup>44</sup> is unlikely to be appropriate. The analysis of the historical evolution of land markets further suggests that such advice may be particularly misplaced in sub-Saharan Africa. It is recognised that, in most countries, the patterns of landownership are 'not the products of the interplay of supply and demand in an impersonal market' (WB 2003:6). Still, the market model serves as the *ideal-type model* that informs the overall analysis presented. The way the text is structured, and the discursive strategies employed, reinforces this role of the market model. It is supported by the inherent discursive link between 'growth' and 'poverty reduction' given in the title itself: *Land policies for growth and poverty reduction*. Also, there is an immediate linkage on page 1 between a discussion of land rights and the question of how to facilitate land markets and the effective use of land. Under the heading *The relevance of land rights*, the first sentence reads: 'Access to land and the ability to exchange it with others and to use it effectively are of great importance for poverty reduction...' (WB 2003:1).

*Property rights* are defined as 'social conventions backed up by the power of the state or the community' (WB 2003:22). This statement draws upon de Soto (2000) to support the perspective of property rights as social constructs, referring not only to the assets

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44 That is, markets 'without transaction costs and structural rigidities' (WB 2003:6).

themselves, but to the ‘consensus between people about how these assets should be held, used, and exchanged’ (WB 2003:22). Furthermore, Sjaastad and Bromley (2000) are cited to emphasise a key role for the *state* in protecting the ‘claim to benefits’ that is seen to be inherent in the concept of property rights.

The report recognises the existence of various forms and combinations of rights. Different combinations of primary and secondary access and user rights are seen as representing stages within an evolutionary framework. ‘Full ownership’ (that is, freehold) is the final stage and represents the ideal-type form of ownership in the discussion, even though the context-specific adequacy of other forms is recognised. Combining cost-benefit considerations and an evolutionary framework produces policy recommendations taking into account that ‘well-defined group rights are not necessarily inferior to full individual ownership and can have advantages in providing public goods’ (WB 2003:53). A key argument is that ‘high levels of tenure security can often be achieved at low cost by delineating rights for a group rather than for individuals’ (WB 2003:53).

#### **4.2 Is ‘formalisation’ equal to ‘securing property rights’?**

A core concern and key concept in the report is *secure property rights* – not ‘formalisation’. Security is understood the establishment of clearly defined rights, which can be enforced at low cost, and thereby instil confidence in economic agents.<sup>45</sup> ‘Well-defined property rights’, ‘secure rights’ or ‘increasing security’ are, however, not used as purely analytic terms in the report. These terms also have a normative content, indicating desirable processes and outcomes.

A number of economic arguments are used to support this normative orientation. It is stated that ‘well-defined property rights reduce the need to expend economically valuable resources in defending claims and allow these to be used for productive investment instead’, and it is recognised that under certain circumstances and within well-defined and socially cohesive groups ‘informal rights normally provide [enough] security’ (WB 2003:24). Whereas broadly recognised (formalised) property rights increase the scope for exchange, and thereby constitutes a ‘condition for participation in a modern economy’ (WB 2003:24).

A central dimension in this discussion is, however, the costs of formalisation or ‘increasing security’ in the abovementioned sense of the term. On the one hand, the establishment of ‘secure property rights ... requires considerable investment in both technical infrastructure, such a boundary demarcation ... maps and land records, and social infrastructure, such as courts and conflict resolution mechanisms’ (WB 2003:25). A cost-benefit argument will thus lead to the conclusion that ‘high-cost systems

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45 By contrast, the cost-benefit considerations included in the World Bank Report’s definition of ‘secure property rights’ are not part of the definition and interpretation of ‘formalisation’ as presented and used in this report (see Chapter 2).



providing “full” enforcement [of secure property rights] may not always be optimal or preferable to lower-cost mechanisms at the local level’ (WB 2003:34).

The way the report uses an ideal-type market model in the overall analysis and cost-benefit arguments with regard to land rights must be seen in relation to the possible implications of formalisation of land tenure for women’s right to secure tenure. Women’s land rights are addressed on several of the report’s 230 pages, but as a specific topic rather than a general concern. Under the heading ‘strengthen women’s land rights’ an important point is presented regarding the relationship between *formalisation* and *women’s land rights*. The report states that the same processes that lead to increases in the value of land, which at present result in increasing demands for formalisation of land rights, may also lead to ‘a progressive weakening, or even the loss, of women’s rights to land’ (WB 2003:58) unless women’s land rights are specifically protected and strengthened.

In this way, the report clearly points out that formalisation programs must be carefully assessed so as to ensure that secure tenure is established on an equal basis between women and men. Against this background, our question is: Within the analytical framework underlying the policy advice given in the World Bank report; on which basis could (or should) women’s rights to land be specifically protected?

### **4.3 A World Bank approach to women’s land rights**

The report presents a brief, but critical discussion of the ‘unitary model of the household’ commonly used in land policy initiatives (WB 2003:57–8). This critical discussion concerning the use of the *household* concept complements the report’s criticism of an unmediated use of the ideal-type market model in formulating policy advice on land tenure reforms irrespective of costs and country-specific conditions. According to the report, such a use of the unitary household model has contributed to concealing the importance of how control of land – and other assets – is actually assigned *within* the household. This failure to analyse the internal dynamics of households both with regard to resource use and resource allocation, has often resulted in a neglect of women’s land rights. This argument is in line with emphasis of the human rights based approach on women’s individual rights and the need to ensure equality within family and marriage relations.

What are, then, the new perspectives and more adequate analyses presented by the 2003 World Bank report? What consequences does the recognition of the fact that women’s land rights have often been neglected in analyses treating the household as a single, undifferentiated unit have for the new policy? The report refers briefly to evidence from several studies indicating the importance of women’s access to assets such as land, both for children’s nutrition and for children’s education opportunities, especially girls (WB 2003:57–8). This implies that women’s land rights are central to key poverty-reduction indicators related to children’s nutrition and basic education. However, apart from the

pages that specifically address ‘women’s land rights’, the unitary model of the household is still employed without further reservations or refinement.

Using a human rights framework as a starting point leads us to see women both as individuals and as part of a household unit. From this perspective, an adequate approach to the issue of women’s land rights is only in part achieved through a more diversified model of the household as such. International human rights standards require that women are treated on an equal basis with men within the household, during marriage and in the event of divorce and death. Policies concerning formalisation of land rights must take the gender equality principle into consideration when dealing with regulations that affect the transfer of land and resource rights through the family line or lineage.

On the pages where the issue of women’s land rights is brought up, emphasis is placed on the fact that ‘bias in the allocation of land rights against women is not justified, as the literature provides no evidence of inferior efficiency by women farmers’ (WB 2003:58). The argument is based on economic efficiency as a criterion (or standard) in the discussion of allocation of land rights. That is, science-based knowledge on women’s equal *economic efficiency* (when compared to men) in making productive use of land for farming provides a basis for the argument in favour of non-discrimination of women. This may be a valid point within an analytic framework where economic growth *and* poverty reduction are inherently linked. However, it can also serve as an example of the limitations of neo-liberal economic approaches. An economic approach delineating how poverty reduction can be achieved *through* economic growth, can be said to provide a perspective that is necessary, but it does not in itself provide a sufficient basis for analysis and policy advice on questions of women’s land rights.

The 2003 report does, however, point to the need for going one step further. Given the importance of land as an asset in the ‘average rural household in many developing countries’, together with increasing evidence that women’s control over household assets affect consumption patterns at the micro level in a way that contributes to poverty-reduction as currently measured on the macro-level, the report indicates that:

...increasing women’s control over land could therefore have a strong and immediate effect on the welfare of the next generation and on the level and pace at which human and physical capital are accumulated (WB 2003:38).

Yet, the human rights-based approach to development goes one step further by striking a legal balance between welfare and commercial interests. A contentious issue in current land reform in many countries in southern and eastern Africa is whether the wife’s share in the family property should be protected in the event of the husband’s sale or mortgage without her consent. National and international banking associations have, in protecting their commercial interests, gone against regulations that give precedence to the right to housing and livelihood. Since facilitation of market transactions, including transactions in the land rights of the poor, is among the objectives of the policy outlined in the World Bank report, there is a need for an explicit recognition of the need to respect, protect and

fulfil basic welfare rights, such as protection of women's share in family property in the event of sale or mortgaging – especially women in their role as wives.

#### **4.4 Concluding remarks**

As we have seen, the human rights-based development approach represents a perspective that both supplements and challenges the World Bank's development models and policies. When seeking to strike a balance between the quest for more effective and productive uses of land and water resources, voiced by international actors like the World Bank, and the concerns of the poor, the HRBA provides a framework based on international legal standards such as the right to livelihood and the right to equality. Setting a bottom line in terms of state obligations to respect, protect, and fulfil the right to life and the right to livelihood without discrimination, HRBA constitutes a legal limitation to neo-liberal economic models.

## 5. COUNTRY STUDY: TANZANIA

*The current land legislation of Tanzania was enacted in 1999 after a long process of consultation and debate. It includes provisions specifically aimed at strengthening the situation of women, while recognising customary law and existing rights. Tanzania's strong civil society participated in the debates preceding the legislation, and has also used litigation as a strategy to strengthen women's land rights. The relationship between statutory law and gender-specific customary law and practices remains a crucial issue for women. However, gendered perspectives have become less visible in debates on land law in Tanzania after the legislation was enacted. One of the aims of the land reform was to facilitate a market for land rights and the use of land as collateral. Today's debates on land focus mostly on the implementation of this, and among the actors are the World Bank, international donors and Hernando de Soto's Institute for Liberty and Democracy. In this picture women's land rights seem to be sidelined, even though NGOs continue to spread information on the rights of women entailed in the new Acts, and efforts to change discriminatory inheritance law continue.*

### 5.1 Background

Today's land policy in Tanzania remains rooted in the colonial era. The country became a German colony in 1891. After the First World War it came under British mandate (1922–1946) and trusteeship (1946–1961). Land policies have all along been seen as a major element and a vehicle to achieve rural development. The socialist policy after independence brought in the so-called villagisation policy. In the late 60s and early 70s, this implied forced resettlement of people to *ujamaa* villages, where agricultural production was to be collective. In spite of the ideological emphasis on the equality of all persons (as stated in the Constitution), little political attention was given to women's land rights.

In the late 70s, the villagisation policy was abandoned. The land policies became increasingly influenced by liberal economic approaches, including structural adjustment programmes (SAPs). By the late 80s, insecurity and confusion related to access to land was widespread due to factors such as ambiguous and, in part, contradictory laws, double-allocation of land rights, the villagisation process, and a generally chaotic administration concerning rights to land. In addition, the international push to facilitate a market for land rights increased. Hence, Tanzania experienced pressure for land reform both from the outside and the inside (Manji 1998; Moore 1999; Tsikata 2003).<sup>46</sup>

Throughout this period, people's access to and rights to land have in practice been shaped by a mixture of customary and statutory law. Customary law has been recognised as a

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<sup>46</sup> Izumi (1997) and Sundet (1997) provide detailed analyses of the economic and political background for the reform. Benschop (2002), Lindstrøm (2001) and Ikdahl (2001) provide more detailed studies of the land reform from a women's human right perspective. For background information, including statistics, concerning the overall situation of women in Tanzania, see Mukaranga and Koda (1997).

part of the formal legal system in certain fields such as inheritance laws. In addition, it has existed as dynamic, lived practices, regardless of whether formally recognised or not. Women's access to and rights to land are claimed, established, and contested within this legal intersection, and the influence of the different normative systems in practice can vary in different areas and situations.

A participatory rural assessment (PRA) carried out in 1999 provides a picture of women's situation in rural areas (Rwebangira et al. 1999).<sup>47</sup> While local variations were found, a common feature was the gendered character of land rights in practice. Land allocation and access was highly gendered in all regions studied, as entitlement and eligibility to land was gender determined. Women accessed land through men, and this was done in different ways at different stages in life: as daughters, wives, mothers, dependent widows and divorcees. In marriage, men were in control of the land and produce, and the most critical deprivation of land to women was observed at the end of marriage by divorce. Existing dispute settlement institutions were dominated by men.

Interaction between 'formal' and 'informal' institutions and normative systems has also been documented in studies from urban areas; see for example Burra (2004). Generally, studies of land issues in urban areas seem, however, to pay less attention to women's situation than research done in rural areas.

Tanzania has ratified most universal human rights documents, including CEDAW in 1985.<sup>48</sup> It is also party to the African Charter of Human and Peoples' Rights (1984) and has signed (in November 2003), but not yet ratified, the African Protocol on the Rights of Women. Topics concerning women and property rights, including land rights, were brought up in the country's second and third periodic report to the CEDAW Committee on the implementation of the convention, and in the Committee's subsequent comments and recommendations.<sup>49</sup> The impact of cultural norms and customary practices on the advancement of women was a central theme here, and is dealt with in more detail below.

## **5.2 The 1999 land legislation**

In 1991, the government appointed a Presidential Commission of Inquiry into Land Matters, which submitted its report in 1992 after extensive consultations around the country (URT 1994). A Land Policy was enacted in 1995 (URT 1995), and during the subsequent process of debate and discussions, NGOs, donors and academics were engaged in discussions about the content of the laws. Women's organisations achieved

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47 The report was produced for and under the guidance of the Ministry of Community Development, Women Affairs and Children and the World Bank

48 It is also a party to CERD (1972), CCPR (1976), CESC (1976) and CRC (1991), and has signed the 1997 SADC Declaration on Gender and Development.

49 Tanzania's 2nd and 3rd report: CEDAW/C/TZA/2-3 (1996). The Committee's considerations: CEDAW A/53/38/Rev.1 (1998), paras 206–242.

significant changes related to what they perceived as the needs and interests of women (Tsikata 2003).<sup>50</sup>

Two land Acts were enacted by Parliament in 1999<sup>51</sup> and signed by the President in 2001 at which point the Acts entered into force. The main objectives of this legal reform were two-fold. The first objective was to provide for more secure tenure for all. The second main objective was to facilitate the operation of a market in land rights.

Towards this end, village land must be demarcated in rural areas. Village authorities are given the responsibility, right and power to manage land, including establishing and administering local registers of communal land rights. They are empowered to issue certificates of customary title within its area. The village authorities must apply local customary law, provided it does not come into conflict with the prohibition of gender discrimination.<sup>52</sup>

Both acts explicitly include the principle of non-discrimination. Section 3(2) in both laws states that:

The right of every woman to acquire, hold, use, and deal with, land shall be to the same extent and subject to the same restrictions as a right of any man.

They also contain more specific gains for the legal situation of women concerning land rights. A first example of provisions seeking to strengthen women's situation concerns their participation at the local level. The traditional institutions that are given an important role for implementing this legislation in practice are male-dominated. To even this out, the Village Land Act establishes quotas for women's participation. The Village Land Council, which will serve as the Land Manager of the village's area and as the first instance for dispute settlement, is required to have at least three female members out of a total of seven persons.<sup>53</sup>

A second example is the requirement of spousal consent to dispositions over land. Matrimonial property is regulated in a uniform law for all citizens, the Law of Marriage Act of 1971.<sup>54</sup> According to this law, a spouse must consent if the matrimonial home is to

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50 An earlier article by Manji (1998) is more critical to the organisations and their achievements.

51 The Land Act, No. 4 of 1999, and the Village Land Act, No. 5 of 1999

52 For more detailed information on the Village Land Act, see Alden Wily (2003).

53 Section 60(2). When a Village Adjudication Committee is established to investigate owners and boundaries, and to recommend on registration of these rights, at least four of a maximum of nine members are required to be women (Section 53(2)).

54 This means that customary law and rules do not apply in regard to any matter provided for in the Law of Marriage Act (WLEA 1993:34). Nevertheless, it seems that most people, at least in rural areas, still apply at least some elements from customs and local practices. Migiro (1988) contends that when a wife lives on her husband's family's land, the land is seen as something the husband has brought into the marriage, and which he is thus always entitled to keep.

be sold, mortgaged or otherwise disposed of. If such consent is not obtained by the bank/ the buyer, the disposition is invalid. A similar provision is included in the Land Act (Benschop 2002; TAWLA 2003; GLTF 2004). During our interviews in May 2004, we got the impression from legal aid clinics for women in Dar es Salaam that cases where the husband has sold their common home without the wife's consent were not uncommon.

This question illustrates the relationship between the public sphere, where it is decided who is registered as holder of the right to the house and under what conditions it can be transferred or used as security, and the private sphere, where women are not registered as rights-holders due to factors such as tradition, gender stereotypes and gendered division of work. It also exemplifies the importance of seeing beyond the household when deciding upon rights to property, as the household is not always a sphere of harmony and common interests.

The rule requiring spousal consent is positive from a human rights perspective. It strengthens women's right to adequate housing, and offers protection in situations where they have a property right that is not formalised. Protecting the wife's interest in the property can be a way to ensure recognition of her unpaid work. Since facilitation of a market in land rights is an explicit objective of the 1999 legislation, we expect this type of legal protection to become ever more important for women.

### **5.3 Women's land rights and application of customary law**

The new Acts recognise customary rights to land, and customary law will be central for the management, titling and registration of land rights. Generally, however, customary law has been perceived as disadvantageous for women. Thus, the question of the application of discriminatory customary law has become a contested subject in the land reform debate (Tsikata 2003).

For a long time customary law regulating transfer of land within the family has been recognised as part of the state's legal system. The Local Customary Law Order (Declaration) of 1963 was an effort to codify customs and usages of patrilineal societies as regards personal matters in areas such as inheritance.<sup>55</sup> This version of customary law, which still is in force, directly discriminates against women and provides them with few rights of control over land. For example, the Declaration does not provide daughters with equal inheritance rights to those of sons, and the situation of widows is similarly weak (Mtengeti-Migiro 1991; Tenga 1988; WLEA 1993). Rwebangira et al. (1999:6–7) see what they call 'the new "customary" laws on marriage' as a male response to the traditional independence of women, rather than a codification of actual practices.

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<sup>55</sup> Government Notice 279/436 of 1963. Most of Tanzania is patrilineal. According to Tenga (1988), they account for 80% of the population, and it seems as matrilineal societies are under pressure. For a study of gender and land tenure transformations in a matrilineal area in Tanzania, see Koda (1998).

Nevertheless, it has been documented that this formal, codified version does not necessarily correspond with custom as practised on the ground. In some cases, practices have been found to support women's rights in relation to, for example, inheritance to a larger extent than often presumed (Odgaard 1999; Tsikata 2003). Although differential treatment based on gender in inheritance matters is sometimes portrayed as having a cultural basis in the population, the PRA carried out by Rwebangira et al. (1999) found that women in the studied area were generally opposed to gender discrimination in inheritance.

The relationship between discriminatory customary inheritance law and the principle of non-discrimination has been tested in a High Court judgment from 1990, the case of *Ephrahim v Pastory*.<sup>56</sup> In this case, a woman inherited clan land from her father through a valid will. When she grew old and had no one to take care of her, she sold the land to someone outside the clan. Her nephew went to the court, claiming that the sale was invalid as it was illegal according to the Local Customary Law Order (Declaration). This law vested the capacity to sell clan land in men only; women could only have life-long *user* rights. Nevertheless, both the District Court and the High Court found that the woman was entitled to sell the land. The court emphasises the principle of non-discrimination as embedded in the Constitution, CEDAW and the African Charter on Human and Peoples' Rights, and states that 'The principles enunciated in the above-named documents are a standard below which any civilised nation will be ashamed to fall'. The customary norm at issue was clearly discriminatory, and could therefore not be applied. Thus, the legal norm is now that 'females just like males can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like'. In addition, the judgment rules more generally that all laws, whether statutory or customary, must be interpreted so as not to violate the principle of non-discrimination. It thus provides a strong support for challenging and dismantling laws that perpetuate inequality (Mtengeti-Migiro 1991).

Customary law was also brought up as a central theme in Tanzania's second and third periodic report to the CEDAW Committee,<sup>57</sup> and the Committee's subsequent comments. The Tanzanian state refers to property adjustment after dissolution of marriage and after the death of the male spouse as one of 'the main legal problems facing women', and refers to work to reform the law of marriage and create a uniform law of succession (Paragraphs 14–19). As regards equality before the law, the state report presents a somehow ambiguous picture of the relationship between customs and the law. On the one hand, it is contended that legal practice respects the principle of equality before the law as embodied in the Constitution. The report states that the law is clear in marriage and family matters, and that: 'the problem lies in practice owing to cultural norms and traditions which continue to militate against women'. On the other hand, the report also states that 'This [problem] is worsened by the fact that the law requires the courts to

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56 *Ephrahim v Pastory and another*, High Court (PC) Civil Application No. 70/89, (unreported) delivered on February, 22, 1990. (Mtengeti-Migiro 1991; WLEA 1993)

57 CEDAW/C/TZA/2–3.



consider the customs of the parties concerned before determining issues concerning custody of children, division of property and inheritance' (Paragraph 113), and mentions that existing 'cultural norms, attitudes and customary practices' are obstacles to legal recourse (Paragraph 26).

The CEDAW Committee responds by taking a clear stance on this issue. It sees traditional practices and the existence of a multiplicity of laws as a hindrance to the advancement of women in Tanzania (Paragraph 225), and expresses concern that customary and religious laws are discriminatory and sometimes supersede the Constitution (Paragraph 29). Based on this, the Committee recommends that the Tanzanian state takes 'immediate action to modify customary laws and religious laws to comply with the constitution and the Convention' (Paragraph 230). It recommends awareness-raising campaigns for the general public, as well as training courses to sensitise policy makers, the judiciary and law enforcement officers.

In addition, the CEDAW Committee points to two areas where the issue of dealing with customary law is especially important. Firstly, it notes that customary and religious laws continue to govern *private life*, and points to 'the critical importance of eliminating discrimination against women in the private sphere' (Paragraph 229). Secondly, the Committee also points at a wide practice and acceptance of customary and religious laws in *rural areas*, and that this 'often prevent[s] women from inheriting and owning land and property' (Paragraph 235). While the state report mainly addresses rural women's interests through referring to measures to disseminate technologies to reduce their workloads, the Committee makes a clear recommendation regarding their legal position: '...that laws of inheritance and succession be formulated so as to guarantee rural women their rights of inheritance and ownership of land and property'. It also recommends a programme to educate rural women about their rights (Paragraph 236).

Still, discriminatory practices continue to prevail in inheritance matters. In what can be seen as a continuity of the private/ public dichotomy, the Presidential Commission of Inquiry into Land Matters of 1991 interpreted its mandate as not covering issues of succession law, and therefore not issues of women's rights to land (Manji 1998). Likewise, Paragraph 4.2.6 in the National Land Policy was initially proposed to read as follows:

- (i) In order to enhance and guarantee women's access to land and security of tenure, women will be entitled to acquire land in their own right not only through purchase but also through allocation. However inheritance of clan and family land will continue to be governed by custom and tradition.

However, organisations lobbying for women's land rights strongly took up this issue. As a result the following modification was included in the Land Policy: 'However, inheritance of clan and family land will continue to be governed by custom and tradition *provided they are not contrary to the constitution and principles of natural justice*'. As the Constitution prohibits discrimination on the ground of sex, this addition implies that discriminatory customs shall not be upheld, in line with the *Ephraim v Pastory* case.

