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Justice for the Poor / Kenya

Women's Access to Land and Property Rights

A Review of the Literature

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Program Background

Justice for the Poor conducted a study on *Women's Access to Land Rights* in Kenya under the World Bank's Gender Action Program (GAP). The overall aim of this project was to promote the design of interventions that enhance women's ability to claim their economic rights, in particular their rights associated with access to land. This review and analysis of existing literature and programming (present and future) on women's access to justice – particularly in regards to land rights under both formal and informal justice – represented the first step in the *Women's Access to Land Rights* project.

This project reified Kenya *Gender Action Plan* recommendations by incorporating gender considerations in the early design and implementation stages of the World Bank's Judicial Performance Improvement Project's (JPIP) 'Access to Justice' and 'Public Communication, Transparency and Accountability' components. In particular, this program sought to build an empirical knowledge base on women's access to formal land rights through the justice system and how women make use of, and are represented in, customary law.¹ This base will serve as a tool for women's legal empowerment by helping to inform the ongoing design and implementation of JPIP and promote women's rights to land and economic development.

¹ The terms "customary" or "law" may not be the most apt since informal practices may neither be based on custom or rigid enough to be considered a law. The term as understood and used in this review is based on Kenyan legislation.

Introduction

Access to land and property rights are extremely important for women's economic empowerment in Kenya. In most rural areas of Kenya, access to land is the basis of economic sustenance, ensures greater security and leads to higher investments for increased productivity. Some authors note the limits of the economic potential land and property rights have in Kenya, since formal titling programs have had a weak impact on perceived land rights, credit and crop yields.² A greater number of authors argue formal rights are crucial for economic development.³ Others note a proliferation of smaller scale credit-giving organizations which do not require land as collateral; however, without secure access to agricultural land, there is little incentive to invest available credit in land which could be easily lost. Regardless of this debate, access to land and property rights for women is a cross-cutting issue which affects economic development, human rights, and access to justice.⁴

Under official law women have the right to own and inherit land. But as a number of authors note, formal law has limits and does not eliminate cultural, informational or institutional barriers which prevent women from claiming their rights.⁵ Even when

² Whitehead, A. & Tsikata, D. "Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary" (2003) *Journal of Agrarian Change* Vol. 3 No. 1-2, 72 ("Whitehead & Tsikata 2003"); Coldham, S. "Land-Tenure Reform in Kenya: The Limits of Law," (Dec., 1979) *The Journal of Modern African Studies*, Vol. 17, No. 4, 620 ("Coldham 1979"); Place, F. & Migot-Adholla, S. E. "The Economic Effects of Land Registration on Smallholder Farms in Kenya: Evidence from Nyeri and Kakamega Districts," (Aug. 1998) *Land Economics*, Vol. 74, No. 3, 360; Jackson, C. "Gender Analysis of Land: Beyond Land Rights for Women?" (2003) *Journal of Agrarian Change*, Vol. 3, No. 4 ("Jackson 2003"); Nyamu-Musembi, C. "De Soto and land relations in rural Africa: breathing life into dead theories about property rights" (December 2007) *Third World Quarterly*, Vol. 28, No. 8 ("Musembi 2007").

³ "Voices of Women Entrepreneurs in Kenya" IFC & WB Publication (2006) ("IFC & WB 2006"); "Land: Better Access and Secure Rights for Poor People" DFID Policy Paper (2007). ("DFID 2007"); Lorenzo, Cotula. "Gender and Law – Women's Rights in Agriculture. FAO Legislative study no. 76, United Nations Food and Agriculture Organization (2002) ("Cotula 2002"); Drimie, S. "The Impact of HIV/AIDS on Land: Case Studies from Kenya, Lesotho and South Africa." FAO Report (2002); Strickland, R. S. "To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa" International Center for Research on Women, Working Paper (June 2004) ("Strickland 2004"); Seebens, H. "One size fits all? Female Headed Households, Income Risk and Access to Resources" University of Göttingen and Center for Development Research, Bonn (December, 2007) ("Seebens 2007"); Fortin, E. "Reforming Land Rights: The World Bank and the Globalization of Agriculture" (2005) *Social Legal Studies*, Vol. 14, No. 2; Land policies for growth and poverty reduction: A World Bank policy research report (Oxford: World Bank and Oxford University Press, 2003).

⁴ Jackson 2003; Musembi 2007; Wojkowska, E. "Doing Justice: How Informal Justice Systems Can Contribute" UNDP, Oslo Governance Center (2006) ("Wojkowska 2006"); "From Despair to Hope: Women's Right to Own and Inherit Property" Futures Group International & Kenya National Commission on Human Rights (2005) ("Futures Group & KNCHR 2005"); Izumi, K. "Gender-based violence and property grabbing in Africa: a denial of women's liberty and security" (March 2007) *Gender & Development*, Vol. 15, No. 1 ("Izumi 2005"); "Secure Land Rights for All" Global Land Tools Network; UN-HABITAT (2008); "Policy Makers Guide to Women's Land, Property and Housing Rights Across the World," UN-HABITAT (March 2007) ("UN-HABITAT Policy Makers Guide 2007").

⁵ For a full elaboration on such factors, see: Wojkowska 2006; Kamari-Mbote, P. "Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences." International Environmental Law Research Centre (2002) ("Kamari-Mbote 2002").

women do understand the formal system, they may not use it since it could exacerbate problems; a formal legal victory lacking local legitimacy may prove Pyrrhic with a woman's house burned down or even physical violence against her.⁶ Generally, formal law is avoided because women fear or mistrust it, lack understanding (linguistic and procedural), it is physically and financially inaccessible, they experience cultural discomfort, or decision making is protracted.⁷ Conversely, customary avenues are culturally familiar, resolve problems quickly, are socially legitimate insofar, geographically and financially accessible and focus more on restorative consensus and reconciliation.⁸ Yet custom is also widely seen as discriminating against women, particularly with respect to land.

Experience from successful legal literacy programs suggests that gender issues need to be approached in culturally appropriate ways so they are actually understood by the recipients. While law as an agent of social change has inherent weaknesses,⁹ customary land tenure and access remain highly significant and might be used to forge social change today including altering access to land and property rights for women under the informal systems.¹⁰ Thus, it is not a question of pitting formal law against local customary practice, but rather a matter of finding synergies between them and developing a dialogue for change within communities at the grassroots level (rather than through legal edicts handed down from above). Such possibilities require a reconsideration of customary law to emphasize its positive and protective aspects rather than the negative. Approaches should be tailored to each community, both bottom-up and top-down approaches with a clear-eyed view of existing gender biases.¹¹ To find cultural solutions the emphasis must be on understanding context-specific relations, usually occurring 'under the surface'.

⁶ Wojkowska 2006; Kalla K. & Cohen J., "Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services" Law and Health Initiative, Open Society's Public Health Program, East Africa Initiative (2007), 21 & 30 ("Kalla & Cohen 2007"); Yamano, T. & Deininger, K. "Land Conflicts in Kenya: Causes, Impacts, and Resolutions," FASID Discussion Paper (2005), 14; Coldham 1979, 620.

⁷ This does not only apply to women; nearly three quarters of Kenyans opt to engage informal regimes through elders and chiefs to resolve disputes and the majority of disputes involve land issues; See: "National Integrated Household Baseline Survey Report." Republic of Kenya Governance, Justice, Law and Order Sector (GJLOS) (Sept. 2006); Kane et al., "Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor," Conference Paper, "New Frontiers of Social Policy" (Arusha, December 2005) ("Kane et al. 2005"); Ayuko & Chopra, "The Illusion of Inclusion – Women's Access to Rights in Northern Kenya" Justice for the Poor/Kenya and the Legal Resource Foundation, December 2008. ("Ayuko & Chopra 2008"); "Balancing the Scales: A Report on Seeking Access to Justice in Kenya," (2005: Legal Resources Foundation); Wojkowska 2006.

⁸ Kane et al. 2005; Ayuko & Chopra 2008; Wojkowska 2006.

⁹ Whitehead & Tsikata 2003, 92.

¹⁰ Huggins, C. & Pottier J., "Land tenure, land reform and conflict in Sub-Saharan Africa: Towards a research agenda" in Chris Huggins and Jenny Clover, eds., *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*. Joint ACTS & ISS African Security Analysis Programme publication (June 2005), 386. ("Huggins & Pottier 2005")

¹¹ Kameri-Mbote 2002; Kameri-Mbote, P. "The Land has its Owners! Gender Issues in Land Tenure under Customary Law in Kenya" IELRC Working Paper 05-9 (2005); Nyamu-Musembi, C. "Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa" Report Commissioned by Governance Division, DFID-UK (February 2003) ("Musembi 2003"); Cotula, L., ed., *Changes in "customary" land tenure systems in Africa*, FAO & IIED (March 2007) ("Cotula 2007"); Jackson 2003.

