

How title deeds make sex safer: women's property rights in an era of HIV

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One impact of HIV and AIDS in sub-Saharan Africa has been an increase in the number of poor, female-headed households. With particular reference to Kenya, this paper argues that under customary law, women's rights to own and inherit property are often limited and secondary to those of men. As a result, women who become widows are disproportionately likely to lose their homes, land, and other assets, placing themselves and their children at risk of destitution and exploitation. Modern systems of individual property rights offer women better legal protection, although such systems can discriminate against the poor, and often lack social legitimacy. Collective action to demand women's property rights has been slow to develop in Africa, despite the support of international legal frameworks such as CEDAW. Paradoxically, the author suggests that the threat that HIV and AIDS poses to national development may spur activists and governments to make greater efforts to ensure women's property rights.

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'My in-laws took everything - mattresses, blankets, utensils. They chased me away like a dog. I was voiceless'.

Theresa Murunga, widow, Nairobi, October 20, 2002¹

'When a woman's property rights are violated, the consequence is not just that she loses assets. The repercussions reverberate throughout women's lives, often resulting in poverty, inhuman living conditions, and vulnerability to violence and disease for women and their dependents

(Human Rights Watch 2003, 30)

Gender-disaggregated statistics on property ownership are few and far between. At the UN Fourth Conference on Women in 1995, the official UN figure was that they own 'less than 1%' of the world's property. Little or no progress has been made beyond this incredibly low figure since then. UN estimates suggest that 1.5 billion people will be living without security of tenure or property rights by 2020. Around two-thirds - or more - of these will be women and girls²

The proportion of households headed by women - and therefore depending on women having independent property rights - is rising in many places, as a result of increasing deaths due to armed conflict and HIV. Southern Africa has the highest average proportion of female-headed households on the continent - approximately 34% of households with children are female-headed.³ Globally, an estimated 41% of women headed households live below the poverty line.⁴ Property rights, and inheritance rights in particular, are critical for women in this and other heavily HIV-affected regions, since many more women are being widowed at a relatively young age, with dependent children to care for and educate. The organisation Widows' Rights International conducted a recent survey in Uganda and found that almost 30% were under 40.⁵

Modern property rights can be defined as the legal right of an individual to acquire, own, sell and transfer property, collect and keep rents, keep one's wages, make contracts, and bring lawsuits. Women's rights advocates have long argued that women desperately need full and equal property rights if they are to realise equality with men. The impact on women of denial of their property rights is that they are totally dependent on marriage and other relationships with men for access to the means to live. Everything depends on making those relationships work. Of course, the reality of life for many poor women is very different. Marriages break down and they are abandoned, or they are forced to continue living in a relationship with a man who sees - and treats - them as a chattel. There is no possibility of leaving with the means to make a living elsewhere, or of throwing a violent husband out of the family home. Ultimately, as the joke goes, men are able to say: 'What's mine is mine and what's yours is mine too'.

For the vast majority of women today in North America and Europe, the story is very different. For them, independent property rights are so obviously a battle won that they are virtually a non-issue (unless, that is, you are getting divorced and fighting your husband for an equal share of the assets). But aside from evolving divorce law, which is in any case rapidly being shaped by changing thinking about women's contribution to marital livelihoods, surely there is little new to say. Property rights were seen as so fundamental to women's empowerment that they were one of the first goals fought for by first-wave feminists in the nineteenth century.⁶ And at an international

¹ Quoted in www.hrw.org/reports/2003/kenya0303/kenya0303-03.htm#P323_65141, last accessed 21 June 2006.

² Again, the figure most often quoted is that 70% of the world's poor are women (UN 1995).

³ www.sahims.net/archive/Briefcases/2005/reg_briefcase_069.htm, last checked 22 June 2006

⁴ Marjolein Benschop, Legal Officer, Land and Tenure Section, Habitat, 'Women's Right to Land and Property', briefing to the Commission on Sustainable Development - Thursday 22 April 2004.

