

Securing Women's Land Rights in Africa
Notes of a Royal African Society meeting
in association with the Centre of African Studies, SOAS
at the School of Oriental and African Studies, London
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by Robin Palmer (Mokoro)
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THE SPEAKERS

Opening the meeting, the chair **Robin Palmer** (Mokoro, formerly Oxfam GB's Global Land Adviser) said he believed that women's land rights (WLR) in Africa were of fundamental importance and he therefore greatly welcomed this meeting. He had had some success in persuading Oxfam to fund some really important regional workshops on WLR in Southern and Eastern Africa, run by Kaori Izumi of FAO, but very little success in getting Oxfam to work on these issues in its programmes. He continues to run the Oxfam *Land Rights in Africa* website which is widely held to be an excellent resource on gender and land:

<http://www.oxfam.org.uk/resources/learning/landrights/index.html>

Robin said that in re-reading some of the literature again recently he was struck by the very strong contrast between the multiplicity of good advice available and the continuation of much very bad practice. As an example, he cited the case of post-tsunami Aceh, Indonesia, where Oxfam had tried to hold the implementation of a major World Bank-funded land administration programme up to the Bank's own excellent gender guidelines in *Gender Issues and Best Practices in Land Administration Projects* (2005),¹ but failed because the programme had neglected even to collect any gender-disaggregated data.

A more recent World Bank publication, *Gender in Agriculture Sourcebook* (2008), contains an excellent Module on *Gender Issues in Land Administration*² which includes much recommended good practice, e.g. the need for gender analysis to be incorporated at all stages of programmes, for a deep knowledge and understanding of customary tenure systems, and to provide legal services to women to help them enforce their rights to land, once those rights are established. Yet its widely respected author, Susana Lastarria-Cornheil, concluded bleakly that: 'reviews of land programs and projects reveal that very little information and data are systematically collected to clarify the effects on women and their land rights,' and that 'no single land-access project has had unqualified success in allocating land to women and men at equitable levels.'

Robin then introduced Birgit Englert and Elizabeth Daley, the co-editors of a new James Currey book, *Women's Land Rights and Privatization in Eastern Africa* (2008).³ which he strongly commended to the audience.

¹ http://siteresources.worldbank.org/INTARD/Resources/Gender_land_fulltxt.pdf

² <http://siteresources.worldbank.org/INTGENAGRLIVSOUBOOK/Resources/Module4.pdf>

³ The book is also published in Uganda by Fountain Publishers, in Kenya by East African Educational Publishers, and in Tanzania by E & D Vision Publishing Ltd. Robin Palmer's Foreword is available at http://www.oxfam.org.uk/resources/learning/landrights/downloads/foreword_womens_rights_to_land_eastern_africa.pdf

Birgit Englert (Department of African Studies, University of Vienna, soon to move to the University of Bordeaux III) wrote her Ph.D. on land tenure security of women and men in the Uluguru Mountains, Morogoro Region, Tanzania. She gave a brief overview of the book. It contains a chapter introducing the subject; two chapters on the broad policy context in Kenya and Tanzania; a further two on the micro-politics of gendered struggles over land within changing customary systems in different regions of Tanzania; a chapter on the impact of new land legislation in northern Uganda; one on the impact of the spread of HIV and AIDS in eastern Kenya on widows' and orphans' land rights; a chapter on the post-conflict context of resource scarcity in Rwanda; and a concluding chapter setting out ways forward in the struggle for WLR. The authors are drawn from a wide cross-section of disciplines. The book, which owed its inspiration to the 'legendary' FAO/Oxfam WLR workshop in Pretoria in 2003,⁴ stresses that despite very difficult circumstances, women in Eastern Africa are not powerless actors but are finding creative means to claim and ensure their rights to land.

It is a book based on solid and empirically-grounded local level research which can offer both a deeper understanding of the complexities at stake within the overarching context of the increasing privatization of land tenure, and a more accurate picture of realities on the ground than more general studies. There is now a vast literature depicting the beneficial effects of secure and independent land rights on women's empowerment and welfare and on the welfare of their families and of society as a whole.