What is missing in Kenya is a firm knowledge base on how informal justice might be harnessed to support women's rights and access to land and what the relationships between informal and formal justice are in this regard. Thus, to guide J4P's initial research, this literature review discusses the trajectory and evolution of women's land rights in Kenya and highlights areas where more empirical data exist on what custom and law mean for women in practice.

The Formal Legal Framework & Women: The Constitution

Kenya is a party to a number of relevant regional treaties that grant equal rights to women.¹² However, the Kenyan parliamentary system requires international treaties/conventions to be received into domestic law through the passing of national legislation. Despite the international agreements to which Kenya is a party, Kenyan domestic law remains paramount.

Generally speaking, Kenyan law does not discriminate on the basis of gender. Section 70 of the Constitution guarantees every Kenyan enjoyment of fundamental rights and freedoms irrespective of their sex, while Section 82 outlaws discrimination on the basis of sex insofar and prohibits the passing of laws with such an effect.¹³ Discrimination itself is defined in section 82(3) as "affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour creed or sex..." Despite these anti-discriminatory guarantees, section 82(4) exempts a number of laws. These include personal laws, and most relevantly, laws pertaining to divorce, inheritance and succession, and in cases where customary law is concerned.¹⁴ Thus, discrimination on the basis of gender may be permitted in these categories of law. Human Rights Watch notes that these exemptions in personal and customary laws eviscerate the non-discrimination provisions.¹⁵ Benschop calls these provisions in conflict with Kenya's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁶ Critics argue the only solution is a new Constitution.¹⁷ Kenya did table a draft Constitution in 2005,

¹² *African Charter on Human and Peoples' Rights*, Nairobi, Kenya, Adopted June 26, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, Ouagadougou, Burkina Faso, 10 June 1998; *International Covenant on Civil and Political Rights* (ICCPR), 999 U.N.T.S. 171, entered into force March 23, 1976 and acceded to by Kenya on May 1, 1972; *International Covenant on Economic, Social and Cultural Rights* (ICESCR) G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316; *Convention on the Elimination of All Forms of Discrimination against Women*, (CEDAW) G.A. Res. 34/180, U.N. Doc. A/34/46; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women Adopted by General Assembly resolution A/54/4 (1999); *The Beijing Platform for Action* (1995). Declaration from the 4th World Conference on Women.

¹³ The Constitution of Kenya, Revised Edition (2001) (1998) ("The Constitution").

¹⁴ Article 82(4) ... (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

¹⁵ "Double Standards: Women's Property Rights Violations in Kenya." (2003) HRW, Vol. 15, No. 5(A) ("HRW 2003").

¹⁶ Benschop 2002, 143.

¹⁷ Benschop 2002; HRW 2003.

but it was defeated.¹⁸ It attempted to expand anti-discriminatory provisions to include sex, pregnancy, marital status and culture, and the blanket exemption for personal laws was also removed; for example Section 42(5) of the draft required parliament to make laws recognizing family law systems based on religion and tradition, “to the extent that such ... systems are consistent with this Constitution,” implying no recognition if inconsistent. As noted, Kenyans voted it down.

The current Constitution restricts the application of custom to matters of personal law. *The Judicature Act*¹⁹ confirms and qualifies the reception of customary law.²⁰ Section 3(2) states the High Court, Court of Appeal, and subordinate courts “shall be guided by African customary law in civil cases in which one or more of the parties is subject to it, or affected by it, and in so far as it is not repugnant to justice and morality, or inconsistent with any written law.” This does not bind these courts to follow customary law, but requires them to be “guided” by it in reaching decisions using formal law. However, the Magistrates’ Courts Act²¹ grants district magistrates’ courts the jurisdiction to hear cases based on customary law, defined by Section 2 of the Act as claims concerning personal matters under customary law, including: land held under customary tenure, marriage, divorce, maintenance/dowry, intestate succession, and administration of intestate estates. These areas may be dealt with unless they are governed by any written law which supersedes the application of customary law.

Formal Land Law in Kenya

The Registered Lands Act

During colonial times, the British occupied lands and administered them using British land law. The British system of individual ownership contrasted against indigenous communal land holding systems which were typically communal; individuals did not own the land, but were permitted to use it by the community. Mackenzie and Dewees note there was already a shift with ownership devolving from the community to individualized holdings.²² The Swynnerton Plan explicitly pushed tenure toward individualized holdings to encourage the creation of a land market.²³

This formal titling and land individualization agenda was continued by the post-independence government for similar reasons.²⁴ The result was the 1963 Registered Land Act (RLA).²⁵ The RLA was enacted as part of a land reform programme

¹⁸ Nyamu-Musembi, C. “For or Against Gender Equality? Evaluating the Post-Cold War “Rule of Law” Reforms in Sub-Saharan Africa. UNRISD, Occasional Paper 7 (August 2005), 10 (“Musembi 2005”).

¹⁹ The Judicature Act, Cap. 8 (1983), revised ed. 1988.

²⁰ Ayuko & Chopra 2008.

²¹ The Magistrates’ Courts Act, Cap. 10 (1985) revised edition 1989.

²² Dewees 1995.

²³ The plan was not concerned only with economic benefits and agricultural productivity, but also sought to undermine civil unrest by creating a new agricultural class. Swynnerton, R.J.M., “A Plan to Intensify the Development of African Agriculture in Kenya” Nairobi, Government Printer (1954), cited in Cotula 2007; Akech 2001; Dewees 1995; Whitehead & Tsikata 2003; Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series).

²⁴ Whitehead & Tsikata 2003, 71-72.

²⁵ Registered Land Act (R.L.A) 1963 (Cap 300) (“RLA”).

specifically designed to eliminate and replace the customary system of communal ownership with the formal British individualized ownership scheme. The intent is for the whole country to eventually fall under the RLA's purview.²⁶ The crux of the RLA is the legally defined certainty of any interest in land through formal registration.²⁷ Before a piece of land comes under the RLA, it must be registered. This involves three steps: first, adjudication, which involves relevant officers from Ministry of Lands and Settlement who are guided by local inhabitants in ascertaining rights of ownership. Such claims are typically made by inhabitants laying claim to a piece of land as their own. It is only required for unregistered land held under a 'customary' title. Second, consolidation involves combining smaller plots of land with ownership rights established into a larger and more economically efficient unit.²⁸ The final step is formal registration whereby entries are made in the land register bringing land under the RLA.²⁹

Because of the contrasting approaches and concepts of land and ownership and a number of RLA features, conflict has resulted and women's access to land has been diminished. First, the entire premise of the RLA is rooted in the Anglo concept of ownership. This precept does not mesh well with customary land tenure in Kenya and belies the cultural value land possesses among Kenyan agricultural communities. Land is most often seen as a crucial part of family and being, not as a commercial object to be disposed of. It also excludes various 'customary interests' in land which the RLA does not recognize. Further, likely due to land's cultural meaning, people did not fully understand the consequences of failing to register their lands, particularly that they might cease to be 'owners' of the land and lose their rights to it under the law.³⁰ Family members and communities likewise did not understand the consequences of RLA registration insofar as it concentrated absolute control and ownership into the hands of a single person able to control and dispose of it; the problem of unscrupulous sales arose. It was a foreign concept that registering land could suffice to deny a family or community the occupation, access to and use of the land where they lived their whole lives.

Second, once land has been registered and brought under the RLA, the application of 'customary' land law is supposed to cease. In practice, this has not occurred. Customary law remains highly prevalent in Kenyan land issues, particularly for women, and is a key area of conflict with registered owners battling those claiming custom.³¹

Third, because the RLA's major purpose was to establish firm legal ownership, it provides that the first person who registers as owner receives an absolute and unimpeachable interest. Even were initial registration fraudulent, provided it was first, it cannot be challenged.³² Thus, were some family members away, imprisoned, or simply

²⁶ Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series).

²⁷ As discussed below, many authors note the RLA only considers formal 'interests' in land as defined in British law and misses common 'customary' interests.

²⁸ Maas notes women in Murang'a have been taking advantage of this for quite some time; Maas 1986.

²⁹ Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series), 4.

³⁰ Cotula 2002.

³¹ Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series), 40.

