

# A GENDER ANALYSIS OF RECENT SOUTH AFRICAN LAND REFORM

by

FANELWA MHAGO and MELANIE SAMSON

February 1998

Paper presented at the Inter-Regional Consultation in Kigali, Rwanda, February 1998 and now part of a Reader published by the United Nations Development Fund for Women (UNIFEM), entitled *Women's Land and Property Rights in Situations of Conflict and Reconstruction* available on the Internet at <http://www.undp.org/unifem/public/landrights>  
Oxfam GB is grateful for permission from UNIFEM to reproduce the 6 articles on Africa from this Consultation on its landrights website.

## Background

After South Africa became a union in 1910 there was a change in the policy of direct rule to indirect rule with control and segregation. The first important shift was in the passing of the 1913 Land Act, which set aside restricted land as the Natives' Reserves - which were set aside from the rest of South Africa for exclusive purchase by African people. This act restricted the amount of land that could be owned by African people to 8%. Later, there was the Native Administration Act, and which was passed in 1927 and which resurrected the black rule in all black-owned rural areas. This act was amended in 1952 by the Bantu Laws Amendment Act, which provided that the chiefs and headmen constitute the first level in the rural government with powers to allocate land. What is interesting is that this system of chiefs and headmen later became the government system into the homeland system. The homeland system in South Africa was the system whereby all ethnic groups of black people were put into the rural areas so that they were given powers to rule and control themselves: the Xhosas were in Eastern Cape, the Zulus in Natal and the Tsutu in the north. In that system the central government had the overall power to control the budget.

In 1936 the establishment of the South Africa Native Trust -- better known as 'The Betterment System' -- aiming at the control of environmental degradation where the areas were separated according to residential areas, grazing areas and arable land, determined which homeland was given an equal piece of land for residential areas and arable land. All homelands had a communal grazing system.

## Tenure Arrangements

South Africa is a very patriarchal country with different tenure systems operating in different areas. These systems evolved over time in line with the social, political and economic factors that have affected black communities. The different tenure systems are the following:

- a freehold tenure system, or the church land system, with the church having a full right of ownership with free obligations to the state other than what was specified in the title;
- a quick-rent tenure system, which means one has to pay a rent in lieu of services. This is a type of leasehold where land is utilised and occupied subject to a rental. This type of tenure was introduced by the British colonial government in the early 1700s. It is the one that is granted to African people, but granted subject to some conditions like 'Rent to be paid

annually', 'Land could not be leased or sold', 'Land to be devolved according to male succession', 'Fee should be paid at the deed office', 'Title could be forfeited under any number of conditions like non-payment of rent and leasing the land', and so on.

- The type of tenure system is the permission to occupy. This is for individuals, subject to the condition that land cannot be transferred to a widow or a daughter on the death of the husband. The system originated in the 1960s as a means to give personal land rights to black South Africans when the 'Betterment System' was imposed; it was finalised in Proclamation 188 of 1969.
- And then there is the labour tenancy system. This is defined as the use of land by a person for a specific reason in return for rent or payment which could be in different forms. This is where two persons enter into an agreement or contract undertaken by the tenant to supply the owner with labour. In exchange the owner provides the tenant with land which could only be used for the agreed purpose or within those limitations.

### **Women and Land Tenure**

In South Africa as elsewhere women are not homogenous entity. There are black rural women, black urban women, white women, Indian women, coloured women, and the women on farms. And in all of these categories we have the haves and the have-nots, as we also have educated and illiterate women. Since tenure can be understood as the process that defines the kind of household that qualifies socially and politically for land, it therefore can be understood as a social and political process rather than a system of laws and rules. But this is also subject to discussion.

A large part of the context on tenure systems is governed by the values of the community and by prevailing power relations. Women are disadvantaged by social assumptions and informal land practices that are not controlled by laws. Tenure and power relations appear therefore to bear harder on women in South Africa. That is why it is very important to think carefully about what the issues are in relation to women's rights to land; this should be looked at in relation to women's empowerment. And we must know that the claim to land rights has an immediately obvious emotional dimension. It is important, therefore, to go beyond this and ask what land rights are and why women should have them, and then look at the future prospects for women in this regard.

### **Customary Marriages**

Customary marriages are not fully recognised as valid marriages, as far as the common law of South Africa is concerned. They are only recognised in the court of traditional leaders. The discussion is then about whether customary marriages should be fully recognised. Another problematic area is that of dual marriages. The spouses of an existing customary marriage may remarry one another in church or before a magistrate. *Lobola* (bride price) plays an important role in maintaining African culture. Registration and other formalities in the customary marriages are not compulsory in South Africa. That is why the South African Law Commission is of the view that all customary marriages should be registered. This is also still under discussion. We have polygamy. Under customary law a man can marry as many wives as his strength will allow. Concerning property relationships and property management, customary law

has no clear rules about spouse relations over property,. Therefore, wives can find themselves disadvantaged on the dissolution of marriage. The wife has no full rights to own and control property.