Privatization, Birgit stressed, is no longer considered just as a matter of individualization, as it has been in Kenya since the 1960s, but refers more broadly to the formalization or regularization of land rights via the registration of land interests in whichever context they customarily occur – allowing for spouses, families, clans, villages, or communities to be recognized as owners of private land rights. Most post-1990 land legislation in Eastern Africa emphasizes the formalization and regularization of land tenure through the titling and registration of existing rights to land, whether they are held individually, jointly or collectively. Yet continuity between colonial and contemporary official thinking still manifests itself in the way that new land laws and policies are being interpreted and implemented by officials. Hence the battle for WLR does not end with the enactment of new laws providing for equal rights to women and men, it begins anew with the challenges of implementation, and what is needed is a change in the culture of practice, which is far more difficult to achieve than law reform. Birgit concluded by stressing that one of the broader aims of the book is to offer suggestions as to how women can best be empowered with the confidence to know, protect and claim their rights to land and supported in their struggles over land through current processes of economic and social change.

⁴ See Birgit Englert and Robin Palmer, *Women's Land Rights in Southern and Eastern Africa: A short report on the FAO/Oxfam GB Workshop held in Pretoria, South Africa, 17-19 June 2003* http://www.oxfam.org.uk/resources/learning/landrights/downloads/wlrsea_short_report.rtf

The second co-editor, **Elizabeth (Liz) Daley** (independent land consultant) wrote her Ph.D. at SOAS on land tenure and social change in Kinyanambo Village, Mufindi District, Tanzania. She has published in the *Journal of Agrarian Change* and has had a great deal of hands on practical experience on a wide range of land issues. Liz stressed that it was all too easy to draw overwhelmingly negative pictures of WLR, but they wanted to offer some hope through this book that not only are women themselves actors in the process of change, who can and are trying and often succeeding in securing their land rights, but that outsiders who are committed to supporting WLR in Africa can also pursue a number of different strategies to do just that.

Liz continued by discussing the issue of customary institutions, which is regularly contested, including among contributors to this book. There is a received wisdom that they are, virtually by definition, bad for women. Yet there is strong and persuasive evidence in Judy Adoko and Simon Levine's chapter on northern Uganda about the importance of trying to work through existing patriarchal social institutions – in the form of the clans – in order to achieve gains for women. Noting the failure of the new government land administration structures to materialise, Adoko and Levine believe that implementation of land registration is likely to proceed much faster if existing structures are utilised and supported by the government. They also note that the clans had in the past protected women's rights as land users, and that men had the role of guardians of the family land rather than being individual owners, and that these norms could therefore be drawn on to protect women's rights during land registration.

While emphasising the role of civil society in promoting and supporting WLR, especially through sensitisation, awareness-raising and legal literacy work, the book also draws out the key point that any strategies to support and promote WLR must be suited to the situation on the ground. Where existing customary institutions can be used as a vehicle for this, why not use them, Liz argued. Equally, where existing customary institutions have become weakened, why not pursue alternative strategies such as creating new local institutions with mandated numbers of women members – as has been done in Rwanda? So, as Liz put it, in the practice of formulating and implementing new land laws and policies, taking a hard-line position at the start on the merits of a particular approach seems less likely to be as effective as a pragmatic approach which looks at the situation on the ground as it is and says 'what now can we do to maximise the gains for women'?

In most parts of Eastern Africa, custom – albeit a moveable feast – is deeply embedded in local social, economic and political relations, structures and processes, and particularly so in relation to land. Countless examples from the literature have shown the fruitlessness, and frequent destructiveness as far as WLR are concerned, of land tenure reforms which superimpose completely new systems in disregard of what is already there. A better approach might be to consider how custom can be reformed rather than replaced.

The law alone is not enough, the book argues, but without the law we have nowhere to start from. Liz gave examples from Rwanda, where she had worked both as an adviser in MINITERE and in a variety of consultancies. Here the Constitution mandates that 30% of members of all decision-making institutions at all levels of

government must be women. Where land administration has been decentralised to five-person committees at local government level, this has resulted in 2 of the 5 members being women in literally thousands of local committees in every part of the country. The 1999 Rwandan Inheritance Law legally provides, for the first time, for brothers and sisters to inherit equally from their parents. In 2006, two different field studies independently came to the same conclusion that, as a result, women were increasingly starting to claim their rights and were increasingly succeeding in doing this, even though many obstacles remain.