³² Section 28 of the RLA grants unimpeachable title: "The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order by the Court, shall

unaware of another member registering the land, another family member could register family land – and possibly even entire tracts of communal lands – in the absence of the “rightful” owners under customary law.³³

Overall, registration has been used as a tool to disinherit and remove people from ancestral lands, and by husbands to clandestinely sell portions of family land to outsiders without family or community knowledge. Women in particular have been negatively affected. Formal case law regarding the RLA demonstrates inconsistent application and interpretation and indicates that cases are boiled down to competing interests between formal and customary legal tenets regarding land. One series of cases upheld RLA registration as absolute (regardless if registered fraudulently), provided it was the first registration. Occupiers living on the lands under the auspices of customary interests (rights) were expelled by court order. The courts stated their customary interests were either unrecognizable as ‘interests’ under the RLA, or were extinguished upon formal registration.³⁴ Conversely, another series of cases found the opposite. Under Section 126 of the RLA, the “particulars” of any trust existing at the moment of registration are not to be entered in the register, though a trust could. The court interpreted this to mean that the content of a ‘trust’ could be implied, and thus include customary interests.³⁵ In these cases, registration of title was not found to intentionally disinherit people entitled to land under customary law. Instead of evicting those without title, the court imposed a “customary trust” upon registered owners and allowed inhabitants to remain. Though this approach still fails to recognize the existence of other and lesser customary interests, at a minimum it recognizes the failure to adequately consider elements of customary tenure which do not match formal law.

The Land Control Act

Four years after the RLA, the Land Control Act established “Land Control Boards” (LCB) in specific areas to control land transactions.³⁶ LCB jurisdiction is limited to “agricultural land” which the act defines as land that is not within a municipality,

be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenant belongings thereto, free from all interests and claim what so ever.” Section 143(1) further notes that while any registration other than the first can be defeated if fraud, mistake or omission are demonstrated, the first registration *cannot* be struck down as such. The reason behind this provision was apparently to prevent the Government from being flooded with claims at the time of independence. Thus, first registration is final, and cannot be challenged under the RLA.

³³ Cotula 2002; Coldham 1979; Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series).

³⁴ Esiroyo vs. Esiroyo, 1972 E.A. 388; Obiero vs. Oregu Opiyo and others High Court Civil Case No 44 1970; Cotula 2002; Benschop 2002; Akech 2001; Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series), 40; the Obiero case is interesting as it actually involved a widow from a polygamous marriage with formal title under the RLA seeking to remove other wives’ sons from her land, going directly against the traditional patrilineal inheritance scheme.

³⁵ Muguthu vs. Muguthu, H.C Civil Case Number 377 of 1968; Gatimu Kingura vs Muya Gathangari (1976) Kenya L.R 265 – “the Parliament could not have intended to destroy this custom of one of the largest sectors of the people of Kenya. It would have required express legislation to enable the courts to so hold”; Benschop 2002; Cotula 2002; Akech 2001; Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series).

³⁶ Land Control Act (L.C.A) 1967, revised 1981 and 1989 (Cap 302) (“Land Control Act”).

township, or a market.³⁷ The main thrust was to prevent fragmentation of agricultural land to the detriment of productivity and economic viability.³⁸

Within an LCB's jurisdiction, all "sale[s], transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land" are subject to a Land Control Board's consent.³⁹ The owner of agricultural land must apply for, and receive, an LCB's consent before any transfer of such land can take place.⁴⁰ It is important to distinguish that such consent would be required were a sale to be formal and legally undertaken; however, most land transactions in Kenya do not appear to follow formal channels because of the costs and lengthy procedures. In reaching such decisions, LCBs consider whether a grant or refusal of consent will have a positive impact on economic development or improve "standards of good husbandry" within the LCBs jurisdiction.⁴¹ LCBs are directed to refuse consent where persons seeking to purchase lands are unlikely to farm or develop the land, use it profitably, or already have sufficient agricultural land.⁴² LCBs are further directed to refuse consent where the terms/conditions of a transaction are "markedly unfair" and/or "disadvantageous", and where division is likely to reduce productivity.⁴³ The Kenyan government issued a policy guideline in the early 1980s instructing LCBs to consider families of persons involved with agricultural land transfers in addition to the economic implications. The reasoning was that families ought not be left destitute and landless as a result of a land transfer – usually undertaken by the husband, perhaps unscrupulously. For example, transactions may be blocked if women report their husband attempting to use their title deed to secure a loan without consulting them, or trying to sell any portion of the land. Daughters may contest their exclusion during subdivision/allocation of family land.⁴⁴ It is unclear whether this guideline is upheld in practice, however.

Draft National Land Policy

In light of Kenya's issues with land (of which the RLA and constitutional reform are part), there has been a consistent drive to reform Kenya's land policies. The result is the Land Reform Policy. Unlike the RLA, the Land Reform Policy is guided by principles and values of gender sensitivity and equality.⁴⁵ It observes Kenya's dual customary and formal tenure systems, noting that the economically advantaged exploit the latter, while those living under customary regimes have been neglected.⁴⁶ This has caused "gross disparities" in land ownership and gender, discrimination in succession and the overall exclusion of women from land access.⁴⁷ These factors have combined to result in

³⁷ Land Control Act, Section 1 & 2.

³⁸ Benschop 2002, 155-156.

³⁹ Land Control Act, Section 2 & 3.

⁴⁰ Land Control Act, Section 3.

⁴¹ Land Control Act, Section 9(1)(a).

⁴² Land Control Act, Section 9(1)(b)(i).

⁴³ Land Control Act, Section 9(1)(b)(iii) & (iv).

⁴⁴ Benschop 2002, fn 603.

⁴⁵ Draft National Land Policy for Kenya, Ministry of Lands, National Land Policy Secretariat (May 2007), S. 1.5.1, ss. 7(c); S. 1.5.2, ss. 8 (h) ("Draft Land Policy 2007").

⁴⁶ Draft Land Policy 2007, S.2.2.3.

⁴⁷ Draft Land Policy 2007, S. 2.3.

uncertain tenure security from overlapping and uncertain rights in both formal and customary systems, the exclusion and disinheritance of women from their land rights, and a highly inequitable distribution of land in favour of Kenyan men.⁴⁸ The Policy identifies women's land rights as an issue which requires special intervention and attention, specifically with regard to discriminatory customary practices regarding inheritance and land ownership, women's insufficient representation in land institutions and communal ownership schemes, and the paucity of women with formally registered land.⁴⁹ The Land Reform Policy remained in the advocacy and debate stage at the time of writing.⁵⁰

Different Languages: Rights & Ownership in Kenyan Customary Law

When legal terms with distinct meanings in 'Western' laws are laid over customary systems, problems ensue.⁵¹ Literature on land ownership in Kenya indicates a divide between statutory law and customary law regarding some of the fundamental concepts underpinning those systems. For example, the term 'ownership' is culturally loaded and one upon which Kenya's RLA formal titling program relies.⁵² It intends a formal definition of ownership identical to the Anglo 'bundle of rights' concept which accrues to an individual owner, including control and the ability to dispense with it as desired.⁵³

Literature identifies a number of problems in applying the Anglo term to the customary system: first, the idea of what constitutes land over which "ownership" can be exercised; second, what interests may be held; and third, the concept of ownership itself as a bundle of "rights". This divergence in conceptualizing ownership and rights means those speaking from each system do so in separate languages even if using the same words.⁵⁴

Under the RLA, various rights and interests are held over land. Ownership, as defined in Kenyan law, is the totality of rights an individual has in and over a given piece of land, amounting to full control over how it is used, held, distributed, passed down, and dispensed of or alienated – barring any overriding interests.⁵⁵ Ownership applies to the soil and everything under it (subsoil rights) and above it (subject to a number of exceptions). It also includes everything permanently fixed to the soil such as buildings, houses, and other 'permanent' structures. They are seen as part of the land and under the same exercise of ownership. Thus, when buying a piece of land with a house on it, it is implicit that one is also buying any fixtures upon it.

As noted by a number of authors, different interests in use, disposal and access under Kenyan customary land tenure systems do not mesh well with this formal legal concept

⁴⁸ Draft Land Policy 2007, S. 2.3, at 25 & 3.2, at 37.

⁴⁹ Draft Land Policy 2007, S. 3.6.10.3.

⁵⁰ See: Workshop Proceedings on Land Issues in Kenya, Kenyatta International Conference Centre Center (KICC) Shimba Hills Hall, Thursday July 31st, 2008; facilitated by The Kenya Institute for Public Policy Research and Analysis (KIPPRA).

⁵¹ Whitehead & Tsikata 2003, 75.

⁵² "The Case for Women's Land Rights in the New Constitution" Kenya Land Alliance Report (2006), 8 ("KLA Report 2006").

⁵³ Musembi 2007, 1471.

⁵⁴ KLA Report 2006, 8.

⁵⁵ Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series), 12-13.

and have left a rift between statutory and customary ownership.⁵⁶ Customary tenure entails a complex system of interlocking rights reflecting the ‘power’ allocated to each individual for a particular purpose in relation to control, access and usage, rather than absolute ownership.⁵⁷ Rather than the Anglo concept of property ownership consisting of a singular ‘bundle of rights’, in Kenya’s customary systems, each person may hold a specific ‘stick’ (or ‘sticks’) in that ‘bundle of rights’ related to a specific function/s – e.g. cultivation, grazing, or collection of firewood. Each function carries varying degrees of control at different social levels.⁵⁸ One could have ‘rights’ to cultivate crops, while, on the same plot, another may have ‘rights’ to gather fruits,⁵⁹ and the same plot may be shared during the cropping season and by herders in the off-season.⁶⁰

Land in customary systems means only the soil. Houses or anything else built or resting upon the land is not included. There is a clear distinction between land and houses. Some authors note it is not uncommon to hear of someone owning a house, but not the land it is built upon.⁶¹ This is permissible and apparently widely practiced. Houses built in this manner – which usually include access to land for farming – may be passed within a family and possibly outside it.