### **The Land Issue after Apartheid**

The complexity of the land issue under apartheid must indeed be emphasised. It was a very difficult situation in which to commence land reform. The main political motivation for land reform was to redress past injustices, but the ANC government also had three other motivations - some of which are contradictory - for embarking on a process of land reform: reconciliation, stability to underpin economic growth, and improvement of household welfare. This emphasis on the household is something important. Land reform needs to be understood within the broader context of South Africa's policies. The Constitution has a formal commitment to gender equality, which places requirements on other forms of legislation. In it there is a commitment to land reform as well, but this is accompanied by a private clause. There was intense political battle over that, and organisations like the National Land Commission, which opposed the private property clause, lost out. Private property was entrenched very firmly in the Constitution. So, this combination of a commitment to reform land and to uphold private property, and to expropriate people only when necessary and to pay market-related prices, has led to a market-based system of land reform in the country.

The other component which is important in South Africa's Constitution is that traditional law is officially recognised. However, a caveat is put in place that it cannot contradict the Bill of Rights, which is the one of the most progressive bills of rights in the world. There is tension because up to now women have been prejudiced by traditional law; we have yet to see how the two systems are put together. The other major context for land reform in South Africa has been the shift in the past few years from the reconstruction and development programme -- the ANC's election development plan -- which was a social welfare type of approach to development. In 1995, the ANC Government adopted a macro-economic strategy entitled 'Growth, Employment and Redistribution Strategy' or 'GEAR'. This is a neo-liberal policy very similar to structural adjustment policies implemented elsewhere in the world, and which has reinforced the emphasis on market approaches. In this context, a 1997 White Paper on Land Reform was produced. As with all South African legislation, it went through several stages of consultation where members of the public were allowed to give their analysis, input and recommendations. South African women were mobilised around this; they appreciated the commitment to gender equality in the earlier drafts of the White Paper, but noted that women's views were not listened to. So, although there was an opportunity for consultation, it did not result in substantial gains for women.

The three main components of South Africa's land reform are: restitution, redistribution, and tenure reform. The objective of the restitution programme is to restore land and provide other remedies to people dispossessed by the racially discriminatory legislation of 13 June 1913. People dispossessed before that date have no right to restitution. The restitution policy has a limited lifetime; it expires in 1998. People had only three years to launch their claims. There have been several claims launched, but very few have been processed. And we found at the National Land Committee that under restitution people do not pay for their land, while they do under the redistribution programme. The restitution programme is going slowly, so the

Department of Land Affairs officials in the field are actively encouraging dispossessed communities to drop their claims for restitution and trade them for claims for redistribution instead. And people are so desperate to get land that they are doing this. But the result is that they must pay for the land because under the redistribution programme the objective is to give poor people access to land.

The main mechanism for people to get land is that eligible individuals can apply for a 15,000 rand once-in-a-lifetime grant to purchase land, under the redistribution programme. Eligible individuals are defined not as individuals but as adults, in married relationship or with dependants. And in the married relationship, in the household, you must have a joint income of less than 1500 rand a month to qualify. Who qualifies as an eligible individual is the main problem gender activists have with this piece of legislation. The other thing to note about the redistribution programme is that it is based on a 'willing buyer, willing seller' policy, such that when you purchase the land you must pay a market price. 15,000 rand is approximately US\$ 4,000, which is insufficient to purchase land with. So, this market-related price becomes very problematic.

The last programme of land legislation is tenure reform. This is a very complex process meant to provide equal and secure tenure rights to all South Africans. Within the legislation there is a specific commitment to gender equity, and the Department of Land Affairs has followed through on some commitments in establishing a sub-directorate responsible for gender affairs. For this reason South Africa is seen by many as a role model for entrenching gender rights. Much as we value that, we do however have some deep concerns about the process. And we would like to outline these briefly before we propose some recommendations.

### **Criticisms of the Legislation**

The first criticism is that the sub-directorate on gender has only two staff. One resigned, so there is only one woman responsible for gender issues and land in the entire country. We can now see the seriousness of this commitment on the part of the Government!

Our criticisms of the land reform process from a gender perspective are based on a particular understanding of what the relationship between gender and land reform should be. The typical way of looking at this issue and the way it is entrenched in our legislation is to see how gender differences will affect land reform. But we want to turn that on its head and ask: 'How will land reform affect gender relations?' Will land reform be a tool to empower women and to shift power relations in their favour? We ask this because land is a critical component of women's cultural, social and political power as well. Or will the land reform process in South Africa maintain the status quo? Or, worse, will it marginalise women still further? We fear the latter will happen.

Our first main criticism of the legislation is that it is based on a very inadequate understanding of gender. It slips from talking about gender to talking about women. It holds women as a homogenised, separate category: it talks about labour tenants, farm workers, dispossessed people, etc, and women, as if none of those communities has a gender element in it. Concerns for gender are not integrated into the policy.