All case studies presented in the book lead to the conclusion that strategies to support WLR in both formulation and implementation phases of land tenure reform must involve all levels of government and civil society, as well as local, national and international actors, but what is also vital is 'increased awareness, understanding and confidence among Eastern African women themselves.'⁵

To do this, the book makes clear that the formulation and implementation of land tenure reforms requires flexibility in approach based on detailed understanding of local cultures and customs and land rights and responsibilities. As Liz explained, the goal must be to learn and understand how different women can best be supported, in differing ways according to circumstance, choosing from every strategy available the one most likely to be effective, and then to be open to adapting the strategy as events unfold. Ultimately, as said many times in the book, in order for WLR to achieve lasting social legitimacy, it is the women themselves who must find the confidence to pursue them. Our role as outsiders, Liz concluded, is to lend support and solidarity in helping them to find it.

As a very positive spinoff from their book, Liz and Birgit are combining again to edit a forthcoming edition of the *Journal of Eastern African Studies* devoted to WLR in Eastern Africa to be published in November 2009.

The third speaker was **Sibongile Ndashe** (Lawyer, Interights – The International Centre for the Protection of Human Rights, formerly Attorney, Women's Legal Centre, Cape Town) who made a presentation on gender aspects of the South African Communal Land Rights Act (2004), which has generated a great deal of controversy.⁶

Sibongile began by stating that Section 25 (6) of the South African Constitution provides that tenure which is legally insecure as a result of past racially discriminatory laws must be secured through an Act of Parliament. The Communal Land Rights Act is a result of that mandate. But this meant that the framework adopted had already been set and people who wanted to articulate an alternative reform had to work within the constraints of statutory reform. The legislature moved towards formalising land rights (converting old order rights to new order rights). It did

⁵ 'Afterword', in Englert & Daley, *Women's Land Rights*, 174.

⁶ See Aninka Claassens & Ben Cousins (Eds), *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (Cape Town; University of Cape Town Press, 2008). The introduction to this book by Ben Cousins is available at http://www.oxfam.org.uk/resources/learning/landrights/downloads/land_power_&_custom_sa_clra_intro.pdf

not, however, create a framework that recognised absolute property rights but a process where people who had old rights in the land would have those rights converted into new order rights. Upon registration of the new order rights they vest on the community, and the exercise of the rights in land will be made subject to community rules, which will determine how people exercise the rights that have been conferred.

Sibongile went on to discuss the limits of and gaps in the rights discourse and then some of the problems with the Act. The bulk of the criticism on women's rights was that it failed to take into account women's socially and legally constructed disadvantages and that it conferred equality to women in form but not in substance. The definition of old order rights, although gender neutral, served as a basis for discriminating against women because in reality women were not holders of old order rights. Clause 14 provided for a land rights inquiry and was criticised for an inability to articulate the measures required to promote gender equality, thus leaving it in the hands of officials to determine those measures. This was fundamental in failing to recognize the double discrimination which African women suffer, as their insecure tenure was as a result of race and gender discrimination. Hence it was likely to have the effect of entrenching the status quo and aggravating the existing inequalities of women with regard to land rights.

Sibongile then turned to the role of civil society and the women's movement, noting that the lack of women's rights Advocates credited with steering the course between the State and a more radical civil society agenda common in other parts of Africa did not occur in South Africa. But the women's movement is often faced with a dilemma when taking up contentious issues such as communal land tenure. Accusations levelled at their role range from their issues being donor-driven, a vulnerability to being used by the state because their demands can be easily met, or being used by other interest groups opposed to legislation, and so on. There was a level of discomfort from the women representing rural NGO's. When law reform is presented as a break with the colonial past, no one wants to be seen as embracing that past, so it poses a dilemma for those advocating for women's rights. From the questions that MPs asked them, there was a constant need for women to keep on justifying why their actions did not mean a revolt against tradition but were rather an attempt to secure their rights in what is increasingly becoming uncertain terrain.