⁵ Kate Young, (2006), 'Widows Without Rights: Challenging Marginalisation and Dispossession', *Gender and Development* Vol. 14 No.2

⁶ In the UK, for example, the Married Women's Property Act of 1884 permitted women bringing property to their marriage to keep ownership rights over it. Previously these had passed automatically to their husbands.

level, women's equal rights to access, own and control land, adequate housing and property are firmly recognised in law.

Yet for women in many developing countries, lack of rights over any property shared with their husbands remains a reality. Latin America has the most egalitarian legal traditions and inheritance norms concerning women's property ownership, and a powerful lobby has sought to establish and enact these rights. South Asia has significant inequality – despite extensive mobilisation for women's rights in the region. But sub-Saharan Africa, with its combination of outsider-imposed political boundaries and systems resulting in weak or failing states, and high HIV prevalence, presents the most interesting case for analysis in this short paper. The analysis below focuses in the main on Kenya, as rich data exists on the connections between HIV and denial of women's property rights.

In sub-Saharan Africa, relatively few countries have legislation in place designed to assure women's access to land and property. The few countries that do have legislation include Burkina Faso, Malawi, Mozambique, Niger, Rwanda, South Africa, Tanzania, Uganda and Zimbabwe. And of course, knowledge of the law, money to gain access to it, and courage to cope with the inevitable backlash from the family and wider community are required too. Most women have no choice but to bend to the will of husbands and in-laws, and forget assertions of independent rights. Just as in Europe a century ago, women discover that in the absence of control over the crucial resources we all need to live, having the dreams and aspirations to survive without a man mean absolutely nothing at all.

Making a living depends on having a place to live, and – depending on what you do to survive – on having some land to farm, a room to run a business from, money to pay for materials, a computer, and someone to look after the children. Yet without legal independent rights to own property, regardless of marital status, most women living in poverty in developing countries depend on their relationships with men to deliver these things. And hence their livelihoods are precarious. If the relationship sours, or if the man gets ill and dies, how are they and their children to survive?

Property rights, inheritance and HIV

Currently, the issue of women's property rights needs to come right up to the top of the agendas of development policymakers and governments. Human rights activists are researching the impact of the lack of these rights not only on women and children, but on the HIV pandemic itself, which currently presents the greatest development challenge of all facing sub-Saharan Africa. In the region, nearly 60% of HIV-positive adults are women. In the 15–24 age group, women are five to six times more likely than men to be HIV positive due to their dependence on sexual relationships for the means to live.

Gender inequality is seen as the major cause of the HIV pandemic. As Anne Marie Goetz and Joanne Sandler of UNIFEM point out, 'while the disease is a health issue, the pandemic is a gender issue'. Efforts to fight HIV and AIDS around the world are ineffective in protecting young women in particular from infection because they fail to focus sufficiently on the need for women to have control of economic assets if they are ever to gain control over their sex lives.⁷ Women who have independent assets have greater bargaining power within marriage and families, and, if they are widowed, they are more likely to be able to survive outside the sex trade.⁸ Millions of wives

⁷ Sixteen years ago economist Amartya Sen modelled the link between women's perceived contribution to household income and their relatively better breakdown position in conflicts - (1990), 'Gender and Co-Operative Conflicts', in I. Tinker (ed), *Persistent Inequalities*, Oxford University Press: Oxford

⁸ International Center for Research on Women research argues that women need 1) property rights and economic security, 2) protection against violence, and 3) female controlled prevention methods such as microbicides – ICRW Press Release 30 March 2006.

contract the virus from their husbands. Livelihoods fail as men become ill and women add the job of caring for the sick and dying to their existing back-breaking workloads. After husbands die, wives and children commonly lose the houses they lived in, the land they farmed, and any other assets they used and earned in business. This dependency on men makes wives acutely vulnerable.

In countries like Kenya, where the HIV and AIDS pandemic is hitting hardest, property rights are in the headlines due to the thousands of women who face destitution due to lack of the right to inherit property on their husbands' deaths. Denial of women's right to inherit marital homes and property is crippling the chances of women and children surviving economically after the death of husbands and fathers.

