LAND IN AFRICA: MARKET ASSET OR SECURE LIVELIHOOD?
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Session on Gender, Land Rights and Inheritance

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BACKGROUND

My comments relate to South Africa and focus on the issue of women's land rights under communal tenure systems. In making them I am conscious that South Africa differs from most other countries in sub-Saharan Africa in a number of respects that are significant for land policy, including relatively high levels of urbanisation and the relative unimportance of agriculture, land-based livelihoods and communal tenure systems economically as well as socially.

These comments are based on reflections on four inter-related sets of developments that have had a bearing on this issue in South Africa over the past 11 years, which I describe very briefly below, namely:

1. The constitutional debate about the relationship between the principle of gender equality and the status of customary law and traditional leadership institutions;
2. The Gender Policy developed by the Department of Land Affairs (DLA) since 1994;
3. The protracted struggle around the development of tenure reform policy since 1994;
4. A recent Constitutional Court judgment on the property rights of women and minor children under customary law.

Clearly these are all major topics for discussion in their own right, and in the space available I can do little more than identify them as the context for my comments.

The constitutional debate about the relationship between the principle of women's rights and gender equality, on the one hand, and the status of cultural rights, customary law and traditional leadership institutions, on the other, was played out in the constitutional negotiations of 1993 in the context of what I termed at the time 'the politics of traditionalism.' [1] The outcome then, which was reaffirmed in 1996 in the final Constitution, was an insecure balance that affirmed that gender equality and non-discrimination on the grounds of, *inter alia*, gender and sex are fundamental rights, but also gave recognition to customary law and to traditional leadership institutions within the post-apartheid democratic dispensation.

The DLA's 'Land Reform Gender Policy' was adopted in 1997 and committed the department to a wide-ranging set of guiding principles aimed at promoting the principle

of gender equity and ensuring women's equal participation in and benefits from the land reform programme. As I have argued elsewhere, however, the DLA has consistently struggled to turn high-level commitments to gender equality at the level of principle into operational-level policy within each of its three land reform programme areas (land restitution, land redistribution and tenure reform), and, thereafter, to manage effective implementation of its gender policy at project level. These problems can be attributed to a number of factors, including various institutional and operational weaknesses, conceptual shortcomings in how the task is understood, lack of political accountability at senior level around the implementation of the gender policy, and weaknesses in the women's movement, especially in the rural areas.[2]

The formulation of tenure reform policy for South Africa's communal areas (the former bantustans/native reserves, in which land is still owned primarily by the state 'in trust' for the people who live there) has been an extremely protracted and contentious process since 1994, with the role of the state, the role of traditional leaders, the value of communal versus individual rights and tenure systems, and the treatment of women's rights in the development of policy all being major issues of difference and debate. A long drawn-out legislative process culminated in early 2004 with the enactment of the controversial Communal Land Rights Act, which is likely to be the subject of a constitutional challenge in due course. A key issue here is whether the government has or has not met its obligations to secure the tenure rights of women in the communal areas, given the enhanced role that has been assigned traditional leadership institutions in the future administration of community-owned communal land.

However, what I think is of particular interest for the discussion in this session is what I see as the dancing-on-eggs treatment of women's land rights on the part of the government, which was anxious to show that it was looking after women's interests in the drafting of the legislation in 2003, at least at the level of textual response to its critics, even while it was giving traditional leadership institutions a powerful role in land administration. To that extent, it seems to me, the discourse of gender equality has been consolidated in South Africa at the level of national policy since 1993/94; the tension between high-level endorsement and implementation remains unresolved, however, as does the contradiction between women's independent rights and tradition.

In this regard, **the recent *Bhe* Constitutional Court judgment** is extremely significant for the future development of policy and practice around women's property rights under communal tenure systems.[3] This judgment deals with the status and property rights of women and minor children under customary law in situations of intestate estates, and in the process affirms unequivocally that the constitutional commitment to equality is an overriding requirement in making determinations on the exercise and content of customary law and cultural rights. On that basis the Constitutional Court has now ruled that male primogeniture is unconstitutional. At the same time, however, the judgment also gives recognition to what it terms 'living customary law' as an important body of law in its own right within South Africa's legal system, and thereafter grapples in an open-ended way with how to give content to that and to develop the jurisprudence; in particular, how to draw out the underlying values within customary law that are

meaningful for society today, notably those of sharing, common humanity, fairness and responsibility for vulnerable members of society. This judgment will have major repercussions for the debate on women's land and tenure rights, including their treatment within the Communal Land Rights Act, and needs to be widely read, debated and further developed.

COMMENTS

With the above as background, I wish to contribute four points to the discussion.

The first is that the issues embedded in the question of how to legislate for women's land rights, and thereafter of how to advance these rights in practice, continue to be extraordinarily complex.