The same approach is taken more generally in the Village Land Act, which states that if customary law is found to ‘(deny) women (...) lawful access to ownership, occupation or use of any such land’ it shall be deemed void and inoperative.<sup>58</sup>

Litigation is still being used by civil society actors in Tanzania as a strategy to promote women’s rights. In May 2004, one of the legal aid schemes in Dar es Salaam, the Women’s Legal Aid Centre, informed us about two current efforts at challenging discriminatory customary laws before the courts. A case concerning whether discriminatory customary inheritance law is unconstitutional is before the national courts. The other case, regarding the disadvantaged position of women in relation to division of matrimonial property, is being brought in the African Court of Human and Peoples’ Rights.

#### **5.4 Implementation of the 1999 land legislation: Recent debates**

As of May 2004, the two Acts were to a large extent still not implemented. There seems to be a general lack of knowledge about the law. Copies of forms, regulations and even the Acts themselves are also lacking (GAPP 2004). To some degree, NGOs and the relevant ministries have been carrying out information campaigns, including some with a main focus on women’s land rights. However, as the legislation is complex, held in a technical language and quite detailed, due process can only be achieved if complete, nuanced and understandable information is spread to all those concerned. The EU has provided financial support for a draft strategic plan for the implementation of the land laws (URT 2005), and both the EU and the World Bank are seen as potential sources for funding for implementation. The Tanzanian Poverty Reduction Strategy Paper makes mention of implementation of the land legislation, and the Institute of Liberty and Democracy and donors are also involved in related projects.

##### **5.4.1 Land formalisation in the Tanzanian PRSP**

The strategic part of the Tanzanian PRSP which was published on 1 October 2000 (URT 2000) makes mention of the implementation of the 1999 land legislation in a section on rural development. The government states that it will support the rural sector through ‘putting into effect the new Land Act and ensuring that related regulations facilitate the use of land as collateral for purposes of commercial transactions’ (URT 2000:17), while the poor themselves and the private sector are expected to take the lead in organising co-operatives, providing credit and so on.

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58 Section 20.2. The law also contains more specific rules aimed at supporting the rights of women, for example Section 30(4)b, which requires that a Village Council disallows assignments which ‘would be likely to operate to defeat the right of any women to occupy land under a customary right of occupancy, a derivative right or as a successor in title to the assignor’, and Article 33(1)d, which states that the Village Council, in approving a disposition of a customary right of occupancy, is bound, inter alia, to ensure that the special needs of women for land are adequately met.

In the section of the PRSP that describes the status of poverty in Tanzania, the relationship between gender, land and poverty is addressed by referring to two earlier participatory poverty assessments (PPAs) – one carried out by the World Bank in 1995 and the other by the UNDP in 1997 – as well as to zonal workshops organised to receive perspectives of various stakeholders during the PRSP process (URT 2000:5–13). One of the findings of the World Bank PPA that is mentioned is the importance that the poor attach to secure land tenure. In relation to income poverty, it is noted that women perceive themselves to be poorer than men owing to their lack of asset ownership (including land and livestock). The PRSP makes mention of the following factors emerging from the UNDP PPA:

...livelihood insecurity, poor social service provision, and gender inequality as factors that contribute significantly to poverty. Cultural constraints, weak governance, scarcity of funding, and poor infrastructure are also identified as development obstacles. Gender bias in the control of household resources, was of particular concern to women.

During the zonal workshops, non-availability of credit was brought up as one cause of income poverty in the agricultural sector. In addition, it was pointed to cultural factors:

...slightly over one-half of groups at the workshops mentioned that cultural customs and traditions were an obstacle to poverty reduction. A related issue that was cited by about one sixth of the groups was gender discrimination, especially in regard to customary ownership of property; participation in wage employments; and decision-making at the national and household level. A breakdown, by gender, of the concerns of the workshop participants revealed that (i) rural women were proportionately more concerned about the role of cultural customs and traditions than rural men; (ii) women raised the issue of gender discrimination more frequently than men; and (iii) about one quarter of the women expressed concern about laziness and drunkenness among men (URT 2000:13–4).

Between them, the World Bank study, the UNDP study and the zonal workshops present a comprehensive picture on the relationship between women's land rights and poverty. The economic role of land is linked to the need for secure tenure, as well as the need for credit. These perspectives are supplemented with concerns about the intra-household division of power and resources, including land, and the role of custom.

It seems, however, that the latter concerns only receive limited attention in the strategic and forward-looking policy section of the PRSP. In a study of gender in PRSPs, Whitehead (2003:23) finds that 'once described, the Tanzanian ... PRSP hardly refers to local-level findings again'.<sup>59</sup> While gender has been addressed in more detail in the progress reports, land tenure is still addressed mainly in the context of 'earmarking and advertising land for commercial farming so as to attract investors' and using land as collateral (URT 2004:24, 16). Little attention is paid to securing tenure for the poor, the

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<sup>59</sup> Whitehead also discusses the role of civil society and the World Bank in the PRSP process. In addition, see Emma Bell's report for a critique of the lack of women's priorities and of understanding of the relevance of gender in the PRSPs of Tanzania and three other countries (Bell 2003).

role of culture and intra-household relations. A rather vague comment on women and the Land Act is made under the heading '*Reform of laws that are discriminatory towards women*', where it is stated that 'NGOs have been working on creating awareness about other discriminatory laws such as the Inheritance Law and the Land Law. The Legal Reform Commission is working on the findings' (URT 2004:45).

Generally, it seems that some of the concerns from the debate preceding the land legislation, namely the quest for secure tenure for all and addressing the negative impact of discriminatory customs and laws as well as intra-household relations on the situation of women, are receiving less attention than facilitating the use of land as collateral. This can be questioned in the light of studies such as the one by Englert (2003) in which she found that the demand to use land as collateral was low, especially among women. She also saw signs that land users may prefer not to register their land rights 'formally', as the current customary tenure is perceived as being secure enough, and formal registration is seen as connected with taxation.

#### **5.4.2 The ILD formalisation programme**

Recently, the Tanzanian government has decided to embark on a formalisation programme proposed by the Peruvian economist Hernando de Soto and the Institute for Liberty and Democracy (Benjaminsen et al. 2004). The Norwegian Agency for International Development (NORAD) has agreed to fund the first stages of a programme in Tanzania using ILD's approach to formalisation. Critical questions have been raised concerning several aspects of the programme, both in relation to Tanzania specifically<sup>60</sup> and as a general approach.<sup>61</sup> It is unclear how the programme will relate to the World Bank's planned initiative to implement the 1999 land legislation as referred to in the PRSP. The ILD programme will work under the auspices of the President's Office, while the World Bank programme will be hosted by the Ministry of Lands. We will limit our discussion of the ILD programme to raising a few questions regarding gender issues, based on the three elements of the human rights-based approach as outlined in Chapter 3.<sup>62</sup>

While human rights require non-discrimination concerning protection of access to and rights to land, little attention has been devoted to potential gendered effects of the ILD formalisation programme. The issue of existing use and rights is formulated in a gender-neutral manner, and the gendered nature of use and access is not explicitly dealt with so far. From a human rights point of view, the new agenda should include safeguards to ensure that women's rights can be formalised even when they are perceived to be subsidiary to a man's rights, that discriminatory customary norms are not used as basis

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60 See Benjaminsen et al. 2004.

61 See for example Benda-Beckmann (2003), Benjaminsen (2002), Mathieu (2002) and Benjaminsen & Sjaastad (2003).

62 This topic is also discussed by Ikdahl and Hellum (2004).

for formalisation, and that there is continued protection of the interests of spouses in the case of sales and mortgages of the matrimonial home.

Likewise, the demand for participation by women at all stages has not been dealt with. Where the existing legislation is a result of a process where women's voices were (at least to some degree) heard, the new programme seems to be designed through a top-down process which leaves little room for public debate. The ILD programme suggests that the local communities will play a central role in the concrete surveying and registration of land rights. It does not, however, discuss power inequalities at the local level. If the programme is to be compatible with a HRBA, measures such as the existing quota provisions should be retained to ensure that the process does not reinforce existing inequalities, but rather allows for all voices to be heard.

A final point is the need to ensure that the process is governed by due process and the rule of law. What safeguards will be available for those who feel that their rights are being violated in the process of formalisation? Legal remedy, complaint procedures or similar measures must be established, even if this makes the formalisation process slower and more complicated.

## **5.5 Concluding remarks**

In general, the 1999 legislation can be seen as a delicate balancing act. On the one hand, it decentralises power to local bodies and builds upon existing institutions, customary norms and rights. On the other, it attempts to erode the influence of discriminatory practices and strengthen the position of women rather than reinforcing existing inequalities. While the slow pace of implementation makes it hard to draw conclusions about the success of this process, the Tanzanian legal model can at least serve as an example of efforts to integrate women's rights issues into legislation aimed at the formalisation of land rights.

As regards the policy process, our impression is that civil society participation and public debate was stronger during the 1991–1999 land reform process than more recently planned processes of formalisation following the World Bank and ILD approaches. For example, during our visit in May 2004, very few of those interviewed, and none of the women's organisations, were familiar with the plans for an ILD formalisation programme. The focus seems to have been narrowed down to a stronger emphasis on land rights as collateral and the facilitation of a market for land rights.

It seems that some progress was achieved regarding the legal position of women during the 1991–1999 land reform process. As regards the ILD formalisation programme, certain questions must clearly be dealt with before implementation of this process to avoid jeopardising these gains.

The programmes planned by the ILD and World Bank may be characterised as 'rights-based' in a narrow sense, as they focus on establishing formal property rights for the

poor. Nevertheless, they cannot be seen as 'human rights-based' unless protection of women's land use, participation by women at all stages of policy-making and implementation, and legal safeguards during the implementation phase are all put in place.

## 6. COUNTRY STUDY: MOZAMBIQUE

*The present Land Law was enacted by the Mozambican Parliament in 1997, after a process of consultation and debate involving civil society organisations, professionals and academics. According to the law, men and women have equal rights to land. The 1997 Land Law also recognises customary rights, as long as they do not contradict the Constitution. This implies that rural land rights often belong to communities rather than individuals, and the law provides for formalisation of communal rights through a delimitation and registration process. Women's and men's rights to land through inheritance or after divorce are, in part, addressed in the new Family Law enacted in August 2004. The key issues of debate in the preparation of the new Family Law have primarily been related to codification of different forms of marriage and the principles of equality of men and women contracting marriage and in the family. Present-day debates on land rights revolve around the practices of implementation of the 1997 Land Law; if there is a need for further formalisation in the form of privatisation of land; how to deal with de facto emerging land markets; and how to deal with land grabbing on the part of the rich and powerful. The debate on land rights and the debate on the Family Law have, however, basically been two separate debates.*

### 6.1 Some historical antecedents

Compared to the other three countries covered in this study, Mozambique went through a long – though somewhat fragmented – history of European colonisation. Shortly after Vasco da Gama's voyage to India in 1498, south-eastern Africa was given a central role in the Portuguese Kingdom's strategy of controlling trade in the Indian Ocean. Over the centuries, the colonial power implemented different models of control and landholding within the territory of present-day Mozambique. One of these models is known as the *prazo* system, involving large tracts of land, and documented by contracts dating back to the mid-17<sup>th</sup> century, when the Crown granted control over land to individuals/families for 'three life tenures' (Newitt 1995:224). The *prazo* system is of interest in this context due to its particular articulation of land rights and gender relations, European and African traditions.

*Prazos* were often granted to women, but on the condition that the woman married a Portuguese man. The land would, in turn, be inherited matrilineally, from mother to daughter. Over time, an Afro-Portuguese elite consolidated its position based on the *prazos*, primarily in the vast areas near the Zambezi River (Newitt 1995:226). In the ethnic/ language groups north of the Zambezi River, access to land has traditionally been through the matrilineage, and land has been inherited matrilineally. The Portuguese colonisers, on their side, represented a patrilineal tradition. The result of the *prazo* model was, according to Newitt, a 'hybrid system of social and property relations which placed women in positions of great wealth and influence as inheritors of land and slaves...' (Newitt 1995:231). Over time the *prazo* system was adapted to the needs of a developing capitalism.

In the late 19<sup>th</sup> and early 20<sup>th</sup> century, *prazos* in Zambezia were leased by plantation companies, established with international capital to grow and export sugar and copra (Newitt 1995:421).<sup>63</sup> In our context the *prazo* system exemplifies a recurring feature in the Mozambican material: the close relationship between women's land rights and women's authority and negotiating power. In comparative terms it is, however, usually argued that only to a limited extent the colonisation of Mozambique involved colonisers taking over rights of access to land (WLSA 2001). After the 'scramble for Africa', from the 1890s onwards, the land policies of the Portuguese colonial administration were guided by two principles: 1) colonial settlers and companies were permitted access to the most productive land; while 2) the indigenous population were ensured access to enough land for food security (Waterhouse 2001:28; Negrão 1995).

## **6.2 The legal context of the present land law**

The Constitution of 1975 established the People's Republic of Mozambique as an independent state. According to the Constitution, the Mozambican state aimed at 'the elimination of colonial and traditional oppression and exploitation structures and their related mentality', and women's emancipation was declared as 'one of the essential tasks of the State'. It was explicitly stated that women were 'equal to men in their rights and duties'.<sup>64</sup> The Constitution also declared that land was state property.

The principles of equity and emancipation embedded in the 1975 Constitution meant that parts of the (authoritarian) legislation inherited from the Portuguese were contradictory to the new Constitution. New legislation in a range of areas was therefore drawn up. A new Land Law (*Lei No 6/79*) was made, stating that all people – that is, both men and women – 'singular or collective, with legal capacity may have land titles'.<sup>65</sup> Even if all land in principle was nationalised, the law had provisions for leaseholds for commercial development, as well as for customary rights at village level (Walker 2002). With regard to customary landholding, the Regulations to the Land Law, however, introduced the concept of *household* as the basic unit and its *head* as the subject of landholding; thereby in practice marginalising the majority of women from the right to independent and individual land titles (WLSA Mozambique 1997:147–59).<sup>66</sup>

In the late 1980s, after many years of internal war, the changing context of international relations, combined with external pressure and interventions, led to significant changes in Mozambique. In 1990 a new Constitution was adopted. Land remained property of the

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63 Among the companies was Madal in Zambezia, which for a long period was controlled by Norwegian economic interests.

64 Constituição da República Popular de Moçambique, Articles 4 and 17; translations in WLSA Mozambique (1997:146).

65 Law No 6/79, Article 4; translation in WLSA Mozambique (1997:153).

66 Over the last years many authors have pointed to the weaknesses inherent in operating with a model that represents (especially rural) societies in terms of households, assuming that households are, somehow, homogeneous units, normally with a male head. One result of using such a model is that intra-household relationships and gender domains are overlooked and sidelined (Waterhouse & Vijfhuizen 2001).



state, and cannot be sold or mortgaged (Article 46). Basic principles of equity and non-discrimination are stated in Article 66, which declares that:

All citizens are equal before the law ... independently of colour, race, sex, ethnic origin, place of birth, religion, instruction level, social position, civil status of parents or occupation.

Article 67 of the Constitution specifically states that:

Men and women are equal before the law in all domains of political, economic, social and cultural life.<sup>67</sup>

With respect to women's rights to property and inheritance in the family, the Portuguese Civil Code was not consonant with the Mozambican Constitution of 1975.<sup>68</sup> A series of law projects, draft legislation and *ad hoc* legislation was prepared from 1978 to solve the problems resulting from these contradictions. A 'Draft Family Law' due to come into force in 1982 as a Directive from the President, was prepared to solve some of the problems resulting from these contradictions.

In the 1990s the need for a more comprehensive revision of the Family Law within the *Codigo Civil* was put on the agenda, and a Law Commission was appointed in 1997. Drafts were produced and discussed, followed by repeated re-drafting in response to lobbying and the outcomes of consultation. The key issues of debate in the preparation of a new Family Law were primarily related to recognition of different forms of marriage (civil, religious, and customary – including the issue of polygamy), and the principles of equality of men and women when contracting marriage. Inheritance and land rights seem to have been more peripheral issues. The Bill was first passed by the Mozambican Parliament (*Assembleia da República*) in 2003, but vetoed and sent back to Parliament by President Chissano, who judged some of its provisions to be unconstitutional. After a final revision, the new Family Law (*Lei de Familia*) was approved by the Parliament in August 2004. The law recognises equal rights for men and women both in society and in the household, in accordance with the principle of non-discrimination in the 1990 Constitution. The provisions regarding inheritance of for example land will, however, also require amendments in the inheritance legislation.

The principle of non-discrimination in the 1990 Constitution has also been followed up in the international arena. In 1993 Parliament ratified CEDAW, and in 1989 it ratified the African Charter on Human and Peoples' Rights. The African Protocol on the Rights of Women was signed in 2003, though not yet ratified, and in 1997 the President signed the Southern African Development Community Gender and Development Declaration (SADC 1997). Mozambican authorities have, however, been less active in reporting on

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67 Constituição da República de Moçambique, translation in WLSA Mozambique (1997:149).

68 According to the Portuguese Civil Code of 1967, the husband was the family/ household 'head', and was not accountable to his wife for his dispositions over family property (Waterhouse 2001:27).

the actual internal follow-up of conventions, and had the 2004 not yet submitted the report on the follow-up of CEDAW, which was due in 1998.

### **6.3 *The land law of 1997: Development and implementation***

In the early 1990s, several factors pointed towards the need for a new land law in Mozambique: a first agreement between the Government of Mozambique and the IMF to implement a Structural Adjustment Programme in 1987, the enactment of the 1990 Constitution, the ideological shifts that accompanied the end of the ‘war of destabilisation’ and the final Peace Agreement in 1992, together with the historical fact that the 1979 Land Law was made as a framework for developing a socialist co-operativist agriculture, and a post-war situation requiring the resettlement of large numbers of ‘dislocated people’.

The University of Wisconsin Land Tenure Center, in collaboration with the Ministry of Agriculture Project on Land Policy Reform, played an important role in preparing the law through carrying out research in a number of provinces in the period 1992–94. The studies were designed to provide an updated knowledge base for the new law in the highly volatile post-war period. The research identified a situation characterised by competing claims and struggles for land, partly resulting from government agencies ‘haphazardly distributing land rights to new and returning private national and foreign enterprises as well as to government officials through privatisation of the vast state farm sector, reactivation of former colonial titles, and granting of concessions’ (Myers 1994:603). It was recommended that the government ‘encourage a dialogue with all segments of Mozambican society and, rather than viewing smallholders and customary rules as impediments, incorporate them as active partners’ (Myers 1994:603).

In 1995 a new Land Policy was approved by the Council of Ministers.<sup>69</sup> Among the fundamental principles stated in the 1995 Land Policy (Article 17) were:

- Maintenance of the land as state property
- Guaranteed access to and use of the land for the population as well as for investors. In this context, customary rights of access and management of the lands are recognised for the resident rural population
- Guarantee of the right to access to and use of the land by women

An Inter-ministerial Land Commission<sup>70</sup> was given the mandate to draft the new land law. In the drafting process, a number of civil society organisations were involved,

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69 Published in the Official Gazette of the Republic of Mozambique, February 28, 1996. Series I – No. 9. Supplement.

70 The Technical Secretariat of the Commission (that is, its executive organ) was headed by a respected female lawyer, Maria Conceição de Quadros.

among them two organisations representing small farmers' interests, UNAC<sup>71</sup> and ORAM.<sup>72</sup> A consultative process was organised to discuss the draft land law, and in this period the issue of women's land rights gained increasing attention. In the province of Nampula in the north, women's land rights were raised as a focal issue, and the 'Nampula Women's Declaration' was formulated. The national Women's Forum – *Forum Mulher* – also supported the initiative to secure land rights for women independent of the customary systems of land tenure in their region (Kanji et al. 2002). In these debates, the need to secure women's land rights (basically women's rights to access land) was also used as one of the key arguments against privatisation of land.

In 1996 a National Conference on Land Issues was organised with participation from government, civil society and international organisations. The various initiatives to secure women's land rights were presented at this conference. A concrete suggestion which emerged was that the law should include an explicit reference to the non-discriminatory principle in the Constitution, stating clearly that customary rights could not be invoked to justify discriminatory practices (Kanji et al. 2002:3). This resulted in a change in the legal text, with Article 12 stating that land rights are acquired through either:

- a) occupation by individuals and by the local communities, according to those customary rules and practices that do not contradict the Constitution;
- b) occupation by Mozambican individuals who have been using the land in good faith for at least ten years;
- c) authorisation of an application presented by individuals or corporate bodies in the form set out in the present law.

The 1997 Land Law – *Lei de Terras (Lei No. 19/97)* – clearly states that men *and* women shall have equal rights to land. Similarly, the principle of non-discrimination applies with regard to formal individual titles, where the Law (Article 13) says that:

Individuals, men and women, who are members of a local community, can apply for individualised titles, after division of the respective community areas of land.

The Law further states that proof of the right of use and benefit may be made through either written or oral statements, putting written (titles) and oral (testimonies) by men and women on an equal footing. That is, proof (Article 15) may be made through:

- a) Presentation of the respective title;
- b) Testimonial evidence presented by members of the local communities (men and women).

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71 União Nacional de Camponeses, created in 1987 to be a national unifying body for local farmers' associations at a time when Mozambique was turning towards a market economy.

72 Rural Association for Mutual Support; an organisation created in 1992 by members of the Christian Council in Mozambique to deal with land issues (which were considered to be politically sensitive).

Knowledge about new legislation is central to implement this principle of non-discrimination, but is not easily available in the Mozambican countryside. Following the enactment of the Land Law in 1997, a unique campaign was launched to inform about and discuss the new law. Professor José Negrão from the Land Studies Unit at the Eduardo Mondlane University in Maputo was contracted to co-ordinate the campaign. Close to 200 civil society organisations – including churches, farmers' organisations and research institutions – were involved in the Land Campaign (*Campanha Terra*). Over a period of two years (1997–99) around 15 000 people were involved in informing others about the new law. This information included messages about men's *and* women's land rights. Diverse media of communication were used, and information about the law was published in 20 local languages (Negrão 2003:253).

Even with this amount of effort, it was (of course) not possible to get through to everybody. In the meantime, regulations for the rural areas were approved in 1998, while a Technical Annex to the Land Law Regulations was approved by the Minister of Agriculture and Fisheries in 1999.<sup>73</sup> The Technical Annex deals with the procedures for identifying the 'local communities' as defined in the Land Law, as well as procedures for delimitation and demarcation of land in rural areas. The methodological approach set out in the Technical Annex has been considered as innovative, especially in its use of participatory methods in the delimitation of community land (Tanner 2001). It states that both men and women shall participate in the process of community land demarcation, but does not indicate how many (or what percentages of) men and women should be involved (Chilundo 2004).

The Land Commission acted as a co-ordinating organ in the early phase of the implementation, and continued its work until 2002. During interviews carried out for the present study in 2004, however, the continued need for such an organ was repeatedly pointed out. Other state institutions were given the responsibility for implementing the law within their fields of mandate. According to *Diploma Ministerial No. 3/97*, the Cadastral Services – DINAGECA<sup>74</sup> – is responsible for the implementation of the national land policies, for disseminating the Land Law and the regulations, and for putting into practice the established mechanisms for delimiting land and issuing titles. In our interviews in 2004, the capacity and effectiveness of DINAGECA was, however, mentioned as an issue of concern.