Currently many more women are being widowed, at a younger age, than before AIDS hit, and the individuals and households responsible for trying to grab their property are themselves often very hard-hit. In the absence of enforceable laws protecting the rights of widows, their property is vulnerable to grabbing by husbands' relatives. The stripping of widows' assets is justified and socially condoned by asserting widows' stigmatised social status. In Kenya, desperately hoping to hold onto their property by submitting to rape and forced marriage, widows 'choose' to conform to traditional 'cleansing' rituals: having sex with a jater (an outcast from the community who is given this role and paid for it), or even having sex with their husbands' dead body. This is the price they pay for continuing support from their in-laws. Many women are subsequently 'inherited' by their brother-in-law, who takes them as a wife with a specific inferior status.

In Kenya, the original practice of wife inheritance (known as *ter* in the Dholuo language spoken in western Kenya) was a communal way of providing widows with economic and social protection. Since widows were not entitled to inherit property in their own right, being inherited was a way to access land. An inheritor was supposed to support the widow and her children.⁹ But there is no guarantee these days, as traditions break down, that brothers-in-law will not after all throw them out and dispose of their assets as they see fit.

Similar stories come from other parts of Africa and South Asia. As Kate Young of Widows' Rights International says: 'Widows often lose control of land and other assets to which they have rights, and are subjected to all forms of sexual harassment. In India, the word for widow and for whore are closely related in Hindi'.¹⁰

The lesson from this story is clear. People who are forced to depend on their good relationships with others for their most basic rights to shelter and the means to make a living are vulnerable to appalling abuse and exploitation. Once crisis strikes – whether this is in the form of economic crisis following the HIV and AIDS pandemic, conflict as in Rwanda or Burundi in the 1990s, battles over eroding natural resources, or the undermining of traditional views of rights and obligations which happens once people's attitudes and beliefs change in response to international media – people have to decide on where their first loyalties lie. Social obligations to people beyond one's immediate loved ones feel less important, and if they have property which will ensure one's own survival, it is tempting to grab it.

At that point, the pretence that some people (men) who have a primary interest in property will benignly look after the interests of those with a secondary interest (women) breaks down.

The impact on development

Obviously, the impact of widows lacking inheritance rights has knock-on effects on the next generation and ultimately on national development. Development needs women's equal property

⁹ www.hrw.org/reports/2003/kenya0303/kenya0303-02.htm#P264_48906, last accessed 21 June 2006.

¹⁰ Young (2006), *op. cit.*

rights. Among other things, they increase agricultural productivity, ensure more secure access to services, and provide incentives and ability to invest. By improving women's bargaining power within marriage, ultimately promoting property rights using development arguments creates a virtuous circle in that it ultimately challenges ideas and beliefs about women being 'junior partners' in marriage and enables them to assert equality with men.¹¹

Future development is compromised if women's property rights are not enforceable, because destitute mothers cannot send children to school. Kate Young states: 'Widows can have the heartbreak of losing their young children, due to inability to earn an independent living. Their daughters may suffer very early marriage, be sold into concubinage, or be forced into the sex trade, while their sons may be absorbed into their late father's kin group as labourers with few rights, or 'leased out' to those who can make use of child labour'.¹²

Challenging the roots of the problem

What are men's arguments against women's equal property rights? Why the 'stickiness' of traditions around property ownership? The roots of the problem lie in ancient – and pretty universal – attitudes and beliefs about marriage, the family, and the role of women, which justify inequality and the exploitation of less powerful groups – women and children – by comparatively powerful men.

In traditional 'legal' systems and in modern-day family law alike, women's claims to resources are justified by ideologies of wives as 'junior partners' in the marriage, to be cared for by male 'family heads'. Women's access to property depends on their conformity to ideals of being a 'good wife' to their husbands. In most cultures around the world, customs and social practices governing property have their roots in patriarchal families,¹³ in which land, the houses built on it, and other family property are passed down from father to son. While boys were born in the house they could expect to live in all their lives, girls moved away from their families when they got married. They found themselves living in a new place, where they were allowed to use land, buildings and tools belonging to the family they had married into. This very different life experience defined women's relationship to all the commodities that they depended on for their livelihood as fundamentally different, right from the start.

