

**POLICY DISCOURSES ON WOMEN'S LAND RIGHTS IN SUB-SAHARAN AFRICA: THE  
IMPLICATIONS OF THE RE-TURN TO THE CUSTOMARY**

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*This article examines some contemporary policy discourses on land tenure reform in sub-Saharan Africa and their implications for women's interests in land. It demonstrates an emerging consensus among a range of influential policy institutions, lawyers and academics about the potential of so-called customary systems of land tenure to meet the needs of all land users and claimants. This consensus, which has arisen out of critiques of past attempts at land titling and registration, particularly in Kenya, is rooted in modernizing discourses and/or evolutionary theories of land tenure and embraces particular and contested understandings of customary law and legal pluralism. It has also fed into a wide-ranging critique of the failures of the post-colonial state in Africa which has been important in the current retreat of the state under structural adjustment programmes. African women lawyers, a minority dissenting voice, are much more equivocal about trusting the customary, preferring instead to look to the State for laws to protect women's interests. We agree that there are considerable problems with so-called customary systems of land tenure and administration for achieving gender justice with respect to women's land claims. Insufficient attention is being paid to power relations in the countryside and their implications for social groups, such as women, who are not well positioned and represented in local level power structures. But considerable changes to political and legal practices and cultures will be needed before African states can begin to deliver gender justice with respect to land.*

**Keywords:** land tenure reform, women's land interests, customary law, legal pluralism, Africa.

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## 1. INTRODUCTION

This paper examines the content of some contemporary policy discourses about land tenure reform in sub-Saharan Africa, in general and specifically as it relates to women's interests in land. We identify a developing debate about the potential of so-called customary systems of land tenure to meet the needs of all land users and claimants of land use rights and go on to examine the implications of this return to the customary for achieving gender justice with respect to land. Local populations all over Africa are being affected by pressure on land resources. In most cases this represents a historical shift from relative land abundance to relative land scarcity, a change which has occurred, or is occurring, throughout the sub-continent. Although there are still some rural regions where suitable land is not all under agricultural use, these tend to be areas poorly served by markets and where the commercialization of agriculture is low. African countries differ widely with respect to contemporary levels of land scarcity. In the context of an absolute rise in total populations, the severity of land scarcity depends on a country's particular experiences of the colonial appropriation of land, of the commercial development of agriculture and the nature and degree of urbanization. This paper is heavily weighted towards British post-colonial states and confines itself to rural land issues. Many regions are experiencing growing conflicts between land users and they, together with national and international policy makers, are increasingly concerned with growing land access problems and land conflicts all over the continent. A burgeoning policy debate about land tenure issues - described by Quan as reforms 'which change tenurial relations between land owners and land users without necessarily altering land distribution' (Quan 1997, 1) - is evident. Recent land tenure reform has been undertaken, or is underway, in a number of countries, including Tanzania, Uganda, Malawi, Cote d'Ivoire, Niger, Ghana and Zimbabwe, and international donors have been heavily involved in the design of these reforms. In many countries, government proposals have sparked off considerable NGO and civil society activity about land issues, which has been picked up and commented upon by international NGO's. In some cases land is an important focus for radical and democratizing struggles, as land scarcity bites and land conflicts take on an international character, as for example throughout the 1990's when land was annexed for tourist enterprises and extraction.

An important minority voice in these national debates are African feminists and women's advocates and international gender and development experts and advocates, who have long sought to promote better and more secure land access for rural African women. Most rural African women play a substantial part in primary agricultural production, making the complex of local norms, customary practices, statutory instruments and laws that effect their access to and interests in land very significant (not only to them, their dependants and their male relatives, but also arguably to levels of agricultural production). Although there are discernible common features, local level empirical studies demonstrate great diversity and complexity in women's land interests and in the factors affecting these. In addition, norms and practices about women's land access, as well as who gets land, how much and from whom, are not static but have changed and are changing over time. Our primary concern is not with this level of analysis, although as a setting for our discussion, section 2 considers, through a gender lens, some of the main features of rural land access and use. Section 3 explores the policy discourses of some of the main protagonists in current debates about tenure reform. We consider first, the World Bank and discuss documents from its Land Policy Division and from several of its gender specialists and second, OXFAM Great Britain (OXFAM GB) and International Institute for Environment and Development (IIED), as two UK-based organizations that have been very active for a number of years on land policy issues. Third, we consider the approaches and discourses of African and Africanist feminist legal specialists. Throughout these accounts, we highlight and explore historical shifts in thinking and the evidential and theoretical, as well as political and ideological, factors affecting these shifts. These sections demonstrate a developing

consensus amongst the non-gender specialists towards encouraging the evolution of customary practices to deal with conflict and disputes over land access. Gender specialists are divided. Some argue that a reformed and strengthened customary law is in women's interests, but the majority reject this and instead argue for women's land and property rights to be enshrined in statutory law. In section 4 of the paper, we examine the idea of reforming and building on customary law from the perspective of gender justice, outlining some important problems that we think the return to customary law will pose for contemporary African rural women.

## 2. AFRICAN LAND ACCESS AND USE : A GENDERED DISCUSSION

The scholarship on land issues in sub-Saharan Africa is both deep and wide, with developed and sophisticated literatures from several disciplinary perspectives and a large policy literature.<sup>1</sup> None of these can be read simply or innocently. They diagnose and describe circumstances of profound and complex change, on the basis of empirical evidence that has been produced out of the negotiations between actors with widely different access to the political, economic and technical resources required to record history. Most of the historical evidence about the local level was collected after rural localities had been affected by colonialism, as had the research and official communities that played a large part on the production of the written records. The recent writings of anthropologists and historians have emphasized the ways in which the perspectives, concepts and meanings attached to African forms of land tenure arise as much from the framework of colonial history and the forms of evidence this produced, as from the nature of land holding itself. These kinds of nuances are rarely found in the policy-focused writings of land tenure experts. As a result many implicit and explicit contestations over meaning run through the literatures.

### *'Individual' Land Access and Kenya's Experience of Registered Individual Titles.*

To-day, most rural areas of the sub-continent have active land markets, although it is important to distinguish between formal market transactions where titled land is bought and sold, and other kinds of informal transaction, which form the bulk of land transfers. All the sources agree that the growth of land markets has not and does not require formalized property rights and they also document the multiple, though often limited, forms of local land markets (Reyna 1987, Platteau 1996, Bruce and Migot Adholla 1994, Heck 1996, Shipton 1988, Toulmin and Quan 2000). Informal transactions can include a wide variety of loans, leases, sharecropping contracts, exchanges and pledges, while in some places, forms of sale take place in the absence of registered title (Bosworth 1995). These kinds of transaction have a long history under so-called customary systems of tenure, but they are interpreted in very different ways in the literatures. Bosworth, who in the mid-nineties studied land transactions in south Kigezi in Uganda, where population densities are very high, warns against seeing them as the emergence of individual rights (Bosworth 1995). She is at pains to distinguish herself from authors such as Feder and Noronha who see individual rights as a long established feature of African land holding systems and informal market transactions as evidence of these individual rights (Feder and Noronha 1987).

These contestations about whether individual rights exist outside registered titles, and their longevity, pivot around perspectives on 'the evolution' of African land tenure, a language which also has a long history in this context and which has been particularly powerful in policy. Chanock, in an account of the development of colonial property law in Africa, argues that from early on, British colonial administrators developed a common framework for understanding

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<sup>1</sup> Basset and Crummeay 1993, Berry 1992, 1993, Bruce and Migot-Adholla 1994, Channock 1991b, Deininger and Binswanger 1999, Downs and Reyna 1988, Feder and Feeny 1991, IIED 1999, McAuslan 1996, McKenzie 1998, Migot-Adholla et al 1991, Moore 1998, Okoth-Ogendo 1989, 1998, Platteau 1996, Shipton and Goheen 1992, Toulmin and Quan 2000.

tenurial systems that dominated the colonial period, 'fitting like a grid over events' (Chanock 1991a, 73). In this evolutionary framework indigenous African land holding was viewed as 'communal', and individual proprietary ownership was interpreted as a more developed form of land tenure linked to the development of market exchange (see for example Lugard 1922, 280-1, quoted in Chanock 1991a).<sup>2</sup> In British colonial administrative discourse, societies were understood to have progressed on a grand and rather long term scale from communal to individual forms of land holding; conversely the type of land tenure of particular colonial societies were thought to indicate the level reached within this evolutionary progression. Bassett argues that early British colonialists used this idea of the communal nature of African land tenure to gain ultimate control over land, establishing the legal right to alienate land by creating crown land and by declaring that 'vacant' lands belonged to the State (Basset 1993). Cultivators were dispossessed in Eastern and Southern Africa, where European settlers and companies were provided with land to farm, on which Western property categories of freehold and leasehold were conferred. Formal legal pluralism, with customary and statutory law established and constructed as two separate systems was an essential element in these policies. Basset also argues that up until the 1930s, colonial authorities did not wish to transform communal to individual tenure for Africans, but wanted to preserve what they described as customary rights in the interests of political stability, which was the paramount colonial objective. When in the 1930s colonial administrators became more interested in developing African agriculture, this self-same colonially constructed customary tenure 'was increasingly viewed as an impediment to growth' and 'a major obstacle to realizing production goals', and they began to promote land tenure reform on the basis of individual ownership in African held land areas (Basset 1993, 12). At this point, individual land tenure became firmly embedded in modernizing discourses about agricultural intensification and economic growth. The more developed form of land tenure- freehold tenure and individual property - offered 'the most propitious conditions for agricultural investment' (ibid.).

In a further, latter-day evolutionary model, extensively discussed by Platteau (which he calls The Evolutionary Theory of Land Tenure -ETLT) modernizing discourses and the evolution of individual land tenure are also closely linked (Platteau 1992, 1996, 2000). The ETLT, prominent in policy discussions from the 1980's onwards, contends that population pressure, together with commercialization of agriculture, puts great pressure on land resources and leads to increased individualization of land access, increased conflicts between land users and a growing demand from them for more formal property rights (i.e. from 'below'). In response, states step in to initiate formal systems of registered individual ownership. In the ETLT this in turn promotes greater security, reduces the incidence of conflict and sets in train a number of economic benefits - the accelerated development of the land market, investment in land and in agriculture, reallocation to more efficient producers and ultimately greater capital accumulation and government revenue.

The most important case-study of the link between individual titled ownership and positive economic effects is Kenya, where the registration of rights for Africans to land in individual freehold title began in the 1950s and continued to be official policy until very recently. Several commentators on the history of Kenya's land tenure policy, suggest that the highly influential Swynnerton Plan for Kenyan agriculture (Swynnerton 1954), which set in motion colonial land tenure reform, was concerned not only with the benefits of formal titling for improving agricultural productivity but also and perhaps equally the potential of these economic policies to undermine the widespread political instability (Heyer and Williams no

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<sup>2</sup> Chanock suggests that the central idea of the communality of earlier resource access rules owed much to the British Colonial Service's familiarity with the work of 19<sup>th</sup> century legal theorists, such as Maine.

date, Platteau 1996).<sup>3</sup> Heyer and Williams argue that land tenure reform in Kenya was part of a plan to create a new agricultural class of yeoman farmers as a response to the rebellions in Central Province in the 1950s. After independence, the new government was equally attached to a modernizing agenda. Registration and titling continued throughout the 1960s and 1970s, as part of agricultural and land policies justified on almost identical grounds as those of the colonial state (Okoth-Ogendo 2000, Platteau 1996).