#### **6.4 Institutional challenges, customary law and women's strategies**

The Mozambican PRSP, the *Programa de Acção para a Redução da Pobreza Absoluta* (PARPA) [Action Plan for the Reduction of Absolute Poverty](Mozambique 2001), points out six fundamental areas of action. 'Agriculture and rural development' is one of

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73 By 2004 the (apparently more controversial) regulations for urban areas had not yet been finalised.

74 DINAGECA: Direcção Nacional de Geografia e Cadastro. At the provincial level the implementing agency is SPGC – the Provincial Services of Geography and Cadastre.

these programme areas, with ‘management of agricultural land’ singled out as one component. The main objectives under this component are (Mozambique 2001:68):

Contribute to the sustainable use of land and ensure the timely access to citizens and investors (also increasing the capacity of the family sector to consolidate and increase their agricultural activities).

The principal measures to be undertaken are to:

- Organise the national land register
- Simplify the process of land adjudication
- Strengthen and equip, with both material and personnel, the institutions responsible for managing and granting land concession
- Together with other institutions, inform peasants of their rights regarding land, including consultations with the communities.

To a considerable degree, these measures refer to implementation of the Land Law. In contrast to the Law itself, however, women’s land rights are not explicitly mentioned in relation to land management in the PARPA. Nor are women’s productive activities brought up under the general programme area of ‘agriculture and rural development’ (see Fórum Mulher 2003).<sup>75</sup> Here ‘gender mainstreaming’ seems to have resulted in minimal attention to women’s land rights and women’s roles in agricultural production, even if the existence of gender inequalities in the Mozambican society is recognised at a more general level.

While the Land Campaign was still active, a small group of institutions and individuals took the initiative to organise a number of seminars on land tenure issues in Maputo. This group<sup>76</sup> looked into *gender relations* and ‘how these impact upon and are affected by ... access, use, control and benefit from land and related agricultural resources’ (Waterhouse & Vijfhuizen 2001:1). According to this group, more research-based knowledge on women’s *actual strategies* to access, use and control land was needed in order to understand how rural women both respond to and overcome the constraints they face in their daily lives. A book was published in 2001, bringing up a number of issues of particular relevance for the present study.<sup>77</sup> One of these issues is the need to question the assumption in current land policies that ‘the law, implemented by the State, can and will guarantee equal rights and improved living standards for rural women’ (Waterhouse & Vijfhuizen 2001:6).

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75 Some gender-specific measures are defined in other PARPA programme areas, such as education and health.

76 A first organising committee was created by ActionAid-Mozambique, the Geography Department and Land Studies Unit (NET – Núcleo de Estudos de Terra) at Eduardo Mondlane University; later joined by the Faculty of Agronomy and Forestry Engineering (UEM), and the (Wisconsin) Land Tenure Center – Mozambique.

77 In 2001, a PhD thesis on the gender dimensions of land policy in Mozambique was also presented at the University of Cape Town (Waterhouse 2001). The organised initiative to work specifically with women’s rights and land rights has, however, not been continued.

The question of the State's capacity to guarantee human rights through legislation was repeatedly brought up in our interviews in Mozambique in May 2004. It is clear that women have legal rights regarding access to and control of land, but the *de facto* situation is much more complex. The capacity of the judicial system to guarantee the rights stated through statutory law cannot be taken for granted, and this highlights the linkage between rule of law and the implementation of substantial rights as pointed out in Chapter 3 of this report.

After independence in 1975, the government aimed to create a legal system that was 'popular, Mozambican and democratic' (Sachs & Welch 1990:3). One of the basic elements in this system of popular justice was the local popular tribunals; institutions constituted by elected judges who at the local level should contribute to settling conflicts through consensus. If that was not possible, judgements should be made in accord with 'good sense and justice' (Berg & Gundersen 1991; Gundersen 1992). Thus, it can be seen as an attempt to bridge the gap between formal laws and laws as practised and perceived on the ground. With the new legislation following the Constitution of 1990 in the form of Law No. 4/92, the popular tribunals were formally replaced by community courts – *tribunais comunitários* – at the locality and *bairro* level. A general reorganisation of the judiciary system was enacted in Law No. 10/92 *Lei da Organização Judiciária* (Gomes et al. 2003; WLSA Mozambique 2000).

The most comprehensive study so far of the legal sector and the legal pluralism in Mozambique, carried out between 1997 and 2000, also included a study of the community courts.<sup>78</sup> The research team covered both urban and rural courts, and from 15 courts of a total of 34 visited, it was able to collect written material about 350 cases (Gomes et al. 2003). Of the 350 cases presented, 121 dealt with conjugal problems. A total of 48% dealt with family problems in a wider sense (excluding intra-family conflicts and inheritance of land). Only 18 cases (or 5%) dealt with problems related to land.

This low percentage of land-related cases in the community courts may be part of a larger picture. At present the formal judicial system lacks legitimacy among large parts of the Mozambican population. According to a recent study on corruption, the judicial sector is perceived as the most corrupt of the public institutions (ÈTICA Mozambique 2001).

A Joint Review of the Justice Sector carried out in 2004 expresses serious human rights concerns with regard to processing of both civil and penal cases by the courts. The review pointed out that slow processing in civil cases, extremely complex legislation and high judicial costs affect both property rights, investments and contract enforcement (Joint Review 2004). Against this background, it is perhaps not surprising that the courts have

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78 An edited two-volume presentation of the research results was published in Portuguese in 2003 under the title *Conflito e transformação social: Uma paisagem das justiças em Moçambique* (Santos & Trinidad eds.).

not been used to try the constitutional and legal rights of women, as stated in the Land Law, against customary practices that discriminate against women. The same lack of legitimacy may lie behind the relatively low percentage of land-related cases in the community courts.

An important issue in the debate on the Land Law has also been local variation, with regard to principles, adaptations and the context-dependent practices of customary rights. The Law does, to a certain degree, recognise customary norms and rights, and even where it does not, customary law will in practice continue to shape people's relations with land. The ways in which customary law interacts with statutory law will necessarily have implications for women's land rights. It has been argued that the legal context in present-day Mozambique is not so much that of a dichotomous legal pluralism based on the colonial state's distinction between 'law' and 'custom'. What de Sousa Santos has labelled a 'pluralism of legal orders' refers to a much more heterogeneous situation, reflecting the adaptations of diverse principles – hybridisation – over time and in space, from local to national and international levels (Santos 2003).

On the basis of available information, including a number of local case studies, five distinct customary systems have been distinguished; regulating access, use and control of land in contemporary Mozambique (Negrão 2003). Two of these cover several provinces and will be briefly referred to here. In the provinces north of the Zambezi river, a changing and fairly heterogeneous system originally based on *matrilineal* succession and inheritance still provides a framework for access to land, decisions regarding marriages, and rights to land through inheritance (see Geffray 2000). At the local level, these matrilineal systems can provide very high degrees of flexibility and adaptability. Lending and borrowing of land has been very common, often with reference to the norm that all should have access to land in order to produce and eat (Arnfred 2001:165).

Allocation and control over land may to a great extent be the domain of men, even in matrilineal societies.<sup>79</sup> Men's relative power and control over resources does, however, seem to become stronger where cash crops are important sources of income. Since colonial times, state authorities furthermore seem to have been unable – or unwilling – to grasp the role of female power structures in matrilineal groups (Moore 1998; Arnfred 2001:158). A critical point in the current changes and adaptive processes within traditionally matrilineal groups are in fact the forms of authority and power presented and recognised by the state in interactions between local communities and representatives of state institutions. These problems and challenges include the processes and institutions involved in implementing the 1997 Land Law.

By ignoring women, through not recognising their important role in this society, through not valuing their knowledge about the community and not considering them to be valid interlocutors

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79 In matrilineal societies it is often a woman's brother or mother's brother who makes decisions on land allocation, even if inheritance and succession is recorded in the female line.

... State intervention presents the community with an image of power that is closely associated with masculinity (Braga 2001: 217).

In the southern provinces, a system based on *patrilineal* succession and inheritance dominates, and women's rights to land are secondary rights. Access to land and rights to land use will for women primarily be achieved through marriage and investments of labour in cultivating land where the married couple settles (traditionally on the husband's family or lineage land). The practice of *lobolo/ lovolo* – a 'bride price' transferred from the bridegroom's to the bride's family – can in this system be seen as a symbolic expression of the transference of rights between families; representing not only 'the guarantee of transferring [the right to] future children from one site [and lineage] to another, but also a public expression that the family receiving the [other's] daughter will give her access to land for residence, agriculture...' (Negrão 2003:237).<sup>80</sup> A different view on the *lobolo* claims that it is a practice that 'legitimizes inequality by representing the transfer of powers from the wife's to the husband's family, giving responsibility for her [the woman's] support to the husband's relatives ... In return ... the woman must reproduce herself through children and domestic work' (WLSA Mozambique 1997:49). Since women's land rights are seen as secondary rights (achieved rather than ascribed) within this system, women's ability to assert their rights is likely to be both contextually dependent and negotiable. Cases are frequently reported when widows are left with nothing since the husband's family 'grabs it all'.

On the other hand, community-based research over the last years has also indicated that local land systems 'are enormously more diverse than existing academic formulations allow' (Gengenbach 1998:10; see Arnfred 2001 and Waterhouse 2001). In part, this diversity has been exemplified in rural women contesting men's claim to power, asserting women's authority in land management and food production. Land rights, especially in rural societies, are closely related to livelihoods. The *right to livelihood* is often expressed as any individual's 'right to eat' – which includes providing food for children. Women's rights to livelihood have at the local level often been seen as 'indirect' (or secondary) rights to land; and as such they have usually required negotiation, and the consent of men.

Land rights that individuals can claim as members of families, lineages or communities can in part be formalised as *property rights*. The right to livelihood can also be claimed either as a member of a family or lineage, or as a member of a community or village. Present formalisation processes have, however, primarily been directed at formalising land rights in terms of secure ownership to productive resources. In the Mozambican context, the right to livelihood has traditionally implied a certain level of social security independent of the provisions of a welfare state. How to secure the traditional (and informal) rights to livelihood is a challenge that must be addressed when formalisation in the form of property rights to land is gaining momentum through the implementation of the new Land Law.

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80 Our translation from Portuguese.



## 6.5 Recent debates on land and formalisation

A common view among the individuals and institutions interviewed for the present study is that formalisation of land rights through titling – within the frameworks of the 1997 Land Law – is particularly important in those zones where there is an increasing pressure on land and conflicts over land. A common opinion is also that the Land Law should not be changed until ‘we see how it works when it is implemented’. As regards assistance to communities in the (relatively complex) processes required to obtain land titles, a number of NGOs are in practice assuming important roles in different parts of the country.<sup>81</sup> Opinions vary, however, as to what extent local communities and rural women in practice benefit from their legal rights to have land delimited and registered through the prescribed participatory consultation processes.<sup>82</sup> Another open question is to what extent women participate in questions regarding communal rights. Research-based knowledge on the consequences of registration for women within the communities is, to a great extent, lacking.

According to the 1997 Land Law, both individuals and corporations can get authorisation to acquire land. Land titles can now, in principle, be acquired through a process which takes 90 days. Representatives of the private sector in Mozambique have, however, voiced a need for further privatisation of land. A new debate on privatisation was initiated in 2001 when the Minister of Agriculture and Rural Development told the newspaper *Domingo*:

The time has come to begin the discussion about a land market compatible with our reality. Our land law protects the peasants ... but I think we have arrived at a time to start selling land (quoted in Hanlon 2002:10).

A few months later, the World Bank representative in Mozambique declared that ‘land use rights need to be clarified and monetised, so that land can be used as collateral and ... be used by the most productive users’ (Mans 2001). However, another line on these issues was presented by the World Bank land expert Hans Binswanger at a meeting in Maputo in early 2002, where he argued that the World Bank land policy had actually changed over the last 25 years, and that Mans’s perspectives were those of the 1975 World Bank policy paper (Hanlon 2002:11, see also Chapter 2 and 4 of the present report). The US Agency for International Development (USAID) in Maputo formed a Private Sector group to follow up the issue, and in 2003 initiated a study on land markets. The Mozambican Bank Association has, on its part, declared that land will not be accepted as collateral. Among the interviewees consulted for the present study, there is

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81 The most important NGOs in this context are so far ORAM, UNAC, IUCN (World Conservation Union, formerly the International Union for Conservation of Nature and Natural Resources) and Helvetas (a Swiss organisation).

82 ‘Securing land rights in Africa: can land registration served the poor?’ – a project funded by the UK Department for International Development’s (DFID) Policy Division (for the period 2002–2005) – is presently examining land registration procedures in Mozambique, Ghana and Ethiopia to establish to which extent land registration tends to further impoverish marginal members of society.

considerable consensus that privatisation of land will affect women negatively. There is, however, a lack of debate on how women's situation can be further secured at present.

Ongoing debates on formalisation beyond what the present legislation makes possible primarily have to do with 'full transferability', that is, the possibility of a title-holder to use land as collateral – and lose it. A central argument against formalisation aimed at creating a land market and providing for the use of land as collateral in order to obtain credit, is that land provides a basis of social security, especially for the rural poor, and the country cannot cope with greater numbers of landless people. On the other hand, it is recognised that credit is necessary for agricultural development, and emerging commercial farmers lack credit for investments. A key question seems to be: what is more important, and what comes first, *equity* or *growth*? Current debates in Mozambique usually question the World Bank's perspective which assumes an inherently harmonious relationship between the two.

## **6.6 Concluding remarks**

With the enactment of the new Family Law, the legal framework for women's equal rights to land in Mozambique is basically in place. In practice, however, structural, cultural and material constraints are still likely to limit women's access and control of land and other resources. The current legislation is a type of hybrid, through its recognition of both customary and statutory rights. Still, there is a lack of knowledge on how the present multiple and hybrid laws and practices actually impact on women's rights to and access to land. The current focus on facilitating market mechanisms in the field of land rights does not adequately take into account concerns and questions related to ways women actually access land, for example, through inheritance.

Crucial issues in the future will be how women's interest are represented in the local and national reconstruction of 'customary rules and practices', and the actual participation of women in the implementation of the Land Law; but also to what extent women will in practice be able to claim the formal rights defined in the legislation. In order that women's rights and claims are actually recognised within the judicial system, further training and capacity-building within the judiciary itself is necessary. In this regard, the Legal and Judicial Training Centre (*CFJJ*) no doubt has an important role to play. For many judges the courses offered at this centre expose them for the first time in their professional careers to the concept and the challenges associated with a gendered approach.

## **7. COUNTRY STUDY: SOUTH AFRICA**

*The 1996 Constitution of South Africa seeks to balance the protection of existing property rights against a mandate for land reform based on three pillars: redistribution, restitution and tenure reform. While the government's policy is committed to gender equality, land reform has mainly been concerned with the racially skewed ownership of land. In general, there is a disjuncture between policy ambitions and how gender issues are treated in practice. The Communal Land Rights Act of 2004 has been widely criticised because it places the responsibility for land administration with 'traditional councils' and thereby revamping the tribal authorities that controlled land under apartheid. There are fears that this will further marginalise women and have severe consequences for women's access to land. Farm workers on commercial farms have generally poor tenure security, despite the Extension of Security of Tenure Act of 1997. In addition, women on farms tend not to be recognised as occupiers in their own right, but are seen as 'secondary occupiers' who can be evicted on the basis of the eviction of their spouses. However, there is also some good news regarding women's access to land in South Africa. While the recent Bhe Constitutional Court case illustrates tensions between customary laws and the non-discrimination principle, it also demonstrates the potential of legal rights as a means to support women in their struggle for land.*

### **7.1 Introduction**

As a result of conquest and forced dispossessions during the colonial and apartheid period, 13% of the area in South Africa was set aside as so-called 'homelands', 'bantustans' or 'reserves' (today called 'communal areas') for the black African majority. The white minority government controlled these areas through 'traditional' authorities often installed by the apartheid government itself. Since land in the 'reserves' was scarce and hardly enough to sustain a living for a family, people there, usually men, had to migrate to urban areas to find a job. As a result of these migrant labour practices, women significantly outnumber men in these reserves (Walker 1998). However, despite being the main producers of food and the ones responsible for land-based activities such as wood and water collection, their access to land still depends on their relationships to men:

Only male heads of household who have been formally allocated land rights hold full citizenship rights within their communities, including the right to build a house, plant a crop, control their productive earnings from the land, access public resources and participate in public debates. Women's secondary rights to land similarly correspond to secondary rights in respect of other community activities, rendering them as subjects, or minors, both within their households and within the wider community, as dependents of the formal holder (Cross & Hornby 2002:37).

The South African land reform programme is an important tool aiming at rectifying the social and economic inequalities of the past. This programme is centrally concerned with the racially skewed imbalance in land ownership and the beneficiaries of land reform are defined primarily in terms of race (Hargreaves & Meer 2000). However, the government also recognises that past policies have led to skewed gender relations in terms of possibilities for securing livelihoods through access to productive resources. To address

gender equity issues, the state has made several commitments (Hargreaves & Meer 2000).

The government has signed various international conventions and declarations aimed at advancing the rights of women. It has ratified the Convention on the Elimination of All Forms of Discrimination Against Women. The Government has also signed, but not ratified the International Covenant on Economic, Social and Cultural Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women. The South African government made its initial report to the CEDAW Committee on its progress on the elimination of discrimination in 1998.<sup>83</sup> The Committee considered the report at its 387<sup>th</sup>, 388<sup>th</sup> and 393<sup>rd</sup> meetings.<sup>84</sup> It underlined that 'vulnerable groups of women, especially rural women, require specific measures to empower them to overcome the constraints of poverty, low levels of education and literacy, high unemployment and high fertility rates. It notes the need for rural women's participation to be ensured in land reform programme' (Paragraph 135).

The right to equality between men and women is enshrined in the Bill of Rights of the Constitution of the Republic of South Africa of 1996. Secondly, the land reform policy includes a commitment to the principle of gender equity. In 1997, the Department of Land Affairs approved a 'Land Reform Gender Policy' document 'aimed at creating an enabling environment for women to access, own, control, use and manage land; as well as access credit for productive use of the land' (DLA 1997:2-3). Thirdly, the government is committed to ensuring that a 'gender perspective' is embedded in all its policies and programmes through the mission statement of the Office of the Status of Women in the Office of the President.

These overall principles are yet to be translated into practice. In its comments to South Africa's initial report to CEDAW in 1998 'the Committee expresses concern that, in spite of the legal measures put in place, *de facto* implementation of such laws and policies have yet to be achieved in many areas. It also notes with concern the continuing recognition of customary and religious laws and their adverse effect on the inheritance rights and land rights of women and women's rights in family relations' (Paragraph 117). The Committee recommended 'that the Government complete, as a matter of priority, the adoption of legislation as well as ensure its effective implementation in order that women's *de jure* and *de facto* equality be guaranteed. It also recommends that a uniform family code in conformity with the Convention be prepared in which unequal inheritance rights, land rights and polygamy are addressed, with the aim of abolishing them' (Paragraph 118).

Research on women's land rights has also identified a disjuncture between the ambitions stated in the land policy documents and how gender issues are treated in practice (Cross

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83 CEDAW A/53/38/Rev. 1(1998).

84 CEDAW/C/SR.387, 388 and 393.

& Hornby 2002; Walker 2003). Walker found that ‘the commitment to gender equity has operated mainly at the level of lofty principles, a kind of ‘piety in the sky’ that has not been translated into vigorous action on the ground’ (Walker 2003: 114).

## **7.2 Land reform in South Africa**

From 1990, the African National Congress (ANC) Land Committee responded to demands from rural communities and civil society by giving land a prominent place in key policy documents. The Reconstruction and Development Programme (RDP), the ANC’s 1994 election platform which later became official government policy, held that land reform should be the ‘central and driving force of a programme of rural development’, aimed at redressing the injustices of the past, securing tenure for rural people, generating employment and increasing rural incomes, supplying residential and agricultural land to the poorest, and increasing agricultural productivity (ANC 1994:19–20). Land policy debates were interwoven with the negotiation of the ‘interim’ 1993 Constitution and the ‘final’ Constitution of 1996. Section 25 in the Bill of Rights of the 1996 Constitution, ‘the property clause’, seeks to balance the protection of existing property rights against a mandate for land reform. It says that the state may expropriate property for public purposes or in the public interest including land reform and that such expropriation must be subject to the payment of compensation, which is ‘just and equitable’.

Equality, protected under Section 9 in the Bill of Rights of the Constitution, is defined as including the ‘full and equal enjoyment of rights and freedoms’. Recognising South Africa’s cultural diversity, however, the right to culture is also recognised in the Constitution. As a reflection of these crosscutting concerns, both civil and customary law is recognised by the legal system. Lawmakers, policymakers and the courts are faced with the challenge of harmonising these often incongruent rules to secure women the full protection required by the Constitution. The Constitutional Court has, in a number of cases, set aside customary laws originating from the apartheid era. The general approach taken by the courts is that the fundamental rights in the Constitution take precedence over all new and old laws including customary laws.

Based on the mandate in the Constitution, land reform in South Africa comprises the three programmes of redistribution, tenure reform and restitution.

*Land redistribution.* The RDP stated that the government aimed to redistribute 30 % of farmland owned by white people within five years to people and communities who were disadvantaged under apartheid. Until 2000, the programme was mainly implemented through a Settlement/Land Acquisition Grant (SLAG) of up to R17 000 per household. In order to be eligible for this grant, applicants had to be poor, with an income below a certain level. From 2001, the government extended the deadline for redistribution of 30% of white-owned land to 2015. The government then introduced the Land Redistribution for Agricultural Development (LRAD) programme. LRAD offers grants of between R20 000 and R100 000 to beneficiaries able to contribute a minimum of R5 000 in cash

or labour. The grant increases on a sliding scale according to how much the beneficiary is able to contribute, but in such a way that the grant proportion is higher for those beneficiaries who are only able to make a small contribution. LRAD was intended to contain different components including 'food-safety-net projects', equity schemes and support for agriculture in communal areas. However, in practice, it has caused a shift towards supporting fewer relatively more well-off farmers (Hall et al. 2003). By 2004, approximately 3% of commercial land had been redistributed. Researchers estimate that to meet the 2015 deadline for a 30% land transfer, government would have to transfer 2.1 million hectares annually, equivalent to the total amount of land transferred during the eight years up to 2003 (Hall & Lahiff 2004). As at 29 February 2004, 11.9% of all households benefiting from land redistribution were female-headed (DLA 2004).

Cross and Hornby (2002) concluded that while LRAD may be able to meet its gender targets, it may do so without admitting significant numbers of poor women who do not have husbands or other resource persons to act for them:

Poor rural women are held back by class factors, and by customary gender roles as well as by lack of information and by formal outreach. Women household heads appear least likely to become beneficiaries of LRAD (Cross & Hornby 2002:141).