The holder of land as an ‘owner’ depends on the customary system and whether it is communal, clan/family-based, or individual.⁶² Individuals and households overwhelmingly get access to land through intergenerational succession. Many claims under customary regimes are claims to use – usufructory – rather than claims to ownership. Such community-level patterns of land use are not rigid, but flexible and negotiable.⁶³ ‘Control and ownership rights’ permitting the alienation of land outside social groups are extremely limited. Within kinship groups and households, men and women make claims to use of lands inherited within these groups. This concept of ‘family interest’ means a central household head holds land on behalf of other family members; members hold concurrent ‘rights’ and ‘interests’ in the land.⁶⁴

⁵⁶ Whitehead & Tsikata 2003, 77; Akech 2001; Mackenzie, F. “Land Tenure and Biodiversity: An Exploration in the Political Ecology of Murang’a District, Kenya” (Fall 2003) Human Organization, Vol. 62, No. 3 (“Mackenzie 2003”), citing: Okoth-Ogendo, H. W. O. 1978 The Political Economy of Land Law: An Essay in the Legal Organization of Underdevelopment in Kenya, 1895-1974. Ph.D. dissertation, Law School, Yale University.

⁵⁷ For example: The use of formal legal language in the attempt to formalize land tenure had gendered effects. For example, in Luo language, the term for ‘owner of land’ (*wuon lowo*) is understood to refer to a person – male and usually a grandfather – who is imbued with the power distribute land to others. On a secondary level, it refers to a female or male with a recognised interest in a piece of land. This interest exists by virtue of their relationship with the *wuon lowo*. The formal concept of ownership focuses only on the first, exclusively-male interpretation and ignores the second interpretation, Musembi 2007, 1477.

⁵⁸ Mackenzie 2003, 257; Akech 2001.

⁵⁹ Dewees 1995.

⁶⁰ Feder, G. & Noronha, R. “Land Rights Systems and Agricultural Development in Sub-Saharan Africa.” (1987) Research Observer No. 2, 147; Akech 2001, 14-15.

⁶¹ Akech 2001; Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series), 2; Dewees 1995.

⁶² Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series), 13.

⁶³ Whitehead & Tsikata 2003, 76.

⁶⁴ Akech 2001, 9.

Rights to land are generally predicated on one's membership and status in a controlling social group, while individual families hold spatial and temporal usufructory rights over land.⁶⁵ In practice, no one holds greater rights than those of the cultivator. However, those rights do not necessarily include the ability to alienate the land; under customary tenure, sales are rare, if permitted.⁶⁶ The ability to alienate land as such does not mesh well with customary restrictions on permanent transfer. Instead, transactions are typically limited to borrowing and seasonal or permanent exchanges and usually only to members of the land-controlling social group. Such practices guarantee access to land without undermining the underlying 'ownership' thereof. This maintains land within ancestral units with portions allocated on contingent, temporary bases. Such findings distinguish this vision of customary ownership from that of formal ownership.⁶⁷

Customary ownership may be more usefully conceptualized as a set of interlocking rights of access and control reflecting power allocated to individuals for particular purposes.⁶⁸ The recognized distinction between rights of control and rights of usage and access support this view.⁶⁹ Such 'rights' and 'interests' – particularly those accruing to women – have proven problematic and have been ignored by the formal system.⁷⁰ The problem perhaps rests in the conceptual definition of 'rights' and 'control' held as 'interests' in land. Many authors find the terms 'ownership' and 'rights' are misplaced and loaded, culture-bound legal terms.⁷¹ Some assert the term 'rights' ought not be used for customary land claims since it mistakenly implies any claims made are strong and unambiguous.⁷² Such 'Western' terms may not translate and where the systems meet, customary 'rights' become less secure and formal rights become avenues of conflict.⁷³

Customary 'rights' or control interests are neither acknowledged nor upheld under the RLA since they do not conform to the narrow legal definition of 'interests'.⁷⁴ Those registering lands sought to quash such interests to ensure their powers were absolute. European concepts of legal tenure were presumed universal (and perhaps intended to become so).⁷⁵ The imposition of exogenous legal concepts has effectively challenged customary interests, especially women's interests.

⁶⁵ Akech 2001, 14-15.

⁶⁶ This is practice may not be generalized for all of Kenya. Akech 2001, 14-15; Whitehead & Tsikata 2003.

⁶⁷ Mackenzie, 2003, 257; Musembi 2005, 18; Lastarria-Cornhiel, S. "Impact of privatization on gender and property rights in Africa" (August 1997) *World Development*, Vol. 25, No. 8 ("Lastarria-Cornhiel 1997"); Musembi 2007, 1468.

⁶⁸ Mackenzie 2003, 257; Akech 2001.

⁶⁹ Dewees 1995, 219.

⁷⁰ Akech 2001, 9.

⁷¹ Mackenzie 2003, 257; Akech 2001.

⁷² Whitehead & Tsikata 2003, 76.

⁷³ Mackenzie, F. "Land and Territory: The Interface between Two Systems of Land Tenure, Murang'a District, Kenya," (1989) *Journal of the International African Institute*, Vol. 59, No. 1, 93 ("Mackenzie 1989").

⁷⁴ Dewees 1995, 221; Mackenzie 1998.

⁷⁵ Pottier, J. "'Customary land tenure' in Sub-Saharan Africa today: Meanings and contexts" in Chris Huggins and Jenny Clover, eds., *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*. Joint ACTS & ISS African Security Analysis Programme publication (June 2005), 59 ("Pottier 2005"); Kenya Law Reform Commission: Booklet on Land Law in Kenya (Legal Booklet Series).

Customary Land Access and Women

It is difficult to speak of ‘custom’ as an overarching set of practices given the diversity of practices in Kenya (though some authors do).⁷⁶ However, there are some commonalities. Customary rights to land for women are typically called unfair and discriminatory.⁷⁷

Generally, patrilineal tenure means property is “owned” by the husband or his family. Men, as head of the family unit accrue powers over the allocation of land, albeit *within* the family structure. Property belongs to the husband’s lineage which in turn means that wives are usually excluded from participation in major decisions. Daughters may be perceived as transients and wives as newcomers and interlopers. Neither wives nor daughters are seen to have a durable interest in family patrilineal land resources.

Under customary law only men have the right to ‘ownership’ and women derive their access and usage through their relationship to men (a husband or father). Rural women living under customary systems have no secure land ownership rights – despite being the main producers of food.⁷⁸ Women’s rights have been called “secondary” because of their contingency upon a relationship with a male.⁷⁹ Strickland notes widows often only hold land in “trust” until their male children are old enough to inherit it themselves.⁸⁰ It must be stressed that even though women’s ‘rights’ do not equate to ‘ownership’, there are still specific rights to access and usage within the male dominated overarching structure.

Others argue this ‘secondary rights’ view is overly restrictive. Women hold positions of ‘structural significance’ as mediums through which individual rights pass to their sons. This guarantees them security of tenure rooted in their role in perpetuating the lineage.⁸¹ Given the collective clan-based holding system, the focus should be on the kin group from which a woman gains access to land.⁸² This kin group may protect her claims, though also capable of perpetrating abuses.⁸³ That women get land through many different social relations is important given the broad policy and rights based critiques of customary systems assert women only gain access to land as wives.⁸⁴

The important point: analysts and policymakers alike should move past the shallow view that women’s claims to land are always “secondary” in customary law.⁸⁵ The more

⁷⁶ See HRW 2003; Henrysson, E. & Joireman, S. “Property Rights Adjudication in Kisii, Kenya” Conference Paper, ISA 49th Annual Convention (March 2008), 6 (“Henrysson and Joireman 2008”); Joireman, S. “The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law” (July 2008) World Development, Vol. 36, No. 7, 1242 (“Joireman 2008”).

⁷⁷ HRW 2003; Joireman 2008.

⁷⁸ “Baseline Survey on the level of awareness and impact of CEDAW on rural women in Kenya” Federation of Women Lawyers – FIDA Kenya (2006) 20 (“FIDA Baseline Survey 2006”).

⁷⁹ Whitehead & Tsikata 2003, 91; Pottier 2005, 66; Yngstrom, I. “Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems” (February 2002) Oxford Development Studies, Vol. 30, No. 1 (“Yngstrom 2002”).

⁸⁰ Strickland 2004, 18.

⁸¹ Whitehead & Tsikata 2003, 90-91.