Today, resistance to equal property rights is justified by fears that giving women equal property rights will lead to family and clan estates disintegrating. Fears that land settled by a community will pass to others if women have property rights are at the bottom of objections in some sub-Saharan African societies. One Ugandan man is quoted as saying 'What happens to the clan land if my daughter marries a Nigerian?'¹⁴ Yet of course these concerns would be of no consequence if other legislation on citizenship were reformed to ensure both women and men were full and equal citizens, able to inherit property and determine family identity and lineage.

It is not simply a matter of education and persuasion to shift from a backward, 'traditional' view of women to an enlightened 'modern' realisation of gender equality. In 2006, despite assertions of women's equality and universal human rights, these attitudes and beliefs still endure – among educated and powerful elites as well as less educated people – because they justify the appropriation of resources from the less powerful by elites aiming to feather their nests still further.

¹¹ Ruth Meinzen-Dick, Summary Note 'Empowering Low-Income Women', Sustainable Food for All by 2020, Conference, Bonn, Germany, 4-6 September 2001.

¹² Young (2006)

¹³ Even in matriarchal cultures, property is usually inherited by women's male relatives (Benschop 2004).

¹⁴ http://www.sarpn.org.za/documents/d0000333/P313_Kenya_Report_Contributing.pdf, last checked 4 August 2006

Governments do little in practical terms to challenge the deep-rooted discriminatory attitudes to women, because to do so would not only be deeply unpopular with men, but would depend on men in government themselves challenging their own prejudice and self-interest in retaining the status quo. Thus, pronouncements on gender equality may exist at the level of constitutions but fail to be carried into national law. And if women's organisations successfully lobby for legal change, the task of making the law accessible and affordable to the women who need it remains.

Modern laws and individual rights: do they always support women?

Researchers suggest that each of three types of legal land tenure systems has advantages and disadvantages. Customary systems facilitate social cohesion. Public systems facilitate equal access to land and ensure that people too poor to consider purchasing land are not excluded from eking out a livelihood. In contrast, private land ownership, it is argued, gives users a sense of security which promotes investment in land.¹⁵

From a gender perspective, all three systems have disadvantages for women. The social cohesion promoted by customary and publicly-owned land systems rest on inequality between women and men, and this paper has argued that this is a major factor in widespread violence and abuse directed at women, with knock-on effects on their dependent children and wider society. Traditional systems of property control and ownership are inherently discriminatory against women, assuming complementarity of interests and roles for women and men, and giving women secondary property rights alone. It is also true that the process of codification of custom into 'customary law' which went on as part of the colonial project made things much worse: 'Historical experience suggests that in the evolution of oral to formal, written rights, certain interests tend to lose out, typically the poor holders of secondary rights'.¹⁶

While customary and public systems discriminate on grounds of identity, private systems depend on purchasers having sufficient funds or collateral and therefore by definition benefit the wealthier in society. Indeed, De Soto argues that formalised land and property rights are a fundamental element in capitalist modes of development¹⁷. Land privatisation has been the major objective of donor-endorsed land reforms in African countries including Tanzania, Mozambique, Malawi, Zambia, Botswana and Namibia¹⁸.

There is a considerable cost to women in land privatisation. Women are disproportionately numbered among the poorest in society, and therefore enter the land and property market on unequal terms. Government policies promoting private land ownership have been extensively critiqued as leading to growing inequality and poverty as traditional user-rights of marginalised groups are eroded. This lesson, learnt through the imposition of the Enclosures Acts of the English eighteenth century, holds firm today when assessing the impact of economic structural adjustment policies imposed on developing countries in the 1980s and 90s. Economic liberalisation has led to increased and intensified contests over land, as land in some areas gains value as a commodity for investment. On the one hand, the poor are forced to sell land to survive. On the other hand, there is land-grabbing by political elites, appropriation of common land by the state, and allocation of land to investors.