It is important to recognize that in some contexts the agenda is set elsewhere and civil society is put in the unviable position of either calling for a complete withdrawal of the legislation and asking the legislature to start over again, or trying to secure women's rights within a flawed framework. The difficulties of an agenda set elsewhere placed the women's movement in an invidious position. There were criticisms that the framework was fundamentally flawed and there were questions raised regarding the wisdom of proposing changes within such a flawed system. There were questions about the nature of the interventions and consequently the form in which the amendments to laws are made by CSOs. In the South African context, chairpersons of various Portfolio Committees often ask an organisation, after critiques of various clauses have been made, to suggest ways in which amendments can be made. At this stage there are two options, yes or no. The danger however remains present regardless of the option exercised. If the legislation is flawed because of constitutional deficiencies in the proposed framework, the

superficial amendments may close the constitutional gaps and make it difficult to lodge a constitutional challenge. If, however, one refuses to participate in crafting the amendments, there is a chance that the legislation may be passed in its current form and only left to constitutional challenges that may or may not ensue.

There are criticisms directed at both the supporters and detractors of the legislation. They centre around constituencies and who are you speaking on behalf of? They extend to class compositions of the groups represented. Important as this discussion is, particularly in a country as diverse as South Africa that continues to bear the scars of deeply imbedded patterns of inequality, it fails to point out the agendas or substantiate the basis of the objection of the class complained of. In the same vein it was important to acknowledge that a lot needs to be done to enable these discussions to take place at the level where they will have a profound impact, i.e. in the traditional communities.

The literature setting out the impact that formalizing rights has had on women's access to land suggests that women's rights to land are revealed as being tenuous and secondary and therefore likely to diminish when rights are formalized. This knowledge makes it imperative to legislatures who prefer law reform as a tool for land reform to ensure that whatever model is used guarantees women's rights to land before the process of formalizing land begins. An analysis of this nature can rarely be done without looking at the nature of land rights that women have in communal settings and how they exercise these rights in practice, and more importantly what the de facto as opposed to de jure impact of these reforms are going to be.

After the initial public outrage at the Bill, attempts were made to fix the offending pieces of the draft legislation. The tinkering with the legislation to enable women to access land has not solved the reality of men manipulating institutions and giving interpretations of customary law aimed at securing rights for themselves. The legislation has failed women by refusing to acknowledge that playing fields are not level and failing to recognise that for this legislation to work reasonable accommodation for women needed to be made. Sibongile concluded by saying that we keep on missing the fact that a radical Constitution enables the women's movement to make radical demands.

DISCUSSION, COMMENTS AND QUESTIONS

Irene Mugure from Kenya asked about a 35-year old land dispute between the two wives of a deceased man, with appeal after appeal. What role can a will play in protecting women? Liz Daley said that this was a familiar situation in the region. Wills would be an effective method of securing land rights because they were not costly and there was need for heightened awareness of the need for wills. Robin Palmer gave an example from a workshop in Zambia where even those who were most fervently advocating the need to make wills did not often make wills themselves!

Liesl Gernholtz (Human Rights Watch) asked Sibongile Ndashe whether the obligations contained in the South African Constitution had increased women's access to land and whether they might work in other parts of the continent. She replied that it depends! The rule of law is the first thing that needs to be in place for

the law to be an agent of social change. It also depends on what the law states. She distinguished between two types of Constitutions: the one that exempts the application of the equality clause to customary laws, personal and family laws, the 'claw-back' clauses. Many post-independence constitutions had this feature. Some of the newer Constitutions allow that equality to be applied without exemptions, there are no 'claw-back' clauses. The South African Constitution is different in that it recognises customary law to the extent that it is not inconsistent with other rights in the Constitution. This has created an enabling environment for women's rights: it has allowed the Constitutional Court to make very strong pronouncements on women's rights and created space for women's groups to articulate their rights based on what the law allows. But the real question is whether strong legal pronouncements can trickle down. Access to institutions that allow the enforcement of the newly won rights is key. The new laws provide an enabling environment which is a good starting point from which to negotiate because they have some protection for women. If a customary forum is not doing women justice, they have an option of moving their dispute to another forum. Hopefully, the two (what the laws say and what people experience) will merge eventually.