⁸² Pottier 2005.66-67.

⁸³ HRW 2003.

⁸⁴ Pottier 2005, 66.

⁸⁵ Pottier 2005, 66-67.

accurate statement in this regard is, 'it depends' – namely upon the community in question, the particular woman's relationship with it, and whether one defines rights in the formal sense or the customary sense.

End Result of Mingling Systems: Women Lost Out

Though some limited positive results⁸⁶ have come from the mingling of formal and informal systems, overwhelmingly results have been negative for women. Some authors have called Kenya *the* stellar example of the negative impact formal land registration and titling systems can have on 'customary' systems.⁸⁷ Despite what many gender, justice and rights advocates assert, simply referring to customary law as *the* culprit is misleading, overly simplistic and inaccurate. It is possible to generalize on one point: as the individualization of land ownership progressed, women lost out.⁸⁸ It is not informal/customary systems or the formal system individually which are to blame, but the collision of these systems and how they have combined to push women into an ever more subordinate position in terms of access to land rights. Given pre-existing power imbalances, women have suffered.⁸⁹

Men and Customary Land Allocation: Logical to Register as Land Owner

Given men's traditional role as household heads charged with rights of land allocation, it was virtually inevitable men would register the property since formal ownership closely relates to such allocative powers; cultural definitions of ownership played a role in the logic which pushed men to register. That women held a disadvantaged position in society and within family structures eliminated potential resistance to such registration. Overwhelmingly men registered lands and vested themselves as individuals with more powers than those available under customary systems.⁹⁰ Though the RLA process was intended to be neutral, the male-dominated results simply reflect the custom and/or expectations of communities and families.⁹¹ This process was even further skewed

⁸⁶ For example, women have been known to buy land individually from their parents to secure access in case their marriage failed. Widows have sometimes registered land in their name instead of having it revert to the husband's family (albeit rarely); a gender-neutral land market has enabled women to purchase land for themselves as individuals or in groups albeit such activities remain limited due to the lack of equal access to capital; see Cotula, 2002; Mackenzie 1989; Francis, E. "Gender and rural livelihoods in Kenya" (December 1998) *Journal of Development Studies*, Vol. 35, No. 2 ("Francis 1998"); Maas 1986; Davison, J. *Land and Women's Agricultural Production: The Context. Agriculture, Women, and Land: The African Experience*. J. Davison. (Boulder, Westview Press, 1988). ("Davison 1988"); Gray, L. and M. Kevane. "Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa." (1999) *African Studies Review* 42(2) ("Gray & Kevane 1999").

⁸⁷ Gray & Kevane 1999, 24.

⁸⁸ MacKenzie, F. "Local Initiatives and National Policy: Gender and Agricultural Change in Murang'a District, Kenya," (1986) *Canadian Journal of African Studies*, Vol. 20, No. 3, 385. ("Mackenzie 1986")

⁸⁹ Whitehead & Tsikata 2003, 90-91.

⁹⁰ Kameri-Mbote, et al. "Human Rights, Formalisation and Women's Land Rights in Southern and Eastern Africa." (2005) *Studies in Women's Law* No. 57, ("Kameri-Mbote et. al. 2005"); Coldham 1979; Mackenzie 1989; Mackenzie 1990; Akech 2001; Seebens 2007; Cotula 2002; Musembi 2007; Pottier 2005; Yngstrom 2002.

⁹¹ Musembi 2005, 18-19; Pala, A.O. "Women's access to land and their role in agriculture and decision-making on the farm: experiences of the Joluo of Kenya." (1983) *Journal of East African Research and Development*, Vol. 13; Nyamu-Musembi, C. "How should human rights and development respond to

against women by male-dominated land adjudication committees who heard RLA adjudication claims.⁹² While this is not necessarily the case today, the continued concentration of formal titles in men's hands indicates that the results persist. This is partly due to the RLA stipulation that, once a claim to land is been successfully registered, it becomes unimpeachable.⁹³ Thus, the transfer of power over land to men is absolute in the eyes of the law, and vested them with absolute ownership over lands with all the rights and privileges it entails, namely use, access, the right to deny either, abuse, and free alienation.⁹⁴ Because the RLA was intended only to increase tenure security, it was blind to gender and the environment in which it was to operate. By failing to recognize inequalities and culturally gendered land-roles, the RLA extended and expanded such roles by granting men absolute ownership.⁹⁵

Formal and Customary: Mis-Matching Concepts

Second, formal land law (the RLA) was not dropped into a vacuum, as clearly evidenced in the preceding section.⁹⁶ Customary land tenure was and remains strong. In addition to concentrating land into male hands, unimpeachable RLA registration quashed customary interests held by women since they were unrecognizable under the RLA.⁹⁷ The complex nature of customary "interests" and rights of access and control are difficult to define accurately and precisely and therefore, confound the common law doctrine of "interests". Rights under the RLA are free from interests or encumbrances stemming from customary claims. This includes "semi" rights like those traditionally held by women. Only actual occupation or possession of land could be recorded in the RLA adjudication register as an "occupation/possession" equivalent to periodic tenancy, though this can be terminated by simply giving notice of intent.⁹⁸ Many customary interests went and continue to go unrecognized by the formal system and are considered legally extinguished.⁹⁹ This does not correspond to most Kenyan customary tenure systems. Instead of the absolute powers of formal ownership, customary systems recognize and enforce certain limits on a husband's authority and likewise for women. Yet when formal title is obtained, these customary checks and balances are removed and land becomes freely alienable despite any jeopardy to other interests in the land.¹⁰⁰ Formal registration under the RLA has hardened men's customary land rights into absolute legal rights and extinguished

cultural legitimization of gender hierarchy in developing countries?" (2000) *Harvard International Law Journal*, Vol. 41, No. 2.

⁹² Cotula 2002, 4.

⁹³ RLA, section 124(1).

⁹⁴ Akech 2001, 6; Benschop 2002.

⁹⁵ KLA Report 2006, 23; Mackenzie 1989, 92.

⁹⁶ Musembi 2007.

⁹⁷ Importantly, this phenomenon is recognized in recent Kenya's Draft National Land Policy; see Draft Land Policy 2007, S. 3.3 at 54, 3.3.1.2, at 64; Mackenzie 1986; Mackenzie 1990; Mackenzie 1993; Mackenzie 1998; Musembi 2005; Musembi 2007; Cotula 2002; Seebens 2007; Kameri-Mbote et al. 2005; Yngstrom 2002; Whitehead & Tsikata 2003; Gray & Kevane 1999; Cotula 2002; KLA Report 2006; Gray & Kevane 1999; Benschop 2002.

⁹⁸ Akech 2001, 6.

⁹⁹ Akech 2001, 9 & 24.

¹⁰⁰ Musembi 2003, 18.

women's customary rights.¹⁰¹ Customary safeguards for women have been heavily eroded or destroyed.¹⁰²

Forum Shopping in Disputes

Despite the supposition that RLA was (and still is) supposed to pre-empt any other “law” where applicable, customary practices were not dismantled.¹⁰³ While formal law exists, it is not seen as the key to property relations in Kenya but exists on a competing plane separate from custom. The tension between the two is driven by divergent claims of values and rights.¹⁰⁴ Formal law created a new arena of struggle for access to land.¹⁰⁵ Mackenzie describes this situation as “a complex picture in which [men and women] contest rights to land by drawing ... on which ever legal resource they can” to suit their needs and/or interests.¹⁰⁶ Increased commercialisation has provoked private claims to land, a proliferation of customary claims and counter-claims has also been spawned with novel struggles over how “custom” is defined and applied.¹⁰⁷ Men and women deploy arguments from both statutory and customary law as ‘tools’ to reach desired ends.¹⁰⁸ Pre-existing societal inequalities and the failure to recognize women's customary rights mean the outcome of such ‘battles’ have not favoured women.¹⁰⁹

Box 1: Impacts of Grafting Formal Law into Customary Practices¹¹⁰

Jadaks are part of a Luo system of untenured agricultural workers living on small plots. While able to build a house and grow crops, they never had rights above access and usage and these could be revoked at will. This provided free agricultural labour and extra manpower in case of conflict. Kenya's Limitation Act granted *jadaks* indefeasible squatters' rights should land owner fail to challenge an occupation within a given timeframe. Once the law passed, *jadak* rushed to claim title – their right under formal law – and land holders evicted them as quickly as possible – their customary right. Those with the knowledge used the law and those without were victims of formal law. Formal law disrupted social collectivism and pitted neighbours and family against each other.

This interaction, combined with a number of socio-economic pressures, has resulted in people intentionally ‘warping’ and abusing custom to suit their individual aims.¹¹¹

¹⁰¹ Musembi 2007, 1471; Gray & Kevane 1999, 24; Mackenzie 1990; Pottier 2005, 66; Whitehead and Tsikata 2003; Yngstrom 2002; Shipton, Parker. “The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property” in R.E. Downs and S.P. Reyna, eds., *Land and Society in Contemporary Africa*, (Hanover: University Press of England: 1988).