Clearly, the property market is not gender-neutral, and excludes poor women by discriminating against them because of their lesser power and resources. There are dangers that World Bank

¹⁵ Though this can be countered citing examples of land tenure systems where, despite land being owned by the state, it is granted to people in perpetuity and they have full rights to bequeath it to their descendants.

¹⁶ Camilla Toulmin 'Securing land and property rights in sub-Saharan Africa: the role of local institutions' http://www.iied.org/Gov/mdgs/documents/mdg3/ch2_28pp.pdf last checked August 5 2006

¹⁷ <http://www.id21.org/insights/insights48/insights-iss48-art01.html> last checked 5 August 2006

¹⁸ Although even the World Bank now recognises that land titles are not necessary for secure tenure – people can achieve this through political pressure, obtaining receipts for utilities, or sheer force of numbers which prevents them from being 'moved on' by authorities (www.ID21.org.insights48/insights-iss48-art00.html, checked 22 June 2006)

promotion of freehold land titles, by increasing the costs of land and simplifying bundles of rights, may actually increase barriers to women's access as users, and thus further entrench gender inequalities by turning 'resources' into 'property'. Land 'reform' in Kenya, while not obviously discriminatory, has exacerbated women's inequality by recognising men's traditional allocation rights as worthy of registration while ignoring women's user rights to clan land.

Yet, despite all these issues, individual formal ownership and inheritance rights guaranteed in law offer by far the most convincing way forward to ensure that growing numbers of people – predominantly women and children – are able to guarantee independent control over the property which will enable them to make a dignified and decent living, and to realise their rights.

An interesting example to use here is that of Ethiopia, where the government has stood fast and rejected donor demands for land to be privatised. It fears destitute farmers living on exhausted land selling up and moving to cities, squatting on the outskirts as they seek alternative ways of surviving. Yet ironically, it is lack of enforceable independent property rights which leads many Ethiopian widows and divorcees to abandon rural livelihoods for destitution in the streets of Addis Ababa. Without land and the resources needed to farm it, including ploughs and draft animals, women from the Highlands find it impossible to make rural livelihoods work in the absence of markets for non-agricultural products or services. From a women's rights perspective, equal rights to land are critical in Ethiopia, and resistance to the principle of sex equality means formal legal redress is required.

This kind of scenario leads to a pragmatic alliance between women's rights activists and neo-liberal development policymakers based on their very different analyses of the desirability of individual privatised property rights.

Pinpointing the difficulties with the existing legal frameworks

To what extent do existing national legal frameworks actually guarantee women's individual independent property rights?

Formal law is unable to provide a coherent response to the issue of women's rights to property in most countries, because such laws are a part of a 'foreign', outsider-imposed, system of governance which has no real roots in popular assent. If the law is not socially legitimate and enforceable, changing attitudes and beliefs is critical. Land researcher Kaori Izumi points out that: 'Institutions that govern women's relationship with land cannot be seen simply as a set of rules, norms, policies, and laws: it is the social legitimacy of these which constitutes institution'.¹⁹

Neither traditional nor modern systems of jurisdiction over property have the genuine assent of women – how could they, since they were designed by elite interests to serve their own ends? Like traditional custom, modern legal systems are the products of male-dominated systems of governance. Far from dispensing 'blind justice', these systems enshrine familiar biases against women. While national legal systems may support individual rights at the level of Constitutions which contain declarations of non-discrimination, the actual laws often reflect the idea that the family and household are sites where men and women have very different roles and household heads are male.

Another huge issue is the incoherence created by the existence of parallel systems of jurisdiction over property rights. Currently, in many countries including post-colonial countries in sub-Saharan Africa and South Asia, systems of property control and ownership are very incoherent. Inconsistencies exist both within systems, and between different systems in places where older

¹⁹ Kaori Izumi (1999), 'Liberalisation, gender, and the land question in sub-Saharan Africa' in *Gender and Development* Vol. 7 No.3, page 16

systems co-exist with the 'modern' system of civil law. The very fact of the existence of two or more systems gives elites the opportunity to 'cherry-pick' those elements of a particular system which serve their own ends.