As registration of titles proceeded, concern about their effects grew and many case studies in the 1980s found bountiful evidence to criticize free market modernizing approaches to tenure reform (Barrows and Roth 1989, Bruce 1986, Haugerud 1983 Green 1987 Shipton 1988).<sup>4</sup> A repeated finding was that land registration had promoted inequality and enhanced insecurity: '...land titling can be said to supply a mechanism for transfer of wealth in favour of the educated economic and political elite...' '...land titling opens up new possibilities of conflict and insecurity' (Platteau 2000, 68). This finding from Kenya is supported by Atwood's wider overview, which concludes that, wherever it has been introduced in sub Saharan Africa, titling *creates* greater uncertainty and conflict (Atwood 1990). '...women, pastoralists, hunter-gatherers, and low-caste people, former slave and people belonging to minority tribes etc' (Platteau 2000, 66) were particular groups whose customary claims were denied recognition during registration processes (Green 1987). Vulnerability increased as land access became much more insecure (Platteau 2000, Quan and Toulmin 2000). On the other side of the coin, research on the economic effects is summarized by Platteau as showing 'no clearly discernible impact on investment behaviour' (Platteau 2000, 57). Far from getting greater efficiency, the absentee owners and urban educated elites who scrambled for titles in the early period of registration 'farm inefficiently and under-cultivate the land' (ibid.) and there had been paradoxical effects with respect to credit (Platteau 2000, citing Green 1987, Shipton 1988, Barrows and Roth 1989).

#### *Land in Post-Independence States*

The considerable continuity between colonial and post-colonial land and agricultural policies found in Kenya is much more widely applicable. Most post-independence governments in ex-British and French colonies continued the land policies of their previous regimes. 'Nationalization in the early years is followed by a set of policies to grant private title redistribute land and more recently, decentralize land management and grant some form of recognition to customary rights' (Toulmin and Quan 2000b, 11). Few, if any, relinquished the states' rights to land appropriated to establish and maintain colonial political sovereignty nor could they resist the appeal of the wide-ranging potential for political patronage (Alden-Wiley 2000; Lavigne- Delville 2000, Mamdani 1996, Moyo forthcoming, Okoth-Ogendo 2000, Toulmin and Quan and 2000b, Shivji 1998). Land remained and remains a significant weapon in power struggles within many African states (Platteau 1996). In the first decades of independence, many governments seized land for infrastructure development and state-owned agricultural projects -a period also marked by land grabbing by political and economic elites.<sup>5</sup> These processes were aided by very poor and inefficient land administration, with many

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<sup>3</sup> The main outlines of Swynnerton's blueprint for Kenya are reproduced in a subsequent policy document covering East Africa as a whole (EARC 1955).

<sup>4</sup> Sorrenson 1967 is one of very few commentators on the Kenya experience of titling who is positive about it.

<sup>5</sup> Several authors have noted how new sprees of land grabbing by urban elites emerged in different states and in different periods, especially when state funds were being spent on agricultural modernization. See for example Shepherd (1981) and Goody (1980) who describe the rash of absentee landowners on land being used for commercial rice growing in Ghana's Northern Region in the 1970's. These were mainly southern-based state employees and entrepreneurs who persuaded local chiefs to give them access to so-called customary land.

opportunities for abuse and corruption, offered by the post-colonial systems of statutory land law and administration, which Okoth-Ogendo describes as poorly understood, especially in their differences from those in the ex-colonial metropolises (Okoth-Ogendo 2000).

The Kenya experience also throws the spotlight on how the relation between statutory and customary law worked in practice and the extraordinary complexity of the legacy of the pluralistic legal orders as post independence unfolded. Some of the problems in Kenya were that formal land registration did not work very well in tandem with local practices. It was time-consuming and costly, so that as time went on, the land registers became increasingly at variance with possession and use'... a gap developed between the control of rights as reflected in the land register and control of rights as recognized between most local communities' (Barrows and Roth 1989, 7 cited in Platteau 2000, 61). Confusion was created and the land law 'failed to gain popular understanding and acceptance'. '...the state has decided to retreat from radical interpretations of freehold tenure and to revert to some customary principles' (Platteau 2000, 63). Haugerud 1989, Mackenzie (1993), Pinckey and Kimuya (1994) all suggest that land boards 'are frequently reluctant to permit transactions that would leave families and their descendants landless and destitute' (Platteau 2000, 63). Despite the existence of registered titles, access to the majority of plots was through inheritance or non-registered sales, lending and gifts (Shipton 1988, Green 1987, Haugerud 1983, Barrows and Roth 1989, MacKenzie 1993).

This interpenetration of statutory and customary systems at the local level is borne out by studies of the effects on women's land access of the introduction of registered title and the new systems of land administration (MacKenzie, 1990, 1993, Haugerud 1989, Davison 1988a, Karanja 1991, Fleuret 1988, Shipton 1988). Although Lastarria-Cornhiel summarizes these that 'usually women lose access or cultivation rights while male household heads have strengthened their hold over land' (Lastarria-Cornhiel 1997, 1326), Mackenzie's historical study of the different ways in which the land reform of the 1950s had affected patrilineal Kikuyu women's land claims in Central Province gives a more detailed and nuanced picture (MacKenzie, 1990, 1993, 1998). Women's claims to use land as wives and as daughters were becoming insecure as the area was experiencing severe land shortage and land was becoming commoditized. Some of her cases showed that lineage land given to men on marriage was still managed on a day-to-day basis by women, but it was now registered in the name of the husband who thereby gained more exclusive rights over its disposal. As the married couple purchased land out of their joint efforts this land too could be registered in the name of the husband. The strength of the claim that wives had to land through marriage was implicitly diminished, especially in the light of the difficulties that a small group of elite women faced trying to purchase land in their own names. Although the land reforms could support daughters' inheritances within their patrilineages, these practices were coming under growing pressure from the sub-clan, which wanted to consolidate land interest within their own groups. Mackenzie thus concludes that land reform had increased men's resistance to women's control over land, while increasing women's insecurities. Registration and titling diminish women's land access in this example by encouraging a single registered owner, and providing a new legal arena for gender conflicts, but it did not extinguish customary claims on land. But in addition it gave a new context for claims in the language of custom and 'men found they were able to manipulate the historical precedents of 'custom' to exercise greater control over land to the detriment of women' (Mackenzie 1993, 213; see also Yngstrom forthcoming).

#### *Legal Pluralism and 'Customary' Tenure*

There now exists a considerable debate within the academic literature on law and legal theory about the nature of Africa's legal pluralism (Woodman 1985, Manji 1999, Griffiths 1997, 1998, 2001, Manuh 1994, Wilson 2000). Woodman points out that there is a dominant centrist legal

conception that views statutory law as a proper and higher form of law and customary law as a residual subordinated category (1985).<sup>6</sup> Woodman describes this as ‘lawyers’ customary law’ and contrasts it with ‘sociologists’ customary law’ ‘the former referring to that law applied within the state courts, the latter to that which is socially recognized outside’ (Manuh 1994 citing Woodman 1985, 215). African states are routinely described as legally pluralist and customary law as constructed, but sources differ widely in what they mean by this. Much rural land holding is characterized by informal local level practices and normative principles, usually called customary tenure arrangements.<sup>7</sup> These coexist within the nation state with others that are guaranteed by statutory law and in some states with other legal orders based on religious law. Colonial legal pluralism consisted of a formal, and sometimes constitutional, recognition of customary practices, in which these practices were systematized and placed within a framework of recognized institutionalized dispute settlement procedures.<sup>8</sup> In many of today’s national legal orders, the constitution and statutory law *prescribe* the nature and broad competencies of the customary system, specifying the scope of its practices and processes. For legal centrists, customary law may be constructed, but there is nothing wrong with that. After all, its contemporary existence is palpable and sculptured and guaranteed by the statutory.

However for many other commentators, there are more broad-ranging and significant differences between the customary and statutory systems. The formal system of local dispute settlement fora, together with a body of rules about the principles of adjudication, introduced by colonial states, was far from a simple formalization of existing local-level practices. Formalizing its content also changed it. ‘Despite official interest in preserving ‘native law and custom’ the interpretation of customary tenure was quite narrow, influenced as it was by European notions of proprietary ownership. The search for individual landowners, the redrawing of community boundaries ...created new rights and conditions of access that became the subject of considerable dispute’ (Berry 1997). Many of the supposed central tenets of African land tenure, such as the idea of communal tenure, the hierarchy of recognized interests in land (ownership, usufructory rights and so on), or the place of chiefs and elders, have been shown to have been largely created and sustained by colonial policy and passed on to post-colonial states (Berry 1992, 1993, 2000, Bosworth 1995, Heyer and Williams no date, Lavigne-Delville 1999, McAuslan 1996, Okoth-Ogendo 1989, Shipton and Goheen 1992, Yngstrom 1999). In addition, the content of so-called customary rules reflected only some of the voices of indigenous society. In Chanock’s well-known interpretation, what came to be the content and procedures of customary law were generated out of a compromise and uneasy alliance between the power holders of African indigenous societies and colonial powers (Chanock 1982, 1985).

In centrist models of legal pluralism, customary law comes not only to have a static and over systemic character, but also an *overly legal* one. Many legal specialists see the customary as a separate system that has rules of adjudication and other features similar to those in the statutory system (Griffiths 2001). Many terms with distinct meanings in Western law are then used to describe characteristics of customary systems. The model is one of dualism, albeit of an

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<sup>6</sup> Interesting insights into this process are to be found in Griffiths’s account of the discourses of othering and difference present in the historical devolution of these conflicts to a realm of custom (Griffiths 2001).

<sup>7</sup> Lavigne-Delville (1999, 2) provides an interesting discussion of what these should be called. ‘Researchers prefer to talk about local landholding systems, conforming to...socially determined land use rules!’...‘There is no system that is traditional or customary in itself, but there are forms of land management based on custom’.

<sup>8</sup> In writing in this very general way on the basis of sources which seek to generalise, we are conscious of Anne Phillips’s caution about the dangers of producing a much too coherent account of what was often a very messy and contradictory set of policies. As she notes, colonial policy was ‘necessarily makeshift’ (1989: 11) and so different in different states, despite recourse to often highly uniform analyses of the economic, social and political situations of particular states.

unequal kind. This dualism, in which customary law is seen as a different kind of primarily legal system carrying out many of the same functions as formal law, is one of the most common modalities in which policy advocates describe customary systems. For example, Bruce and Migot-Adholla say: 'in land tenure... two sometimes conflicting sources of legitimacy, philosophy and rules have come to govern land tenure' (Bruce and Migot-Adholla 1994). An example here is the use of rights language to describe land claims in indigenous systems. 'Generally, individual families enjoyed fairly clearly defined spatial and temporal rights of use over different parcels of cultivated land. Such family rights were transmitted to succeeding generations in accordance with prevailing rules of succession' Migot-Adholla and Bruce, 1994, 5). By using the term rights, Migot-Adholla and Bruce imply that the claims made by persons against each other with respect to land are strong and unambiguous.<sup>9</sup> For anthropologists and historians local levels systems of dispute settlement are not really 'law' at all, but practices which are processual as well as being socially embedded. They use more circumspect language, implying, for example, that the language of rights may be inappropriate. Translating local level ideas into the term rights gives an erroneous impression that the claims are similar. In this vein, Bosworth, referred to earlier, argues that there is no Bakiga word corresponding to the English word rights (Bosworth 1995).

