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Customary to modern transition: challenges and recent advances

A commentary on Delville's paper: the impact of HIV/AIDS on land issues

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1. Introduction

Delville's paper is a useful overview of the challenge of making land rights more secure within customary tenure systems in the context of new challenges to traditional land rights systems. In essence Delville outlines the question of "bringing together legality, legitimacy and practices, by providing a legal framework which gives room to local land rights", in order to bridge the disjuncture between "law and local practices". In the paper he explores various strategies that have been attempted to bridge this divide (registering and mapping local rights; codifying local rules; decentralizing the authority over land and natural resources; and formalising land transactions) and the "evolutionist" theory of "transition" between "customary" and "modern" systems.

Delville argues that a "modern" land administration system, which fits with the reality of contemporary democratic states in Africa, is a system in which the state offers a warranty of rights to all its citizens. This system would provide a broad set of solutions that meet the specific needs of diverse stakeholders in specific locations. In Delville's view, an effective land policy is one which, in a given history and political context, can build an efficient land administration system that is a mix of rules, authorities and rights, which traverses state and customary bases. To this end, Delville explores the notion of enhancing a contractual dimension in land management. This offers people a set of solutions for securing rights, in which they can choose what is necessary, useful and affordable for them, with simple ways of moving from informal to formal rights. This "articulation paradigm", where the state does not try to incorporate local rights in a systematic framework of legally recognised rights, but offers pragmatic solutions to the main problems encountered by communities, begins a process of social evolution of interpenetration between law and practices.

2. Commentary: a missing dimension?

Delville has emphasised the importance of an "evolutionary" process that underpins the adaptability and responsiveness of existing customary systems and the intention not to constrain local coping strategies that ensures more security for existing rights. Indeed, as Adams *et al* have argued, land tenure reform must be built on a thorough understanding of the livelihood strategies of those intended to benefit if a fundamental goal is to enhance and to secure people's land rights (1999). However, if the abstract system described by Delville is truly to be effective in the African context it should have at its centre a conceptualisation of the impact of HIV/AIDS on land issues pertaining especially to rural households and their survival strategies.

It is notable that in the terms of reference for this session, the organisers picked up the issue of "specific stress points" involving, amongst others, the issue of "AIDS and inheritance" specifically of widows. It seems that this point is often under-emphasised when considering tenure reform, as the epidemic is likely to fundamentally impact on land tenure institutions across the continent. The complexities involved in the processes and mechanisms related to access to and control over land imply that approaches to the land question have to be sought which reflect realities and incorporate economic, political, cultural, social and power related issues. HIV/AIDS is a major dynamic affecting all these issues.

3. The impact of HIV/AIDS on Sub-Saharan Africa

The impact of HIV/AIDS will increasingly devastate people's lives, particularly in the poorer areas of Sub-Saharan Africa. Louwenson and Whiteside have summarised the implications of HIV/AIDS for poverty reduction in a background paper prepared for the United Nations Development Programme (UNDP):

“The devastation caused by HIV/AIDS is unique because it is depriving families, communities and entire nations of their young and most productive people. The epidemic is deepening poverty, reversing human development achievements, worsening gender inequalities, eroding the ability of governments to maintain essential services, reducing labour productivity and supply, and putting a brake on economic growth. The worsening conditions in turn make people and households even more at risk of, or vulnerable to, the epidemic, and sabotages global and national efforts to improve access to treatment and care” (2001: 4).

Although intensifying responses to the epidemic have focused on prevention and care, these have tended to ignore the broader picture of the implications for development and poverty reduction (Collins & Rau, 2000). Discussions amongst development practitioners and policy makers have therefore been limited and a number of policies and goals, including the United Nations Millennium Declaration Goals, have failed to take into account the added challenges resulting from sharp increases in AIDS related mortality rates¹.

Certainly the impact will also affect traditional land rights systems and attempts at land tenure reform. At a recent conference organised by the Southern African Regional Poverty Network (SARPN)², Dan Mullins of Oxfam-GB argued that ‘if we do not explicitly factor in the impacts and trends of HIV/AIDS as a central feature of how to do land reform... we are being professionally negligent, misusing resources for poverty reduction, and are unlikely to achieve stated objectives’ (2001).