¹⁰² Whitehead & Tsikata 2003, 91.

¹⁰³ Section 4 of the RLA read: ‘Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act’. Customary law, therefore, legally may not apply if it is inconsistent with the RLA.

¹⁰⁴ Musembi 2007, 1471; Dewees 1995, 220; Whitehead & Tsikata 2003, 92.

¹⁰⁵ Gray & Kevane 1999, 27; Mackenzie 1993, 195-196.

¹⁰⁶ Mackenzie 2003.

¹⁰⁷ Pottier 2005; Yngstrom 2002.

¹⁰⁸ Pottier 2005, 70; Akech 2001; Musembi 2003; KLA Report 2006; and see Mackenzie's work generally.

¹⁰⁹ Pottier 2005; Whitehead & Tsikata 2003, 92.

¹¹⁰ Odenyo, A. O. “Conquest, Clientage, and Land Law among the Luo of Kenya,” (Summer, 1973) *Law & Society Review*, Vol. 7, No. 4.

¹¹¹ POLICY & KNCHR 2005, 3-4; Seebens 2007.

Ongoing socio-economic changes are partly responsible, not only in Kenya, but throughout the world. Such changes exert pressure on resource availability which in turn generates new forms of exclusion and disenfranchisement through attempts to secure those resources.¹¹² Demographic changes, urbanization, economic shifts (integration into global economy), socio-economic/cultural changes, HIV/AIDS, conflicts, public policy, legislation and climate change ‘squeeze’ people and may lead them to take advantage of whatever resources are available to secure land resources, even if the means are unethical and require corrupting customary values at the expense of family.¹¹³ Land scarcity leads to a redefinition of land claims by different groups (for instance, along gender lines), with weaker groups becoming more vulnerable to losing their land access.¹¹⁴ More often than not, the persistence of customary law relegates formal law to a marginal role while customary laws are interpreted on a case-by-case basis to suit individual desires. A simpler way of describing this is greed.¹¹⁵ Culture may become a self-serving tool invoked to suit given interests regardless of its content or the reasons underlying certain practices. It may likewise be discarded entirely in favour of the formal system. This could be termed ‘forum shopping’. Given women’s lack of access to the formal system and traditional disadvantaged position in customary systems, the result is a lack of access to justice for women in a male-dominated society able to resist women’s claims by vacillating between the two systems.¹¹⁶ Institutions governing land tenure provide ample opportunity for abuse; formal institutions can usurp rights instead of protecting them.¹¹⁷

Box 2: Sample Case of “Forum Shopping”¹¹⁸

A Masai man from Masai Mara, an area governed by customary law and exempt from the Law of Succession Act, had 12 wives upon his death. These wives bore him 42 sons and 36 daughters. He left no will. The estate was split between his sons and widows while his daughters received nothing. They filed a lawsuit seeking portion of the estate. The daughters are asserting their formal legal rights, but the brothers are asserting their Masai customary rights which would see them inherit the entire estate. How they intend to explain why the widows received property as well may prove an integral part of the case since widows do not inherit under Masai law. The daughters are resorting to formal law since it is in their favour, while the sons are resorting to customary which favours their claim.

To understand how custom works in this context one must look at the intersection of culture, law and socio-economic wellbeing.¹¹⁹ The evolutionary aspect of customary law means change can be for the worse if distorted for harmful or selfish reasons.¹²⁰

¹¹² Musembi 2003, 18.

¹¹³ Cotula 2007, 10.

¹¹⁴ Cotula 2007, 10; Musembi, 2003; Akech 2001; Pottier 2005; see Mackenzie’s work generally.

¹¹⁵ Musembi 2007, 1460-1461.

¹¹⁶ Whitehead & Tsikata 2003, 90; Akech 2001; Dewees 1995; Francis 1998, 80.

¹¹⁷ Aliber, Walker, et al. “The Impact of HIV/AIDS on Land Rights : Case Studies from Kenya.” HSRC Publishers (2004), 140 (“Aliber, Walker, et al. 2004”).

¹¹⁸ Discussion with and written legal opinion from Soipan Tuya, Legal Aid Coordinator Kitua Cha Sharia, Nairobi, June 27, 2008.

¹¹⁹ Kane et al., 2005, 25.

¹²⁰ Huggins & Pottier 2005, 385-386.

Women's access to land in Kenya can be seen as a complex interaction of law, custom and negative socio-economic pressures. Customary values are distorted for specific individual and selfish goals to the detriment of women and traditional values/practices. This greed-twisted conception of custom is manifested overwhelmingly in one key area of Kenyan women's lives: the denial of inheritance and succession rights to land.

Key Issue: Inheritance & Succession Rights

Inheritance is the key issue in women's access to land and property rights. It is the principle way women access land in Kenya.¹²¹ Accordingly, it is where land rights violations are most likely to occur.¹²² Widows are known to suffer some of the most grievous rights violations including physical and emotional violence.¹²³ Given the increasing number of women widowed by HIV/AIDS, such problems will increase. Daughters are also denied inheritance and may likewise be forced from their fathers' lands by encroaching male siblings. The relevant legal framework is explained before a deeper discussion of women's inheritance.

The Law of Succession Act

The Law of Succession Act¹²⁴ is the key piece of legislation on Kenyan inheritance. It was passed to unify various laws of succession operating under different personal law statutes and sought to improve the status of women. The Law of Succession Act applies to both testate and intestate succession. Women have the legal right to acquire and administer land. They may receive it if willed as such. This area is not problematic, albeit still subject to prejudice at the personal level.¹²⁵

Provisions on intestate succession are by far more contentious. Female and male children have identical inheritance rights.¹²⁶ However, Section 35(1) only grants a surviving widow her husband's personal and household effects and a 'life interest' in the whole remaining net estate. A life interest means a widow's interest in any land terminates upon her death and cannot be included in her own will. It is also a contingent life interest; should a widow re-marry, the entire estate devolves to the surviving child, or is

¹²¹ Whitehead & Tsikata 2003, 77; Akech 2001; UN-HABITAT Policy Makers Guide 2007, 18.

¹²² Mak, K. "Engendering Property Rights: Women's Insecure Land Tenure and its Implications for Development Policy in Kenya and Uganda" (Spring 2005) *Journal of Public and International Affairs*, Vol. 16, 156 ("Mak 2005").

¹²³ Mak 2005; HRW 2003; Izumi 2005; Draft Land Policy 2007, S. 2.3, at 25 & 3.2, at 37; Joireman 2008.

¹²⁴ The Law of Succession Act, Chapter 160 of the Laws of Kenya ("Law of Succession").

¹²⁵ Cotula 2002.

¹²⁶ Though defined in the Law of Succession, the definition of "child" or "children" does not explicitly include female girl-children. This may permit discriminatory interpretation. Section 3 of The Law of Succession Act defines a "child" or "children" as follows: "a 'child' or 'children' shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. (3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock." Law of Succession, Section 3, ss. (2) & (3).

divided among the surviving children, or reverts to the husband's family as if there were no wife or children.¹²⁷

Amendment Act No. 10 of 1981 added Section 3(5) which allows for wives and children from polygamous marriages to inherit. The provision has been commended for reflecting Kenyan reality, however critics say it jeopardizes inheritance for women in monogamous marriages because where a woman wishes to be considered a wife for the purposes of Section 3(5), a court will consider whether the formalities of a customary marriage were satisfied, rather than a legal marriage.¹²⁸ Thus, mistresses could meet the definition of 'wife' to the detriment of the legal wife or wives' stake in an estate.

Though the law provides for women to inherit as 'children' (implicit since gender is not specified for children), a number of authors note the Law of Succession Act in some ways exacerbates women's access to land. It provides widowers absolute rights over their wife's land, but widows receive only a contingent life estate.¹²⁹ The land does not belong to the widow; in essence, they only hold it in trust for their children.¹³⁰ A widow's interest in her husband's land also terminates once she remarries, yet the law is silent regarding widowers' rights upon remarriage.¹³¹

Despite the original aims, the law's application is troublesome and a source of discrimination against women. Even so, the limited protections under the Law of Succession Act are relegated only to specific areas. The law does not apply to agricultural lands gazetted by the Minister.¹³² These are defined as "land used for agricultural purposes which is not within a municipality or a township or a marker". The law will apply to such lands if registered under the provisions of the RLA.¹³³ If land has not been registered, customary law is used for succession.