#### *The Implications of Social Embedded-ness*

Many of the differences between African local level legal processes around land claims and statutory processes arise from the socially embedded nature of land access. Continent-wide, socio-legal practices with respect to land and modes of gaining access to it are very diverse, although there is broad general agreement within the historical and anthropological literature that African systems of land access were socially embedded, created by use and negotiated and that to some extent remain so to-day.<sup>10</sup> Although overwhelmingly individuals and households got access to land through intergenerational succession, most claims were claims to use and community-level patterns of land use were not rigid, but flexible and negotiable.<sup>11</sup> Control and ownership rights in which land could be alienated from the social groups with claims to use it were limited. Within kinship groups and households, claims to use were made by men and women for land inherited within these social groups, while between them, claims could also be made on a number of bases. Pawning, pledging and loaning provided access to land for use without undermining the flow of land through inheritance and most communities also had ways in which in-migrants could make claims to land that was not already assigned. The land as a natural resource also provided different kinds of utility, often for different groups of people. In all these cases the claims to use and dispose of land arose out of social relations - out of relations between people - rather than out of property relations - relations between people and things.

Multiple socially embedded land claims have produced the widespread description of land in African tenure systems as subject to a bundle of rights, but this designation is coming under increasing scrutiny in recent historical and anthropological scholarship. The description of African land tenure as a bundle of rights, used in the colonial period to underline the

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<sup>9</sup> See Whitehead (1984) for a discussion of how to conceptualise the subjects of resource claims in pre-modern kinship systems.

<sup>10</sup> Land access is used here in the loose sense of the ability to make claims on land and not in the narrow sense of the character of a particular interest acquired in a piece of land.

<sup>11</sup> This is attributed to the relative land abundance that characterised much of Sub Saharan Africa in the past. This land abundance is closely linked to agricultural technology and practices. Examples of areas with forms of intensive land use of relatively long duration include the dry zones of Northern Nigeria and some of the areas of the Barotse plain. In both cases more restricted kinds of land use access came in (Hill 1972, Gluckman 1941).

different character of various kinds of land claims, is modelled on western jurisprudence.<sup>12</sup> One distinction often made is between land ownership and various categories of use rights, with use rights defined as belonging to members of a land-owning group and ownership as vested in political leaders on behalf of their groups. This formulation, which was in the past embedded in ideas of communal ownership, generated conflicts between political leaders and persons with use rights.<sup>13</sup> The different kinds of interests between use and disposal in African land tenure do not properly correspond to the Western jurisprudential distinction between ownership and usufruct and the collapse of these differences in colonial anthropology and today is misleading. A significant contestation in current policy discourses is between those who describe multiple claims in land as a bundle of rights that are hierarchically ordered, in which some are primary and some secondary (especially the distinction between claims to cultivate, or otherwise use, as against claims to alienate, or otherwise control), and those who, while arguing that there are multiple claims, reject the core distinction between primary and secondary claims and their hierarchical ordering. These latter authors stress instead the negotiated dynamic and fluid nature of the tenure relations and tenure claims and treat their socially embedded nature in radically different ways (Lavigne-Delville 1999, Falk-Moore 1975, Berry 1989, Okoth-Ogendo 1989, Moore and Vaughan 1994).

#### *Women's Land Claims*

Whether land is subject to hierarchically ordered claims and the meaning of social embeddedness are very important in understanding the gender aspects of land access. Women have long had access to land in sub-Saharan Africa, but men and women have rarely, if ever, had identical kinds of claims to land, largely because the genders have very differentiated positions within the kinship systems that are the primary organizing order for land access.<sup>14</sup> It is striking that there is no recognized formal category for the particular character of women's land access. Marriage is one important site for women's claims to land and many authors report that husbands devolve land to their wives for farming. However other authors find that it is from the husband's kin groups that wives get land and it is this kin group that may in some circumstances protect her claims. Women often also retain some residual land claims in their own kin groups as well as frequently obtaining land by loan or gift from a wider circle of social ties. That women get land through many social relations bears emphasis because some policy discussions assert that women get access to land as wives and go on to argue that their claims are weak because of this.

Several recent studies of gendered land access which have examined land disputes and court cases suggest not only that women's claims to land are much more diverse, but also that women's claims to land are much stronger than usually represented (Yngstrom 1999, forthcoming, Bosworth 1995, Cheater 1982, Moore and Vaughan 1994). Ironically for those who link social embeddedness with women's *weaker* claims, the empirically demonstrated strength of women's claims seems to lie precisely in their social embeddedness.<sup>15</sup> These authors contest the idea that women's indigenous land claims are secondary, or amount simply to a use

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<sup>12</sup> Western jurisprudential ideas were a strong influence also on anthropological accounts of law in the colonial period - for example Meek 1946, Fallers 1969, Gluckman 1943, 1965.

<sup>13</sup> Mamdani 1996 argues that control over land was an important area of struggle between the colonial state and the kinship/chieftaincy based political institutions. He argues that there were differences in the outcomes of these struggles for various societies and suggests that in a large number of cases, kin groups succeeded in maintaining their control over land, marginalizing the state.

<sup>14</sup> For discussions of gender aspects of land interests see Moore and Vaughan 1994, Davison 1998b, Jacobs 1991, Schroeder 1997, Kevane and Gray 1999, O'Rourke 1995, Manuh et al no date, Fortmann et al 1997, Rocheleau and Edmunds 1997.

<sup>15</sup> Lavigne-Delville 2000 and Leonard and Toulmin 2000 point out that as both men and women acquire land through social relations, this is not an explanation for the respective strength of their claims.

right contrasted with a control right. They also suggest that women's claims to land are not justified solely through the recognition of their obligations in food production, but that local-level land-management fora make moral and material evaluations of inputs and behaviour between male and female household members over a very wide spectrum when adjudicating land claims (Bosworth 1995, Yngstrom 1999, Kevane and Gray 1999).

These more recent studies represent an important break with the interpretation of the difference in women's land claims from men's as necessarily implying their claims are weaker. Nevertheless the key issue remains what happens to men's and women's historically constituted land interests with economic transformation, especially where land has become scarce as new economic uses for land have developed. Several studies show that with changing uses for land, particularly with new crops and forms of agriculture, contestations take place between men and women (Davison 1988b, Moore and Vaughan 1994, Carney and Watts 1990). Although there are examples where women do maintain their land access in these contestations, the weight of evidence suggests that economic changes have resulted in women's diminished access to land. But what are the factors and processes at work?

One set of factors lying completely outside the issue of gendered land tenure is the distribution of economic resources required successfully to work the land in the context of present-day agriculture. Although they do farm much less land than men do, this is not usually because women are prevented from getting land, but because they lack working capital, inputs, extension access or credit.<sup>16</sup> This point is analogous to one made by Lastarria-Cornhiel (1997), who has examined the continent wide evidence for the effects of land privatization, finding that simple titling and land registration do not transform a customary tenure system into a freehold one - other changes in the commercialization of agriculture and the development of a land market are needed. She concludes that the general processes of privatization and concentration affect women's land and property rights negatively, rather than national land registration schemes per se. In the development of private property regimes of any kind, sub-Saharan African women tend to lose the rights they once had. This is because women suffer systematic disadvantages both in the market and in state backed systems of property ownership, either because their opportunities to buy land are very limited, or because local level authorities practice gender discrimination preventing women from claiming rights that are in theory backed by law.<sup>17</sup> Women also encounter problems in both the statutory and customary systems for resolving land struggles and disputes - who does the adjudicating and how - or in wider aspects of gender relations. In Kenya, as new economic uses for land developed, men's and women's historically constructed claims to land use were always potentially in conflict - titling 'provided a new institutional arena for existing struggles and debates to be played out' (Yngstrom forthcoming)- but women could not translate resources for negotiating informal access into negotiating registered ownership. Carney (1988) and Carney and Watts (1990) have documented a particularly visible example of gender conflicts over land in the Gambia, where men re-labelled as 'household' land, farms that had once been women's 'private' fields, thereby wresting control from women of rice lands for a new irrigation project. Here men use the language of custom to dominate a new economically rewarding form of agriculture. The remainder of this paper examines this theme on a wider canvas, as we turn to modern uses of the language of custom in the field of land tenure policy making, in the gendered processes of claiming land and in the politics of state and society in Africa.

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<sup>16</sup> See Whitehead 2001a for a more extended discussion of this point.

<sup>17</sup> These findings are important because many gender and development policy documents still advocate a blanket policy of ensuring women's land access through titling, without any reference to the specificities of the sub-Saharan African situation.

### 3. POLICY DISCOURSES

Land tenure reform has become a significant area of policy making in many African states in the last ten years and international organizations have been heavily involved. This section focuses on the policy discourses of three sets of significant agents: The World Bank, OXFAM Great Britain and the International Institute for Environment and Development (IIED) and African women lawyers.

#### *The World Bank 1970-2001*

The approach of the World Bank to the issue of land reform has not always been without of ambiguities and (at least) potential contradictions. Nor has it remained constant (Platteau 1992, 7).

The World Bank's interpretation of macro-economic processes and development and its evaluations of the nature of African societies, states and economies has been of profound importance in the last 20-25 years, in which African countries have become heavily aid dependent and indebted, with the World Bank and IMF particularly significant donors and creditors. Their strongly top-down analysis and policy prescriptions are allied with interventions of unparalleled range and depth. But the World Bank however is a large and complex organization and, despite heavy orchestration to produce a strong orthodoxy in its analyses,<sup>18</sup> its many separate divisions have different kinds of policy focus and make a range of thematic arguments, no more so than with respect to land and gender issues, where the Bank's separate sections have very different levels of expertise.

#### *Land Policy Division and the Evolution of Its Land Tenure Policy for Africa*

Changes in the World Bank's thinking between 1975 and 2001 about land reform are well documented by their own land and agriculture specialists. A series of papers has commented on the empirical bases for these changes and on the implications for approaches to productivity and growth in African agriculture (Deininger 1998, Deininger and Binswanger 1999, World Bank 2001). The Land Policy Division (LPD) is the major unit charged with formulating land policy. From being centrally concerned with freeing land into individual ownership through the introduction of 'modern' registered freehold titling, the LPD has moved against registered titling as the necessary precondition for agricultural investment and growth (World Bank 2001). Although still dominated by an orthodox modernizing position that land markets and individual tenure are essential, if individuals are to be willing to invest in land in order to raise its productivity (cf Quan 2000, 34), the LPD'S current thinking is influenced by recent evolutionary theories of land tenure that see privatization developing from below, in response to population pressure and commercialization (Platteau 1996). By the late 1980s, it had become ambivalent whether and when states should kick in to support these processes and increasingly developed a more positive view of the capacity of African customary systems of tenure to change in the 'right' directions.

The landmark policy statement was a 1975 Land Reform Policy Paper from the LPD (World Bank 1975). Quan summarizes this as recommending 1) 'formal land titling as a precondition of modern development, 2) the abandonment of communal tenure systems in favour of freehold title and sub-division of the commons, 3) widespread promotion of land markets to bring about efficiency- enhancing land transfers, and 4) Support for land redistribution on both efficiency and equity grounds' (Quan 2000, 38). In addition to its concerns with equity and the highly political nature of land distribution, land reform had wider development implications because of its role in wealth creation and accumulation. Tenure reform was seen as central to promoting agricultural growth, with private freehold tenure an

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<sup>18</sup> See Whitehead and Lockwood (1999) for a description of this process with respect to the World Bank's Poverty Assessments.

essential step to a modernized agriculture, promoting investments and providing incentives to adopt new technologies.