In many places, traditional obligations which used to be binding are being ignored or questioned and breaking down. Increased mobility for work, and increased influences from global media emphasising consumerism and individualism, all erode social ties within communities and within the extended family. When norms of conformity to a particular system of rules have been breached, vulnerable groups find their claims to just treatment go unheard.

Modern legal systems are also much less accessible than traditional ones – it costs money and takes education to be able to use the law, and some women – for example, rural dwellers married under customary law – may find they are told to pursue their claims under customary law.

Conversely, the fact that women's behaviour is popularly seen as an indicator of the health of a culture means that if they abandon traditions and seek help from the civil law this in itself is seen as bad behaviour. Women may be branded socially deviant and suffer a backlash of abuse or ostracism if they resort to the courts to pursue their rights.

Ways forward

Latin American experience would suggest that there is no serious alternative to political struggle to achieve rights that are so fiercely resisted at all levels.²⁰ In terms of the likelihood of governments addressing the issue of women's property rights, this will remain a fundamentally unpopular issue which remains unaddressed until arguments about the cost to development of inaction become overwhelming.

Perhaps inevitably and because individual property rights are by definition individual, collective social action around them has not happened with the pace and the commitment that has been shown around protecting natural resources used by whole communities – for example the Chipko movement in India or the Greenbelt movement in Africa.

Using human rights arguments to lobby governments around women's property rights does not seem effective unless there is a strong and vociferous local women's movement making demands on this basis. In Uganda, where the women's movement is vibrant, a wife's consent is now legally required to undertake transactions on jointly occupied land. However, translating these rights into practice is a whole new challenge.

In Kenya, similar collective action has not taken place and there is very limited government engagement with the issues. Commitments made internationally are no indicator of national action. The international human rights framework is unequivocal. Kenya is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the CEDAW Committee has observed: 'Any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family, and to live in dignity as an independent person' (General Recommendation 21, 13th session 1992).

However the Kenyan government has limited itself to sounding obligatory notes of sympathy for women in documents submitted to international financial institutions, acknowledging on paper the links between women's unequal property rights, their poverty, and Kenya's stumbling development. These words on paper have not translated into greater awareness, programmes, or

²⁰ Robin Palmer, 'Gendered Land Rights – Process, Struggle or Lost Cause?', unpublished, 28 November 2002

action. Officials repeatedly told Human Rights Watch in the research report quoted in this background paper that combating women's property rights violations is not a priority, not part of their jobs. They cited 'custom' as their most frequent excuse, and lack of resources to solve the problem came a close second.

It seems that HIV and AIDS presents such a dramatic challenge to national economic development that this is, paradoxically, perhaps the best chance that women have to get governments to take women's rights seriously. In Kenya, the government-sponsored National AIDS Control Council acknowledges that Kenya's serious policy and strategic gaps relating to women's rights have contributed to the spread of HIV and AIDS which in itself has a disastrous effect on national growth. According to the United Nations Development Programme, women's insecure property rights are a core cause of Kenya's economic troubles, contributing to low agricultural production, food shortages, underemployment, and little income for most rural residents. Kenya's absolute poverty has risen to between 52 and 56 percent of the population, up from 40.3 percent in 1994.²¹

The activism of women's movements to ensure that the law provides a coherent and user-friendly safety net for women whose rights are under fire is also critical, but the question of the extent to which grassroots women can be motivated to fight for an aspect of governance which is not rooted in their contexts is questionable. Reform to customary law looks more possible. For example, the South African Law Commission (SALC) started investigating reforms to customary law in 1996, and the Centre for Applied Legal Studies (CALs), together with the Rural Women's Movement engaged in this process including conducting research, providing a written submission, and doing advocacy. The resultant Recognition of Customary Marriages Act was made operational only two years after its enactment in November 2000.²²

Nor is it only government action which is needed. As argued earlier, to challenge women's lack of property rights would also bring profound changes to attitudes and beliefs about wives' role in marriage. To get this change requires widespread social action by women and men to challenge views which currently go largely unquestioned. Social activism is needed on a massive scale, supported by NGOs, bilaterals and states.

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²¹ http://www.hrw.org/reports/2003/kenya0303/#P303_58288

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