Part of the problem with factoring in the impact of HIV/AIDS on land tenure is the lack of empirical data pertaining to the issue. In response, the Southern African Regional Office of the Food and Agricultural Organization of the United Nations (FAO) commissioned a three-country study into the impact of HIV/AIDS on land issues. The results of this empirical research, conducted in Kenya, Lesotho and South Africa, are currently being finalised by the Human Sciences Research Council. Some of the findings will be elaborated here as a contribution to the workshop although the final report will only be available later this year.

¹ See Louwenson and Whiteside for an analysis of the impact of HIV/AIDS on selected UN Millennium Goals (2001).

² In keeping with the goals of SARPN, the conference was designed to facilitate the sharing of perspectives on land issues in several Southern African countries and to generate debate about how pro-poor policy processes may be incorporated into land reform policy options in the region. During the conference the issues surrounding the impact of HIV/AIDS on land reform received significant interest partly as a response to the perceived dearth of information and policy research on the issue. See the SARPN website at <http://www.sarpn.org.za>

Indeed, as iterated earlier in this response, the terms of reference for the session on “customary to modern transition” identifies the issue of AIDS and inheritance, noting that many customary tenure systems provide little independent security of tenure to women on the death of their husband, with land often falling back to the husband’s lineage. While this may, traditionally, not have posed problems, it may create serious hardship and dislocation in the many cases of AIDS-related deaths. In order to shed some light on this issue, recent data collected for the FAO study will be used to document how, in specific circumstances customary arrangements were impacted. Such findings may help point out ways to deal with this issue in a forward-looking manner.

It is, however, important to first outline a conceptualisation as to how HIV/AIDS might impact on tenure systems.

4. A conceptual framework

HIV/AIDS is a development issue and the largest single management challenge facing land reform practitioners. It will impact on every aspect of management, planning and implementation of land reform for decades, as well as the social environment in which this occurs. HIV/AIDS fundamentally changes all aspects of land reform policy as it affects both the people whom land reform (including tenure reform) is intended to benefit and the people staffing the institutions that support the policy implementation. The impact of HIV/AIDS on land tenure can be categorised into three areas: people/households, use of resources and institutions (Mullins, 2001). These will be elaborated briefly below.

The impact of HIV/AIDS on people and households is widely documented³. As illustrated by the narrative below, it is important to look at the phases of HIV/AIDS: asymptomatic; early illness; chronic illness; critical illness; death and, lastly, survivors. Each phase of the disease is associated with a different impact, which has different implications for tenure. It is important to emphasise the final category on this continuum - the category of survivors. HIV/AIDS has a massive impact on those left living, as there are many more affected than infected people.

Mercedes Sayagucs has portrayed these phases through a general narrative outlining the impact of HIV/AIDS on the agricultural production of an African household:

“A man is taken ill. While nursing him, the wife can’t weed the maize and cotton fields, mulch and pare the banana trees, dry the coffee or harvest the rice. This means less food crops and less income from cash crops. Trips to town for medical treatment, hospital fees and medicines consume savings. Traditional healers are paid in livestock. The man dies. Farm tools, sometimes cattle, are sold to pay burial expenses. Mourning practices (in Zimbabwe) forbid farming for several days. Precious time for farm chores is lost. In the next season, unable to hire casual labour, the family plants a smaller area. Without pesticides, weeds and bugs multiply. Children leave school to weed and harvest. Again yields are lower. With little home-grown food and without

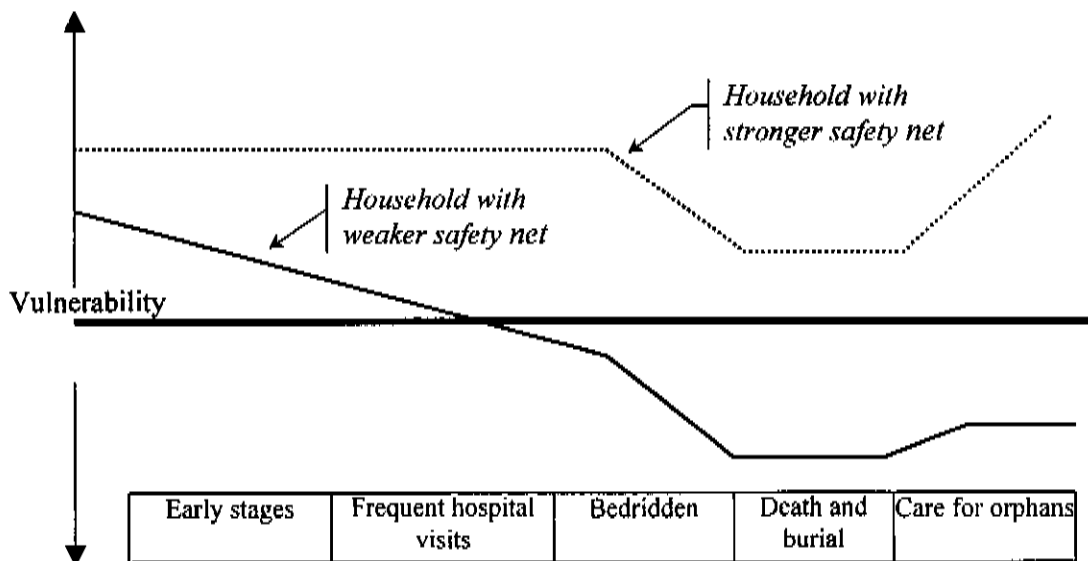
³ See for example Ayieko, 1998; du Guerny, 2001; Mutangadura, Jackson & Mukurazita, 1999; Rugalema, 1999; and World Food Programme, 2001.