Platteau argues land tenure reform in the World Bank was seen as primarily relevant to Latin America and Asia throughout the 1970s, on the widespread understanding the sub-Saharan Africa was a land abundant continent characterized by extensive agriculture (Platteau 1992, 5-6). All this changed in the 1980s when the food crises and famines of different regions led to a renewed focus on agricultural productivity and the conditions for agricultural growth in Africa. This coincided with the adoption of highly interventionist structural adjustment lending, and economic reform aimed at removing rigidities and promoting markets and the 1980s saw a series of developing critiques of Africa as a land-abundant continent. As early as 1982 a highly authoritative report on agricultural development in SSA pointed to land as a growing constraint and recommended greater attention to land use and land tenure issues (Eicher and Baker 1982). An equally influential account emphasized the growth of land sales and the impediments afforded to a free market in land by post-colonial states. Feder and Noronha suggest that some post-colonial states were creating considerable problems of land access by continuing the colonial prohibitions on land sales and denying that land markets were growing (Feder and Noronha 1987). The informality of what was in reality a thriving land market, involving informal and disguised transactions all over Africa, led to distortions in the market, they argued. Continuing to prohibit land sales had allowed politically influential groups, such as chiefs and civil servants, to accumulate and become economically distinct from their subjects.

These developments are readily apparent in the 1989 Report, *Sub-Saharan Africa: from Crisis to Sustainable Growth*, was manifestly concerned about growing land scarcity and rising population and with environmental and sustainability crises arising because land fertility was no longer sustained by long fallow periods (World Bank 1989).<sup>19</sup> It argues that increased agricultural productivity required new technologies and the incentives to adopt them, to be provided by tenure security through land titling. Land rights secured by titles would also help rural markets in credit and land to develop. Customary or local level systems of resource allocation, in contrast, led to poor incentives, did not stimulate land and credit markets and hence prevented the distribution of land to the most efficient users.

This report, with its marriage of liberalization and neo-Malthusianism, was a high level macropolicy document (cf Williams 1994), was very influential, but the LPD itself had meanwhile become more concerned with the growing evidence that registered individual title had not brought the predicted economic benefits (Feder and Feeny 1991). In the early 1990s, new studies were undertaken or funded by the World Bank on the supposed link between the security of freehold tenure and improved agricultural productivity (Bruce and Migot-Adholla 1994). Among the countries studied was Kenya and here the findings confirmed earlier research. No differences in the productivity and investment of lands held in freehold title compared with those held in customary tenure were found (Migot-Adholla et al. 1994b). Companion studies in other countries concluded that many farmers without formal title perceived that they had rights to continuous and unchallenged use of agricultural land (Migot-Adholla et al. 1994a). Customary tenure systems appeared to offer sufficient security of tenure for farmers to invest in land, although the lack of formal title meant they had no automatic rights of disposal. There seemed to be no compelling economic justification for replacing customary land law with state guaranteed titles.

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<sup>19</sup> In an extensive discussion Williams (1994) argues that this report has many similarities with British colonial policies towards the end of the colonial period, especially the content and approach in the Swynnerton report and its implementation plans. See also Heyer and Williams (no date)

This important set of studies led Bruce et al to re-evaluate customary systems and their capacity for change and flexibility and to downplay the role of state backed formal systems of individual titling (Bruce et al 1994). They forecast: 'a market economy will eventually produce a land tenure system that, while not identical, will bear a strong family resemblance to the Western concept of ownership' (ibid., 262). They therefore recommended incremental approaches to policy, adapting, and not replacing existing land management practices, with the role of the state to provide the legal and administrative environment that will support and promote evolutionary change. The heavy financial costs of introducing and maintaining systems of registered title are further reasons cited for the policy sea-change.

In a 1999 presentation, Migot-Adholla summarized the World Bank's current position: the circumstances in which land titling is 'an optimal solution' are 'much more limited'; 'communal' tenure systems can provide 'a more cost-effective solution', 'if transparency and local accountability can be assured' (Migot-Adholla 1999). The World Bank is now promoting reforms that will eliminate conflicts between parallel sets of rights and is setting up pilot programmes to register and adjudicate customary rights, to provide titles on a community basis and to redistribute land through negotiation and the market (Quan 2000). This consolidates the shift away from the 1975 document in the attitude towards customary systems of tenure. From being one of the greatest obstacles to agricultural modernization and enhanced productivity, in this new analysis they emerge as flexible and locally managed systems for guaranteeing secure land access on owner-occupied farms. The LPD has recently posted a 2001 policy statement on the net that says quite unequivocally that there is now a consensus for the legal recognition of customary tenure and in favour of building on these (World Bank 2001).<sup>20</sup>

As statements about the policy approach taken to land tenure reform in particular African states however, these documents from the LPD have to be treated with caution. The policy drivers in the constituent parts of the World Bank are by no means the same. The nuanced, self-critical, and empirically-foregrounded approaches of the Land Policy Division, with a new stress on the evolution of local level practices are not necessarily shared elsewhere. One competing set of discourses come out of the Bank's divisions working on the environment and sustainability where there is a long-held view that communal forms of property ownership lead to over-exploitation. Cleaver and others take a very strong line on the need for individual land rights to prevent land degradation (e.g. Cleaver and Schreiber 1993). Many macro-economists also support this position, although for many different reasons. A free market philosophy and an agenda of economic growth through further market liberalization, even when accompanied by poverty reduction objectives, are responsible for the almost routine way in which reform to individual land titling appears in many country-level documents.<sup>21</sup> The World Bank continues to offer substantial support to governments establishing land tenure reform with individual registered titles.<sup>22</sup>

#### *World Bank Gender Specialists*

The LPD identifies its new policy directions as positive for women although the internet responses point out the brief and ill developed nature of the gender analysis in its the recent draft policy document (Handstat 2001, Quan 2001). Beyond the LPD, there are discernible and

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<sup>20</sup> This statement is the equivalent of the 1975 LPD paper. It represents the outcome of the kinds of shifts and assessment of empirical evidence that we have described in this section. However it came out only when this paper was in its very final stages and hence we do not consider it fully.

<sup>21</sup> For example in its Country Assistance Strategies, which are largely written from a macroeconomic perspective (World Bank 2000c).

<sup>22</sup> See for example, World Bank (2000d), where it is stated that one of the components of phase 1 of the Land Administration Programme would be sub-pilot projects in systematic land titling and registration. The World Bank is financing \$25 million of the \$40 million estimated cost of the project.

sharp differences among gender specialists. Within the Africa Division, for example, some gender specialists have put considerable work into looking for synergies between better outcomes for women, poverty reduction and overall economic growth (Blackden and Morris-Hughes 1993). Centered on the growth-efficiency model and taking a modernizing approach, the 1998 SPA report stresses the need for top-down reform to give women better land rights and secure their access to land (Blackden and Bhanu 1999). In contrast, the Gender and Law Reform in Africa (GLRA) group within the Africa Division emphasizes that state reform involving titling and ownership has been negative for women and it is much closer to the Land Policy Division in arguing that customary systems have some merit.

This Group has been very active throughout the region, providing support for various networks of feminist lawyers and sponsoring in-country and cross-country studies, workshops and networks. It operates against a backdrop of the rights-based approaches, symbolized in CEDAW,<sup>23</sup> which have come to dominate international discourses on gender and development and in which legal reforms and statutory law are a major means for women to achieve rights denied them through custom and tradition. Much of the discussion in the conference proceedings on *Gender discrimination in Francophone sub-Saharan Africa*, which was promoted and funded by GLRA, uses the language of rights to address discriminatory practices in customary systems. Publications authored by the GLRA itself, in contrast, take a more positive approach to the customary, and often criticize formal law as a means of achieving gender equity in Africa (World Bank 1994). Gopal suggests that reformed customary law has the potential to promote women's land and property issues, at the same time as acknowledging that land allocation is for the most part based on customary practices that deny women control over land (Gopal 1998). For them, these customary practices need to be understood as colonial constructs, and as not fixed. As socio-economic conditions changed, the implementation of customary law as a fixed body of rules or practices, largely misunderstood by colonial regimes, has been very disadvantageous to women.

Elsewhere, Gopal criticizes colonial and post colonial modernist legal reforms more elaborately (Gopal 1999). Legal reform 'introduced personal laws that were based on a vision of personal relationships that bore little connection to the reality in these countries' (Gopal 1999, 22) and simultaneously undermined existing systems of claims and dispute settlement, leaving women in the unenviable position of being unprotected in either legal system. Drawing an important distinction between the premises underlying customary law and the forms of customary law and practice prevalent in African states today, they promote the idea of basing change on the reformed customary. She argues forcibly that women must participate in legal reform and that this participation will be strengthened when women get better access to wider economy (ibid.).

These differences between gender specialists in the late nineties, which appear to reflect the degree of institutional commitment to growth and efficiency models and of appreciation of the potentials and pitfalls of legal reform and of the customary, are also apparent in some uneasiness about land issues in a recent important gender and development policy document (World Bank 2000b). This analysis owes a good deal to the newer poverty frameworks, for example in the 2000/2001 World Development Report, which while remaining committed to growth, now stress institutions and rights, emphasizing the role of the state in institutional reforms and the use of law to promote governance objectives (World Bank 2000a). In their analysis of gender and development issues and policy priorities, Mason and King give high priority to transforming the institutional environment and place a welcome stress on social relations (World Bank 2000b). Although the comments in Mason and King on women and land are very brief, the phrase 'land rights' occurs in several places, but the pro-customary stance, is

<sup>23</sup> Convention on the Elimination of All Forms of Discrimination against Women.

also there: 'In places, such as SSA, where systems of customary law operate side-by side with statutory law, special care is needed in the use of statutory changes' ... 'efforts to improve women's land rights in Ghana succeeded because the new incentives under statutory law were consistent with custom' (World Bank 2000b, 15). All signaling perhaps that issues about the respective merits of the customary and statutory for women's land access remains unresolved.

*Independent Land Policy Advocates: Oxfam GB and the International Institute for Environment and Development (IIED)*

The last twenty years has seen a substantial expansion in NGO and other activity in Africa, with the development of a wide range of national and regional African NGOs and European based organizations also expanding their Africa programmes. OXFAM GB and IIED are two European organizations that have been particularly active with respect to land policy. Both organizations have a position on land tenure reform that is very different in its starting point and objectives from that of the World Bank. A strong hostility to orthodox economic positions and the promotion of registered individually owned freehold land titles is part of their much wider critique of the World Bank's policies throughout the 80s and 90s. These organizations have long advocated building on local-level land management, suggesting potential convergence with the new stance by the World Bank's LPD.