In the absence of the Law of Succession Act, two other institutions may help deal with land. Land Control Boards (LCBs – discussed above) may have jurisdiction, provided lands involved in a succession case are 'agricultural lands' as defined in Section 2 of the Land Control Act and transmission of land through will or intestacy would "result in the division of the land into two or more parcels to be held under separate titles."¹³⁴ In such cases, consent must be obtained from a local LCB for the division to be legal under formal law. At this point, daughters and widows are offered some modicum of protection by the consent process. However, it is up to the parties involved and the LCB itself to ensure women are involved. As noted above, women are seldom involved. Notably,

¹²⁷ Law of Succession, Section 35(5).

¹²⁸ Benschop 2002, 167.

¹²⁹ Ayuko & Chopra 2008; Law of Succession, Section 35(1) & 36(1).

¹³⁰ In Kenya, this age is stipulated in the Children Act, section 2, as eighteen years.

¹³¹ FIDA Baseline Survey 2006, 20; Ayuko & Chopra 2008; Benschop 2002.

¹³² Law of Succession, Section 32.

¹³³ Law of Succession, Section 3(1) "Agricultural Lands"; The Minister gazetted a number of areas in Legal Notice No. 94, namely: West Pokot, Wajir, Turkana, Garissa, Marsabit, Tana River, Samburu, Lamu, Isiolo, Kajiado, Mandera, Narok.

¹³⁴ Land Control Act, Section 2, "agricultural land" & Section 6(3).

literature reviewing and/or evaluating LCB functioning, processes, successes, and/or failures proved impossible to find.

A second mechanism is the more recent Land Disputes Tribunal¹³⁵ (LDTs). LDTs were established in 1990 to handle civil cases involving disputes over the division or determination of boundaries to land, and claims to occupy or work land, *inter alia* - issues which may arise in the context of succession.¹³⁶ In deciding cases, LDTs do so “in accordance with recognized customary law.”¹³⁷ LDTs have been established in a number of districts many of which are agricultural areas.¹³⁸ Where established, LDTs are a ‘court of first instance’ for the aforementioned land issues and retain jurisdiction to the exclusion of Magistrate Courts.¹³⁹ Like LCBs, it proved impossible to find any evaluation or analysis of LDT operations. It is unclear what impact LDTs have on women’s access to land.

Regardless, a number of authors concur that even where the Law of Succession Act applies – and likely where LCBs and LDTs may be operating – customary law is still being used and succession matters are decided outside the formal system without being legally registered.¹⁴⁰ In light of the persistence of customary practice the question becomes: how does customary law treat women when dealing with issues of succession and inheritance?

Customary Laws of Inheritance

Interpreting precisely what customary inheritance laws say regarding women’s inheritance is a disputed area. Most authors agree women fare poorly under the customary law and may be subjected to objectionable practices that constitute human rights violations themselves.¹⁴¹ The most commonly cited issues – wife inheritance, land grabbing by in-laws, and exclusion of daughters from succession – are discussed below.

Widows

The death of a husband immediately changes a woman’s economic and social circumstances. This may mean access to land becomes more insecure for woman as a widow. The plurality of customary practice in Kenya makes it difficult to speak of uniform inheritance practice throughout the country; however, it is possible to speak

¹³⁵ Land Disputes Tribunal Act (Act No. 18, 1990) (“Land Disputes Tribunal Act”).

¹³⁶ Land Disputes Tribunal Act, Section 3(1).

¹³⁷ Land Disputes Tribunal Act, Section 3(9).

¹³⁸ Tharaka; Marsabit; Meru Central; Meru South; Embu; Mbeere; Baringo; Koibatek; Keiyo; Trans Nzoia; Laikipia; Thika; Murang’a; Bondo; Siaya; Nyamira; Teso; Vihiga; Lugari; Butere/Mumias; Kakamega; Taita/Taveta; Uasin Gishu; Wajir; Malindi; Minister for Lands and Settlement orders regarding “Establishment of Land Disputes Tribunals”; Land Tribunals Act. Apparently additional Tribunals have been set up in other Districts and at the Division level as well though no formal legal orders stating as such were encountered; see: Samuel Kibara Wainaina v. Land Disputes Tribunal, Kieni West Division & Another [2006] eKLR; Republic V Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex-parte Peter Maru Kariuki [2005] eKLR.

¹³⁹ Land Disputes Tribunal Act, Section 3(9).

¹⁴⁰ Benschop 2002, 170.

¹⁴¹ HRW 2003; Benschop 2002; Strickland 2004; Henrysson and Joireman 2008; “ASAL Gender Policy Guidelines,” Gov. of Kenya, Office of the President, Arid Lands Resource Management Project (2005).

broadly of certain values. Some customary structures preclude women from inheriting ancestral land altogether.¹⁴² Women gain access to property through their husbands; thus, should a woman's husband die, if she attempts to remain on the land, she may be forced from it.¹⁴³ This is more common should a man die without children or only girl-children. His estate often remains as though he were unmarried and his brothers inherit, not his widows.¹⁴⁴ Fathers may leave their land to son(s) – not their wife – in the expectation they will care for his widow(s).¹⁴⁵

Additionally, the customary practice of 'wife inheritance'¹⁴⁶ exists in numerous Kenyan communities. Human Rights Watch describes wife inheritance among the Luo as a communal way of providing widows economic and social protection. They note that since widows are not entitled to inherit property as individuals, being 'inherited' was a way to access land. The 'inheritor' was supposed to support the widow and her children. Thus, the term "wife inheritance" refers to the long-term union of a widow and a male relative of the deceased (though possibly an outsider as well). Human Rights Watch asserts the practice reflects the common belief that women cannot be trusted to own property.¹⁴⁷ Human Rights Watch identified a number of separate practices with regard to wife inheritance depending on the clan: there may be "non-sexual wife inheritance"; long-term relations (usually with a brother in-law) in what amounts to re-marriage; a combination where a widow first "has sex with a social outcast (known as a *jater* in Luo) ... paid to have sex with her to cleanse her of her dead husband's spirits, and [is] then inherited by a male relative of the dead husband"; or a widow may be cleansed by a *jater* but need not be 'inherited.'¹⁴⁸ Human Rights Watch found women's property rights were closely related to wife inheritance insofar as many women cannot remain on their land unless they are inherited. According to a women's rights advocate, "women have to be inherited to keep any property after their husbands die. They have access to property because of their husband and lose that right when the husband dies."¹⁴⁹ While valuable in outlining the practice, Human Rights Watch's work is wanting in a number of ways. Research indicates wife inheritance is widely practiced among Kenyan communities; however, only Luo practices are surveyed without significant mention of other groups. Any claim to universality among practices is dubious, even among Luo groups, since

¹⁴² Mackenzie, 1998; Kevane & Gray 1999; Yngstrom, 1999; Know, Duvvury & Milici, "Connecting Rights to Reality: A Progressive Framework of Core Legal Protections for Women's Property Rights," ICRW (2007), 11.

¹⁴³ Kalla & Cohen 2007, 21.

¹⁴⁴ Benschop 2002.

¹⁴⁵ Cotula 2002.

¹⁴⁶ Known technically as levirate marriage. The use of the term "wife inheritance" with its 'negative' connotations insofar as women are seen as passively consumed by male dominated families is taken from HRW 2003. However, use of the term does not support this negative interpretation. In many cases, "inheritance" is really re-marriage. While it may be required for a widow to stay in the property, it may not be because she has not residual rights to her husband's land through her children, but rather is required as a deterrent against and to effectively repulse encroachment by other in-laws or outsiders onto her husband's lands. Thus, "wife inheritance" – or remarriage – may be a conscious decision made by a widow to ensure herself continued access and usage to the land as well in the best long-term interests of her children.

¹⁴⁷ HRW 2003, 12.

¹⁴⁸ HRW 2003, 12.

¹⁴⁹ HRW 2003, 12.

customary practices may vary at the individual family level. Though the ‘potential’ past benefits of wife inheritance are acknowledged, these are dismissed in favour of a rights-based argument and the practice is condemned. There are clear health-related issues in terms of the potential spread of HIV/AIDS and the practice has taken on a ‘predatory’ aspect;¹⁵⁰ however, it would be helpful to fully identify and understand the benefits of the practice rather than to paint it as uniformly bad.