cash to buy fish or meat, family nutrition and health suffer. If the mother becomes ill with AIDS, the cycle of asset and labour loss is repeated. Families withdraw into subsistence farming. Overall production of cash crops drops”.

(Mail & Guardian, 16 August 1999).

This narrative captures the stark reality of the cruel impact that HIV/AIDS has on the household producing on the margins (and above) the subsistence level. As an elaboration of the narrative, the diagram below is a useful tool for the further conceptualisation of how HIV/AIDS impacts on different households. It shows the value of use of micro credit at various stages of illness to reduce vulnerability of households. That is, households with a stronger economic safety net and a wider range of options (including land) to draw upon during the crisis are less vulnerable at each stage of the continuum of HIV/AIDS illness than their poorer counterparts.

The effect of HIV/AIDS on households/livelihood strategies



Source: Donahue *et al*, 2000

The dotted line represents the rate of degradation experienced by a household with a stronger economic safety net and a wider range of options, including rights to land, to draw upon during the crisis. The other line represents the rate of economic degradation experienced by a household with a weaker safety net. The different rates of degradation appear to pivot on the presence or absence of physical assets, business income and access to credit, savings or land.

According to Mullins, there is a general pattern as people move along the continuum of HIV/AIDS illness (cited in Drimie & Heustice, 2001). It is clear from the range of literature on HIV/AIDS that the epidemic affects the most economically productive members of the population. At a household level the impact of this arc significant with labour, skills and experience, income and expenditure of the household all being affected. Briefly, as illness progresses so the ability of the infected person to earn an income is reduced, the household loses its primary source of income, placing a strain on household income and resources. Loss of skills and experience is also a growing

problem as the most productive members of the household die before they are able to pass on their experience and specialist skills to the next generation. This reduces the ability of other members of the household to recover from expenses incurred. Further pressure is also placed on the household budget as cash is used to pay for medication, and time of family members is diverted away from other activities, such as farming, to caring for the sick. Households' ability to cope will also depend on the extent to which they can adapt to the changes in household composition, particularly in terms of age and gender, brought about by HIV/AIDS, and their ability to take on new roles and responsibilities. Policy makers and planners need to note these changing relationships in households, as they will affect both with whom they engage and how they plan interventions.

Secondly, it is important to conceptualise the impact of HIV/AIDS on the use of resources. Ill health, and time spent in caring for the sick, reduces time spent in land utilisation, leading to under utilisation of resources and reduced productivity. In some cases this has resulted in changing use of land as households move away from more to less labour intensive, and often less nutritious, type of crops. In some cases land has even been left fallow or abandoned. Other households have been tempted to rent out or sell their land in order to raise extra income to meet additional household expenses due to HIV/AIDS. Selling off productive resources like land and farming implements has critical long-term implications for the household, increasing their vulnerability and sustainability in the long term.

Finally, it is essential to look at the impact of HIV/AIDS on institutions charged with issues around rural development such as health services, welfare and land. HIV/AIDS has implications for their sustainability, effectiveness and ability to cope with increased demands. HIV/AIDS increasingly impacts on and changes the environment of institutions. People and clientel, as well as ways of working with people, will change; and there is likely to be a significant effect on morale. The internal capacity of organisations will also be affected as more staff become infected and affected. Most notably, as infection rates increase, so too will absenteeism and staff productivity decrease. This will be coupled with increasing financial costs to the institution in retraining staff to replace those who fall ill and die, severance and hiring, loss of time, drain on medical aid funds, increased death benefits and pension payouts. Staff turnover will also increase as staff get sick and need to be replaced, and competition for skilled staff will increase as the pool of skilled and experienced individuals is reduced.