*OXFAM Great Britain*

OXFAM GB runs a specific website on land policy issues<sup>24</sup> and their concern with land issues arises from their commitment to reducing poverty and working for sustainable livelihoods. OXFAM GB's main analysis is of the political processes at play, where it foregrounds the role of international interests in national policy and identifies recent processes common to several African states. National governments set in train land tenure reform 'generally designed to open the door to privatization and greater foreign ownership of land' after consultations that are usually very narrow (Palmer 1998, 2).<sup>25</sup> It also pays attention to the interests of the state in maintaining control over land allocation, and the power and patronage that is built on land relationships: 'Politicians may tolerate bottom-up participatory processes in other areas, but not in matters which require them to relinquish control (directly or indirectly) over land allocation' (Adams pers. Comm., cited in Palmer 2000, 288). 'In brief, access to land by the poor in many parts of Africa is currently seriously threatened by a combination of privatization and unrestricted market forces; by governments desperately seeking foreign investments including for tourism; and by greed and corruption by the rich and powerful' (Palmer 1998, 1).

OXFAM GB has been heavily involved in supporting NGOs and coalitions in Eastern and Southern Africa for the last ten years; in particular, those NGOs, coalitions, and Land Alliances<sup>26</sup> seeking local level management of land allocation and dispute settlement in order to promote better access to land for ordinary people. Recent documents from OXFAM GB, take many cues from Alden-Wily, who emphasizes first, the persistence of customary modes of landholding and dispute settlement, despite the considerable efforts of governments to diminish

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<sup>24</sup> <http://www.oxfam.org.uk/landrights>. This site has details of the relatively large number of publications and conference papers on land tenure issues in Africa that have come out since this paper was written.

<sup>25</sup> Palmer gives Tanzania as an exception.

<sup>26</sup> Details of current land alliances and networks in Eastern and Southern Africa are to be found on Landweb, hosted by MWENGO at <[www.mwengo.org](http://www.mwengo.org)>. MWENGO is a reflection and development centre for NGOs in Eastern and Southern Africa. The organisation is based in Harare; the Secretariat has been operating since late 1993. The LandWeb is part of a broader project whose main goal is to strengthen the impact of land advocacy by NGOs in Eastern and Southern Africa (ESA). '(This) project was launched in 1999. It was designed in response to the increasing interventions in the area of land by NGOs in most countries of the region' (from [www.mwengo.org](http://www.mwengo.org)).

them, and second, the state's capacity throughout recent reform processes to preserve the link between land relations, power and patronage and its own absolute land ownership (Alden-Wily 2000, forthcoming). On the basis of a review of over 60 land laws in Eastern and Southern Africa, she asserts that 'the most radical shift in tenure reform occurring in sub Saharan Africa is that for the first time in 100 years states are being forced to recognize African tenure regimes as legal in their own right and equivalent in the eyes of national law to the freehold leasehold culture' (Alden-Wily forthcoming, cited in Palmer 2000, 271). The persistence of customary modes of landholding and dispute settlement is tantamount to a form of resistance to the state. In her arguments, two important strands are evident. First, there is the idea that statutory procedures can be improved by incorporating some of the principles of customary land holding systems. The recognition of the customary brings into play new ideas of property and of ownership. Common property can be recognized and new forms of process confirming land ownership - such as verbal contracts - become recognized. Second, there is a firm belief in the ability of local communities to manage their own affairs and the importance in general of letting them do so. The key is community control, when 'the point at which acquisition and disposal of land rights are officially endorsed and regulated is moving closer to the landholder' (ibid.). She sees the new institutions proposed, or required, for land tenure reform as part of a broader process of democratization and building local level political and decision-making capacity (Alden-Wiley 2000).

This approach fits in well with OXFAM GB's general support for encouraging participation and building of local capacities. Palmer diagnoses subsidiarity and local devolution as the key objectives in current land reform policy 'meaning that decisions on land management and control should be taken at the lowest levels possible' (Palmer 2000, 24). He identifies a trend 'towards formal tribunals, independent tribunals with recourse to the ordinary courts, operating at the local level and in some cases operated by community members' (ibid.) and criticizes the role of prominent land lawyers because they adopt centrist top-down solutions. Little of the discussion in OXFAM GB authored publications examines in detail how the proposed local level systems might work, including whether the values and processes of customary systems can deliver more equitable land access. There are many warnings that the local level is also the site of power relations. For example Palmer discusses the danger that NGOs may be inadequate vehicles for equitable land policy, not only because they are sometimes short-lived and often dependent on outside funding, but also because class, ethnicity and other social divisions may be reflected in their memberships. Here we are beginning to see an incipient tension between the customary as the site of resistance to the state, and hence an important discourse around which greater local level political capacities can be built, and the customary as the site of unequal rural social relations.

*International Institute for Environment and Development (IIED): The 1999 DFID conference.*

IIED is a UK-based organization undertaking research and lobbying on global environmental and sustainability issues. With a particular emphasis on working with partner organizations and promoting networking, it has also been at the forefront of promoting participatory approaches and is a major resource centre for these. Its main impetus to land work in sub-Saharan Africa comes from its concerns with environmental sustainability, with the growing exclusion of some rural people from the natural resource base and with the proliferating conflicts between different kinds of land user, especially between pastoralists and arable farmers. It has a specific interest in problems of conflict between different land users, especially those with secondary rights (such as pastoralists), in common property resources and how to protect the land claims of small rural producers that are essential to sustainability and to poverty alleviation.

The IIED is an organization with major experience and expertise in land policy issues in Africa and it is not possible to review all its work here.<sup>27</sup> In 1998 it was recruited by DFID to work with the Natural Resources Institute in the UK to organize a conference on land tenure issues in Africa (DFID 1999). DFID has played a major role in land tenure reforms in Eastern and Southern Africa and continues to work extensively with African governments on land policy. The conference brought together many of the main specialists on African land tenure, including African and international legal experts, representatives from international donors and from national and international NGOs and a large number of country experts from a wide spread of Africa's nations. Its papers have been edited into one of the most up-to-date assessments on current land tenure policy issues in Africa (Toulmin and Quan 2000).

In their introduction, Toulmin (IIED) and Quan (NRI) distance themselves from the approach taken historically by the World Bank, arguing for a strongly human centred approach, less driven by economic prescription (Toulmin and Quan 2000). They rehearse the arguments about the limitations of legislation, reform and registration, paying special attention to the failure to capture secondary rights, to inequitable outcomes and to the conflict and difficulties of resolution within dispute settlement procedures, points pursued in a number of the other chapters (e.g. Platteau 2000, Lavigne-Delville 2000). The alternative is land tenure reform based on the practices and institutions of customary law, modified so that they reflect the social and political realities of contemporary rural circumstances. There are against universal solutions and think that the actual forms of reform should differ in different countries. 'A new paradigm is emerging which does not prescribe a specific approach to land reform, based on pluralism and the need for Africans themselves to negotiate their own solutions' (Toulmin and Quan 2000, 6). Their introduction not only discusses the merits and demerits of customary versus state law, but also steers the discussion in the direction of how to resolve the problems of land tenure within a modified customary law framework and what kind of institutional innovations might be needed to do so.

Their justifications for basing reform on customary law are several: customary law is able to provide relative security to community members at lower cost than state-run structures, is flexible in that it allows different forms of access, and more equitable in that it considers the needs of the poor (Toulmin and Quan 2000, 12). They refer to Sjaastad and Bromley (1997), who argue that customary law, which is neither communal nor ambiguous, is flexible and responding to increasing land scarcity and permitting individualization. Customary law has the merits of being embedded within local social relations and values and could be administered in recognized forms that would meet rural people's need for security of rural people, best guaranteed in the modern world by community social networks and 'the weight of an official stamp' (op cit., 13). Basing reform on customary law also fits with new global thinking about the need for local people to participate in the management of natural resources and with renewed interest in decentralization. Toulmin and Quan argue that in circumstances where land registration is needed, it should proceed with more respect for customary law; it could be simpler, cheaper and more equitable to register collective rights as opposed to individual rights.

The role given to the state in this new customary law-based framework is relatively limited: to pass enabling legislation, redistribute land if need be and establish the authority of the institutions tasked with managing land. Even so, a modified customary system is not an easy option. It is expensive and long-term. It needs additional measures such as education, support such as credit, extension, inputs, access to land, and so on. Moreover, legal changes to make laws consistent with land law are needed. Their bottom-up approach leads them to be relatively non-prescriptive about the new institutions required to run these modified customary

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<sup>27</sup> Relevant recent publications include IIED 1999, Toulmin and Pepper 2000, Toulmin, Lavigne-Delville and Traore 2001

land tenure systems. They should focus on dispute resolution but it is very important which institutions are granted the powers to make land decisions. Different implications follow from whether it is the chiefs or an elected local body (e.g. district assembly) that is selected. 'Authority in land whether vested in the chiefs, or in the government officials and political leaders, can in turn, lead directly to private economic benefits for these actors, derived from land accumulation, patronage and land transactions' (Toulmin and Quan 2000, 6).

Chapters in the book document a number of different experiences of registering customary rights, which have not always ensured protection for the claims of different stakeholders, in particular the poor. The book contains a chapter giving an overview of women's access to land (Hilhorst 2000) and several papers on gender issues were given at the Conference, but no real attempt had been made to subject the policy proposals to a gendered view, despite women being one of the stakeholder categories who have demonstrably lost out in the historical development of land tenure reforms. Later work from IIED on women and land tenure does begin to explore some of the nuances of customary systems for women (Leonard and Toulmin 2000). They argue that women's land access under customary systems is very diverse, and that 'in practice, women do not perceive their rights to land as insecure, as long as their household and community relations remain stable' (op.cit., 4). Women's disadvantages often occurred at divorce or widowhood or because they lacked power in social negotiations. An important theme developed in this account is the issue of women's lack of a voice in rural decision-making. Citing Odgaard personal communication with respect to Tanzania,<sup>28</sup> they highlight the enormous difficulties women face in seeking to use the law to claim their rights and identify women's lack of direct participation in village assemblies and similar local institutions as a major stumbling block to greater equity in local resource allocation (op.cit 14-15). They recommend the strengthening of women's representation in central and local government as integrally linked to more gender equity in land issues.

Both IIED and OXFAM GB, then, emphasize the ways in which recent national land policy has led to important tracts of local resources being alienated by international companies and the close link between national and local politics and landholding. They respond by exploring new forms of ownership supported by local management, devolution, subsidiarity and democratization. In important elements, this response converges with that of the World Bank, especially in the role that the 'modified customary' should play in local-level land management, despite approaching the issue from different positions. For the World Bank, the policy is to encourage these to evolve; for the independent land policy advocates, more democratically accountable management systems are to be introduced to build on what already exists locally. While recognizing that they are constructed, each organization persists in using the term 'customary' to refer to these local level systems. In no case are the gender implications of these proposals addressed adequately. However, it may be women particularly, who have a great deal to lose from the turn to 'the customary' as a solution to the problems in centralized state-led legal reforms of land tenure. The main constituency that has addressed these issues are Africa's feminist lawyers and it is to these we now turn.

#### *African Feminist Legal Discourses*

African and Africanist feminist lawyers have long been concerned with drawing attention to women's rights issues within the legal system as a whole and within different areas of law. Early path-breaking studies (Hay and Wright 1982, Manuh 1984. See also Armstrong 1987, Armstrong and Stewart 1990) have been deepened by more specific studies of areas such as family law, inheritance, land relations and more recently violence against women (Molokomme 1991, 1995, 1996; the WILSA series 1997, 1998). Since the late 80s and 90s, in the context of the series of UN conferences, women lawyers have become more influential in policy advocacy

<sup>28</sup> But see also (Wanitzek 1990, Lawi 2000),

and demands for legal reform. During this period, their regional and sub-regional groupings have grown in strength, and they have been increasingly engaged in advocating law reforms and the implementation of UN conference outcomes, popularizing laws relevant to women's rights, and promoting legal literacy and paralegal training for women (Manuh 1994). In the fight for gender equality, activist feminist lawyers are oriented towards the international conventions and instruments and a rights perspective and have a generally positive stance towards the role of the state and statutory law to deliver rights to women.