*Land tenure reform* aims to increase tenure security for labour tenants and farm workers and people occupying land without formal rights. The major and most contested issue in tenure reform has been the passing of the Communal Land Rights Act to deal with the plight of the estimated 15 million people (about 35% of the population) who experience insecure tenure in former reserves. The 1999 draft Land Rights Bill was shelved after a new Minister of Land Affairs was appointed in that year. A new draft bill was discussed at the National Land Tenure Conference in Durban in November 2001, and in August 2002 the government published the Communal Land Rights Bill (CLRB) for public review. In October 2003 the Cabinet adopted an amended version of the CLRB, placing the responsibility for land administration with 'traditional councils', effectively revamping the tribal authorities that controlled communal land under apartheid. The CLRB was debated during hearings in November 2003. It was severely criticised by civil society and communities for being fundamentally undemocratic and for placing excessive powers in the hands of traditional leaders. Since women are already marginalised and discriminated against under customary law, a further strengthening of traditional leaders and customary law risks severe negative consequences for women's access to land, especially for widows, divorcees and unmarried women. In response to the criticism, the Department of Land Affairs proposed various amendments of the proposed law. The most important change for women was the inclusion of a joint vesting provision and a provision stating that women are entitled to the same land rights and security of tenure as men (Claassens, forthcoming). The revised Bill was approved by Parliament in February 2004 and signed into law in July 2004.

Cross and Hornby (2002) point to the highly dependent nature of rural women's land rights as a major constraint to obtaining security of land access, control and use under

communal tenure. On the basis of selected case studies in KwaZulu-Natal province, they concluded that change, though uneven, was taking place. Land access for single women no longer appeared to be as contentious as had previously been the case. However, land access for married women remained problematic. Their research concluded that men tend to be fearful of women's economic independence.

*Land restitution* involves returning land or other compensation to persons or communities who were dispossessed of property after 1913 as a result of past racially discriminatory laws or practices. Restitution is based on the mandate in the 'interim' and 'final' Constitutions and the Restitution of Land Rights Act 22 of 1994, which established a Land Claims Commission and a Land Claims Court. About 69 000 claims had been submitted by the submission deadline of December 1999 (80% from urban areas). However, by March 2004, the total number of claims had risen to 79 693, due to existing claims being split up (Hall 2004). By August 2004, 56 650 had been settled at a total cost of R4.2 billion (Hall 2004). The form of settlement included both land and cash. Rural claims often involve multiple, overlapping claims and by August 2002 only about 5% of the rural claims had been settled (Kepe & Cousins 2002). In February 2002, President Thabo Mbeki announced that the government would complete the land restitution process within three years.

The national budget for land reform has been between 0.3% and 0.5% of the total national budget and has seen a slow, but steady increase to R1.64 billion in the 2003/04 budget (Hall & Lahiff 2004). The budget reflects increasing emphasis on restitution (R839 million or 65% of total) as compared to tenure reform and redistribution (R465 million or 35%). The projected 2005/06 budget for restitution is R1.157 billion, but the Commission on the Restitution of Land Rights has estimated that R13.5 billion will be needed to settle outstanding claims (Hall & Lahiff 2004). No disaggregated statistics are available on how women have benefited from restitution.

### **7.3 Women and land in South Africa**

One crucial issue in debates about women's land rights in South Africa is the tension between the government's commitment to gender equality on the one hand, and its wish to rely on traditional authorities for rural development on the other. This is a highly emotional debate at the national political level that is seen by some as a matter of race and African values (Walker 1998). However, recent research indicates that there are no clear-cut boundaries between national legislation, the official customary laws embedded in legislation, and court practice and people's local practices (Mbatha 2003). As is the case elsewhere in Africa, the process of change taking place on the ground in South Africa is uneven as people adjust to a wide variety of social, economic and normative imperatives. Another central issue is the relationship between class and gender. The need for a land policy that targets poor women more effectively has been emphasised by a number of researchers (Cross & Hornby 2002). The class aspect was also emphasised by the CEDAW Committee when dealing with South Africa's initial report: 'The Committee

underlines that vulnerable groups of women, especially rural women, require specific measures to empower them to overcome constraints of poverty...’<sup>85</sup>

### 7.3.1 Gender equality and the right to culture: A recent case

According to South African customary law on inheritance expressed in the Black Administration Act (No. 38 of 1927) and the Intestate Succession Act (No 81. of 1987), where there is no will, which is the case in the large majority of cases, the eldest male relative inherits the family property, while women are denied the right to inherit any property (Martabano & O’Sullivan 2004). These laws are a colonial heritage which still applies to ‘black African’ people in the country not only in the former reserves, but also in urban areas.

However, in the *Bhe v Magistrate, Khayelitsha and others* case, the Constitutional Court ruled on 15 October 2004 that male primogeniture is unconstitutional.<sup>86</sup> On behalf of their clients, two young girls aged two and nine, the Women’s Legal Centre in Cape Town challenged the provision that the girls could not inherit their father’s estate. ‘The estate was the girls’ home in Khayelitsha<sup>87</sup> where they had been living with their parents until their father died in 2002. Since their parents were never married, the mother also had no legal claim to the house. In terms of African customary law, the house was therefore deemed to be the property of the eldest male relative of the father. The house thus fell to the girl’s grandfather, who planned to sell it’ (*Business Day*, 18.10.04). However, the Constitutional Court ruled that the two daughters were the heirs of their father’s estate. Judge Pius Langa stated that customary law was subject to the Constitution. According to Walker (2004:3) ‘(t)his judgement will have major repercussions for the debate on women’s land and tenure rights, including their treatment within the Communal Land Rights Act, and needs to be widely read, debated and further developed’. Martabano and O’Sullivan argue that whether the Bhe case will actually improve women’s lives depends on how well information about the decision is disseminated, and they continue: ‘Practical reality reveals that even when good decisions are handed down, they are often unknown to those most effected, so that discriminatory practices continue despite what the law clearly says’ (2004:59).<sup>88</sup> However, a more optimistic position would hold that new court cases will follow, eroding the influence of practices which discriminate against women, both in urban and rural areas.

Changes are also taking place from below. Scattered research shows that people gradually are changing their practices in inheritance cases. Research has shown that family decisions on inheritance in many instances were favourable to women (Mbatha 2003). In many instances parents tended to leave their property to children and other dependants, depending on how needy they were and regardless of sex. Such dependants were often

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85 A/53/38/Rev.1 (1998), Part 2 (session 19), Paragraph 135.

86 Constitutional Court case CCT49/03.

87 A large township in Cape Town.

88 Michelle O’Sullivan was the children’s lawyer in the Bhe case.



married daughters, daughters who had returned home from broken marriages, and sons who could not establish their own households. Respondents in Mbatha's research indicated that they, contrary to the rule of male primogeniture, would like the surviving spouse to inherit the marital property.

This illustrates that the living customary law may in practice be more flexible and responsive to changing social, economic and legal demands than the customary law found in books.

### **7.3.2 Communal land**

The Minister of Land Affairs holds the land in trust for the people in the communal areas. Major constraints to rural women living under communal tenure systems are obtaining access to land and security of tenure. The major challenge identified by researchers, civil society initiatives and human rights treaty bodies is the highly dependent nature of women's land rights. Customary land rights are seen as being tied to men – husbands, fathers and brothers – with the result that at the moments of crisis in women's lives such as divorce, separation or the death of a husband, women are left extremely vulnerable to eviction and loss of livelihood resources.

The formulation of a tenure reform law for these areas has been a long and contentious process. The Communal Land Rights Act of 2004 was intended to give effect to Section 25(6) of the Constitution which provides that 'a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. However, the Act is likely to be subjected to a Constitutional Court challenge, based on the contention that the law fails to meet the constitutional obligations of the government to secure the tenure rights of women in communal areas (Cousins & Claassens 2004; Walker 2004) and that it is therefore unconstitutional.

The Act establishes traditional councils as the bodies that will administer communal land. All communities are required to establish 'land administration committees' to 'represent the community owning communal land' and which would have 'ownership and administrative powers conferred on it by the rules of the community'. However, where a community already has a 'traditional council', the functions and powers of the land administration committee 'must be performed by such a council' (Cousins & Claassens 2004). The Traditional Leadership and Governance Framework Act requires that 40% of the members of the traditional councils be elected and that 30% be women. Yet, this requirement has been met with considerable resistance from the traditional leaders.

Traditional leaders and their supporters celebrated the way the Act provides for traditional councils to have the power to manage communal land, while many civil society organisations protested that this provision would undermine fundamental

democratic rights (Cousins & Claassens 2004). A press statement from six NGOs and research institutes released on 12 February 2004 said that giving traditional leaders more power over the land and thereby over people's lives is undemocratic, and a particular problem for the rights of rural women who suffer severe discrimination under current customary law. The Commission on Gender Equality concluded that the Communal Land Rights Bill did not give effect to the constitutional obligation on the state to respect, protect, promote the right to gender equality because it: 'places key administrative powers in the hands of bodies (i) in which women are in permanent minority; (ii) which in the past have been primary agents of discrimination in relation to land administration allocation; and (iii) which are not accountable to the people affected in the ordinary democratic manner' (CGE 2003).

Another contested issue in the new Act is that it opens up potential for the establishment of individual title deeds within the communal areas through the registration of existing rights. Under the official customary law regime these rights are seen to be vested in men. Until the last amendments were made to the Bill, there were no provisions assuring that women's rights were asserted or registered. In a divorce, this could lead to a woman losing her access to land because rights to the land are vested in the man. On this issue the South African Human Rights Commission demanded in its submission to Parliament dated 11 November 2003 that where land is transferred to a household, the land must be registered in the woman's name as well as in the man's name. The Bill was then amended to make this possible.

### **7.3.3 'Commercial' farms**

While men are 'citizens' and women are 'subjects' in the communal areas, on commercial farms owned by whites a similar duality prevails (Cross & Hornby 2002). Here farm workers do not have independent land rights and their access to and use of land depends on their employment relationship with the farmer. Without the goodwill of the white farmer, workers on the farms risk being evicted. The Extension of Security of Tenure Act of 1997 (ESTA) addresses this situation. The Act attempts to strengthen the rights of farm workers, but its provisions to reduce the farmers' power to evict employed workers from their farms has often been met with fierce resistance. In addition, farmers have started to replace labourers who have stayed on the farms for decades or even generations with casual labour on short-term contracts. This trend disproportionately affects women farm dwellers whose rights to stay typically depend on their husbands having a job on the farms (Cross & Hornby 2002). Hence, many women and children have been evicted from their farm dwellings when the men they depend on have lost their jobs. Divorce, separation or the death of a husband can also lead to evictions from commercial farms. ESTA gives certain rights to 'occupiers' and this has created some debate about who qualifies as an occupier. The Land Claims Court distinguishes between a 'primary occupier', who resides on a farm with the consent of the owner, and other household members, who are not considered occupiers in their own right (Hall 2003). Only long-term occupiers – those over 60 years old who have been resident for more than 10 years – may not be evicted, unless they violate the terms of their tenancy. Occupiers facing eviction must get notice, the application for eviction must go to court, and the

court must consider all relevant circumstances including the implications for the human rights of those involved. For example, access to schooling and shelter for children has been cited as a possible reason for refusing an eviction application, but this is rarely applied. Most applications for evictions are granted, regardless of the circumstances. ESTA has been used more as a mechanism to regulate rather than prevent evictions and it has failed to improve tenure security as was originally intended. Legal precedents on the tenure rights of women farm workers have been mixed; where women are employed, their own independent tenure rights have sometimes been recognised, but the courts have tended to treat unemployed women as 'secondary occupiers' who can be evicted on the basis of the eviction of their spouses (Ruth Hall, pers. comm.). However, there are also cases of employed women being evicted:

Mr Monyiki had lived on the farm all his life, but one day he was dismissed and faced an eviction hearing. The court ruled that his adult daughter, who was a permanent employee on the farm, was not an occupier in her own right. She was found to be an occupier only on the basis of her employment, which she had obtained because she was residing on the farm as a result of her father's employment. Hence, Mr Monyiki, his children and grandchildren, totalling 15 people, were all evicted (Hall 2003:16).

In conclusion, women tend not to be recognised as occupiers in their own right and many farmers do not employ women permanently. Instead, they tend to see women on farms as a convenient, cheap, flexible and easily available seasonal labour force which can be employed and dismissed according to needs (Hall 2003).

### **7.3.4 From ideals to practice**

Civil society's engagement with land reform includes both partnership with government and more critical and strategic approaches. Research done by the Promoting Women's Access to Land programme enquired into whether poor women's interests were being served by the increasing organising activities of civil society with and within rural communities (Cross & Hornby 2002). The report argued that women's attempt to access state-led programmes are constrained because the programmes rely on community organisations that tend to be male-dominated. Focus group interviews revealed that men tend to dominate leadership of rural social movements, and this appears to result in objectives that neglect the land interests of women. According to the report there is a need for effective state measures that counter existing male domination. A major question that rural social movements should ask themselves, according to the report, is how they can serve the needs of and interests of those most marginalised and how they can build and sustain strong representative organisations which voice the concerns of poor rural women. It concludes that attention needs to be given to articulating a demand for land that meets the need of these women as both individuals and members of families, groups and communities.

### **7.3.5 A basic challenge: Defining the demand for land among women**

A basic challenge for land reform is defining the demand for land among different groups of women in order to understand how well land reform is responding, particularly to the needs of poor rural women. Cross and Hornby (2002) refer to research indicating that poor rural women migrate to towns and cities in search of opportunities to generate cash income. In these urban areas, poor women take up 'squatter gardening' to raise crops for consumption and sale on whatever marginal land they can access. Cross and Hornby (2002) argue that this trend has led to new types of land demand, namely residential plots with access to a small patch of productive land. This shift has been seen as a 'feminisation' of land demand representing a move away from the larger grazing areas typically sought by men for livestock and field production. Instead of field cultivation, many women are intensively cultivating gardens close to where they live where the risks of loss are less. Gender equality in land reform calls for policies that are responsive to poor women's agricultural activities

### **7.4 Concluding remarks**

The land reform programme has mainly been concerned with the racially skewed ownership of land in South Africa. The beneficiaries of the programme are therefore defined primarily in terms of race. However, the government also recognises that past policies have led to skewed gender relations in terms of access to productive resources. The right to equality between men and women is stated in the Constitution. The land reform policy also includes a commitment to the principle of gender equity, the government is committed to ensuring that gender issues are considered in all its policies and programmes, and finally, the South African government has signed various international conventions and declarations aimed at advancing the interests of women. However, the different legal and policy components of the land reform programme fail to meet all the HRBA requirements, both at the formal and at the practical level. The land reform policy in general has no specific measures to promote the land rights of women beyond broad commitments to equality. This is especially important for redistribution where gender targets are set, and usually missed, without any corrective actions being put in place.

Regarding the harmonisation of the right to secure tenure, the right to equality and the right to culture, all embedded in the Constitution, there is a tension between government, civil society and the judiciary. The government has yet not responded to the CEDAW Committee's urge to ensure women secure tenure on an equal footing with men. In its comment in 1998 the Committee expressed 'concern about the continuing recognition of customary and religious laws and their adverse effect on the inheritance rights and land rights of women and women's rights in family relations'.<sup>89</sup> In the *Bhe* case the Constitutional Court recently ruled that the provision of the Black Administration Act providing that girls cannot inherit their father's estates was unconstitutional. Whether the *Bhe* case will actually improve women's lives depends on measure taken to ensure its

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<sup>89</sup> A/53/38/Rev.1 (1998), Part 2 (session 19), Paragraph 117.

implementation by local authorities as well as the amount of information available to female rights-holders and the local communities where this right is to be exercised.

The government's policy commitments to gender equality and its institutional implementation is a site of contestation. Central in the current debate is the government's wish to build on the power of traditional authorities to achieve rural development. The Communal Land Rights Act has been severely criticised, especially for its anticipated consequences for women's access to land and participation in land management. The constitutional shortcomings of the Act have been challenged by a wide range of organisations and institutions such as the Commission on Gender Equality and the South African Human Rights Commission. The Act demonstrates resistance at government level to implement the recommendations of the CEDAW Committee.

There is also clear evidence that government's land reform policy is not equally beneficial for all women. Female farm workers lack secure tenure due to lack of recognition as occupiers in their own right. Poor rural women lack the necessary resources to make a mark on the objectives of the land reform programme. Measures responding to new and inventive forms of agriculture carried out by poor women, such as 'squatter gardens' have so far been absent. To counter the existing male bias that gives rise to indirect discrimination of poor women, an effective strategy is needed to mobilise the interests of poor rural women at all levels both from government and civil society.

## **8. COUNTRY STUDY: ZIMBABWE**

*Land distribution, access to land and secure tenure have been issues since Zimbabwe became independent in 1980. The government of Zimbabwe has signed and ratified a wide range of international and regional human rights instruments that require legal, economic, social and organisational measures to facilitate pro-poor and gender equal land reform be taken. Yet a series of discriminatory laws and practices have been maintained, effectively impeding equal land rights both before and after the fast tracked redistribution of land that started in 2000. Security of tenure in relation to private, communal and resettlement land has not been identified as an issue in the Governments 1980s resettlement programme or under fast track. The Zimbabwe case addresses the quest for tenure security for different groups of women in relation to different land-holding systems. It compares the resettlement programme that started in 1980 with the fast track programme the government embarked on in 2000 in promoting not only racial, but also social and gender justice. It identifies factors and forces that promote or constrain different groups of women benefiting from land reform on an equal basis with men. The close interrelationship between civil and political and social and economic human rights in promoting pro-poor gender equal land reform is demonstrated. It shows that access to land in itself, unless combined with infrastructure and laws facilitating secure tenure, is not sufficient to improve the position of poor women.*

### **8.1 Background and overview**

The Zimbabwean government inherited a dual property structure with commercial land (formerly European), which was privately held, and communal land (known through time as reserves, tribal trust lands and now communal areas) which are subject to customary tenure and whose land may not be bought and sold. Before the government embarked on the fast track land reform programme in 2000, 4 400 large-scale commercial farmers (about 500 of them black Africans) owned 157 000km<sup>2</sup> of the land. The communal land areas constituted 163 500km<sup>2</sup> of the country's land and were inhabited by about 4 500 000 people, mainly small-scale farmers. Although the 1979 Lancaster House agreement which paved the way for an independent Zimbabwe imposed restrictions on the new state's ability to nationalise land through a Constitution that could not be altered for a decade, the government managed to resettle 71 000 households on 3.5 million hectares of land acquired on a willing buyer-willing seller basis by 1998.

In 1993 The Commission of Enquiry into Appropriate Agricultural Land Tenure Systems (the Rukuni Commission) was appointed by the President. The commission recommended that resettlement be made a permanent government programme (Rukuni 1994). Recommendations as to how agricultural production could be increased in communal and resettlement areas included legally secure tenure, improved credit and financial services, access to water and comprehensive agricultural support institutions. The commission made a number of recommendations about securing tenure in communal and resettlement areas, but it did not adequately address women's tenurial concerns nor

directly respond to presentations made by women's groups. The commission reinforced the public/private dichotomy underlying Zimbabwe's land regime by leaving out transfer of land within the family in the event of marriage, divorce and death (Hellum & Derman 2004 a).

The recommendations of the Rukuni Commission were not followed up. Resettlement declined with general economic decline in the 1990s (Kinsey 2004). Yet models of land reform based on principles of participation, gender equality and rule of law were being developed and debated (Shivji et al. 1998). At the International Donor Conference on Land Reform and Resettlement in Zimbabwe in 1998, donors<sup>90</sup> indicated their concerns for rule of law, transparency, and gender equality in the next phase of land reform. The donors agreed to fund an extensive land-reform programme encompassing 1 million hectares. In return for the assistance, they wanted the following: greater proof that land reform would benefit the poor and women; more transparent implementation; compensation for land to be paid to landowners; and that the administration should be organised by a technical unit organised outside government. This agreement rapidly fell apart.

The Zimbabwean government was of the view that to do historical and social justice, political measures beyond existing laws were required. In 2000 the Zimbabwean government's Draft Constitution included a clause that made the British government responsible for land expropriated from white commercial farmers.<sup>91</sup> Although the draft Constitution was rejected by the people in a referendum, a constitutional amendment in April 2000 allowed for expropriation of land without compensation from the Zimbabwean government. A series of violent farm occupations followed, purportedly organised and sustained by the National War Veterans' Association with the support, sometimes in the form of active participation, of the ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF). In April 2000 the government issued a short document laying the formal foundation for what is referred to as 'fast track land reform' (Zimbabwe 2000). The farm occupations led to many confrontations between the government and the judiciary with the government taking a non-legal approach, resting its arguments on the need for historical justice. The government argued that the law, much less all the human rights obligations, do not apply to the government since land is a political issue, not a legal one. The Minister of Justice, Legal and Parliamentary Affairs Patrick Chinamasa stated that 'The rule of law that is based on unjust laws is founded on quick sand and will not last' (*Herald*, 10 July 2000). In his view, principles like the rule of law were Eurocentric it was therefore need of a 're-orientation of the judiciary so that it embraces an Afrocentric worldview' (*Herald*, 10 February 2002). From a broader political perspective, 'fast track' has been seen as a part of the ZANU-PF's political

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90 The United States Agency for International Development (USAID), the UK Department for International Development (DFID), the Danish Agency for International Development (DANIDA), the Norwegian Agency for International Development (NORAD), the World Bank and others.

91 Final Consolidated Draft, 29 November 1999.

strategy of consolidating its political power rather than a resettlement programme (Hammar et al. 2003; Kinsey 2004).

While fast track has been legitimised through constitutional and legal changes, it involves a series of human rights abuses towards farm workers, those who were dispossessed of land, members of opposition political groups, colourds and women in virtually all groups. In short, many of the stakeholders who should have had highest priority to participate in a land reform programme have been victimised. The human rights argument as put forward by Movement for Democratic Change (MDC) members of Parliament, women's groups and civil society groups has not had any effect on the content or implementation of the fast track programme (Hellum & Derman 2004b).

In 2003, the Presidential Land Review Commission (the Utete Commission) examined the implementation of fast track. The commission's work was done through president's office and offered no basic critique of fast track in terms of consequences such as the breakdown of the economy and the rule of law. It only mentioned a few negative outcomes of the programme. Among other findings, the commission made clear that women have not benefited on an equal basis with men. The commission concluded that land leases should be registered in the names of both husband and wife. It also suggested that a quota of at least 40% of land allocation should be made to women and that a quota of 40% funding should be reserved for women's credit and other purposes. In cases of widowhood, the commission suggests that widows should have first option to take over the lease, provided they can work the land (Zimbabwe 2003:163). These recommendations are consonant with both CEDAW and the African Protocol on the Rights of Women, while most elements of fast track are not.

## **8.2 The legal context of land reform with a view to gender equality**

The government of Zimbabwe has signed and ratified a wide range of international and regional human rights instruments that require legal, economic, social and organisational measures to facilitate pro-poor and gender equal land reform be taken.<sup>92</sup> Yet a series of discriminatory laws and practices have been maintained, effectively impeding equal land rights both before and after fast track. Zimbabwe has ratified the Convention on the Elimination of All Forms of Discrimination. When Zimbabwe presented its first report on the progress of implementation, the CEDAW Committee commented on the spill-over effect of these underlying normative structures on women's status in general:

...although the national laws guaranteed the equal status of women, the continued existence of and adherence to customary laws perpetuated discrimination against women, particularly in the context of the family. The Committee notes with dissatisfaction that prevailing traditional and socio-

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92 The following instruments have been ratified: CEDAW, 1979, the International Covenant on Economic, Social and Cultural Rights, 1966, the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, 1990, and the Convention on the Rights of the Child, 1988. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) has been signed but not ratified.



cultural attitudes towards women contribute to the perpetuation of negative images of women, which impedes on their emancipation.<sup>93</sup>

The Zimbabwean legal system is plural. Inherited Roman-Dutch law, customary law and new legislation operate side by side. This is reflected in a plurality of marriage systems, partly regulated by customary laws that were developed by the colonial legal institutions, and partly by civil law (Ncube 1989). The main legal stumbling block for equality in relation to land reform is Section 23 of the Zimbabwean Constitution which gives precedence to customary law if it comes into conflict with the gender equality principle in the field of marriage and inheritance. This has worked to protect male privileges in relation to property.