Even where widows are permitted to inherit, this does not mean their rights to that land are secure. They may be forced out by their in-law family, usually led by the brother-in-law. This may involve moving the boundaries on a widow’s land by planting crops or simply physically forcing her from the land and taking it.¹⁵¹ A widow’s perceived character may help to determine her vulnerability to land expropriation. She may be accused of having ‘bad character’; practicing witchcraft; sexual promiscuity; drinking too much; being rude or stubborn – all of which increase the likelihood that she will be chased away.¹⁵² The forced eviction of widows is a major problem and is a violation of their human rights.¹⁵³

There is little in-depth analysis of what customary law actually entails for inheritance, but rather broad assertions women do not inherit and suffer human rights violation, omitting exactly what role the practices termed as such play in protecting women, and what role women play when they remain on the land, e.g. holding land in trust for their sons, or what protective role the community plays. Though she comes down on the side against culture, Joireman identifies an ongoing debate over the “protectiveness” of customary law, noting Aliber, Walker, et al.’s findings that widows were protected by their communities and retained their lands in the majority of instances, whereas Human Rights Watch surveyed a great number of cases – albeit in urban settings – where widows were clearly not protected and often abused.¹⁵⁴ The difference between these two studies is telling in a number of regards. First, Human Rights Watch research dealt with widows from across the country (though mainly Luo) in urban slums and only entailed specific case studies of women identified as having suffered ‘the worst of the worst’. There were no interviews conducted with widows who had managed to hold onto their houses, thereby rendering the research skewed *ab initio*. Conversely, though focusing on HIV/AIDS and widows, Aliber, Walker, et al. conducted a broad cross-sectional survey in three rural districts and focused on multiple case types. The broad indications from their findings diverge from Human Rights Watch’s; they indicate that the more in-depth one delves into the content and functioning of customary law, the more protective of women such customs appear. In-depth case studies from the Kenya National Commission on Human Rights and GROOTS Kenya indicate customary law is protective of widows in a number of ways and does not support land grabbing or forcing widows from their

¹⁵⁰ Discussion with Patricia Kameri-Mbote, Nairobi, July 2008.

¹⁵¹ Henrysson and Joireman 2008, 7.

¹⁵² Henrysson and Joireman 2008, 8; Whitehead and Tsikata 2003.

¹⁵³ Izumi 2005.

¹⁵⁴ Joireman 2008; Aliber, Walker, et. al. 2004; HRW 2003.

lands. Authors found customary practice being twisted, abused and misused by greedy people seeking to snatch widows' lands.¹⁵⁵

Daughters

In Kenyan customary systems it is common practice for fathers to leave land to their sons but not their daughters. The reasons for this vary: the daughter's husband is expected to care for them;¹⁵⁶ and the patrilineal system sees daughters as 'transient passers-by' who will eventually join another lineage and have no durable interests in their family's resources.¹⁵⁷ Others claim allowing daughters to inherit from their father permits 'double' inheritance since they inherit from their husband, too. This claim to double inheritance ignores the usurpation of custom denying widows from inheriting or other customs which see the wife herself being inherited, rather than inheriting the property.¹⁵⁸

In many communities, if a man dies and leaves behind only daughters, his estate is treated as though he were unmarried. It is therefore inherited by his father if alive and in his absence, by his paternal nephews, uncles or the nearest paternal male relative in that order, but not by his daughters.¹⁵⁹ Daughters may, however, inherit from their fathers if explicitly detailed. While uncommon, this occurs most frequently where the daughter has borne children and is unmarried (since land would not be removed from the patrilineage).¹⁶⁰ Should a daughter inherit from her father it will be less than her brothers.¹⁶¹

That said, unmarried daughters retain the "right" to use and access land within the maternal homestead but only to plant "annual crops", not "permanent" crops, and may not erect "permanent" structures. Occasionally, a father may gift a daughter a plot of land (permanently) while still alive, but this is rare since it diminishes sons' access via inheritance and may be challenged.¹⁶² The extent to which land allocation is accepted by brothers may be related to the size of the original holding. If pressure on land is severe, a sister obtaining land is unlikely and a probable source of conflict. Even where land is relatively abundant, the transfer of land to a daughter is frequently contested.¹⁶³ In many instances, daughters are forcefully evicted from the land by their male siblings (often invoking "custom") who believe daughters should not have a share of paternal land, even though they are supposed to retain some rights of access and usage under informal systems.¹⁶⁴ Given the explanation of how socio-economic factors – particularly land

¹⁵⁵ Chesoni, Muigai, & Kanyinga "Promoting Women's Human Rights and Enhancing Gender Equality in Kenya" Sida Evaluation 06/25.

¹⁵⁶ The practice was upheld in the Njeru Kamanga case – Succession Case No. 93 of 1991, unreported, quoted in CRLP, 1997; Cotula 2002.

¹⁵⁷ Musembi 2005.

¹⁵⁸ Kameri-Mbote 2002.

¹⁵⁹ Benschop 2002.

¹⁶⁰ Mackenzie 1989, 104.

¹⁶¹ HRW 2003.

¹⁶² Lastarria-Cornhiel 1997.

¹⁶³ Mackenzie 1989, 104.

¹⁶⁴ Benschop 2002.

pressures – have fuelled perversions and changes in customary law, it is probable that male siblings are driven as much by greed as custom.

Box 3: Custom ‘Twisted’ Against Daughters

Human Rights Watch gives one case study on customary law used to demonstrate that “custom” is manipulated at the family level. The interviewee described how she and her sisters inherited nothing when their father died; their brothers got it all. She attributed this to “custom”. However, she then explained that custom in this case, while it indeed would have vested the estate in her brothers, dictated that her brothers care for their sisters with these funds. Yet her brothers did not take the responsibility seriously. The interviewee asserted custom was the problem, even though it was her brothers who were greedily *ignoring* custom to increase their portion of their father’s estate. Custom was not the problem, but rather that it was not being followed. (HRW 2003)

Overall, customary land rights for daughters are highly precarious in the formal legal system which does not specifically acknowledge them. This is particularly so for unmarried daughters living on land registered in their fathers or brothers’ names who have no independent legal existence and must derive their claim from the title-holder’s interests. Without formal recognition of customary rights, access depends on their relationship with the title holder for security.¹⁶⁵ Since males tend to invoke twisted interpretations from informal systems for their own benefit, daughters’ claims to inheritance and land rights in Kenya are particularly weak and subject to manipulation.

Conclusions, Gaps and Key Questions

The broad assumptions that customary law is highly discriminatory and abusive toward Kenyan women are in some ways overstated. This is perhaps a function of the breadth of the studies conducted. Indeed, when studies involving greater depth in given districts are analyzed, what instead emerges is a picture of customary law actually being protective of widows, with a number of customary practices enacted to guarantee them protection and access to land. The recurrent issue in these in-depth studies is the misuse and misappropriation of custom by greedy relatives seeking entry to and possession of the deceased husband’s property to the exclusion of widows. This meshes precisely with the interaction of customary and formal law to the detriment of women described above and indicates custom being twisted by personal motives to women’s detriment.

Studies indicate how such manipulation of custom can be defeated by invoking available community support mechanisms, such as elders, children, and broader community bonds. These findings are being confirmed and built upon by both the KNCHR and GROOTS in their work with overarching customary governance structures and involvement with grassroots community groups to safeguard women’s access to land. Not only are they ensuring women’s rights are upheld in the immediate sense, but they are also helping to stem what could be a significant customary structural evolution operating to the extreme disadvantage of women. Culture is harnessed to combat negative practice.

¹⁶⁵ Musembi 2007.

The following areas have been identified as gaps and key questions for future research:

- ⌚ **Specific Local Concepts.** Research has focused mainly on the Kikuyu and Luo and is geographically narrow regarding locations surveyed (e.g. Murang'a and Nyanza). Research is vague on specific local concepts which allow women to access land, particularly across communities in a comparative framework. Concrete information on customary systems with a comparative focus would be very useful.
- ⌚ **Existing Barriers to Women's Access to Land.** Research identified women's poor access to land; however, it is insufficiently exact in identifying precise barriers women face, namely whether they are legal, social, cultural or economic. There is therefore a need to precisely identify these in order to design appropriate responses. Related to this, it is desirable to understand which justice and/or governance mechanisms are available to women attempting to access land – formal and informal – and which are actually used, and why they are (or are not) utilized.
- ⌚ **Disputes & Trajectories.** Research did not reveal with a high degree of precision how women (or men, for that matter) would pursue a land dispute and the trajectories of such. Though survey results indicate customary means are most commonly engaged, more precise information on where people take their disputes and why they decide so is necessary to design more targeted support and programming. It would be useful to understand how local concepts are applied in practice, whether it be by customary institutions or by semi-formal institutions like Land Dispute Tribunals.
- ⌚ **Land Disputes Tribunals & Land Control Boards.** Though related to the previous paragraph, these institutions warrant particular attention. There is no research evaluating or analyzing either of them which surprises given their wide presence across the country. Understanding how these institutions function in practice and how they promote or deny access to land and justice is highly desirable.
- ⌚ **Coastal Areas Neglected.** There has been very little research in the coastal areas. Some of these areas may be of particular interest as they are doubly exempted from the application of the Law of Succession Act¹⁶⁶ and by the application of Islamic law. Broadly speaking, lands are squatted upon or held under customary title in coastal areas. FIDA has recently completed a study on 'Traditional Justice and Gender' in the coastal region and the results show well-established customary institutions which could be engaged to promote women's access to justice. Further in-depth research in the coastal region is desirable.

¹⁶⁶ Per Legal Notice No. 94 referring to the Law of Succession.

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