5. The impact on land tenure

Since land is a primary means of both subsistence and income generation in rural economies, access to land and security of land rights are of primary concern for households and the eradication of poverty (Quan, 2000). For those relying on local rural resources for their livelihood, a secure place to live, free from threat of eviction, with access to productive land and natural resources are essential for rural livelihoods throughout the region.

Despite evident diversification out of agriculture, rural production remains an important component of many rural livelihoods throughout Sub-Saharan Africa. 'African rural dwellers ...deeply value the pursuit of farming...food self-provisioning

is gaining in importance against a backdrop of food inflation and proliferating cash needs' (Bryceson, 2000, cited in Cousins, 2001). Participation in "small-plot agriculture" is highly gendered, with women taking major responsibility for it as one aspect of a multiple livelihood strategy. Access to land-based natural resources remains a vital component of rural livelihoods particularly as a safety net. In this context, land tenure becomes increasingly important for the diverse livelihood strategies pursued by different households.

If one briefly considers the potential impact of HIV/AIDS on the bundle of land rights that a household might enjoy then one realises the urgency of factoring in the epidemic into attempts to strengthen these in a land rights systems. Land rights may include:

- Rights to occupy a homestead, or to use land for annual and perennial crops, to make permanent improvements, to bury the dead, and to have access for utilising the natural resource base.
- Rights to transact, give, mortgage, lease, rent and bequeath areas of exclusive use;
- Rights to exclude others from the above-listed rights, at community and/or individual levels; and
- Rights to enforcement of legal and administrative provisions in order to protect the rights holder (Adams *et al*, 1999a).

In considering different systems of land rights, it is important to note the role of different tenures. The impact of HIV/AIDS throws a dynamic dimension into the debate between the *pros* and *cons* of different systems.

In the context of HIV/AIDS, many households need assurance that they will not be evicted without compensation and that their children can inherit the property. The ability to rent out their land when household labour becomes short and the ability to borrow money using the land as collateral, as well as the right to have the property serviced with such things as water, electricity and transport connections, especially for families with members who are sick or dying are vital with increasing pressure from HIV/AIDS.

If a family lacks the labour to make use of its own land, and also lacks cash and other resources to hire skills and labour, it may undertake one of several responses:

- Abandon land the family is unable to utilise out of fear that rental or leasing could result in loss of control
- Rent out all or portions of land to others who can work it more easily in order to earn cash and to avoid leaving a productive resource lying idle
- Enter into sharecropping or other contractual arrangements
- Lend land to others
- Sell land formally or informally in order to earn cash

- Forcibly take land way from those who have it, a situation faced by many widows and orphans that can leave them completely impoverished, often as they begin to fall ill themselves (adapted from Daw, 2002).

Clear rights to land can contribute positively to households affected by the epidemic, as it can underpin livelihoods and economic development by removing uncertainty and by encouraging families to utilize the asset through leasing, renting or sharing for the production of nutritious food and other goods for sale.

6. Country studies

It is crucial that the framework suggested in the abstract by Delville is complemented by an analysis of local-historical processes describing the impact of HIV/AIDS. It is within this vein that the following issues, drawn from three-country case studies of research-in-progress funded by the FAO, are offered as a contribution to strengthen his theoretical analysis. It should be emphasised that the cases pertain to specific places in specific countries. Far more research and understanding is required if general lessons are to be drawn from the specificities described.

Under the first section attention will be focused on the rights to use land productively, to occupy a homestead, to make permanent improvements, and to have access to the natural resource base. The second section will focus on rights to transact, give, mortgage, lease, rent and bequeath areas of exclusive use, with particular emphasis on widows and orphans.

6.1. Rights to occupy a homestead, to use land productively, to make permanent improvements, and to have access to the natural resource base.