At one level this is stating the obvious, yet giving content to that complexity in policy development remains a challenging conceptual, analytical and political task. In part this is because women's interests and experiences straddle different domains - the public and the private, the social and the economic, to name the most obvious – and cannot be treated as simply technical matters. Adding to the complexity, women's interests, even the interests of those women who are classified together as poor and rural, are not all the same, nor are they static. A major consideration here is how women's interests in land tend to shift over time according to the different stages they pass through in the life cycle, which is generally lived out across a sequence of different family groupings with different land holdings - natal, marital, adult – groupings which are themselves in flux. Thus a widow and a daughter-in-law of a deceased man may be expected to have quite different, even antagonistic, interests in the family land that was attached to the person of that man. Similarly, the tenure insecurity faced by a divorced or separated woman within a customary marriage has a different legal standing and social construction from that potentially confronting a widowed woman within a customary marriage. Heightened concern about the social impact of the AIDS pandemic has resulted in considerable attention being paid in current debates to the tenure insecurity of widows; it is important that this should not be at the expense of the needs and interests of other categories of vulnerable women under communal tenure systems – among whom, given the widespread instability of the contemporary institution of marriage, divorced and separated women loom large.

In South Africa today there is no clear consensus on how best to accommodate women's land rights and interests within a communal tenure dispensation that straddles contradictory elements - premised on a form of social organisation that no longer exists (i.e. stable, locally-rooted, pre-AIDS, largely self-sufficient, patrilineal households and clans); governed by an as yet unclearly defined, even contested, 'living' or 'true' customary law, as the constitutional judges have construed it (as opposed to colonial/apartheid-decreed customary law); in which there must also be a role for democratised but still traditional (and hence patriarchal) leadership institutions. The majority and the minority judgments in the Constitutional Court case provide a fascinating case study of some of our country's finest legal minds grappling with this

question at the level of the law. On the one hand they hail the flexibility of 'true' customary law; on the other they struggle with the absence of consistency and clarity as to its content in given situations.

It seems to me that one way to negotiate through these tensions, which we could debate further, is to focus on desired policy outcomes for different vulnerable groups and work backwards from there, rather than to premise the process of policy formulation on the limited notion of 'women's rights' *per se*.

My second point is that the outcome of the *Bhe* and linked cases is an emphatic vindication of the importance of constitutional protection for the principle of gender equality, as a precondition for strengthening the land rights of marginalised women and for setting the parameters within which 'living' customary law around succession and inheritance must henceforth operate.

This is not to argue that adequate constitutional provision for gender equality is sufficient to achieve progressive outcomes for women on its own, as the problems that have beset the operationalisation of the DLA's land reform gender policy demonstrate. (It is, however, worth noting that the *Bhe* judgment does not operate at the level of abstract principle only – it also has direct and tangible benefits for the individuals on whose behalf the cases were brought, and will extend similar protection to others whose land and property rights are adjudicated upon by the lower courts in the future.)

The *Bhe* case has also highlighted the important role in policy development that committed advocacy groups can play, if they have the capacity not only to mobilise politically and lobby national government, but also to litigate on matters of principle at the constitutional level. Another issue to consider here is the importance of ensuring that judges who are appointed to the constitutional court are themselves committed to the principle of gender equality and sensitive to the challenges involved in giving this content.

My third point relates to the policy/implementation gap and the importance of ensuring that the policy debate does not remain at the lofty heights of broad principle, but is taken down a level, to the domain of operational practice.

The example of how the DLA's gender policy has fared illustrates the range of obstacles that stand in the way of meeting this objective. They relate primarily, I think, to the lack of political accountability of government ministers and senior public servants for women's rights in practice, as distinct from broad principle. In South Africa the broad women's movement has demonstrated its importance for securing and defending the principle of gender equality around women's property and inheritance rights at the level of national law and policy; when it comes to local implementation, however, the absence of a strong rural women's movement in South Africa remains a serious constraint on making these rights real.

My fourth and final point is conceptual, but not academic.

In developing policy on communal tenure and how best to secure women's rights and livelihoods, we need to be clear about the differences between certain key constructs, which tend to be elided in the policy and political debate in South Africa but nevertheless refer to distinct domains.

One important cluster of overlapping constructs involves the notions of 'customary', 'communal' and 'traditional', which tend to get used interchangeably (certainly in South Africa) not only by patriarchs in whose interests it is that these terms be conflated, but also by advocates of women's rights. Yet they are not the same, and may be used in different ways towards quire different policy outcomes. Thus it is possible to have communal tenure systems that support poor people's livelihood strategies, that are not based on customary law, nor dependent on traditional institutions for their administration. Equally, it is possible to have traditional institutions administering tenure systems that are not based on customary practices, nor are necessarily communal.

'Community' and 'family' also need to be separated analytically in the discussion on communal tenure systems. In the South African context I think it is easier to give women independent rights in communal community land than it is in patrilineal family land, where the organisational logic of the land-holding entity continues to be premised on the idea of women marrying out and leaving their natal homes and hence their claims to a share of their natal families' land.

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[1] See Cherryl Walker, 'Women, "Tradition" and Reconstruction' in *Comparative Studies of South Asia, Africa and the Middle East*, Vol XV, No. 1, 1995.

[2] See Cherryl Walker, 'Piety in the Sky? Gender Policy and Land Reform in South Africa,' in *Journal of Agrarian Change*, Vol 3, Nos 1 and 2, January and April 2003.

[3] Constitutional Court of South Africa, Judgment, Case CCT 49/03, *Bhe and Others v The Magistrate and Others;* Case CCT 69/03, *Shibi v Sithole and Others*; Case CCT 50/03, *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*, date of hearing 2-3 March 2004, Decided on 15 October 2004.