Jonathan Lingham (DFID, Food Group) spoke about the international food crisis and rising food prices, yet Africa's ability to respond to these was severely limited. He felt that women's insecure access to land had played a part in this. Africa was constantly depending on imports and there was a need to get out of this loop. Liz Daley responded that a crucial part of tenure security lay in making land markets more flexible, and rental markets could be very important for boosting production and are very important for women to enable them to increase their access to land.

Samir Elhawary (Humanitarian Policy Group, ODI) said that HPG had been doing research on the massive post-conflict displacement in the Great Lakes and Sudan⁷ and asked how can WLR be strengthened during negotiation processes? The question was thrown back at him, and he acknowledged that land was a big gap in the work of humanitarian agencies; it was seen as too politically complex and lots of conflicts over land were not taken into account. There was a need to negotiate land rights during a process of organised return, with particular attention paid to vulnerable groups such as widows and orphans. Samir thought there were lots of problems in securing women's rights during return processes in Rwanda, particularly with policies such as land sharing and villagisation. Liz Daley had a different understanding of the Rwandan case, based on what she has seen there. Some villages in Rwanda were specifically created for widows and orphans to enable them to get their own pieces of land, and sometimes these vulnerable groups got additional help from humanitarian agencies with house construction which the rest of the population did not benefit from. On land sharing, while there will always be exceptions and injustices, there is evidence that on the whole most household heads got land, with wives in illegal polygamous marriages usually getting their own separate plots too.

⁷ See <http://www.odi.org.uk/hpg/land.html>

Patrick McAuslan (Professor of Law, Birkbeck College) was asked to reflect on his role of legal draftsman in Eastern Africa and elsewhere in the context of WLR. He stressed the distinction between procedural and substantive matters. The latter were about rights, obligations, powers and duties with respect to the acquisition, ownership, occupation, use, succession to and loss of land. Procedural matters concerned e.g. having a certain percentage of women on committees, boards, courts etc dealing with land issues and the subsidiary matters arising from that, e.g. women having to be at a meeting or hearing for it to be valid. Both were important and neither was straightforward. What was possible in Nairobi might not be so in Mombasa, with its greater Islamic influence on women's opportunities to take part in public life, and what was possible in urban areas might not be so in rural areas. Among the questions to consider were: do you legislate to prevent meetings being held at times which it is known will be inconvenient for women, and how can you ensure that enough women will be willing *and allowed* to sit on committees?

On substantive issues, Patrick cited the saga of the amendment on women's rights to land during the passage of the 1998 Land Act which is now part of the folklore of women's rights and law in Uganda. He spent many hours working on an amendment to the Act to re-introduce co-ownership of land between spouses, but it was in vain as President Museveni announced that Uganda's social and economic stability would be threatened if any such amendment were introduced. Patrick believed that the biggest problem was over succession. What happens on the death of a spouse may undo all the good of a land law designed to further WLR via market processes. Rwanda was correct in dealing with this early in the life of the new post-genocide government. It was a fallacy to assume that drafting can provide a magic wand to ensure women's rights to land. New laws are certainly an important part of a process of policy implementation and public education, but without changed social attitudes, new laws, however well drafted, will be difficult to implement.

A SHORT VIDEO

The meeting was well attended, with an audience of around 50, comprising a cross-section of people working for international NGOs and human rights organizations and academics, lawyers, and students.

It concluded with a presentation by **Kate Nustedt** (International Communications Director, ActionAid International) of a short video on women claiming their rights to land in Sierra Leone, Pakistan, Uganda, Haiti, and Mozambique (featuring Graça Machel). This forms part of ActionAid's current HungerFREE Women campaign.⁸

Various questions followed about the campaign which indicated a high level of interest in this and future campaigning on women's land rights, and it is to be hoped that members of international NGOs present, and others, will rise to the challenge of continuing to engage seriously, at different levels, in the struggle to secure women's land rights in Africa.

⁸ <http://www.hungerfreeplanet.org/update-from-actionaid-staff?start=15>