The impact of HIV/AIDS on crop production relates to a reduction in land use, a decline in crop yields and a decline in the range of crops grown, mainly with reference to subsistence agriculture. Reduction in land use occurs as a result of fewer family members being available to work in cultivated areas and due to poverty resulting in malnutrition leading to the inability of family members to perform agricultural work. This, in turn, leads to less cash income for inputs such as seeds and fertiliser. These impacts lead to changes in the use and security of land. For example, the under utilisation of land under some traditional systems may result in forfeiture as communities attempt to keep a productive resource in use. HIV/AIDS-affected households may therefore lose their land rights as a result of an inability to provide labour.

6.1.1. Lesotho⁴

It is clear from the Lesotho study that the problem of HIV/AIDS has affected various facets of life including households' coping strategies in the two study sites. These are namely Ha Poli in the Katse Catchment and Matsatsaneng in Botha Bothe, two distinct areas under customary land management institutions. Morbidity and mortality have negatively impacted on the capacity of affected households to effectively utilise

⁴ The examples from Lesotho are largely derived from the forthcoming report compiled by Mphale, Rwambali and Makoae for the FAO study (2002).

their assets, particularly labour and land. The epidemic deprived the affected households of their savings and investments because households incurred medical and funeral costs that basically dried up their resources.

In the absence of more reliable livelihood sources, agricultural production remained the main livelihood source even for households that were affected by the epidemic. In-depth interviews with the affected households revealed that illness had impacted on agricultural yields substantially. This change was attributed to the fact that most of the farming activities were directly affected by morbidity to the extent that some activities had to be postponed or abandoned due to illness. Affected households reported declined productivity in their home gardens since they contracted HIV/AIDS, which has had a direct effect on household food security.

In response to HIV/AIDS, affected households and infected individuals have adopted a number of strategies involving land such as sharecropping, livestock sales and *mafisa*⁵ to ensure that assets such as land remain in their custody as well as to foster food security. Some of these responses may ultimately be negative for the household as they have long-term implications for the sustainability of livelihoods. For example, there have been numerous illegal land sales and land use conversions clearly motivated by economic pressures, which have been aggravated by HIV/AIDS. These transactions have seriously affected access to land, utilisation and agricultural productivity. Importantly, it may mean that land will eventually be concentrated in the hands of a fewer number of people with resources and who have not been as severely affected by the epidemic.

Some of these strategies are precipitated by a provision of the Lesotho Land Act of 1979, which states that land which lies fallow for more than for two years in succession automatically reverts back to the allocating authority. This provision, which is encouraged in the land policy review report of 2001, is an attempt to enhance agricultural productivity through ensuring that all cropland is used by allottees. One of the major challenges facing people affected by HIV/AIDS in Lesotho is deprivation of agricultural land due to continued illness which would render their land fallow for an extended period. Though meant to ensure equity, this provision could create disparities given the current socio-economic situation, which may motivate some vulnerable allottees to sell their land before it can be dispossessed.

It has also been argued that this situation is likely to be aggravated by the impending replacement of the traditional land administration authorities by *de facto* land boards, which often lack on-site knowledge on the status of people affected by the epidemic. In both study areas, land administration and management was found to be still under the control of the chiefs. The research indicated that some chiefs have not been observing the legislation pertaining to land lying fallow. Instead the HIV/AIDS affected households, in order to avoid revocation, have been reporting their problems to the chiefs who then informally grant them a special concession by indefinitely postponing deprivation. Ironically this role played by the chiefs has not only strengthened their authority but has also ensured that land management at the community level provides a relatively secure means of livelihoods for the HIV/AIDS

⁵ This is a system where livestock is lent away to other households, in most instances relatives, so that they can benefit from services or products provided by these assets. Such services include draught power, while outputs include milk, wool, and mohair.

affected households. It seems that, despite its strengths, the 2001 policy review report and its recommendations did not put HIV/AIDS epidemic centrally into the picture.

Another strategy has been the sale of livestock, which has deprived some households of their cattle that are needed for draught power. This change is considered as one of the major inhibiting factors to effective management of fields since other community members are used to helping people who have at least one form of resource even if this was a single livestock unit. However, other incidences were reported where infected households utilised sharecropping to gain access to draught power after they had sold their livestock to cover medical expenses. In general affected households were increasingly using sharecropping as a means of working on their fields and also as a strategy to avoid revocations due to fallow. Sharecropping assured them of continued access to agricultural land as well as part of the harvest despite being too sick to cultivate their own land.