In the field of inheritance, discriminatory customary provisions originating from the colonial period have been challenged by individual women in a number of court cases. In spite of the savings clause in the Constitution, the Supreme Court has, in some instances, ruled in favour of women. In the *Chihowa v Mangwende* case<sup>94</sup>, the Supreme Court ruled that the equality principle embedded in the Legal Age for Majority Act of 1981 changed customary law to the effect that property can devolve to both sons and daughters. In *Murisa v Murisa* case<sup>95</sup>, the Supreme Court would not extend the equality principle in the Legal Age of Majority Act to widows. In 1997 the position of women was radically changed through the Administration of Estates Amendment Act which provides that property of an estate is to be divided by the surviving spouse and the children, regardless of sex. The reform resulted from empirical research undertaken by the Women and Law in Southern Africa Research Project (WLSA) and well as pressure from a number of women's organisations. The WLSA research demonstrated that the living customary law practised in the family and in local courts was moving toward greater equality (Stewart & Tsanga, forthcoming 2005).

Section 23 of the Constitution prevented a legal challenge to provisions which prevent women married under customary law from obtaining equal property rights at marriage and divorce. State court customary law allows the husband, by virtue of his matrimonial power, to dispose of assets on behalf of the family when property is held jointly, including, most importantly, land. Women may enter contracts to buy land in the same way that men can. However, when a woman contracts a customary marriage, it is the husband who has the legal power to dispose of it on behalf of the family. The matrimonial power of husbands has barred married women from being able to access credit and has led to highly unequal divisions of landed property in the event of divorce. In the *Nyemba* case<sup>96</sup>, the Supreme Court ruled that under African law and custom,

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93 Concluding observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe, A/53/38, 14 May 1998.

94 *Chihowa v Mangwende* (1987)(1) ZLR 228 (SC)

95 *Murisa v Murisa* (1991) S-41-91

96 *Jenah v. Nyemba* 1986 (1) ZLR 138 (SC)

property acquired during a marriage, becomes the husband's, whether acquired by him or his wife.

The call of women's organisations for Section 23 of the Constitution to be repealed was recognised and acceded to in the Government's Draft Constitution of 1999, but the defeat of the constitution in the national referendum of the following year has meant this has had no influence on the programmes that followed under the fast track land resettlement process.

### **8.3 Privately-held land**

On the basis of the Legal Age of Majority Act that in 1980 gave women contractual capacity, women can buy and hold land on an equal basis with men. In practice, women, particularly from the middle classes, acquire land through purchase, inheritance, gift or divorce (if married out of community of property). The deeds registry process, however, hampers their actual use and protection. A recent study that was carried out by the Centre for Applied Social Studies at the University of Zimbabwe and the Land Tenure Centre at the University of Wisconsin documented obstacles faced by widows. (See Petrie et al. 2003.) For example, it took several years to transfer a title – one woman said she had waited 13 years. While waiting for title, women had substantial difficulties obtaining bank loans for improving land and housing.

According to the Deeds Registry Act of 1996, spouses may register property jointly. Yet the Act constitutes a contravention of CEDAW by demanding that a woman who wants to register property be assisted by her husband when 'executing any deed or document required so to be registered'.<sup>97</sup> There has been a long-standing call for joint registration of title and joint permits in resettlement schemes by organisations like the Women and Law in Southern Africa Research Trust, the Women's Action Group and now the Women and Land Lobby Group in order to obtain secure tenure for women. Vice President Msika faced a demand for joint registration of marital property when meeting women stakeholders at the Women and Land Lobby Group meeting in Harare in August 2000.<sup>98</sup> He responded by saying that ZANU-PF was pro-woman, but that it always had to take black Zimbabwean culture into account in its land policies. Although the Deeds Registry Act allows joint registration of property, Msika stated that such a practice would not be pursued by the fast track programme because it undermined African customary values.<sup>99</sup>

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97 Section 15.1 The section refers to the husband's assistance being required where she lacks the contractual capacity to act herself – which would be where the couple are married in community of property, which is rare.

98 Women and Land Lobby Group meeting, Sheraton Hotel, Harare, August 2000. The author of this chapter was present at the meeting.

99 Public meeting in Harare arranged by the Women and Land Lobby Group in 2000.

#### **8.4 Communal land**

The majority of Zimbabweans live in communal land areas where land is owned by the state. The main target of the Zimbabwean governments' land policy has been the racially skewed distribution of land. The Rukuni Commission reinforced the public/ private dichotomy underlying Zimbabwe's land regime by leaving out transfer of land within the family in the event of marriage, divorce and death.

Communal land is state land and is allocated by chiefs on the basis of customary law. With some individual variations, land is allocated to the head of the household. Neither married nor single women are seen as heads of households. In the event of divorce or death, women are expected to leave the property. Depending on the attitude of the local chief, some divorcees are able to negotiate their position. In practice widows, though protected by the Administration of Estates Amendment Act of 1997, often have to negotiate their position in the event of their husband's death. No systematic research as to the impact of this legal reform on rural women's position has yet been undertaken. But instances where widows have to leave the rural home are frequently observed (Hellum & Derman 2004a).

A large body of natural management research suggest that women, in spite of their disadvantaged legal position, play an important role providing basic resources for food security, health care and education expenses (see below). Vegetables from family gardens mainly managed by women are a crucial source of food and cash for food, medicine and school fees. Access to land and water for these gardens relies heavily on common pool resources that are obtained free of charge. Research from different parts of Zimbabwe point towards the existence of a set of interrelated norms of sharing of land and water that are essential for livelihood in terms of wetlands and dambos (Sithole 1999; Matondi 2001; Nemarundwe 2003; Hellum, forthcoming 2006; Derman et al. 2005) The widespread acceptance of these norms appears to be vital in the ways in which local communities handle poverty and food security. These local norms and practices resonate with the human right to livelihood in a broad sense, encompassing both clean drinking water and adequate access to water for subsistence farming and for securing livelihoods. Neither the Zimbabwean land reforms nor the water reforms address how to assist those engaged in this type of small-scale agriculture.

#### **8.5 Resettlement: The post-conflict period 1980-2000**

The Zimbabwean government's land redistribution programme that followed independence in 1980 set out to effect post-conflict reconstruction and redress the racial inequalities that followed 90 years of colonial rule. In practice, land for resettlement was mainly facilitated by the many farmers of European descent that abandoned their farms at the end of the liberation war. By 1998, 71 000 households had been resettled on 3.5 million hectares of land. The resettlement process, which was at its peak in the 1980s slowed down and changed character throughout the 1990s when a gradual shift from a social justice to a political reward system took place, along with decreasing international funding and a declining economy (Kinsey 2004).

This section addresses Model A resettlement schemes because this is the most important type. It is based on a permit system, with each household receiving the same amount of land in the 1980s (the 'golden age' of resettlement). Under this scheme 12 acre plots with variable grazing rights were distributed to individual families by the household heads. The overall aim of Model A resettlement was a combination of alleviating poverty and promoting indigenous production by establishing a permanent settled peasantry producing for a market. The resettlement schemes were, in the initial stages, provided with technical assistance, credit opportunities, depots for seed and fertiliser, dip tanks for cattle, clean domestic water sources, schools and clinics. Funding for infrastructure was provided by both national and international resources.

The redistribution process was highly centralised and government-controlled, lacking a legal framework securing the right to participation and access. Criteria for redistribution were provided by shifting government policies. The discretion of the administration was guided by guidelines that made the following groups eligible: 'effectively landless', 'not employed', 'widowed women with dependants', returned refugees, and 'master farmer' willing to give up land elsewhere. Shifting political priorities were reflected in the 20% quota for war veterans that was later introduced. In the same vein, an increasing number of high-ranking political supporters were granted commercial farms – approximately 400 by 1999.

Redistributed land was classified as government land held by the President on behalf of the people of Zimbabwe. It was granted to a family on the basis of permits that could potentially be withdrawn by government if a household failed to meet any of several criteria. It was, as a main rule, distributed to heads of household that, in accordance with the official versions of customary laws and government policies, were men. A recent survey of couples shows that 98% of resettlement area permits given for farming and grazing lands were held by husbands, against a mere 2% by wives (Petrie et al. 2003). Widows and divorced women were eligible to apply and could accordingly be granted a permit in their own names.

In case of divorce, a married female settler lost any right to stay on the Model A scheme. Fragmentary evidence suggest that there were many instances of resettlement officers in the 1980s and early 1990s allowing women to stay on the land in the event of the death of a husband or divorce (WLSA Zimbabwe 1994; Jacobs 2000; Kinsey, pers. comm.). In communal areas, where traditional authorities have greater influence on land allocation, research has suggested that widows and divorcees were more frequently denied access to land in resettlement areas (ZWRCN 1998). In the resettlement schemes, state-law was not the sole regulator (Moore 1998). These social units also had capacity to generate their own internal norms in response to changing social and economic conditions so as to a certain extent modify the discriminatory customary law. The emergence of internally-generated norms improving the position of women is also reflected in the Women and Law in Southern Africa project's research into changing inheritance practices and family forms (WLSA Zimbabwe 1994, 1997; WLSA 2000).

Due to lack of entitlements, most married women continued to be without control of resources. Crops were usually marketed through the husband's name, and payments received in his name. The lack of title deeds and control over income by women has given rise to an increasing number of 'harvest suicides' in both communal lands and resettlement areas.<sup>100</sup> Yet a number of factors strengthened women's bargaining position in the resettlement areas. Susie Jacobs carried out a study focusing on gender relations in the new resettlement areas in the mid 1980s (Jacobs 1989, 2000). Her study suggests that the changing social structure within the resettlement schemes generally operated to improve women's conditions compared to the communal areas where they came from. Due to the requirement that the applicant should be a full-time farmer, there was a marked shift in the gender division of labour. The shift from extended to nuclear families was seen as positive by both wives and husbands. It was felt that this increased the wife's influence on the husband's decisions in relation to decisions over crops, money, schooling and so on (WLSA 1997).

Looking at this socio-legal process as a whole, it is suggested the legal and economic environment with increasing recognition of civil and political and social and economic rights in the 1980s had a spill-over effect on the conditions under which women negotiated their relationship to land with family, husbands and resettlement officers. Although the legal framework as such left a lot to be desired from a human rights perspective, the overall institutional framework and the social organisation facilitated changing practices and norms from within.

## **8.6 From 2000: Fast track**

The government departed from its earlier policies when it launched the rapid seizure first of some and most of white-owned commercial farm land in 2000. We will examine how and if this new programme responds to women's needs, particularly those within the more vulnerable groups of farmworkers, communal area female farmers and female farmers who have benefited from resettlement. Fast track constitutes an important site for exploring whether and how this land reform programme centring on racial justice by rapid redistribution of land is responding to the needs of women, particularly those within vulnerable groups such as farm workers and communal and resettlement small-scale farmers (Hellum & Derman 2004 a). The focus is thus on Model A resettlement, now called A1, which remained a village- and permit-based scheme.

In a draft document released by the government in early 2000, the fast track programme is said to build on earlier plans, including the donors' framework of 1998, Section 16 of the Constitution (the new land amendment) and older guidelines for resettlement. The document refers to only 841 farms to be resettled as fast as possible on one million hectares with 30 000 families being set to benefit. The criteria for designation are: 1)

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<sup>100</sup> In 1997, according to Kgogo Mudenge, (Sunday Mail, March 2000) 153 women committed suicide in Gokwe because their husbands had squandered all the money earned from cotton crops.

farms under multiple ownership; 2) farms contiguous to communal areas; 3) derelict farms (farms not being used); and 4) under-utilised farms. There is no discussion as to what constitutes an under-utilised farm. The settlers are to be selected from the 'landless persons in the congested communal areas.' There are no guidelines for what constitutes 'landlessness.' The priority list is as follows:

- successful candidates selected from Rural District Council waiting lists (including women) in the area where the scheme is found,
- successful candidates selected from other districts in the province, ex-combatants and former detainees selected by the local chapter of the War Veterans' Association, and other landless Zimbabweans from elsewhere in the country.

The actual beneficiaries of fast track are very different to government claims of aiding the landless and the less privileged. There have been many suggestions how to make land reform more transparent, more accountable and more participatory. These have all been ignored in favour of provincial and district land committees who allocate land in private and apparently on political grounds. Many chiefs have complained that their lists of beneficiaries have been ignored.

To date, no list has been made public of the actual recipients. However, a high number of government officials (including Cabinet members), military leaders, ZANU-PF leaders, leaders of the War Veterans' Association, businessmen, and others close to the ruling party have benefited.<sup>101</sup> Members of the opposition Movement for Democratic Change have been excluded in many parts of Zimbabwe. It is difficult to establish the numbers of farm workers rendered homeless or jobless because of resettlement. According to the Utete Report and the Farm Community Trust of Zimbabwe (Magaramombe 2003), approximately 1% of resettled people were farm workers. Sachikonye carried out one of the few field-based surveys of farm workers in early 2003 (Sachikonye 2003). He estimated that the number of farm workers varied between 300 000 and 350 000 or 20–24% of the national workforce up until fast track took place. This farm workforce supported a population of approximately 2 million. At best, a third of the original workforce was still employed at the time of the survey, but farm occupations and appropriations are continuing.

On paper, fast track lists women as a category of beneficiaries. To ensure equality between men and women, the Women and Land Lobby Group entered into dialogue with the government about the fast track programme, lobbying for 30% of the land to be distributed to women and be registered in their own names, regardless of marital status. This was rejected by government. The only available figures for how many women actually received resettlement land are in the Utete Report (Zimbabwe 2003:40). The information collected by the Presidential Land Review Commission suggests that the

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101 In one high-profile case, Jocelyn Chiwenga, the wife of the Zimbabwe National Army Commander, seized a farm and then sold the crop on the land to the British supermarket chain Sainsbury.

number of women allocated land under fast track was very low all over the country. Women-headed households who benefited under Model A1 constituted approximately only 18% of households while women beneficiaries under Model A2 constituted only 12%. In the Utete Report, women appear as a homogeneous group, while within fast track, it is important to bear in mind that women are not just discriminated against 'as women.' Women, like men, are not a homogeneous category; they belong to different classes, ethnic groups, races, political parties, and professions.

In practice, who undertakes the selection and resolves disputes concerning land is a key issue, whether the land is in resettlement areas or in communal lands. In fluid and violent land-grabbing situations, as has been the case under fast track, women are particularly vulnerable. There is reason to believe that the removal of the resettlement officers and the strengthening of customary authorities in the adjudication of family disputes and land allocation that has taken place through fast track mean a setback for women. Many chiefs regard themselves as guardians of customary values and patriarchal law. With fast track, yet another force is influential in the allocation of land – the war veterans. They will most likely continue to be in control politically and socially in the new areas. The war veterans have a record of violence against white women, farm worker women, and women who support or belong to the political opposition. Local people have told us about numerous instances where land has been given to female land invaders, women extension staff and police officers by the war veterans in exchange for their co-operation.

When Vice President Msika turned down a demand from the Women and Land Lobby Group for joint registration of marital property obtained under the fast track programme on the grounds that it undermined African customary values, it showed that the government sides with those men who assert that Shona customs and customary law are deeply patriarchal. The notion of customary law as a static and unchanging entity does not give credit to the way in which many people adjust to changing social, economic and legal conditions in their customs and practices, potentially making space for greater equality between men and women (WLSA Zimbabwe 1994).

Making the point that women's human rights stretch beyond equal access to land under the fast track programme, the Women and Land Lobby Group also argued that adequate health services, schools, water sources, credit schemes and agricultural extension services must be put in place by the government to ensure the rights to livelihood of women, children and families. The view that the fast track programme falls short of the minimum standards provided by the International Covenant on Social, Economic and Cultural Rights is clearly formulated in a communiqué from Women and Land Lobby Group and other civil society organisations on the implications of the fast track resettlement programme:

Civil Society was also concerned that the current approach to land reform would threaten food security at household and national level as well as the country's international obligations which will have an adverse effect on the country's gross domestic product and the inflow of the much needed foreign currency.

(...)

Government should make provision of input supply, farmers' training and basic infrastructure should be a priority as the program might lose one of its objectives which is poverty alleviation<sup>102</sup>.

In its examination of the implementation of fast track, The Utete report emphasises women farmers' need for greater opportunities in terms of access to inputs and labour-saving technologies, land ownership, information and extension services and education (Zimbabwe 2003:146). This recommendation resonates with Article 19c of the African Protocol on the Rights of Women on the right to sustainable development which requires states parties to 'promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women'.

Women, already prejudiced in terms of property rights, find their situation has worsened. Earlier reform plans which were to have been put in place to enhance women's tenure rights have not been implemented. The possibilities for single, widowed and divorced women to be able to use resettlement land productively are, as pointed out in the Utete report, is extremely limited when their resources are meagre. These are the groups most dependent upon a well-supported land reform programme with technical backup. In the new resettlement areas there are hardly any schools for their children, clean water, clinics, or adequate transportation. Because they are far from familial support systems, there could be pressures which lead to greater use of child labour and fewer educational opportunities. The programme proceeded with virtually no attention paid to who is already working on a given farm: the number of women, the number of children, where they would be moved to, or how alternative employment would be found for them. Internal displacement has, according to the Norwegian Refugee Council's report of July 2003, negatively affected female headed households that do not have resources to get resettled or be attractive as labour for the new commercial farmers (Refugees International 2004). This calls for special attention to regularise this group of women's access to land so that they can exercise their right to livelihood.

### **8.7 Factors influencing women's negotiations of land rights: A comparative perspective**

Neither the resettlement programme of the 1980s nor fast track recognised married women's right to hold land on an equal basis with men. Married women's access to land under resettlement in the 1980s and under fast track is not rights-based but derived, relational, discretionary and negotiated. On paper, both programmes reinforce the public/private dichotomy underlying Zimbabwe's land regime by not referring to transfer of land within the family in the event of marriage, divorce and death. However, claims based on the documentation of changing customs and practices have not led to formalisation of the living customary law in terms of legislation, policies or guidelines in relation to either programme.

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102 Undated document



The potential for women to negotiate their position has worsened considerably under fast track compared to the resettlement policies and programmes of the 1980s due to a wide range of factors. In the 80s, the existence of independent, transparent and accountable bodies to undertake the redistribution and management, with resort to an independent judiciary; an enabling legal framework that was developed both through legislation and judicial activism; and the existence of a vibrant civil society that pushed for change through legal literacy, reform initiatives and action-oriented research were important factors. In the economic and political crisis that has gone hand in hand with fast track, the independence of the judiciary, rule of law and freedom of speech has been severely curtailed.

Under fast track, lack of clarity has led to confusion, conflict and contestation over the redistributed land. While women lack formal tenure security under both regimes, their *de facto* security has diminished significantly under fast track. With overlapping authority structures in terms of party-loyal chiefs and war veterans, the prospects for women to negotiate their position in the event of divorce or the death of their husbands do not hold great promise compared to what their position was in the 1980s when the programme was administered by professional resettlement officers.

Another significant difference is the existence of a framework setting clear criteria for redistribution and conditions for holding the land. Under fast track, unlike the resettlement schemes in the 80s, there is no clear definition of landlessness. Certain families who already possess land have been allocated additional land in the resettlement areas. The frequent result has been that many women have been sent out with their children to till the newly-acquired land alone. Where this has happened, women have become a vehicle for land accumulation among men.

The most important comparison between fast track and the 80s resettlement programme has to do with overall policy to address the needs of women, children and families in the resettlement areas in terms of housing, sanitation, clean water, schools and clinics. In the 1980s, improved credit and financial services, comprehensive agricultural support institutions, availability of seeds, fertiliser, equipment and access to markets along with the existence of schools and clinics were identified as vital support for the general working conditions of women. The existence of these resources are, as was pointed out by the Utete Commission, of particular importance for the poorest of the poorest, single, widowed and divorced women with dependants, that are the is the groups that have benefited the least from fast track (Zimbabwe 2003).

## **8.8 Concluding remarks**

The Zimbabwean land policy can neither be characterised as being rights-based nor as human rights-based. It was, and still is, a highly centralised and discretion-based political and legal process. This process is out of tune with the strong concern for securing women's access to land as a part of the right to livelihood which is found in local norms

and practice, and which has been voiced by women's groups and civil society. Security of tenure in relation to private, communal and resettlement land has not been identified as an issue in the 1980s programme or under fast track. There is no legislation in place securing the rights of the beneficiaries in relation to distribution and participation as required by international law. While fast track has been legitimised *ex post facto* through constitutional and legal changes, it has involved a series of human rights abuses towards farm workers, those who were dispossessed of land, and members of opposition political groups. Women belonging in virtually all groups have been subjected to double discrimination – first as women, and secondly, as women within these groups.

While it has claimed to have undone social and historical injustices, fast track has actually created new social divisions. It has led to the collapse of the private land market. The result of the government's focus on redistribution on the basis of race without adequate tenure security is that markets for agricultural products and credit have also collapsed. While there are great inequalities between women from different political, ethnic and social groups in the redistribution of land and access to productive infrastructure, women in all groups lack secure tenure. This is due to lack of political will on the part of the government to change the Constitution in order to make unlawful unequal family law regimes that have a spill-over effect on land transactions in the public sphere. Although secure tenure does not rely solely on the law – the institutional and the infrastructural set-up are also critical – appropriate laws are a basic condition for an entitlement-based land regime.

There are different views as to how clarity and trust should be established with regard to property rights regimes in Zimbabwe. Some see the way forward as re-establishing property rights and institutions, validation of land rights, and restitution and revitalisation of land markets by converting all uncontested state land into permanent leases (Roth 2003:381–92). Others suggest a process where the communities themselves decide whether land should be communally or individually held. A crosscutting concern embedded in the HRBA is that women's access to land, regardless of tenure regime, must be protected on an equal basis with men. To ensure real equality, gender differences in terms of status, power and resources must be considered.

Most importantly, the Zimbabwean case speaks to the close interrelationship between civil and political and social and economic human rights and the character of the state in promoting pro-poor gender-equal land reform. Access to land, unless combined with political will to provide infrastructure, is not in itself a sufficient condition to improve the position of poor women.