In their approaches to women and land, the most common view is that legally backed land ownership is critical to rural women's production and economic efficiency.<sup>29</sup> While some prominent African male lawyers, for example Okoth-Ogendo (1989) and more recently Shivji (1998), have been at the forefront of the reappraisal of the ability of customary law to deliver security of land tenure, with very few exceptions (e.g. Manuh 1994), female lawyers concerned with women have looked to statutory law to address questions of security for women. They have mainly explored the ways in which customary law rules currently do not favour women, and generally argued that both laws and practice discriminate against women. It is important to understand their critiques of contemporary African legal systems and the treatment of women by both customary and statutory systems as a basis for this gender difference in approaches to land tenure policy reform.

One consensus is that legal pluralism has been inimical to women's claims to land. Knowles for example, argues that it allows male dominated society to resist women's claims by vacillating between the two systems and successfully postponing or neutralizing any reforms that might have been instituted (Knowles 1991, 8). Butegwa also writes that in legally pluralistic states, case law has tended to affirm customary law practices even when they are discriminatory (Butegwa 1991). Another argument has been that the imposition of Western notions of ownership in land relations in Africa had led to much confusion about the character of land tenure, to women's disadvantage (Karanja 1991). Some writers contrast women's social embeddedness in the pre-colonial period with the processes of individualization that accompanied colonial economic and legal change, arguing that the inferiority of their inheritance rights under customary law and practice had less import than it does now. Karanja for example argues that in spite of having no inheritance rights, 'women held positions of structural significance, serving as the medium through which individual rights passed to their sons. They enjoyed security of tenure rooted in their structural role as lineage wives...' (Karanja 1991, 116). Knowles agrees:

In theory, customary systems of land tenure and use traditionally provided some recourse for women in need of land for food production. Evidence suggests that this theoretical refuge ran along a continuum from a right to beg for a piece of land from a male relative or acquaintance, to a system where women's rights to land from their native lineages were strong enough to attract them away from their marital residences in patrilocal societies, for the purpose of continuing to cultivate land provided by their natal families. (Knowles 1991, 5)

These positions share McAuslan's analysis of the way African interests in land were extinguished by the colonial state with the support of its judiciary. Safeguards which existed in customary law have been eroded (McAuslan 2000).

The content of customary law, in which their rights in land are described as derived and secondary and depending on their relations with various men - fathers, brothers, husbands and sons, has also been criticized for playing a part in the erosion of women's interests in land. Either they have no inheritance rights or their inheritance rights are inferior to men's, with

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<sup>29</sup> A major exception here is Himonga and Munachonga (1991).

some authors pointing out that women themselves might be inherited when their husbands' die (Butegwa 1991, Karanja 1991). 'The whittling away of women's land rights by the changes instituted by these subsequent regimes was a direct result of their disabilities arising from the customary rules of inheritance and the customary division of labour which had resulted in women not being able to acquire land for themselves' (Karanja 1991, 117). Knowles agrees, arguing that as economic and political changes unfold 'at best, women are forced onto the least desirable and productive land and, at worst, their limited rights may be extinguished altogether' (Knowles 1991, 5). She goes on to critique positive attitudes to customary law, arguing that 'many African governments are choosing to make changes at the margin, leaving untouched the customary laws' prohibitions against formal land allocation to women' (op.cit., 11).

Even so, in the writings of African legal feminists, there is clearly some ambivalence to the state and to statutory law. At one end of the spectrum is the view that statutory laws themselves have discriminated against women. Relevant here is the widespread understanding that women's land rights were severely eroded by titling and individualization backed by statutory law in Kenya. 'The process of land reform solidified the role of men as the inextricable link between women and the land and further hardened their land rights into absolute ownership to the exclusion of women' (Karanja 1991, 122). The other position is that while a law may be progressive in its provisions, it is enforcement that is the problem. Butegwa, for example, argues that where statutory law is on the face of it favourable, it is not enforced because of women's lack of awareness and power, resistance from male relations, the fear of sanctions and the lack of political will on the part of government (Butegwa 1991, 57). Furthermore, even where statutory law does in principle govern land relations, customary practices continue to be very important in the determination of land rights. Women's security of tenure thus continues to be threatened by discriminatory customary practices of inheritance, lack of adequate protective legislation and the failure to observe governmental and legal measures intended for the protection of women's land rights. Butegwa calls this the 'inherent limit of law as an instrument for social change' (Butegwa 1991, 55)

In spite of these reservations of feminist lawyers about statutory law, reforming the law is generally seen as offering a better possibility for securing women's rights in land than simply allowing customary law to evolve. Butegwa still prefers statutory law to customary law, arguing that, in the latter, both law and practice are not favourable (Butegwa 1991, 54). Within this broad position, some emphasize changing laws, some emphasize legal training for better implementation, and disagreement exists about which areas of law should be reformed. Karanja (1991), for example, recommends land redistribution, land ceilings, titling and registration. Knowles does not share this positive attitude to titling and registration: she argues that high levels of security can exist without legal title and vice versa. She also notes that titling programmes are male-biased in assuming a nuclear family and a male household head and being generally hostile to secondary interests (Knowles 1991, 11). Butegwa (1991) supports law reform, but argues for an emphasis on inheritance law: 'Where the acquisition of land is mainly through inheritance, giving a woman a contractual capacity and the right to deal in land is irrelevant if she cannot inherit it in the first place' (Butegwa 1991, 57). In contrast, Himonga and Munachonga (1991) stress that it is not women's legal access to land that is the main problem with respect to poverty and their agricultural income, but other structural disabilities. To improve a variety of access problems, they recommend the education of officials and women, special loan facilities for women, more appropriate technologies and the recruitment and placement of more female extension workers (Himonga and Munachonga 1991, 70-71). Butegwa's recommendations also include legal rights education for both men and women, especially men in the local power structures such as chiefs, dispute settlement personnel, together with community level support groups to dissolve male resistance and help women overcome their fears.

Feminist lawyers also differ in the extent to which they recognize that there may be enormous resistance to equitable practices and the fact that it is broader gender inequalities that are at issue. Karanja argues that the poor record of statutory law in promoting gender equity is due to discriminatory law, ignorance of the law, the interplay of customary and statutory law, and inequalities in marital relationships that can be addressed by effective legislation (Karanja 1991, 131-132). For Knowles, male resistance is a key issue and law reform must go beyond land rights and tackle broader gender inequalities in society (Knowles 1991, 12-13). Butegwa highlights male resistance in the judiciary and courts where many judges prefer 'to dress personal prejudices and lack of appreciation of the issues in ancient judicial precedents' (Butegawa 1991, 57).

Although both Karanja and Butegwa recognize the difference between formal and substantive rights in their work, the assumption is that women have been unable to enforce their rights out of ignorance, thus down-playing the strength of factors such as inequalities in social relations and institutional and cultural biases which prevent women from succeeding in making claims and sustaining them. An examination of these issues requires a broader framework of analysis. Recent literature available at the national level, in which the doubtful value of the western jurisprudential framework and the oversimplified approach to legal pluralism are raised, shows signs of the development of such a framework. Karanja (1991) critiques western notions of ownership and access and the characterization of customary law in the literature, noting that a woman's bundle of rights over land typically does not include any of the hallmarks of western notions of ownership, i.e. the ability to: loan, rent sell, dispose of by will, or make permanent improvements. Both Manuh and Manji are at pains to argue that, correctly understood, legal pluralism does not consist of a dichotomy between customary law and statutory law, nor does it imply a hierarchy of norms dominated by statutory law (Manuh 1994, Manji 1998). The latter, moreover is an invention every bit as much customary law, in that it also embodies ideological assumptions rooted in the contexts of the colonial reformers (Manuh 1994).

These reflections have begun to dismantle the modernizing discourses which have hitherto dominated the perspectives of legal feminists and by implication these very same discourses are one source of the considerable problems that the formal legal system poses for women. They have not yet however led to clear policy recommendations. Manuh has supported Chanock's idea of alternative institutions outside law and state, but her recommendations are very preliminary (Manuh 1994, 224). By and large, the sustained faith in formal law leads many feminist lawyers to underestimate the dynamic power relations that underlie inequity in land relations that ultimately limits the effectiveness of campaigns for women's legal literacy. No doubt some women have been empowered to struggle for their rights because of a growing awareness of legal machinery and of what laws have been passed, but this is not in itself an answer to rural male resistance or to male resistance within legal institutions. However broad or narrow, law reform has to rely on male dominated institutions to be passed and implemented.

#### 4. ACHIEVING GENDER JUSTICE IN WOMEN'S ACCESS TO LAND

##### *The (Re-)Turn to the Customary*

Recent policy discussions reject land tenure reform based on making a complete rupture with customary systems and instead stress building on them. The World Bank wants a flexible system of access, guaranteeing smallholders security and incentives to invest and now thinks that letting the customary evolve will deliver land markets and efficient land allocation in a cost-effective and trouble-free manner. Most of the writers within the Bank's revised thinking say very little about the anticipated effects on women's land access. Paying scant attention to the processes by which evolutionary change is occurring, they underplay issues of equity in the

outcome. Customary land law is seen as moving steadily, even if in a chaotic and problematic way, towards individualized tenure and land markets under its own steam. Oxfam and IIED argue for subsidiarity and the development of local level management systems for legally-backed customary land tenure practices. Many who hold land under informal systems have no way of claiming ownership under statutory law, so it is an important first step to recognize and register these entitlements. They have more concern for secondary users and with the implications of rural power relations, pointing out the link between the economic gains to traditional leaders and systems that support the idea of traditional authority. Nevertheless they still use the terminology of the 'customary'. African feminist lawyers hold a range of views, although for many of them it is state-backed legal systems that are the key to establishing better access to resources for women. There is recognition that, in practice, formal legal systems have often worked to women's disadvantage, but the way forward is to make the formal system work better. The most prevalent view is that customary systems enshrine male domination, although some recent commentators are more positive towards customary law, showing how it has worked to women's advantage.

A turn, or re-turn, to the customary raises acutely the question of what we know about how customary processes actually work. Such a question is an essential forerunner to the critical issue of the potential of so-called customary systems to deliver gender justice with respect to land, especially as changing demands have exposed new ways in which normative principles may be in conflict, bringing individuals into disputes that are difficult to resolve. Although everyone seems agreed that the customary is historically constructed in form and content, is flexible and embedded in local social relations, and that conflicting claims are negotiated on the basis of series of principles and not on a series of rules, it is hard not to agree with Okoth Ogendo that we know very little about customary land tenure institutions within the modern nation state (Okoth-Ogendo 2000). We now turn to look at a small number of recent studies that have investigated the actual ways in which land claims have been made, managed and adjudicated in African rural localities. These show that the customary cannot be considered in isolation and that its links and interactions with other arenas in Africa's pluralistic legal systems are critical for women's land claims. Re-examining the debates amongst African feminist lawyers (and some of their international interlocutors), we pose a series of significant questions. What weight does one give to the fact that women and other disadvantaged social groups are able to seize opportunities within systems that discriminate against them to press their claims in deciding whether to change the system or retain it? Does the recognition that statutory interventions, such as titling and registration, may have the effect of rigidifying customary practices and extinguishing some rights under customary law invalidate statutory interventions as a way of proceeding? How different is the recommendation of to modify customary systems from a simple 'trust customary law' positions of some mainstream African land specialists? Is this a call to do nothing about the glaring inequalities in land relations? To comment on these we need to revisit many themes and issues raised in previous sections, but this time more firmly from a gender perspective.