6.1.2. Kenya⁶

The impact of HIV/AIDS on land use in the case studies in Kenya appears to be extremely serious. In the two study areas, namely Madiany Division in the Bondo District and Othaya Division in Nyeri District, land is held largely under a patriarchal system with households having a strong sense of individual household rights. The study reported that there had been a significant reduction in the cultivated land, arising from the death of breadwinners and adults who were active in agricultural production. This finding was re-iterated by a senior official in the Commission on Land Reform, who stated that the commission had come across large tracts of land lying fallow, particularly in some areas in Nyanza province (where Bondo is situated) caused by the “wiping out of whole villages...”. Despite an abundance of land this impact caused by shortages of labour and other agricultural inputs, such as seeds, has left households, traditionally dependent on the land, vulnerable and unable to continue production.

In addition, prolonged periods of sickness have impacted on labour time for productive endeavours like farming. Respondents in families with persons living with HIV/AIDS suspended or decreased farm-related activities to attend to the ill. About 20 to 30 percent of those living in one division of Nyeri, who are HIV-positive, have migrated from the major towns back to their rural homesteads. This has further increased the burden on rural households with scant financial resources. The rise in the number of orphans, who have become additional dependents in some households, has also increased household work, which in turn impacts on time spent on agricultural productivity. As a result of all these related issues, a number of key informants identified lower food productivity and the threat to food security as an impact of HIV/AIDS on land.

However, some households have embarked upon strategies that utilise their land rights in attempts to offset these threats. There has been an increase in the leasing of land to other less affected members of communities, especially on ancestral land. Granted that fallowing and land leasing have been rare phenomena in the past, and in

⁶ The examples from Kenya are largely derived from the forthcoming report compiled by Bosire, Kiai and Mwangi for the FAO study (2002).

light of the high dependence on productivity from agriculture, it is likely that these practices are related to the increase of deaths from the HIV/AIDS.

6.1.3. South Africa⁷

Numerous studies in South Africa have shown an increasing breakdown of customary management arrangements and the often dysfunctional mixture of old and new institutions and practices (Adams *et al*, 1999). People are often uncertain about the nature of their rights and confused about the extent to which institutions and laws affect them. These situations become more serious under the impact of HIV/AIDS, which has been the case in Mzinto, KwaNyuswa and Muden, areas in KwaZulu-Natal predominantly under customary land systems.

In a number of cases in the Mzinto area, which still has a significant agrarian economy, the crisis of illness caused by HIV/AIDS has cut off many households from using the land effectively. This has been largely a result of the impact on labour and agricultural inputs. Some families have attempted to set up sharecropping arrangements with their existing land. The vulnerability caused by HIV/AIDS has, however, placed some of these households in a weak position when negotiating the terms of the sharecropping contracts. A number of affected households in the Muden area have begun to hire casual labour to help with cultivation during the planting season as the impact of HIV/AIDS on their own labour resource has been significant.

The termination of cultivation due to a lack of inputs intensified by HIV/AIDS has further eroded the livelihood strategies of many households who have become increasingly dependent on the cash economy, lending associations and state welfare grants, or dropped further into the poverty cycle. For many households the rights to land remain a potential solution to the crisis of HIV/AIDS and poverty, if they can find the resources to cultivate it. A few households in KwaNyuswa, a densely populated peri-urban area outside Durban, have either revisited production or intend to do so if they can mobilise resources in attempts to ameliorate the impact of HIV/AIDS and poverty. The impact of HIV/AIDS, however, usually severely undermines existing resources so that agricultural activity no longer is an option for many households. In KwaNyuswa, the informal land market has allowed some households to sell land in crisis situations. This land is more valuable for residential purposes than for agricultural production and there is always a demand for such property close to the job market offered by the city. However, informal land markets results in mounting uncertainty, which makes economic land use risky for many (Cross, 1998).

6.1.4. Commentary

It is clear that rights to land, particularly for agricultural production, remain important for HIV/AIDS affected households. This is particularly significant in KwaZulu-Natal where agriculture has become a small component of livelihood strategies. Land use has, however, been impacted on through the loss of labour and other assets, which

⁷ The examples from South Africa are derived from the work-in-progress by the Human Sciences Research Council team consisting of Whyne Adams, Michael Aliber, Catherine Cross, Scott Drimie, Salome Modiselle, Rendani Randela and Khuli Tlabela (2002). The case studies from Mzinto, KwaNyuswa and Muden are located in KwaZulu-Natal, the worst affected province in the country.

makes it difficult to mobilise rights to production. A number of land-related strategies have been strengthened in attempts to survive the impact of the epidemic. Sharecropping in both the Lesotho and South African case studies were notable, as were land use conversions and sales, the leasing of land in Kenya, and the need to leave land fallow in all three countries. It is important to recognise that households have not remained passive in the face of HIV/AIDS, and other impacts, but generated strategies intended to overcome these difficulties, which have been intensified by the epidemic. Land rights remain an important component of these strategies and are particularly important for those left behind after HIV/AIDS-related deaths.