## **9. COUNTRY STUDY: KENYA**

*While Kenya has committed to the gender equality through international law, the Constitution contains a tension between this principle and the exemptions made for certain laws affecting women's rights. Women's ownership of property in marriage has been object of court cases on issues such as married women's capability to hold property, the valuation of non-monetary contribution to matrimonial assets, and co-habitation without marriage, offering a multifaceted picture of the legal situation of women and the role of courts in supporting them. As regards land tenure in Kenya, colonialism and the Torrens title system had profound effects on existing customary tenure systems although it never succeed in replacing these. Current legislation establishes three main classes of land tenure: individual, governmental and group ownership, which all show weaknesses when it comes to respecting and protecting women's right to land. However, the ongoing national land policy formulation process seems to show more interest in gender issues and the constitutional review provides a framework for consideration of women's land rights. Yet, the question of whether "formalising the informal" is the best way to provide for women's rights to land remains largely unaddressed.*

### **9.1 Introduction**

#### **9.1.1 The Place of International Law**

In analysing the rights to land for women in Kenya, one has to look at both the international and domestic dimensions. Kenya is a signatory to many international legal instruments that have a bearing on the legal status of women. She also has domestic laws touching on this issue. Kenya is a member of the United Nations and would therefore have an international legal obligation to provide for equal rights to men and women as provided for in the UN Charter and the Universal Declaration of Human Rights. Kenya is also a signatory to the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Political Rights of Women and the Convention on the Elimination of all Forms of Discrimination against Women. There is no shortage of obligations in the area of equality of the sexes in international law. Many of these provisions have however, not found their way into the Kenyan domestic legal regime. Domestication of such obligations is imperative if they are to be realized. Kenya does not have an automatic domestication clause in respect of ratified international covenants and domestication of the conventions has to be through legislation. International legal obligations are expressed in general terms. For them to form part of Municipal Law, there has to be specific legal enactment encompassing the international legal obligations as pointed out above. There exists a well established principle of international law that all states parties must organize and regulate their domestic jurisdictions to abide by international legal obligations. In the *Free Zones of Upper Savoy and District of Gex Case* ((1932) PCIJ, Series A/B No. 46) the Permanent Court of International Justice said

"It is certain that France cannot rely on her own legislation to limit the scope of her international obligations" (page 167)

However international law is characterised by weak enforcement machinery and unless a state has the political will and enacts municipal law to fulfil international obligations, its subjects are unlikely to benefit from such international obligations.

At the 1985 World Conference on Women held in Nairobi the domestication of Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was singled out as an important step toward implementation of the basic strategies formulated at the conference at the national level. Issues of equality in the areas of political participation, education, employment, civil codes pertaining to family law, ownership of property, availability of credit, health and social security, to name but a few were also identified as crucial intervention points.

### **9.1.2 Land Tenure**

Land tenure systems vary from community to community and are influenced by the unique historical development of each political grouping and consequent variation of legal and institutional structures (Crocombe 1968, Ojwang 1992). A search for the tenure system operative in a particular society is an attempt to answer the tripartite question as to *who holds what interest in what land* (Okoth-Ogendo 1991). Land tenure refers to possession or holding of the rights associated with each parcel of land. It ordinarily has at least three dimensions namely, people, time and space. In so far as people are concerned, it is the interaction between different persons that determines the exact limits of the rights any one person has to a given parcel of land. These rights are not absolute since there are rules that govern the manner in which the person with tenure is to utilise their rights. While the time aspect of tenure determines the duration of one's rights to land, spatial dimensions limit the physical area over which the rights are to be exercised. The spatial dimension of tenure may be difficult to delineate in exclusive terms since different persons may exercise different rights over the same space at different times (Fortmann & Riddell 1985).

Tenure systems represent relations of people in society with respect to the essential and often scarce land. They are culture-specific and dynamic, changing as the social, economic and political situations of groups change (Lawry & Bruce 1987). Under both African and western systems of land holding, for instance, ownership can be sub-divided and lesser interests can and are frequently held by different persons simultaneously. However, questions have arisen as to whether the notion of legal rights as a cluster of claims, powers and immunities<sup>103</sup> has a place in primitive or pre-capitalist societies. While most African customary laws recognised a measure of individual control over the broad interests that were hosted by land, paramount or allodial title was perceived as vested above society and whatever rights any one person had to the land were subordinate to the entire community's rights (Maini 1967). The saying by the Ghanaian Chief Nana Ofori:

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103 See Hohfeld (1922).

I conceive that land belongs to a vast majority of whom many are dead, a few are living and countless hosts are still unborn

succinctly captures the conception of land ownership by a majority of African communities (Ollennu 1962).

Colonialism had profound effects on African tenure systems by introducing the notions of individual and state ownership of land in a bid to promote economic development (Fortmann & Riddell 1985). In Kenya, the Torrens title system based on statutory registration and ownership of individually demarcated plots was introduced to replace pre-existing customary notions of land ownership (Okoth-Ogendo 1989).<sup>104</sup> The latter have, however persisted and informed and been informed in practice by the introduced system. Thus Bentsi-Enchill notes that the defects of African systems of land tenure have arisen from the fact that these systems have been left to informally adapt to changed circumstances (Bentsi-Enchill 1966).

It is within this context of formalising informal norms with respect to access to, control over and ownership of land that one excavates women's rights to land. It is important to point out from the outset that the effect of the processes of land tenure change was to remove certain sections of the population, such as women and younger men, from controlling land. The creation of reserves and the migration of male members of native communities to plantations and urban areas to seek paid employment, while redefining the mode of production, deeply entrenched the role of women as providers of agricultural labour. However, after the processes of consolidation, adjudication and registration, women lost control over the land. Further, the individualisation of property rights in land and the vesting of those rights in men alienated the women as managers of land from the ownership of the managed estate.

### **9.1.3 Constitutional Provisions**

The Constitution at chapter five provides for the fundamental rights and freedoms of the individual. These rights include the protection of the right to life, protection of the right to personal liberty, protection from slavery and forced labour, protection from inhuman treatment; protection from deprivation of property; protection against arbitrary search or entry; provisions to secure protection of the law; protection of freedom of conscience; protection of freedom of expression; protection of freedom of assembly and association; protection of freedom of movement and protection from discrimination on grounds of race. Article 70 on non-discrimination provides that every Kenyan is entitled to the fundamental rights and freedoms of the individual whatever his ... sex, but these rights can be limited to ensure that the enjoyment of those rights and freedoms of any individual does not prejudice the rights and freedoms of others or the public interest.

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104 The system gained its name from its originator Sir Robert Torrens.

Section 82 of the Kenyan constitution deals with the question of discrimination. Section 82 (1) provides that no law shall make provision that is discriminatory "either in itself or in the effects" and neither should a person be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of functions of a public office or public authority" (Section 82 (2)). Under Section 82 (3) discrimination is defined as "affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour, creed or sex ...". (Section 82(3)).

A number of laws are exempted by Section 82 (4) from the provisions against discrimination. These are laws affecting non-Kenyan citizens; laws of adoption, marriage, divorce, burial devolution of property on death and personal law matters; laws affecting members of a particular tribe or race in matters exclusively concerning them and such an action is seen as justifiable in a democratic society. The laws exempted by Section 82 (4) are in areas that directly affect women. One therefore finds that women's enjoyment of the fundamental freedoms guaranteed by the Constitution is severely restricted.

In most patriarchal states, there is a fear that making sex discrimination illegal may lead to countless court suits by women. (Kibwana 1990:2-3). This fear has therefore meant that women who are most likely to be affected by such provisions, are denied Constitutional protection from sex discriminatory laws. While Section 82 (3) gives women protection from discrimination on the basis of sex generally, Section 82 (4) denies them protection in their communities and homes. The effect is that at no time are women guaranteed protection from sex-based discrimination.

Section 82 (4) legitimises the traditional position, which accorded women fewer privileges than men, in matters concerning their families, marriage, divorce and succession. This presents problems when we seek to apply statutes such as the Law of Succession Act (Chap. 160) which seeks to give both men and women equal rights in matters of succession. Other than this, the Marriage Bill (1985) sought to give equal rights to spouses in a marriage in matters concerning custody of children, divorce, or division of matrimonial property. This Bill failed to go through parliament.

#### **9.1.4 Judicial Decisions on Women's Rights to Property Generally**

Kenya's legal system has since 1971 established the principle that spouses have equal rights in ownership of property. This principle was enforced in the case of *I vs I*<sup>105</sup> in which the court applied the English Married Women's Property Act of 1882. The act has since become a statute of general application and has been invoked to deal with matrimonial property disputes. This has contributed to the general advancement of women in relation to ownership of property.

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105 I v. I, (1971) East African Law Reports 278

Section 1 (1) of the Act provides that a married woman is capable of acquiring, holding and disposing by will or otherwise of movable or immovable property as her separate property, in the same manner as if she is a single women (femme sole). Sub-section 2 of this section of the Act provides that a married woman may sue or be sued in respect of her separate property either in contract or tort as if she were a femme sole. A married woman carrying on business separately from her husband is subject to the law of bankruptcy in respect of her separate property.

Although the parties in *I vs I* were not subject to customary law, the Married Women's Property Act has been extended to parties married under customary law, for example in *Karanja v. Karanja*.<sup>106</sup> The implication of the decision in *Karanja's* case is that the Act is applicable to all the systems of marriage recognised under Kenyan Law, and has the potential of removing inequalities experienced by women especially within the context of customary law. It should be recognised however that the continued application of the English act shows that the Kenyan legal system is wanting. It has yet to be decided with certainty whether relevant developments in English law should be applied in Kenya.

Moreover, there are practical problems in the application of the principle of equality of sexes in the matrimonial context. During the dissolution of a marriage, questions arise as to which spouse owns which property where the property is registered in the name of one spouse and the other spouse claims an equitably interest therein or where it is registered in the names of both spouses but the exact amount of contribution of each is not ascertained. The question as to whether a wife can be deemed to have contributed to matrimonial property by looking after children and attending to other domestic chores also arises. This raises the broader question of society's perception of women's work.

With regard to the issue of registration of property in the name of the spouses, it has been established that where such property is registered in the name of the husband, a wife who claims an interest therein must show that she contributed some money towards the purchase of the property. It has also been established that where the spouse holds the title to the matrimonial home, the other spouse may gain an interest in the property by making substantial improvements to such property.

In the absence of local legislation, Kenyan courts have yet again to resort to English law. English rules of equity and common law are applicable in Kenya "so far only as the circumstances of Kenya and its inhabitants permit and subject to qualifications as those circumstances may render necessary". Under rules of equity, where property is purchased by the husband and is transferred to the wife, there is a rebuttable presumption of a resulting trust in favour of the wife.

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106 *Karanja v Karanja*, (1976) K.L.R. 307

Where a wife and husband have a joint bank account they are presumed to be entitled to it in equal shares. Where investments are made out of the joint account in the name of the husband, he will be held to be a trustee for his wife, who would be entitled to a half share. This position was succinctly stated in *Karanja v. Karanja* as follows:

The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both.

Where the woman is unemployed Kenyan law is silent on the value of her non-monetary contribution to the matrimonial kitty. The Tanzania Court of Appeal was seized with the opportunity of determining whether or not the domestic services of a housewife amounted to a "contribution" in acquiring matrimonial assets in the case of *Hawa Mohamed v. Ally Sefu*<sup>107</sup> and it observed:

On examination of the Law of Marriage Act 1971, and the law as it existed before its enactments one cannot fail to notice that the mischief which the law ... sought to cure or rectify was what might be described as oppression by reducing the traditional inequality between them and their husbands in so far as their respective domestic rights and duties are concerned.

This thinking is also to be found in justice Omollo's decision in *MaryAnne Matanu Kivuitu v. Samuel Mutua Kivuitu*<sup>108</sup> where he was of the view that non-monetary contribution by the housewife in preparing for the family and keeping the family going generally constituted contribution to the acquisition of matrimonial property. There have been more recent cases recognising the wife's contribution to the acquisition of matrimonial property. Such progressive thinking should form the basis of legislation with regard to matrimonial property if the gains made are to be firmly consolidated. The practical application of such principles in favour of women raises questions in view of the fact that resolution of conflicts is largely dependent on legal counsel and access to courts. Legal services are out of reach of a majority of Kenyan women implying that special legal aid arrangements are necessary to enable them challenge discriminatory practices inherent in personal laws. For example under customary law, there is a general principle, that the husband should manage the wife's property except for movables such as personal effects and there are divergent practices on the position of the woman as regards her property rights on dissolution of marriage as noted above.

Although this situation is changing through liberal judicial intervention and increasing advocacy on women's rights, specific policy interventions and legislative measures are necessary to ensure that women are empowered to have access to property. More training and employment opportunities are but examples of the necessary interventions.

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107 *Hawa Mohamed v. Ally Sefu*, Unreported Civil Appeal No. 9 of 1983

108 *MaryAnne Matanu Kivuitu v. Samuel Mutua Kivuitu*, (1991) KAR 241



Legislation is also necessary to address rights of women involved in situations of cohabitation for a considerable number of years without going through a ceremony of marriage. Courts in Kenya have had to grapple with disputes emanating from associations that do not neatly fit into any of the four systems of marriage. The parties to these relations may be those who are on the road to customary marriages not having completed the process or persons who come to live together outside a formal marriage. In the event of such cohabitants acquiring property together or bringing their individually owned property to the union questions as to property rights are bound to occur in the event of death or the relationship turning sour.

Faced with such disputes, courts seek to determine whether in fact the cohabitation constituted a marriage for purposes of allocating property rights. Proof of existence of marriage always tends to be disadvantageous towards a woman who has to prove her status as wife before the court. In *Mary Njoki v. John Kinyanjui and others*<sup>109</sup> the appellant's claim to the deceased's property was rejected despite her cohabitation with him. The court was of the view that cohabitation and repute alone were not enough to constitute a marriage. It was necessary in the court's view, that such cohabitation be accompanied by an attempt to carry out some ceremony or ritual required for any marriage or by customary law. The determination of what constitutes a qualitative relationship can be pretty harsh on women.

## **9.2 Rights to land: Current laws and policies and their implications for women's rights**

Land in Kenya is vested in different legal entities and governed under different laws each of which has implications for women's rights to own, access and use. The main classifications of land ownership in Kenya are individual, government and group or community.

### **9.2.1 Individual Ownership**

Individual ownership of land ensues after the process of consolidation and adjudication.<sup>110</sup> The Minister in charge of land affairs has power to declare any area a land adjudication area following which the entitlements of different persons to that land are determined and a document of title issued. The Registered Land Act and the Transfer of Property Act govern individual ownership of land in Kenya. Both statutes confer upon an owner a fee-simple estate to the land in question.

#### **a) The Registered Land Act (RLA)**

This Act applies to the land formerly held under customary law, namely native reserves and trust land, which has been registered. It does not apply to land held by the

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109 *Mary Njoki v. John Kinyanjui and others*, Unreported Civil Appeal Case No. 71 of 1984

110 See Chapters 283 and 284 of the Laws of Kenya.

government<sup>111</sup> or land held by local authorities.<sup>112</sup> It delimits an individual's property rights to such land after a process of consolidation, adjudication and registration. In this legislation were subsumed the provisions of the Native Lands Registration Ordinance no. 27 of 1959. It was intended to provide a single code of substantive and procedural property law for the whole country. The Act allows for the ownership under other regimes to be brought within its provisions. The content of property rights one gets under it is absolute and can only be circumscribed, in theory, in exercise of the state's right of compulsory acquisition of land for public purposes after the due process outlined at Sections 75 and 118 of the Constitution have been followed.<sup>113</sup> The sale of agricultural land registered under this Act is however, also regulated by the Land Control Act.<sup>114</sup> Similarly, the use of agricultural land governed by this Act is subject to the provisions of the Agriculture Act.<sup>115</sup>

The Registered Land Act provides for absolute proprietorship in similar terms to those of 1959 Native Lands Registration Ordinance. Sections 27 and 28 define the quantum of rights that the registered proprietor gets upon registration as absolute ownership of land together with all rights and privileges belonging or appurtenant thereto and not liable to be defeated except as provided for in Section 30 of the Act. Section 30 lists rights capable of overriding the rights of an absolute proprietor. It is notable that customary rights are excluded from this list. Customary rights are therefore not capable of qualifying the absolute proprietor's rights unless they are recorded in the register.<sup>116</sup> The exact quantum of rights for an individual under this law vis-à-vis customary claims is however, a controversial matter. The High Court has held in some cases that customary law claims should be recognised and is capable of qualifying an individual's rights<sup>117</sup> and in others that they are not overriding interests and should therefore be ignored.<sup>118</sup>

The holder of the absolute proprietorship to land has rights to use, abuse and dispose of her rights as she pleases subject to minimum restrictions. Given the wide latitude given to an owner of land under this statute, the capacity of the state to effectively police all wildlife in Kenya, especially wildlife on private land, is doubtful.

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111 This is governed by the Government Lands Act, Chapter 280 of the Laws of Kenya.

112 This is governed by the Trust Lands Act, Chapter 288 of the Laws of Kenya.

113 The Constitution of Kenya (1997).

114 Chapter 302 of the Laws of Kenya.

115 Chapter 318 of the Laws of Kenya.

116 See § 11(4) of the Registered Land Act, Chapter 300 of the Laws of Kenya.

117 See, e. g., *Mwangi Muguthu V. Maina Muguthu*, Civil Case No. 377 of 1968; *Samuel Thata Misheck & Ors. v. Priscilla Wambui & Anor* H. C. C. No. 1400 of 1973; *Edward Limuli v Marko Sabayi* H. C. C. No. 22 of 1978 and *Alan Kiama v Ndia Muthunya & Ors* C. A. No 46 of 1978.

118 See, e.g., *Selah Obiero v. Orenge Opiyo* (1972) East African Law Reports 227; *Esiroyo v. Esiroyo* 1973 East African Law Reports 388 and *Belinda Murai & Ors v. Amos Wainaina* C. A. No. 46 of 1977.

### **The effect of the Registered Land Act on Women's property rights**

Registration frees the registered proprietor from claims of other parties. The power of allocation is what is considered a registrable interest. The provisions of the Act are gender neutral. However, right from the beginning, registration was bound to exclude most women from acquiring titles to land since they only had rights of use while men retained those of allocation. The tenure reform process only took into consideration the rights of people who had land and not the landless or those who had rights that did not amount to ownership.

In most cases families designated one of themselves, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person would have to deal with the land once so registered. According to the registration statute, a right of occupation at customary law would only be protected if noted on the register which many families did not bother to do for they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had at custom. Cases of such family representatives seeking to evict the other family members from the family land escalated.<sup>119</sup>

The process of consolidation as understood by native Kenyans was the vesting of trusteeship in the family head and not the expropriation of family rights by an individual as the registration process turned out to be. The registration process thus excluded most women from property ownership and the benefits accruing from such ownership.

The RLA does not recognise customary rights of use and women are therefore left at the mercy of the title-holder. Section 30 states that registered land is subject to overriding interests but does not regard customary law rights as one category of such interests. This provision thus excludes rights of use. In *Obiero v. Opiyo*<sup>120</sup>, the Court indicated that the legislature did not intend to recognise customary law rights. The judge said,

Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so.

The decision was followed in *Esiroyo v. Esiroyo*<sup>121</sup>. The effect of this case law is that a woman has no interest in registered land and unless she claims and proves that the land in question is held and registered as trust property, for the benefit of members of the family, and consequently she has no way of claiming a right to the land.

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119 See *Obiero V. Opiyo* (1972) East African Law Reports 227; *Muguthu V. Muguthu* Civil Case No. 377 of 1968 (Unreported) and *Esiroyo V. Esiroyo* 1973) East African Law Reports 388.

120 *Obieri v. Opiyo*, (1972) East African Law Reports 227

121 *Esiroyo v. Esiroyo*, (1973 East African Law Reports 388

The RLA also limits the number of people who can be registered as common or joint owners, of property to five,<sup>122</sup> in order to control subdivision coupled with the Land Control Act<sup>123</sup> which controls transactions in agricultural land and generally discourages fragmentation, the Act affects the rights of women especially in polygamous households. Sections 120 and 121 of the RLA empower the courts to determine succession of registered land in accordance with the tribal custom of the deceased. Sub-division into uneconomic units will not be upheld by the courts and this has the indirect effect of excluding some widows (if widows are many and land is small) from ownership of the land.

The RLA therefore has the effect of weakening the position of women, in that registration has been monopolised by men and a large proportion of women do not therefore have title to land. Registration confers certain powers which strengthen one's economic power and the lack of title to land means that one cannot exploit such powers.

Registration places one in a position free from the interference of parties whose interests are not shown on the register. The right of use is not registrable therefore many women have no interest in the registered land and cannot interfere with acts of the title holder, even though he may be dealing with it unscrupulously prior to registration, such property was family property in which members of the family could claim rights and consequently, in which women could claim rights of use. Registration has in essence resulted in the increased exclusion of women from access to, control over and ownership of land (Benschop 2002).

The position of women in relation to matrimonial property is also extremely weak. Customary law in relation to property rights of women seems to be out of step with the present economic structure and this has the effect of weakening the economic power of women.

#### **b) The Transfer of Property Act (TPA)**

This Act was introduced into Kenya from India to provide for the exercise of fee simple rights to land for the incoming settlers. It still governs land in settler and formerly settler occupied areas, designated during the colonial period as the white highlands, because the aim of bringing all land under the RLA has not yet materialised. The bundle of rights one gets under it is the same as what one gets under the RLA and the Agriculture Act provisions also apply to land held under it.

#### **The effect of the TPA on Women's property rights**

An interesting provision under this law is Section 29 which limits the rights of a married woman to own property individually. This provision achieves quite some significance

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122 Registered Land Act, Section 101

123 Chapter 302 of the Laws of Kenya

when one considers the role of women in resource management in Kenya (see generally Thomas-Slayter & Rocheleau 1995 and Khasiani 1992). Despite the fact that this provision may be disregarded by courts which have now widely applied the provisions of the Married Women's Property Act of England of 1882,<sup>124</sup> it could still be used to deny women rights over property that they have nurtured.<sup>125</sup>

### **c) The Land Control Act, Chapter 302 of the Laws of Kenya**

This Act controls transactions in agricultural land. It makes any dealing in agricultural land subject to the consent of the land control board in the area within which the land is situated.<sup>126</sup> Section 6 of the Act defines a dealing to include a sale or a charge. It seeks to prevent the sub-division of land into sub-economic units. To achieve its objectives, the Act establishes Land Control Boards to control transaction in agricultural land. Owing to the hue and cry of families from different parts of the country whose male head had sold or mortgaged family property leaving families destitute, a policy guideline was put in place for the boards in the 1980s requiring them to confirm proposed subdivisions were agreed to by all in the family before giving consent. The wives' and mature children's consent is therefore necessary before any sub-division consent is given, at least in theory. The practice however is different. Firstly, since most members of the boards are men, they do not give much weight to women's voices. Secondly, the guideline has no force of law and remains an administrative device which may be disregarded. Finally, corruption may lead to the presentation of a 'wife' who consents before the Board while the real family is in the dark with regard to the transaction.

It is encouraging to note that reforms are being carried out to ensure that the boards are effective. These include training of the board members as well as the institutionalisation of gender representation on the boards.

## **9.2.2 Government Ownership**

### **a) Government Lands Act**

The taking up of land by the colonial government and the assumption of title to all land in the Crown gave the government the power to assume rights over land and vest them in other holders as it deemed. The Land Regulations no. 26 of 1897 governed the earliest government titles issued in Kenya. These were subsequently taken up under the Crown Lands Ordinance of 1902 and later the Crown Lands Ordinance of 1915. While the 1902 Ordinance empowered the Commissioner to sell freehold estates to settlers, the 1915 Ordinance further extended the meaning of Crown land as discussed above. The net

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124 This law provides for the rights of a married woman to own property, revising the common law position under which married women had no legal capacity to own any property individually.