In South Africa the commitments to gender are restricted to the sections of the White Paper which look at objectives and principles, but when we get to sections on implementation, monitoring and evaluation, economic considerations, constraints to land reform, etc, gender is not mentioned. This leaves much to officials in charge of implementation. Pilot programmes in at least three countries have shown that in fact no considerations for gender have been integrated into planning, monitoring and evaluation. So, this broad and grand vision has not been made operational, and, most likely, will not be. The approach to gender in the document is highly legalistic and, although it acknowledges cultural and social power it does not address it at all.

As mentioned above, an 'eligible individual' for a grant is not an individual at all. He or she is defined in relation to others. The reason they used this strange term is that gender activists had criticised the use of 'households' as the beneficiary in the original legislation. Policy makers then tried to placate them by taking the word out, but the household paradigm remains. In South Africa we need to ask what a household is. It is complex in many countries and it is very complex in South Africa, because of the system of migrant labour where women remain in the homelands and their male partners work at vast distances. As already highlighted, there is polygamy. Now, do all six wives count as being part of the same household? Households in South Africa are stretched in terms of space and are permeable, flexible. The White Paper thus promotes different kinds of flexibility, which further discriminates against women.

Because access to the land acquisition grant is once in a life time, if my partner and I were to apply for a grant jointly, and if I then wanted to leave him, I would never be able to have access to a land acquisition grant again. I would in effect be rendered landless. This grant is therefore creating extra reasons for women to stay in marriage relationship. It is also causing households to divide. Extended families are deciding that, even though they have chosen to live together, they now separate so that more adults can have access to land. Communities are being encouraged to form community property associations where eligible individuals pool their money and buy land together, and must form a body for the association with a constitution defining which individual is eligible to join them. Although, for example, single women with children legally are eligible, many community property associations exclude them because there isn't enough land and they have to find some way of limiting who has access to it. In some instances, married women have supported this because they fear the unmarried women in the community. What do you do in that kind of situation?

The legislation is also creating incentives for new families to be born. There are cases of young single women becoming pregnant in the hope of becoming beneficiaries of the community property association. There are also cases of Department of Land Affairs' officials creating families in the sense that when they see a single individual without a child on the list, they will say that A is not married and has no child and B is not married either and has no child, and so they will put A and B together in a family so that A and B have to share the land. As you can understand, people are very disturbed by this.

Another related issue is the question of what constitutes tenure security for women. This legislation assumes that it is providing tenure security, but research has shown that women define tenure security not just in terms of having access to land as part of a household; they want

to know they have independent access to land in order to provide themselves with physical, social and psychological security in addition to economic security. The current land legislation does not provide women with what they consider to be tenure security; it provides them land only if they stay with their partners or with their children.

### **The Relationship of Land Legislation to Customary Law**

As already mentioned, there is a commission that is now looking into how to make customary law and the Bill of Rights compatible. One concern that has been raised recently is that even if women gain independent rights or access to land through acquisition grants, if customary succession is followed, that will be only for one generation. In a sense our example can be seen as being the flip side of the Mozambican one, in that we perhaps have a strong formal commitment to legislation, but there is no strong rural social movement in South Africa. There is no rural women's movement, except one, confined to the former Transvaal. There is no grassroots movement to lobby for and further entrench these rights.

### **Recommendations**

We have learned that policy must be unambiguous in its commitment to securing women's right to land and property, and must include measures to ensure this, to prevent officials, communities and even women themselves from excluding women from the implementation stage. The commitment to gender policy needs to be accompanied by the training of officials at all levels and rigorous monitoring and evaluation of the work agenda. Sophisticated and creative evaluation and monitoring criteria are urgently required which go beyond counting percentages of women who have access to land and participate in structures, and should include an evaluation of shifts in gender and power relations. This may require in-depth case studies.

NGOs also need to do more capacity- building with women at the local level so that they know their rights and can advocate them. They also need to provide gender training to men in order to decrease their resistance on gender issues. NGOs need to improve the gender analytical and research skills of their staff and particularly field-workers. In recognition of this, the National Land Committee in South Africa, to give one example, is launching an internal gender strategy programme to that effect.

We are criticising the South Africa experience so that people can take lessons from it in order to make improvements in their own countries, and avoid falling into traps. The lessons are the following:

- It is not enough for legislation to be gender-sensitive; it must be gender-transformational. It must proactively use the land reform policy to empower women and shift gender power-relations within the household and the economic, social and political spheres in their favour.
- Women must have independent access to land. The form of tenure security provided by the policy should not create or reinforce other forms of dependence like, for example, remaining in the household unit.

- Policies need to show that gender equity is necessary for the very success of the land reform programme and is not an additional goal.
- The commitment to gender equity needs to be integrated into all aspects of policy, particularly its components dealing with finance, implementation, monitoring and evaluation. Policy needs to anticipate potential blockages in implementation and set up mechanisms to deal with these.