#### *Legal Pluralism and the Customary Reconsidered*

Recent local level studies, especially those undertaken by gender specialists and feminists, have shown that the empirical relation between statutory and customary law is very far from the legal centrist model identified in section 2. Stewart (1996) for example argues that the systems are not separate in that, even as they have different bases of legitimacy, they operate in more interconnected ways than is realized. In practice, people, including women sustain their claims to resources by employing arguments from both the statutory and so-called customary law. For Stewart, legal pluralism is the consciously constructed dichotomy between statutory and customary. She sees this dichotomy as closely connected to other such dichotomies such as male/female, urban/rural, market/personal activity, public/private and modern/tradition

employed by powerful people to oppress those with less power. Griffiths, a feminist lawyer writing about local forms of settlement of marriage disputes in a Bakwena village in Botswana, argues that the concepts and objectives from one system seem to slip quite easily to the other and that actors, including law enforcement officers, do not treat the legal ideas in the two systems as hermetically sealed off (Griffiths 1998, 2001). A more appropriate model of legal pluralism would see them as mutually constitutive.

More generally, recent literature describes as ‘forum shopping’ situations where individuals are using different courts and other dispute settlement fora and deploying arguments grounded in either ‘customary’ or ‘modernist’ principles, whichever is to their advantage. This conveys a more messy reality in which there are no very rigid boundaries between the plurality of legal fora where different principles of legitimacy and of the basis for claims are brought into play. Recent work in the anthropology of law refers rather to plural legal orders, taking up the term socio-legal to convey both Woodman’s idea of sociologists’ customary law and to express the ways in which both social and legal are in play in many different legal orders (Wilson 2000). The mingling of social and legal is particularly well brought out by Bosworth, who refers to South Kigezi, in Uganda, as having a pluralistic legal order (Bosworth 1995). Adapting her account somewhat, there seem to be at least three socio-legal orders in South Kigezi. At the local level there are many informal means of dispute settlement, including kinship mechanisms that use primarily social norms, practices and processes. The formal legal system does not recognize these as legal. This kind of socio-legal order is very important in land claims throughout rural Africa which leads Okoth-Ogendo, and others, to argue that most adjudication decisions about land operate outside the law.<sup>30</sup> In the Uganda case, not all land claims are through women’s husbands. They can also be made through other kin relations and Bosworth argues that their derived rights were historically very strong claims. However, as lineage members, women had experienced increasing tenure insecurity as senior male lineage members had begun to exercise greater authority over the disposition of lineage lands. This study concurs with many others suggesting that historical transformations have exposed the weaknesses of the customary for ensuring the land access of women as lineage members in situations of land pressure or livelihood insecurity.

Bosworth’s second socio-legal order is the formal local level courts or arbitration fora whose jurisdiction and scope is determined by the state. These include the Resistance Council courts<sup>31</sup> and the various levels of magistrate’s court and she analyses a series of land relevant cases brought before them. The court reports give some access to the practices, norms, ideas of evidence, social valuations and so on within this legal arena and Bosworth stresses that a wide range of social factors is taken into account. Concepts from statutory systems, such as freehold titles, are also in play, but they are only one of a range of resources and only one model of the links between persons that disputants and legal actors call upon. Bosworth gives examples of women in Kabale who have pushed their claims well beyond what is ‘customary’. She cites two cases where women had succeeded in getting their names put onto joint titles on land plots with their husbands and have their claims recognized at the local level. In both cases the women were more educated than the majority of rural women and their husbands were active in the Resistance Councils. A wide range of other persons within a community is involved in dispute settlements, either as witnesses, or as indirect principals. As well as recognizing legal claims to ownership backed by title, women’s successful land claims are often based on the fulfillment of social obligations to a range of kin or family members and over long periods of time. The third socio-legal order, not physically present in South Kigezi, but theoretically open to people living there, is the higher formal courts that operate elsewhere in Uganda. These follow statutory law,

<sup>30</sup> This point is also made about Francophone Africa by Lavigne-Deville (2000) who stresses the permanent illegality and insecurity of rural people.

<sup>31</sup> See Odanga-Mwaka for an empirical study of Resistance Council courts in Masaka, Uganda

but may have recourse to a legally constructed notion of customary law, which is far from the actual practices of Kiga people (Bosworth 1995).

The South Kigezi material also throws light on the arguments about the gendered 'bundle of rights', referred to earlier. It does not seem to be the case that we can generalize that men's interests are primary and women's secondary, although the kinds of interests men and women held were different and that these differences form the basis for inequalities, at least in the second half of the twentieth century, if not before. The extent to which women's and men's interests differ and how they differ is very context-specific and cannot be prejudged. Most policy advocates are generalizing on the basis of one particular set of patrilineal practices in their accounts of the secondary nature of women's land claims. Yngstrom, in her study of a land scarce area in Dodoma, Tanzania, which also has a patrilineal kinship system, shows that in the face of diminishing claims on lineage land, women's main access to land is now through their husbands, and argues that that women's claims are not derived or secondary and that this formulation follows a western legal idea of a hierarchy of rights inappropriate in the African context (Yngstrom 1999). Women did not always fail in land disputes, with significant factors affecting the outcome being the husband's ability to demonstrate land shortage, and the wife's ability to draw on her own lineage men for support. Yngstrom's study encourages a view that variation in the content and strength of women's claims within local-level practices and ideologies more widely in sub Saharan Africa will markedly affect the potential for these modified local-level systems to deliver gender justice.

In our view, these detailed studies demonstrate that more important than the content of the set of interests, are the processes by which interests and claims are made and secured. The flexibility to respond to new circumstances comes about as individual men and women, young and old, farmer and pastoralist, migrant or autochthon, negotiate over specific parcels of land and over specific kinds of use claim. The factors affecting these struggles and disputes are highly context specific. The rhetorical recourse by all sides to the contents of long held practices may or may not be important. The content and direction of the arguments that women make are also highly context specific, although one recurring powerful set of arguments seems to be that the performance of their social obligations, including those to their husbands, but also to other relatives, builds up claims.<sup>32</sup> A very important limitation on customary systems delivering gender justice lies in these decision-making processes and negotiations and their intersection with rural power relations. Land claims are socially embedded not only in the sense that the network of social relations gives rise to interlinked claims and obligations, but also in the sense that the processes of allocation and adjudication are themselves socially embedded. In part this is the lesson from Mackenzie's study of a Kikuyu area in Kenya, where in one sense, it was not the statutory that was the problem. Titling could go to women as wives, widows and daughters, but it did not, because local practices and interests intervened (Mackenzie 1993). Mackenzie suggests that this was not so much because individual men were acting out of economic self-interest, but more because of concerted efforts by male members of the patrilineage to protect the local, kin-based social order. Arguably, however, without the necessity, required by the land reform, to recognize a single claim against land as being ownership, perhaps the customary would have muddled along, with women still able to make their weaker claims. However once registered titles become an issue, local social relations emerge more clearly as sites of gender power, albeit not ones in which women are simply passive victims, unable to negotiate, bargain and contest sometimes successfully.

The Uganda (S. Kigesu) case study too suggests that letting local levels systems just muddle along will not protect women's land claims as economic change unfolds. Here women's claims on the land of the patrilineage they had married into were quite strong – for

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<sup>32</sup> This point is also made in Kevane and Gray (1999).

example, one wife was successful in getting the court to overrule her husband selling land given to him by his lineage, which he was required to pass on to her to farm (Bosworth 1995). They had, even so, largely been unable to translate these claims into effective ownership in the land market and husbands had severely curtailed their access to cash income. Three women who had purchased land had done so in their husband's names with potentially significant implications for its disposal without their consent later on.

These studies, then, tend to confirm the critical perspective adopted by some African feminist lawyers with respect to customary practices, whose starting point was that the 'customary', considered as institutions, as social relations and as discourses, are sites where, on the whole, men have more power than women. Rural African societies are, of course, and were very varied and particularly in the extent of economic and political inequality. Even the most egalitarian societies have been shown to contain significant relations of inequality based in gender and generation. In the past, as today, norms were not universally held, but contested, especially by those whose needs were not met and who lacked voice in decision-making. In those historical periods and regions where there was land abundance and where land tenure was not such an issue, the absence of women's voices may not have affected their access to land. But it is precisely the inequalities in power relations in rural societies, played out in a modern context, that are the mechanism by which women lose claims to land as individualized proprietorship evolves. The flexibility and capacity to change, which are still characteristic of some local level systems, mean that local level practices are the outcomes of negotiations, but they are negotiations between people with very different quotients of economic and political power. 'In any discussion about land, various interested parties will push claims and interpretations. The ability to make these claims or interpretations stick is a function of local structures of power, influence and personality' (Moore and Vaughan 1994, 211). This implies that the rural customary cannot be left to muddle along without widening the gap between men's and women's land access. It is necessary self-consciously to manage change to produce greater gender justice with respect to resource allocation for rural women. The next section then reconsiders the role of the state as a major actor in promoting change.

*Managing Change in a Gender Equitable Manner: The Role of the State  
The Limitations of the Law*

Some of the feminist lawyers reviewed in section 3 brought out some very critical limitations in the use of law to produce gender equity. In the first place there is a problem of access. Time and again, the point has been made about women's distance from legal processes and their inability to access the courts. This is underlined by how celebrated the cases of the few women who do go to the courts become. While Wambui Otieno and Unity Dow are 'household' names within international and African feminist circles and are referred to over and over again by academics commenting on women and the law in Africa, it is important to keep in mind their minority status. The work that has gone into promoting legal literacy is important, as is that to strengthen women's access to fora and bodies of law they are more familiar with. But even local-level formal legal fora may have relatively little legitimacy in rural areas and in many areas women report that they need ways of resolving disputes which are accepted by male relatives and members of the community (Odgaard 2000, Leonard and Toulmin 2000). In arguing for the progressive role of law, then, feminist lawyers need to be more sensitive to the different arenas of struggles for rights and the varied array of forces called forth.

A second set of limitations is that formal legal cultures and institutions are not themselves women friendly, despite their supposed impartiality and neutrality. Studies of the ways in which statutory law operates in African states, especially those which use case law and records of hearings and case outcomes as their main empirical evidence have shown very mixed outcomes for women. World-wide, women and feminist lawyers have exposed gender

bias in legal cultures and the law, criticizing not just lawmakers and legal practitioners, but many legal concepts. One of the paradoxical features of Africa's legal cultures and law is that some of the gender bias in formal law arises precisely from the construction of 'lawyers customary law'. In many contemporary African states lawyers customary law remains a highly important statutorily-defined domain, existing alongside the actual norms practices and processes in rural communities. It was created in the colonial era by devolving many aspects of 'family law' -issues relating to marriage, divorce, children's affiliation and the devolution of property - to it. It is these areas of family law which enshrine gender discriminatory practices in contemporary states. Further bias arises from the ways in which discourses of custom are used within legal cultures and legal institutions. Stewart, especially, has argued that women's claims under modern legal systems in African states are undermined when men argue that their positions are contrary to 'custom'. The language of custom, as she points out, is being used politically in national level discourses to undermine the legitimacy of women's claims within modern legal frameworks using a rights discourse (Stewart 1996). This leaves feminist lawyers and women litigants little room for manoeuvre. Some of the positions we reviewed earlier suggest a good deal of faith in formal legal concepts and in the power of arguments based on equity and reason to undermine highly gender biased legal culture.