125 The Kenyan Constitution, Section 82 allows discrimination on the basis of sex in the realm of private law. A woman who is the victim of such a provision is at the mercy of the presiding court officer who may use precedents to grant her the right to the property or use the Constitutional provision to deny her such a right.

126 Land Control Act, Section 6

effect of these provisions was the assumption of ownership of all land in the Protectorate by the colonial government (Ghai & McAuslan 1970).

The precursor to the Government Lands Act, the Crown Lands Ordinance Chapter 280 of the Laws of Kenya, was originally passed to make provision for regulating the leasing and other disposal of crown lands. Section 2 thereof defined crown land to mean all lands in Kenya subject to control of Her Majesty by virtue of any treaty, convention or agreement or by virtue of Her Majesty's protectorate and all lands which have been acquired by Her Majesty for the public service or otherwise and includes all lands occupied by African tribes of Kenya and all lands reserved for the use of the members of any African tribe, save only the land in the special areas.

Section 3 vested the Governor with the power to alienate any crown land on behalf of Her Majesty on any terms and conditions he may think fit. This has been the main avenue through which public land has been converted to individual ownership in Kenya.<sup>127</sup> The Proviso to this section saved leases granted under both the 1897 Land Regulations and the 1902 Crown Lands Ordinance from alteration or termination if the subsequent terms differed from the ones set by the Governor. This provision thus limited the powers of the independence government to alter unfair grants made during the colonial days. Section 99 of the Ordinance decreed that all transactions affecting crown lands had to be registered under the Act except leases for less than a year. Proof of any transaction in matters pertaining to government grants had to be through a registration instrument and its absence could render the transaction in question void.<sup>128</sup>

Upon independence, the Crown Lands Ordinance became the Government Lands Act, Chapter 280 of the Laws of Kenya. Section 3 thereof gave the President, like the Governor before him, power to make grants or dispositions of any estates, interests or rights in or over unalienated government lands. The Commissioner of lands also has power to divide any portion of government land into plots for the erection of buildings for business and residential purposes.<sup>129</sup> In recent years, a lot of government land has been converted to private land granted mainly to politicians supporting the government.<sup>130</sup>

### **The effect of the GLA on Women's property rights**

Ownership of land by the government does not assure women access to such land. There is literature that suggests that government ownership is akin to private ownership where the government has, as is the case in Kenya, the right to pass the land on to individuals indiscriminately (Kameri-Mbote 2002). Whilst there has been hue and cry over the

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127 The two independence governments to reward political supporters as well as to secure political patronage have used land grants. See, e.g., Yeager & Miller on patronage during President Kenyatta's reign.

128 See §§ 100 and 101 of Chapter 280 of the Laws of Kenya.

129 See § 9 of Chapter 280 of the Laws of Kenya.

130 See Odhiambo (1996), noting that the President deals with government land as if it is his personal estate.

conversion of government land to private ownership, no empirical research has been done to indicate who the beneficiaries of the grants are in gender disaggregated terms.

### **9.2.3 Group Ownership**

#### **a) Trust Lands Act**

The notion of trust land is a way of giving recognition to group and native rights. Trust land consists of areas that were occupied by the natives during the colonial period and which have not been consolidated, adjudicated and registered in individuals' or group names and native land that have not been taken over by the government.<sup>131</sup> It is governed by the Trust Lands Act and is vested in local authorities designated as councils.<sup>132</sup> Councils manage all the resources within the trust land under their jurisdiction and control the development of that land. They decide on the occupation and use of trust land for grazing and pasturing stock, flocks and herds and can order occupants to reduce the numbers of their stock, flocks and herds. They also generally regulate the use and conservation of these areas.<sup>133</sup> Trust land is divided into two that supposed to be registered under the RLA and that which is not for registration. The former may further be divided into that already registered and that not yet registered. Trust land that is not registered comprises 63.5% of the total land area in Kenya (Ogolla & Mugabe 1996). The occupiers of the unregistered land have rights, which are in limbo and awaiting confirmation through registration. These rights are in some cases guaranteed under some form of customary tenure (Ondiege 1996). It is the Council's duty to deal with any matters relating to tenure to land.<sup>134</sup>

With respect to the occupation, use, control, inheritance, succession and disposal of any trust land, every tribe, group, family and individual has all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof.<sup>135</sup> There is an elaborate procedure to be followed in the event that the government or the County Council wants to set aside trust land for public purposes thus protecting the rights of residents from expropriation without compensation.

Tenure to trust land is increasingly changing from the trust status to ownership by individuals, legally constituted groups and the state. The implications of this change are significant since the controls that the Council can exercise over the use of the land are eliminated. The application of customary law is ousted and the land is removed from the ambit of Council control for conservation and development purposes. In instances where the state or individuals take(s) over the ownership of the land, access thereto for

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131 See § 115 of the Constitution of Kenya (1983).

132 See § 114 of The Constitution of Kenya (1983) and Chapter 288 of the Laws of Kenya.

133 See § 65 of Chapter 288 of the Laws of Kenya.

134 See § 65 of Chapter 288 of the Laws of Kenya.

135 See § 69 of Chapter 288 of the Laws of Kenya.

communities previously occupying the land is curtailed significantly.<sup>136</sup> In areas where communal ownership is perceived as capable of encouraging good resource husbandry through the trust land system, land has been parcelled out to groups that do not necessarily have anything in common to the detriment of the management of resources within those areas (Galaty 1980).

#### **b) Land (Group Representatives) Act**

The Report of the East Africa Royal Commission of 1953-1955, concluding the policy on land tenure in the East African Protectorate as Kenya then was, noted that individualisation of land ownership should be the main aim. It however noted that such ownership should not be confined to individuals but could also be extended to groups such as companies, co-operatives and customary associations of Africans (East Africa Royal Commission 1955). The tenure reform process in Kenya has, however emphasised more the control of the state and the individual and only in exceptional cases has group tenure been recognised as such. Group or community ownership in Kenya is through the institution of the group ranch, which is defined as “a demarcated area of rangeland to which a group of pastoralists, who graze their individually owned herds on it, have official land rights” (Oxby 1982).

The group ranch status in Kenya is granted to a group of herders that is shown to have customary rights over the range or pastureland in question. The operative statute in this regard is the Land (Group Representatives) Act.<sup>137</sup> A group for the purposes of the Act is a “tribe, clan, family or other group of persons, whose land under recognised customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner” where such person has, under recognised customary law exercised rights in or over land which should be recognised as ownership.<sup>138</sup> Excluded from membership, however, are those members who are under any kind of disability. The guardian of such a person is included to look after the interests of the ward.<sup>139</sup>

Each group has to have a constitution and elect, at a meeting of all the members, between 3 and 10 persons to be representatives of the group. The group is also required by law to elect group officers in accordance with the constitution.<sup>140</sup> The meeting of members has also to make a resolution pursuant to which the group representatives are incorporated.<sup>141</sup> The group gets a certificate of incorporation becoming a body corporate with perpetual

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136 See § 68 of Chapter 288 of the Laws of Kenya which saves the rights of the government to repossess trust land.

137 Chapter 287 of the Laws of Kenya, No. 36 Of 1978 introduced as an Act of Parliament of provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act Chapter 284 of the Laws of Kenya.

138 See § 23 (2) (a) of Chapter 287 of the Laws of Kenya.

139 See § 2 of Chapter 287 of the Laws of Kenya.

140 See § 5 of Chapter 287 of the Laws of Kenya.

141 See § 7 of Chapter 287 of the Laws of Kenya.



succession subject to any conditions, limitations or exemptions noted on the certificate. They thus have ownership of the land in question in perpetuity and can only cease to be a group by the vote of all members. Group representatives have powers to sue and be sued in the corporate name, acquire, hold, charge and dispose of property of any kind and borrow money with or without giving security.<sup>142</sup> They have a duty to hold the property and exercise their powers on behalf and for the collective benefit of all the group members and fully and effectively consult group members in performing their roles.<sup>143</sup> The group representatives are also enjoined to maintain an office and a postal address for the group hold regular meetings and keep books of account, which should be open for inspection, by all members of the group.<sup>144</sup>

The group representatives have to maintain a register of members including those under a disability and their guardians. Alongside the names of the members should be included information on when each person became a group member and the qualifications entitling him or her to membership.<sup>145</sup> The decision on whether or not a person qualifies for membership to a group is a matter to be determined by the majority of the group members.<sup>146</sup>

Most group ranches are in the areas occupied by pastoral communities in Kenya. The composition of group ranches was an attempt at formalising traditional community structures. The principle idea behind them was to create a land unit smaller than the traditional section but larger than the individual. This smaller unit is not necessarily capable of maintaining economically viable livestock herds (Davis 1970). As has been pointed out above, group ranches have not worked as well as was hoped for a variety of reasons. Firstly, the group representatives lack the authority of traditional leaders. Galaty for instance notes that the relationship of these groups to the traditional social organisation is a complex one (Galaty 1980, 1981a, 1981b). Secondly, government policy has tended to emphasise individual rights and there is a prevalent view that the group rights would eventually mature into individual ones. Further, despite the fact that 37 % of Kenyan land is used for pastoralism as compared to the 9 % used for agriculture, the latter has received greater attention in policy making. Like in many other parts of the world, pastoralism in Kenya has not been fully recognised as an important land use system (Bourgeot 1981, Lane 1996).

### **The effect of Group ownership on Women's property rights**

While community ownership is promoted as egalitarian and more likely to guarantee disadvantaged groups rights to resources such as land, there is no literature illustrating whether this is the case in trust land and group ranches in Kenya. Given the patriarchal

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142 See § 7 of Chapter 287 of the Laws of Kenya.

143 See § 8 of Chapter 287 of the Laws of Kenya.

144 See §§ 15, 16, 18 and 20 of Chapter 287 of the Laws of Kenya.

145 See § 17 of Chapter 287 of the Laws of Kenya.

146 See § 28 of Chapter 287 of the Laws of Kenya.

social ordering, it would be surprising if indeed women have greater rights in these areas. In a study carried out among the Samburu, Rendille and Maasai where group ranches are the norm, it was noted that most fora for making decisions were dominated by men and that most of these cultures excluded women from such fora (Kameri-Mbote & Mubuu 2004).

### **9.3 Reform initiatives**

#### **9.3.1 Constitutional Review**

The calls for constitutional review began in the early 1990s and were capped by the 1997 Inter-Parties Parliamentary Group (IPPG) reform package which identified land law, children's rights, the non-governmental organisation's law and the Constitution as being in need of review. The Constitution of Kenya Review Commission Act was promulgated in the run up to the 1997 elections but it was replaced by the 1998 Constitution of Kenya Review (Amendment) Act which sought to reduce executive control in the review process and to ensure as much participation by a broad spectrum of people in the process as possible. The new constitution was to reflect the principles of democracy, accountability, people's participation, human rights and social justice (Constitution of Kenya Review Commission 2002). Agreement on the composition of the review commission was difficult to arrive at and parallel reform processes were initiated. The consensus on one process and membership to the Constitution Review Commission was reached in 2001 (Constitution of Kenya Review Commission 2002). The process leading to the formation of the Review Commission was informed by the need to incorporate women and other marginalised groups in the team. The principle of affirmative action with a third members comprising of women was adopted and informed the entire review process including the process of identification of representatives to the National Constitution Conference which endorsed the final draft of the constitution. Several fora were held by the review commission to receive memoranda from different interest groups.

In collecting data and views from Kenyans, the Commission was keen to be inclusive and with regard to gender interest groups, it held a seminar to deliberate on the gender question on 5<sup>th</sup> to 8<sup>th</sup> December 2001. At this conference, papers on diverse aspects of the gender question were discussed. Three main background papers were presented on the legal, political and economic and socio-cultural aspects of the gender question.<sup>147</sup> Alongside these papers were presentations from other jurisdictions that had gone through the review process such as Uganda and South Africa; presentations from national and international scholars on the gender question; members of parliament and of the diplomatic corps. A number of organisations and individuals also presented memoranda to the Commission and the Commission organised Provincial Women's Consultative Workshops on 12<sup>th</sup> to 13<sup>th</sup> April 2002. They clearly spelt out the issues that they needed

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147 Prof. Maria Nzomo presented a paper on "The Political and Economic Aspects of the Gender Question"; Dr. Jacqueline Oduol presented a paper on "The Socio-Cultural Aspects of the Gender Question" and Dr. Patricia Kameri-Mbote presented a paper on "The Legal Aspects of the Gender Question". See also Kameri-Mbote 2003.

addressed in the new constitution. UNIFEM also carried out an audit of the draft bill to assess the extent to which it domesticates provisions of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (Kameri-Mbote & Nzomo 2004).

Although the Draft Constitution, as adopted by the National Constitutional Conference on 15 March 2004 is yet to be adopted either by Parliament or in a national referendum, Chapter 7 provides a framework on which to build a national land policy. This articulates the principle of gender equality with regard to access, ownership and control of benefits of land and other resources, in inheritance and the administration and management of estates and other properties. The provision requiring the state to ensure both equitable access to land and associated resources and security of land rights for all land holders, users and occupiers provides, in my view, the basis for protecting women's rights to agricultural and other land that they occupy without ownership rights:

**CKRC Land policy framework**

Land is Kenya's primary resource and the basis of livelihood for the people, and shall be held, used and managed in a manner which is equitable, efficient, productive and sustainable.

(1) The Government shall define and keep constantly under review a national land policy ensuring the following principles -

- (a) equitable access to land and associated resources;
- (b) security of land rights for all land holders, users and occupiers in good faith;
- (c) sustainable and productive management of land resources;
- (d) transparent and cost effective administration of land;
- (e) sound conservation and protection of ecologically sensitive areas;
- (f) the discouragement of customs and practices that discriminate against the access of women to land; and
- (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this constitution.<sup>148</sup>

The laws on land should be amended to reflect this fact. Section 30 of the Registered Land Act should include women's user and occupancy rights as overriding interests to which the rights of the absolute proprietor are subject especially where the woman has invested her time and energy on the land for a period of time.

It is notable that the draft constitution provides for the promulgation of a law to protect the dependants of deceased persons holding interests in any land and the interests of spouses in actual occupation of the land. While the provisions of the Law of succession provide for the rights of widows and all children, including female children, to inherit the property of the deceased, the provision on protection of spouses in actual occupation of the land will protect widows who have invested their time and energy on land from eviction by relatives of the deceased, especially where the land in question is ancestral land. It will also ensure that attention will be given to the nine gazetted areas in Kenya

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148 Article 77, Chapter 7, Land and Property, Draft Constitution of Kenya, 15 March 2004

where customary rules of intestacy are allowed to continue to apply even when they exclude women from inheriting agricultural land and livestock which comprises the main means of production in those areas.

Further, the provision requiring a law on the recognition and protection of matrimonial property and the matrimonial home during and at the termination of the marriage is a monumental step towards the realisation of a woman's rights to property in a marriage situation. The law would give impetus to judicial pronouncements on the rights to women to half of the matrimonial property upon dissolution of marriage.

It is important to point out that gender-neutral laws on property ownership have not resulted in more women owning land because of structural barriers such as access to credit and general lack of resources to purchase land. The proposed law should explicitly provide for women's rights to own land and go further to provide for ways of assisting women to raise capital to purchase land and other property. There should be a presumption of spousal co-ownership of matrimonial property and specific provisions protecting spouses from sale of jointly occupied land without their knowledge and consent and protecting women's interests in the allocation of land. More generally, laws regulating the registration of land and other property rights should be amended with a view to simplifying the procedures and making them more accessible to women.

A surviving spouse shall not be deprived of a reasonable provision out of the estate of a deceased spouse whether or not the spouse died having made a will<sup>149</sup>

At another level, provisions on fundamental rights in the draft constitution will go a long way to promote women's rights to land. The provisions on equality, equality before the law and equal protection before the law are critical to the enjoyment of land rights and provide the context within which these rights are implemented. The bill of rights specifically provides that women and men have equal rights to inherit, have access to and control property. It also explicitly provides that any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited. This provision goes along way towards redressing women's concerns in the area of customary laws and practices.

### **9.3.2 National Land Policy Formulation Process**

The need for a holistic land policy reform process has been felt in Kenya for a long time. In 1999, the Commission of Inquiry into the Land Law System of Kenya was appointed by the President (also known as the Njonjo Commission). It was charged among others with the tasks of reviewing land issues in Kenya with a view to recommending principles that would foster economically efficient, socially equitable and environmentally sustainable land tenure and use system. The Commission reported back in 2002 and

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149 Article 82, Chapter 7, Land and Property, Draft Constitution of Kenya, 15 March 2004

among its recommendations was the need to address gender issues in land access, control and ownership (Republic of Kenya 2002). Following up on the Commission's recommendations, a national land policy formulation process was started in 2004. This process is ongoing and it will definitely address the question of women's rights to land in light of the fact that less than 5 per cent of land title holders are women. It is principally funded by the United Kingdom Department for International Development. The concept paper for the National Land Policy Formulation Process<sup>150</sup> identifies the draft constitution, the Njonjo Commission and the Kenya Economic Recovery Strategy for Wealth and Employment Creation 2003-2007 as important development towards a comprehensive land policy.

#### **9.4 Concluding remarks**

From the foregoing account, it is notable that the formalisation of land rights in Kenya, actualised within a very patriarchal setting, has resulted in the exclusion of women from ownership of land which is a key resource for both subsistence and economic activities. It is heartening to note that there is a policy formulation process in place which seeks to deal with anomalies created by an incomplete and very haphazardly carried out land reform process. Optimal provision for women's rights to access, control and own land must be within a national context that provides for equity.

The promulgation of the draft Constitution would go a long way in getting a template for consideration of women's rights to land. Stopping at law review however does not address the fundamental question on whether 'formalising the informal' is the best way of providing for women's rights to land. This question, unlikely as it is to be entertained by law reformers, is at the core of getting the equation right with regard to property relations. It was noted above that the subjugation of customary rights and their systematic replacement with modern norms on tenure has not resulted in the obliterating of those norms. One notes the resilience of these norms pointing to the fact that formalising informality is not an easy task. Within the realm of property relations which occur within a social context, informal norms can indeed water down formal ones where the former are perceived to be more binding than the latter. In such cases formal law remains outside of the purview of people's lived realities and does not influence people's relations with one another where property is concerned.

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150 Ministry of Lands and Settlement, March 2004.

## **10. CONCLUSION**

Taking the HRBA framework laid out in Chapter 3 as starting point, we have explored how women's land rights are dealt with in national laws and policies, human rights reporting systems, PRSPs, national donor policies and the World Bank's policy in Kenya, Tanzania, Mozambique, Zimbabwe and South Africa. These information sources throw light on strengths and weaknesses of this approach in different contexts and settings. A HRBA also provides a basis for assessing – and discussing – present-day initiatives aiming at formalisation of land rights in Africa. By way of conclusion, we will address some cross-cutting issues concerning the approach's efficacy and adequacy at the international, national and local levels.

### **10.1 HRBA standards**

Seeing human rights as an integrated whole, in Chapter 3 we outlined standards for gender equal land reform. Regardless of what kind of reform the state initiates, the following standards apply:

- Criteria for redistribution that do not discriminate directly or indirectly must be put in place.
- Criteria for recognition, registration and protection of informal rights which are neither directly nor indirectly discriminatory are required.
- Land reform must transcend the public/ private divide and encompass land transactions through both family and market relations.
- The equal participation of women at all levels of policy- and decision-making must be ensured.
- Educational measures must be taken to ensure that decision-makers and users at all levels are aware of their rights and obligations.
- Transparent, representative and accountable land institutions with appeals to an independent court need to be established.

### **10.2 International mechanisms**

The CEDAW Committee is the human rights treaty body that has given the most extensive attention to women's land rights. The Committee has not issued any general recommendation to Article 14 on the right of rural women to equality in development projects and agrarian reform. However, General Recommendation no. 21 on equality in marriage and family relations deals with women's property rights. Women's land rights have been addressed in the CEDAW Committee's comments to the Tanzanian, Zimbabwean and South African country reports (Mozambique has not yet reported). The

UN Human Rights Committee<sup>151</sup> has over the years dealt with individual cases that have strengthened the protection of women's property rights under international law. The Committee on Social, Economic and Cultural Human Rights has not given extensive attention to women's land rights, but in its general comment on the right to food it recommends that national strategies should:

...give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees for full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology.<sup>152</sup>

The 2003 World Bank report *Land policies for growth and poverty reduction* emphasises the need for gender equality stating that: 'bias in the allocation of land rights against women is not justified, as the literature provides no evidence of inferior efficiency by women farmers' (WB 2003:58). This argument is clearly based on economic efficiency as a general standard within a neo-liberal market model, making women's equal economic efficiency the rationale for equal treatment. The report addresses the gender bias of the use of the 'unitary model of the household' in past land policy initiatives. It points to evidence that increased control by women over land and other assets could have 'a strong and immediate effect on the welfare of the next generation and on the level and pace at which human and physical capital are accumulated' (WB 2003:38). It argues that women's increased control of assets at the household level could contribute to poverty reduction at the macro (national) level. The World Bank report indicates the need for more information, as well as advocacy for women's land rights. However, it makes no suggestions for measures to strengthen women's relatively weak position compared to men in order to alleviate poverty. The added value of the human rights-based development approach is that it constitutes a legally binding framework of individual and group rights with corresponding legal obligations for national governments and international community to respect, protect and fulfil these rights. The HRBA standards have to be met even if the outcomes may be more expensive or less productive, economically speaking. As such, it sets legal limitations to free market economic models. HRBA implies that the dignity, integrity and equality of individuals is an end in itself and not a means towards an end such as economic growth.

Each country in our study which has a Poverty Reduction Strategy Paper defines prioritised areas of action under the overall goal of poverty reduction. In the PRSPs for Mozambique and Tanzania, agricultural and rural development figure as a significant area of action. The Mozambican PRSP, the Plan for the Reduction of Absolute Poverty or PARPA (Mozambique 2001), points to measures such as the establishment of a national land register, simplification of the land adjudication process, institutional reform and

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151 The UN body which monitors the compliance of states parties to the Covenant on Civil and Political Rights.

152 General Comment no. 12 by the UN Committee on Economic, Social and Cultural Rights: 'The right to Adequate Food' (1999), E/C.12/1999/5 (Paragraph 26).

dissemination of information. However, it makes no mention of measures as to how women's relatively weak position compared to men can be strengthened in order to alleviate poverty. In a similar vein, the Tanzanian case suggests a need for stronger emphasis on measures for combating poverty through strengthening women's land rights, as provided for under the HRBA.

In recent years, a number of donor countries such as the Netherlands, the UK and Norway have embarked on human rights-based development policies. This implies that, in order to qualify for funding, projects must undergo a human rights assessment. Given the broad and general criteria for such assessments, vital human rights concerns are often overlooked when decisions are made to give economic support to specific projects. For example, the Norwegian government's decision to fund the Institute for Liberty and Democracy's formalisation programme in Tanzania has been strongly criticised for not paying adequate attention to human rights standards, including women's rights to access land without discrimination, and participation, transparency and due process (Ikdahl & Hellum 2004).

The human rights based approach is, as we have seen, gradually making its mark on international policy making bodies outside the UN. International human rights norms and mechanisms have, as demonstrated below, influenced the land reform processes in the countries of study in various ways and in varying degrees. So far, economic policies aimed at productive efficacy have, however, been far more dominant than human rights-based approaches. To have greater impact on international reform policy, the human right treaty bodies should give more attention to the right to equality in development programmes and land reform, both in their general recommendations and in scrutiny of country reports. International economic institutions and development agencies need to develop clearer and more specific criteria for human rights impact assessment.

### **10.3 National policies and legislation**

International law is characterized by weak enforcement machinery and unless a state has the political will and enacts municipal law to fulfil international obligations, its subjects are unlikely to benefit from such international obligations. Of ultimate importance is the protection against gender discrimination embedded in the constitution, which is the supreme law of a country. The South African Constitution puts the gender equality principle on an equal footing with the protection of custom and culture. Both the Zimbabwean and Kenyan constitutions give precedence to custom in personal law matters such as marriage and inheritance.

National law and policy makers have often been slow and sometimes reluctant in responding to women's quest for secure tenure. Although existing inequalities in the family often lead to discrimination of women in relation to land reform, none of the five countries under study have systematically included land transfer through marriage, divorce and inheritance in the reform processes as required by CEDAW and the African



Protocol on the Rights of Women. The extent of the fulfilment of the right to access and participation on a non-discriminatory basis varies.

The Draft Kenyan Constitution goes a long way in getting a template for consideration of women's land rights. Chapter 7 provides a framework on which to build a national land policy articulating the principle of gender equality with regard to access, ownership, and control of benefits of land and resources in inheritance and marriage. It requires the state to ensure both equitable access to land and associated resources and security of land rights for all land holders, users and occupiers. As such it provides a legal basis for protecting women's rights to agricultural and other land that they occupy without ownership rights.

The Tanzanian land Acts strengthen women's access to land through an approach combining recognition of existing customary use with a non-discrimination clause. Furthermore, women's participation in the land committees is made mandatory. These reforms have been the result of a process of public consultation and debate over more than ten years, including considerable involvement by women's groups, human rights organisations and civil society at large. Mozambique's land reform process, with the enactment of the Land Law of 1997 and the final enactment of the new Family Law in 2004, provides another example of a strong push towards equal land rights coming from civil society and women's organisations. South Africa is yet another example of civil society mobilisation of human rights resources to promote gender equal land reform. The Communal Land Rights Act, which gives traditional councils the power to manage communal land, was strongly criticised by a wide range of organisations for undermining democratic rights and women's land rights. These human rights arguments were, however, sufficiently taken into account in the political process of passing this law. It is expected that civil society will challenge the constitutionality of the Act through litigation.

The Zimbabwean case demonstrates the limits of the human rights-based approach in a situation where the government refuses to comply and portrays human rights as a Western dictate that undermines African values. No legal framework concerning principles of redistribution, participatory management or tenure security has been put in place. The process whereby land has been acquired and redistributed falls short of the human rights standards that underlie basic principles of state-citizen relationship such as protection of private property, protection against discrimination on the basis of sex, ethnicity, race and political opinion, due process and the rule of law. Women are discriminated against both on the basis of sex and political and ethnic affiliation.

None of the land reforms in the five countries are fully in consonance with HRBA standards. The proposed Kenyan Constitution sets a template for land reform in consonance with the HRBA requirements. We find the land Acts of Tanzania and Mozambique to come closest to meet these standards. The South African Communal Land Rights Act falls short of CEDAW and the African Protocol on the Rights of Women. The land tenure system in the Zimbabwean resettlement and communal lands is

not rights-based, but discretion-based, which under the present conditions implies continued subordination of women to their husbands and no implementation of formal law to protect rights.

#### **10.4 Judicial activism: General changes through individual cases**

The country studies demonstrate the importance of an independent judiciary to guarantee women's human rights in situations where the legislative body of government does not follow up its obligations – undertaken through international conventions – to eradicate discrimination through legislation.

Case law in countries with an inherited common law tradition – South Africa, Kenya, Tanzania and Zimbabwe – show how individuals and civil society has been able to use court litigation as a means of legal change. In these countries, the higher courts have gradually extended the gender equality principle to the family to improve the protection of women's property rights in the event of marriage, divorce and death. So far, there has been little judicial activism or mobilisation by civil society around court litigation to secure women's land rights in Mozambique.

In the Bhe case from South Africa, the Constitutional Court ruled that the provisions of the Black Administration Act which make the eldest male relative the heir is contrary to the gender equality principle in the Constitution. This demonstrates the potential of a rights-based approach in a setting where the constitution puts the gender equality principle on an equal footing with the protection of custom and culture. The case reflects the interplay between a wide range of factors such as an enabling Constitution and civil society organisations with the capacity to mobilise legal resources to challenge discriminatory customary laws. Judicial activism has also yielded fruits in Tanzania, as shown by the Pastory case in 1989. Here the High Court ruled that the custom establishing that women lacked capacity to sell clan land was discriminatory. In a new case, supported by Tanzanian legal aid organisations, the male prerogative embedded in the customary law of inheritance is challenged by the non-discrimination principle in the Constitution and CEDAW. In a similar vein, a series of inheritance cases from the Zimbabwean Supreme Court in the 1980s, such as the Mangwende case, demonstrates the potential of an independent judiciary to bring customary law in line with the gender equality principle. However, recent developments in Zimbabwe show how the position of women has been weakened in a situation where rule of law, transparency and due process no longer is upheld by an independent judiciary.

All in all, the efficacy of judicial activism as a means of implementing women's human rights is dependent on the constitutional status of the equality principle, the dominant legal culture, the existence of an independent judiciary, and the existence of a civil society that has the human, legal and economic resources to challenge laws, policies and practices. Rural women in all the countries under study have little protection due to lack of access to court and lawyers.

While case law at the higher court level has led to legal change by overruling discriminatory customary laws, there is little knowledge as to how lower courts or local institutions which have the power to register and redistribute land in the event of marriage, divorce or death have responded to these changes. To assess the achievements at the lower court level, there is a need for more systematic empirical studies of local practice. More research will be of great assistance in laying a foundation for a policy directed at the legal and administrative institutions that handle cases concerning transfer and registration of land rights in the event of sale, marriage, divorce or death at the local level.

### **10.5 *From principles to practice***

Under international law, the state is the main implementer of human rights standards. As demonstrated by the research referred to in the case studies, the state is not the sole regulator of women's access to land. Local formal and informal institutions and social entities also have the capacity to generate norms. These internally-generated norms are sometimes so strong that they overrule state law (Moore 1978).

In many instances discriminatory customary practices overrule equal rights-based statutory laws. Whether and to what extent this will be the case with the land tenure reforms that have been initiated in Tanzania and Mozambique, and with regard to the South African Communal Land Rights Act, is too early to assess. There is a great need for further research that describes and analyses the practice of the local institutions tasked with distribution, registration and resolution of disputes under the new land tenure acts.

Research from Tanzania, South Africa and Zimbabwe also demonstrates the capacity of customary law to change in response to changing social, economic and legal conditions. The Zimbabwe case demonstrates how research documenting changing inheritance practices in the 1990s led to law reform that promoted equal inheritance rights for daughters and widows. The Tanzanian and Mozambican land tenure reforms are examples of legal models that incorporate customary practices while at the same time putting in place mechanisms that provide women with protection from discrimination. The institutional arrangements constitute a blend, building on local participatory traditions, but also seeking to secure non-discrimination and women's participation.

On the background of the blurred boundaries between state law and various forms of customary law, we find it virtually impossible come to a conclusion regarding whether state law or customary law provides better protection for women's land rights. Since the time of colonisation, local customs and practices have been merged and mixed with international and national laws and policies producing local, national and international 'hybrids' that are inherently patriarchal. The country studies demonstrate how this complex and situational hybridisation process continues to inform land debates at the local, national and international level.

At the same time, political rhetoric emphasising the difference between African and Western norms and values is also at work, particularly in South Africa and Zimbabwe. In

Zimbabwe, the essentialisation of African identity is a key mechanism in the ongoing struggle for state control as a means of accessing resources such as land and water. When faced with a large opposition party and a host of civil society organisations all demanding democracy and good governance based on international human rights principles, President Robert Mugabe and his supporters claim that the opponents are acting on behalf of the Western former colonial powers. Within this rhetoric, constitutional change protecting the individual rights of married women are portrayed as an alien western notion destroying the social fabric of African society.

Empirical research from the countries under study shows that both international and national laws and policies need a more solid grounding in women's lived realities. A significant example is research from South Africa and Zimbabwe demonstrating that land reforms are not responding to new and innovative local modes of production that are of vital importance for the poor, such as family gardens. Family gardens are mainly managed by women and are a source of both food security and cash for basic welfare needs such as medicine and school fees. They are, as has been pointed out in the country studies, virtually forgotten in debates on land legislation, water legislation and agriculture both in Zimbabwe and South Africa.

In addition, empirical research over the last years has indicated that land rights, especially in rural communities, are closely related to livelihoods. As shown in the Mozambique case, the right to livelihood is at the local level often expressed as any individual's 'right to eat' – which also includes providing food for children. Present formalisation processes have, however, primarily been directed at formalising land rights in terms of secure ownership to land. How to secure traditional and informal rights to livelihood now appears as a challenge that must be addressed at a time when formalisation of property rights to land is gaining momentum.

### ***10.6 From formal to substantive equality including the poor***

Neither laws prohibiting discrimination nor redistribution of land is in itself sufficient to secure substantive equality. This report has referred to empirical studies that analyse how the gendered position women occupy in different contexts influences the ways in which international, regional, national and local laws, norms and values come together in the implementation of actual programs and policies. Research referred to in the country studies indicates that the lack of measures that counterbalance male dominance results in poor access to information among women, thus constraining their participation and the exercise of their rights in land programmes carried out by both state and civil society.

To ensure the ability of married, single, divorced and widowed women to register, secure and use their land on an equal footing with men, long-term political and economic commitment is required, not only involving rights education, but also access to agricultural inputs. Access to such resources is, as pointed out by the Ute Commission in Zimbabwe, of particular importance for the poorest of the poor, for single, widowed and divorced women with dependants. To facilitate the development of pro-poor and

gender sensitive land policies a human rights-based approach must be linked to agricultural policies and extension services. This speaks to the indivisibility of civil and political, social and economic rights, and solidarity rights, including the right to development, as an integrated whole.

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## **International human right instruments and documents**

### **Human rights conventions**

- *The International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). Adopted 21 December 1965, entered into force 4 January 1969.
- *The International Covenant on Economic, Social and Cultural Rights* (CESCR). Adopted 16 December 1966, entered into force 3 Jan 1976.
- *The International Covenant on Civil and Political Rights* (CCPR). Adopted 16 December 1966, entered into force 23 March 1976.
- *The UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). Adopted 18 December 1979, entered into force 3 September 1981.
- *The African Charter on Human and Peoples' Rights* (AfCHPR). Adopted 27 June 1981, entered into force 21 October 1986. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- *The Convention on the Rights of the Child* (CRC). Adopted 20 November 1989, entered into force 2 September 1990.
- *The African Charter on the Rights and Welfare of the Child* (ACRWC). Adopted July 1990, entered into force 29 November 1999. OAU Doc. CAB/LEG/24.9/49.

- *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (AfPRW)*. Adopted by the Assembly of the African Union 11 July 2003.

### **Declarations and statements**

- *The Universal Declaration of Human Rights (UDHR)*. Adopted by UN General Assembly resolution 217 A (III) of 10 December 1948.
- *The Charter of the United Nations*. Signed on 26 June 1945.
- *The Declaration on the Right to Development*. UN General Assembly resolution 41/128 of 4 December 1986.
- *The Beijing Declaration and Platform for Action*. Adopted at the Fourth World Conference on Women 15 September 1995. A/CONF.177/20.
- *Vienna Declaration and Plan of Action*. Adopted by the World Conference on Human Rights, 25 June 1993, A/CONF.157/23.
- *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights*. Adopted by the UN Committee on Economic, Social and Cultural Rights, UN doc. E/C.12/2001/10.

### **General recommendations/ comments from treaty monitoring bodies**

#### ***General Comments by the UN Committee on Economic, Social and Cultural Rights:***

- General Comment no. 4: 'The Right to Adequate Housing' (1991), E/1992/23.
- General Comment no. 12: 'The Right to Adequate Food' (1999), E/C.12/1999/5.
- General Comment no. 14: 'The Right to the Highest Attainable Standard of Health' (2000), E/C.12/2000/4.
- General Comment no. 15: 'The Right to Water' (2002), E/C.12/2002/11.

#### ***General recommendations by the CEDAW Committee:***

- Gen. Rec. no. 13 (1989): 'Equal Remuneration for Work of Equal Value', A/44/38.
- Gen. Rec. no. 16 (1991): 'Unpaid Women Workers in Rural and Urban Family Enterprises', A/46/38.
- Gen. Rec. no. 17 (1991): 'Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the GNP', A/46/38.
- Gen. Rec. no. 21 (1994): 'Equality in Marriage and Family Relations', A/49/38.

### **State reporting under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

#### ***Tanzania***

- Initial report submitted in 1988 (CEDAW/C/5/Add.57, CEDAW/C/5/Add.57/Amend.1, CEDAW/C/5/Add.57/Amend.1/Corr.1).
- Initial report examined by the CEDAW Committee at the 9<sup>th</sup> session (1990), concluding observations and comments published in A/45/38 (session 9, 1990) paras. 93–129, and CEDAW/C/1990/II/L.1/Add.5.

- Combined 2<sup>nd</sup> and 3<sup>rd</sup> periodic report submitted in 1996 (CEDAW/C/TZA/2-3).
- Combined 2<sup>nd</sup> and 3<sup>rd</sup> periodic report examined by the Committee at the 19<sup>th</sup> session (1998), concluding observations and comments published in A/53/38/Rev.1 (1998), Part 2 (session 19) paras 206-242

***Mozambique***

- Initial report due in 1998, not yet submitted

***South Africa:***

- Initial report submitted in 1998 (CEDAW/C/ZAF/1)
- Initial report examined by the Committee at the 19<sup>th</sup> session (1998), concluding observations and comments published in A/53/38/Rev.1 (1998), Part 2 (session 19) paras 100-137

***Zimbabwe:***

- Initial report submitted in 1996 (CEDAW/C/ZWE/1)
- Initial report examined by the Committee at the 18<sup>th</sup> session (1998), concluding observations and comments published in A/53/38/Rev.1 (1998), Part 1 (session 18) paras 120-166

***Kenya:***

- Combined initial and 2<sup>nd</sup> report submitted in ... (CEDAW/C/KEN/1-2)
- Combined initial and 2<sup>nd</sup> report examined by the Committee at the 12<sup>th</sup> session (1993), concluding observations and comments published in A/48/38 (1993), paras 87-143
- Combined 3<sup>rd</sup> and 4<sup>th</sup> periodic report submitted in 2000 (CEDAW/C/KEN/3-4)
- Combined 3<sup>rd</sup> and 4<sup>th</sup> periodic report examined by the Committee at the 28 session (2003). Concluding observations and comments published in A/58/38 part I (2003), paras 190-230.

**National legislation and case law**

**Tanzania**

***Legislation***

Constitution of the United Republic of Tanzania, 1977

Land Act 1999

Village Land Act 1999

Law of Marriage Act 1971

Local Customary Law Order (Declaration) 1963

***Case law***

Ephrahim v. Pastory and another, High Court (PC) Civil Application no. 70/89

Hawa Mohamed v. Ally Sefu, Unreported Civil Appeal No. 9 of 1983

## **Mozambique**

### ***Legislation***

Constituição da República Popular de Moçambique 1990 (the 1990 Constitution)

Constituição da República Popular de Moçambique 1975 (the 1975 Constitution)

Lei de Terras 1997 (the 1997 Land Law)

Lei de Terras 1979 (the 1979 Land Law)

Lei de Família 2004 (the Family Law)

Lei da Organização Judiciária 1992 (the law organising the judiciary)

## **South Africa**

### ***Legislation***

Constitution of the Republic of South Africa 1996

Communal Land Rights Act 2004

Traditional Leadership and Governance Framework Act 2003

Extension of Security of Tenure Act 1997

Restitution of Land Rights Act 1994

Intestate Succession Act 1987

Black Administration Act 1927

### ***Case law***

Bhe v Magistrate, Khayelitsha and others. Case CCT49/03 from the Constitutional Court, decided 15 October 2004

## **Zimbabwe**

### ***Legislation***

The Constitution of Zimbabwe 1999

Marriage Act 1983

Customary Marriages Act

Legal Age of Majority Act 1982

Deeds Registry Act 1996

Deceased Persons Family Maintenance Act

Administration of Estates Amendment Act

### ***Supreme Court Case Law***

Jenah v. Nyemba, 1986 (1) ZLR 138 (SC)

Chihowa v Mangwende, 1987(1) ZLR 228 (SC)

Murisa v Murisa, (1991) S-41-91

## **Kenya**

### ***Legislation***

The Constitution of Kenya (1997)

The Constitution of Kenya (1983)  
The Draft Constitution of Kenya (15 March 2004)  
Chapter 160 of the Laws of Kenya (the Law of Succession Act)  
Chapter 280 of the Laws of Kenya (the Government Lands Act)  
Chapter 283 of the Laws of Kenya (consolidation of land rights)  
Chapter 284 of the Laws of Kenya (the Land Adjudication Act)  
Chapter 287 of the Laws of Kenya (the Land (Group Representatives) Act)  
Chapter 288 of the Laws of Kenya (the Trust Lands Act)  
Chapter 300 of the Laws of Kenya (the Registered Land Act)  
Chapter 302 of the Laws of Kenya (the Land Control Act)  
Chapter 318 of the Laws of Kenya (the Agriculture Act)  
The Transfer of Property Act  
The Native Lands Registration Ordinance No. 27 of 1959  
The Crown Lands Ordinance of 1915  
The Crown Lands Ordinance of 1902  
The Land Regulations no. 26 of 1897  
The (English) Married Women's Property Act of 1882

***Case Law***

I vs I, (1971) East African Law Reports 278  
Obiero v. Opiyo, (1972) East African Law Reports 227  
Esiroyo v. Esiroyo, (1973) East African Law Reports 388  
Karanja v. Karanja, (1976) K.L.R. 307  
Mary Njoki v. John Kinyanjui and others, Unreported Civil Appeal Case No. 71 of 1984  
MaryAnne Matanu Kivuitu v. Samuel Mutua Kivuitu, (1991) KAR 241



## **ANNEX 1: LIST OF PEOPLE AND ORGANISATIONS CONSULTED/ INTERVIEWED FOR THIS STUDY**

### ***Mozambique***

- Nina Berg, Programme Coordinator, Royal Danish Embassy in Maputo
- Maria da Conceição de Quadros, Advisor, Ministry of Agriculture and Rural Development
- Arlindo Chilundo, Coordinator at NET (Núcleo de Estudos de Terra e Desenvolvimento) at *Universidade Eduardo Mondlane*
- Josefina Daniel, Author of study on land rights in Cabo Delgado, *Universidade Eduardo Mondlane*
- Isabel Casimiro, Author of several studies on women and gender issues
- José Negrão, Researcher, *Cruzeiro do Sul*, Maputo
- Ana Loforte, Researcher at the Department of Anthropology at *Universidade Eduardo Mondlane*
- Rachel Waterhouse, Author of several studies on women, gender and land issues
- Terezinha da Silva, Advisor, *Centro de Formação Jurídica e Judiciário*, Matola
- Chris Tanner, Advisor, *Centro de Formação Jurídica e Judiciário*, Matola
- Samuel J. Levy, Sócio-Gerente, SAL Legal & Management Consultants, Maputo
- Amelia Zambeze, *Associação Moçambicana da Mulher Rural*
- UNAC (Peasants National Union): Ismael Ossemane, Executive Coordinator; Diamantino Nhampossa, Cooperation Department
- ORAM (Associação Rural de Ajuda Mútua): Paulo Cuinica, Chefe de Departamento de Desenvolvimento e Programa
- UNDP Maputo: Ondina da Barca Vieira, Programme Officer, Poverty Eradication Unit

### ***Tanzania***

- J.M. Lusugga Kironde: Professor at the University College of Lands and Architectural Studies (UCLAS)
- Bertha Koda, Professor at the Institute of Development Studies
- Ringo W. Tenga: advocate and Professor of Law
- Hakiardhi (Land Rights Research and Resources Institute): Executive Director Ng'wanza Kamata
- Legal and Human Rights Centre (LHRC): Executive Director Helen Kijo-Bisimba
- Tanzania Gender Networking Program (TGNP): Deus Kibamba
- Tanzania Women Lawyer's Association (TAWLA): Mary Kessi
- Magdalena Rwebangira, Advocate and former chairperson of Tanzania Women Lawyer's Association (TAWLA)

- Women's Legal Aid Centre (WLAC): Scholastica Jullu (former director of WLAC) and Rehema Kerefu Sameji
- Nakazael Lukio Tenga, Advocate and board member of Women Legal Aid Centre (WLAC)
- United Nations Development Programme (UNDP), Anne Ouma and Anushka G. Abeynayake
- The World Bank: Benson Ateng and Rest B. Lasway
- The Ministry of Community Development, Women and Children: Lidy Kibona and Redemptor Senga
- Ministry of Lands and Human Settlements. Albert Mallya, Ndemy Uloni and Theresia Nyangi
- Torbjörn Östberg: land surveyor, consultant for the Ministry of Lands and Human Settlement

### *South Africa*

- Ben Cousins, Ruth Hall, Karin Kleinbooi and Edward Lahiff of the Programme for Land and Agrarian Studies, University of the Western Cape.
- Aninka Claassens, independent consultant, Cape Town.
- Sibongile Ndashe, lawyer at the Women's Legal Centre, Cape Town.
- Judith Cohen, South African Human Rights Commission.
- Commission on Gender Equality

### *Zimbabwe*

- Julie Stewart and Amy Tsanga, SEARCWL, University of Zimbabwe.
- Norwegian Embassy, Harare

## ANNEX 2: OVERVIEW OF THE INTERNATIONAL OBLIGATIONS OF THE COUNTRIES STUDIED

	Tanzania	Mozambique	South Africa	Zimbabwe	Kenya
CEDAW	X (1985)	X (1997)	X (1996)	X (1991)	X (1984)
CESCR	X (1976)	-	s	X (1991)	X (1976)
CCPR	X (1976)	X (1993)	X (1999)	X (1991)	X (1976)
CRC	X (1991)	X (1994)	X (1995)	X (1990)	X (1990)
CERD	X (1972)	X (1983)	X (1999)	X (1991)	X (2001)
AfCHPR	X (1984)	X (1990)	X (1996)	X (1986)	X (1992)
AfPRW	S	S	X (2005)	S	S

X: the state is party to the convention. (Year of entry into force for the state.)

S: signed, not yet ratified

### Acronyms:

AfCHPR: African Charter on Human and Peoples' Rights

AfPRW: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

CCPR: International Covenant on Civil and Political Rights

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

CERD: Convention on the Elimination of All Forms of Racial Discrimination

CESCR: International Covenant on Economic, Social and Cultural Rights

CRC: Convention on the Rights of the Child