A final limitation of the law recalls our discussion of legal pluralism, where we argued that some of the tenets of the formal discourses of law and legality, such as formal equality and individual rights, do not sit easily within customary practices that are embedded in social relations. More than that, those principles, when applied to conflict adjudication or law making may lead to outcomes ignoring social relations. This is especially important when we consider one of the main ways in which policy advocates are suggesting that modified forms of customary system should form a basis for modern land reform. Codification is being argued for by both the World Bank Land Policy Division and the independent land policy advocates and the World Bank is currently involved in some pilot codification projects. Lavigne-Delville, writing about attempts to register customary rights in Francophone West Africa, identifies some problems, even where original legal categories are created, derived rights recognized and restrictions placed on the rights to alienate land by the holders of other usage rights (Lavigne-Delville 1999, 17). These are that land tenure management is removed from its socio-political context and 'becomes an administrative act', in which customary authorities are left with no (or a very limited) role to play. Registering customary practices produces 'a radical transformation of the *ways of managing* land rights and hence the very nature of local landholding systems'. This has implications for 'the whole social structure of local society' (ibid.). The point here is that the legal categories of administration and government rest on alienation and decontextualization - the very opposite of the socio-legal principles of indigenous local level practices. Whether codification can (or under which circumstances it will), protect women's socially embedded land claims is one of the issues in current debates between women's groups in Zimbabwe about codification (Whitehead 2001b).

### *The State, Democracy and Gender Justice*

The array of agents re-appraising the customary is wide-ranging, but one agent that we have paid little attention to is the post-colonial state, which has been balancing many contradictions for decades. In relation to land, different conceptions and practices have developed as carry-overs from the colonial period, although breaks with colonial policy have also occurred. Africa's many states and judiciaries have been actively making land and land tenure policy over these many years, but particularly during the structural adjustment decades. In interpreting its role as creating an enabling environment for foreign investment and in promoting liberalization, how have states considered the land question? Was titling a way of enabling? To what extent is the focus on new forms of land tenure an important part of today's post-SAPs dispensation? The World Bank's attachment to the evolution of local levels systems of tenure

and rental is, as we have shown, closely linked to its objectives of deeper and better land markets, and a belief that customary law will deliver, more cheaply, and with less conflict, precisely the individual forms of possession that foreign capital requires.

In this scenario, the language of the customary masks modernization and marketization. It is precisely the recurring discursive power of 'the customary' that is such an important feature of the gender implications of the current policy directions. The idea of the customary carries strong ideological overtones. It is a discourse within what Chanock (1985) has dubbed 'the symbolic capital of tradition'. Claims about the content of 'custom' are rarely reported to have played a part in the negotiations and struggles about changes in resource use going on between men and women.<sup>33</sup> The notion of rural Africa as a 'customary' domain is more often an outsider than an insider perspective. Yet, as we have shown, current land reform debates are dominated by the term, at the same time as there is a good deal of debate and disavowal about its character. Many of our policy advocates prize the consensual and negotiated character of decision-making, a stance, we have argued, that ignores rural power relations. Does part of the attraction of the label lie in idealized versions of its content, as well as the legitimacy it confers?<sup>34</sup>

The term is partly being used because it (often wrongly) implies that rules of land access and so on are long-lived. This is part of a much broader canvas on which practices and values are given legitimacy through their association with culturally specific ways of life of long duration. These more general discourses do not only belong to observers of Africa; they have a very lively currency within African nation states themselves. The ideas of African/traditional/good versus western/new/bad have been an important rallying point in many contemporary African states. They are discursive resources of considerable power within many national cultures, particularly associated with bolstering the power of contemporary political elites, part of whose power base lies in so-called traditional offices. African states and their powerholders differ in their links with the institution of chieftaincy which is a point of change, as well as of continuity, in which the language of the traditional masks what is a contemporary form of political power. To the question, then, of what kind of a political alliance is being made in using the language of the customary, one answer is an alliance with traditional leaders and ideologies. But as with the 'customary' itself, these are contemporary phenomenon, part of the array of forces in early twenty-first century African states. The language of chieftaincy and tradition may mask many different kinds of economic and political processes.<sup>35</sup> Many African feminists are alarmed at developments that point to a renewal of chieftaincy and in the activities of elites claiming the legitimacy of tradition in some states. The language of custom has been used oppressively in the politics of gender at national levels in many spheres - from dress, to education, to the use of public space and of course in relation to the operation of the law and legal culture itself (Manuh 1994).

Where does this all leave women? On the one hand, we have some empirical evidence that negative outcomes for women in local-level negotiations and struggles for land are not

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<sup>33</sup> Carney and Watts (1990) is perhaps an exception here. See also Moore and Vaughan 1994.

<sup>34</sup> See for example, Platteau, who paints a relatively rosy picture of land access under customary land tenure (Platteau 1996, 75) and Gopal (1999) who blames the harmful effects of recent customary practices on women on the changes brought about by colonial and post-colonial processes and not on the customary itself and argues for looking at the *intentions*, not the actualities of customary norms and practices.

<sup>35</sup> In countries such as Ghana and Cameroon, the retreat of the state under SAPs and political strictures at the national level have coincided with the resurgence of chieftaincy, a process strengthened and signified by the growing phenomenon of urban based male elite figures becoming chiefs as an expression of their achievements and contributions to their natal villages. (Goheen 1996, 163-178)

inevitable. Women are seriously negotiating and making some gains in these processes.<sup>36</sup> The importance of labour for rural production means that women have a serious bargaining chip in their transactions with men and indeed have used it (Okali 1983, Mikell 1989). On the other hand, whether as wives, as sisters or as mothers, case studies show that women still have to fight harder and strategize more skillfully for their access to land. Widowhood, divorce, marriage residence and other life cycle changes create uncertainties that have to be negotiated carefully. In doing so, women as well as men, have recourse to discourses within the customary and to discourses within the modern, whatever the formal or informal arenas of dispute settlement.<sup>37</sup> As Stewart argues, the issues facing women, in terms of law and their rights, is not whether to choose statutory or customary law, but how to maximize their claims under either, or both (Stewart 1996). The question for gender policy advocates is what stance on the issue of the complex relation between the customary and statutory, as discourses and practices, can best underwrite these claims?

Women in Africa have many reasons to be disillusioned with the state. Many have a history of resisting women's demands and there is a poor record of women's participation in government and in politics at national and local levels. The main holders of national power do not need to use the language of custom to undermine gender justice and women's claims. Recent manoeuvring around Uganda's new land legislation is instructive. Highly effective lobbying and alliance building strategies by Uganda women's groups and lawyers resulted in a spousal co-ownership clause being included in the draft land legislation. Despite assurances that this clause would be passed, the final late night parliamentary sittings passed the new land law without these clauses. It remains to be seen if the subsequent bitter recriminations will result in amendments re-instating spousal co-ownership.<sup>38</sup>

Even so, the dangers that we have identified in the turn to the customary suggest that we cannot turn our backs on the state as a source of equity for women in relation to land issues, a point made more generally by Stewart (1996). Rural African women will not find it easier to make claims within a climate of anti-state discourses. It is true that the many states lack legitimacy in Africa and that women find it difficult to get justice in male dominated states, but the answer is democratic reform and state accountability, particularly with respect to women's political interests and voices, not a flight into the customary. At a more detailed level women's land claims need to be based on a nuanced and highly sensitive set of policy discourses and policy instruments – ones which reflect the social embeddedness of land claims, the frequent gender inequality in such relations and the rights to livelihood of African women.

The issue of how best to secure rural women's land access depends crucially on democratizing African states, but those processes must engage with issues of gender equity. The main problem is that women have too little political voice at all the decision making levels that are implied by the land question: in local level management systems; within the formal law and also within the government and civil society itself. It is here that we should return to the proposals from OXFAM GB and IIED. The political objectives behind their proposals are to strengthen those who have little voice in national decision-making, especially rural farmers. The call for local level management of land allocation is seen as a major buttress against the

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<sup>36</sup> As well as Yngstrom 1999, see Sahelian examples discussed in Leonard and Toulmin 2000 and Quisumbing et al. 1999, and Vallenga 1985, for Ghana.

<sup>37</sup> Manuh recounts how elite women in Ghana seeking to reform family law to get uniformity in inheritance rights for women couched them in terms of 'custom', evoking flexible and fluid versions of customary law that required what was reasonable rather than a fixed set of rules (Manuh 1994). Shipton 1988 suggests some widows benefited from land registration in a Luo area of Kenya.

<sup>38</sup> The story is complicated by the fact that women in the Ugandan parliament were divided and not all of them supported the clause (Mwebaza 1999, Odida 1999).

processes of land alienation that many national political elites have been facilitating. But there seems to be insufficient interest in making sure that women are amongst the constituency of farmers whose voices are strengthened. Using indigenous institutions is also open to potential abuses of power, and the operation of the 'new or modified' institutions that IIED envisages does not take place in a vacuum, but depends on the way in which local and indeed national power relations feed into the new structures. Moving to community-based management and dispute settlement systems does not necessarily undermine these power relations. The potential for making new or modified local level institutions a site of greater gender equity is suggested by a recent study by Odanga-Mwaka. She found that Masaka Resistance Council courts were somewhat more progressive on gender issues than other local legal fora and attributes this firstly, to the stipulation that one third of the members should be women and secondly to the position adopted on gender issues by the Museveni government (Odanga-Mwaka – personal communication).

Toulmin and Quan are aware of the power dimension to rural social relations and its implications for local level land management. 'The question of who gains access to land and on what terms can only be understood by seeing how control over land is embedded within the broader patterns of social relations' (Toulmin and Quan 2000, 6). There is a sharp contradiction between this point and the continued use of the term customary, which, we have argued, is a discourse that upholds, rather than undermines, social, economic and political inequality. Some of the work calling for new functions for local level institutions, or new local management systems, carefully avoids using the term customary. Lavigne-Delville says specifically it should not be used but refers instead to 'local landholding systems and socially determined land use rules' (1997, 2). But at least until mid-2001, this has not been the stance adopted by in Quan and Toulmin and on OXFAM GB's land policy website. There seem to us to be too many hostages to fortune in the language of the customary at a national level for it to spearhead democratic reforms and resistance to the centralized and elite serving state power. It certainly will not promote gender justice for women, either in the sphere of land access or more generally. There are simply too many examples of women losing out when modern African men talk of custom. Elsewhere of course both IIED and OXFAM GB are aware of the importance of women's land rights. 'Protection of women's and future generations' land rights frequently requires reform of existing inheritance laws, and may in some cases be incompatible with traditional leaders' absolute authority over land' (Quan 1997, ).<sup>39</sup> The absence of sustained and serious discussion of how new functions for existing local level institutions, or new local level land management systems will ensure that women's land use claims are not systematically undermined is regrettable. It suggests that progressive policy making on land has its own box of institutions, networks, resources and discourses, while that on gender exists in another. It is high time for informed dialogue between them.

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<sup>39</sup> See also Quan (2001).

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