6.2. Rights to transact, give, mortgage, lease, rent and bequeath areas of exclusive use.

As a result of HIV/AIDS, the survival of the extended family and the social fabric of community support systems underpinned by traditional systems of land rights are increasingly under pressure. These kinds of support systems are gradually eroding due to poverty, the magnitude of HIV/AIDS epidemic and stigmatisation of the disease. For example, according to widespread anecdotal evidence across southern Africa, forced removals of widows from land and property grabbing have become issues that require urgent attention from policy makers and land reform officials. In addition, the epidemic threatens to increase the number of orphaned children at risk of losing rights and access to the family's agricultural land and thus, decreasing food security.

6.2.1. Lesotho

In Lesotho, women's land rights, though clearly stipulated by the law, were not always protected in reality. Practices varied depending on the manner in which land rights were interpreted and tended to vary with circumstances pertaining to the level of understanding about HIV/AIDS, as well the fairness and compassion of the local authority overseeing land rights. The situation of widows was worsened by the community's perceptions of factors contributing to HIV/AIDS and the stigma attached to the disease, many of which placed the entire blame on women.

Some widows interviewed reported that they had been allowed to retain their late husbands' agricultural land and that they were empowered to make decisions to engage in arrangements such as sharecropping or hiring people to work their land when necessary. Traditional authorities did however make it clear that although widows were treated fairly and allowed to keep their husbands' land, if they remarried, they would lose the right, as land could not be transferred from one household to another through the woman. This perception was based on the belief that by re-marrying such a widow would gain access to her new husband's land. Widows interviewed were aware of this clause and were quite clear that they would not consider remarriage since they would lose their social status within the community and, indeed, their current right to land.

The Lesotho study also revealed that agricultural land was a highly valued asset that the HIV/AIDS infected individuals and households perceived as an ultimate security for their children if they were to die. Many stipulated that it was not to be sold. Therefore the right for land to be a heritable asset was deemed essential as a basis for a livelihood security for future generations and orphans. In both study areas, it was

claimed that AIDS orphans were under the protection of their extended families on their fathers' side. This claim by traditional leadership also asserted that the orphans' uncles used the late parents' land to raise them until they were of age when they could inherit the land. In light of the above, traditional systems can be seen to have imbedded within them social security principles in the form of social capital that protects the vulnerable. This position was, however, challenged by women who argued that this was exaggerated since there were cases where orphans were cheated out of their heritage by the uncles. It was indicated that AIDS orphans lost their land rights when they were raised in hospitals or taken care of on the maternal side. This clearly indicates the need for an effective policy response around this issue.

An additional issue, which threatens traditional land use systems, was the fact that many children would grow up without the guidance of their parents. This was because HIV/AIDS affects the generation that is primarily responsible for the socialisation of children leaving a wide gap between grandparents and children. This includes the loss of agricultural knowledge, especially that of indigenous knowledge about the locality and different techniques of production, as well as the processes of traditional land rights systems.

6.2.2. Kenya

According to the Kenyan study, HIV/AIDS has clearly impacted on inheritance rights particularly those of widows and orphans. The study reported that women and children were the most marginalised in land transactions, a situation that is aggravated by HIV/AIDS in a number of ways. In some of the cases, women were dispossessed of their inheritance to land and to property after their husbands' death. The prevailing practice is that inheritance is patriarchal with the result that in several cases land had been inherited or was being held in trust by male relatives. There is also a practice that when a married man dies of AIDS or gets infected, the woman is often accused of having infected her husband. Widows in cases where the deceased has died of HIV/AIDS are often condemned as the ones who have infected their husbands and are subsequently under massive pressure to leave their marital homes.

An additional issue is the fact that in some localities such as Nyeri, land ownership for women was tenuous when an affected husband or father died, as land was still registered through men. Women inherit only as trustees of the property, mainly on behalf of the children and thus cannot dispose of the property and lose the right to retain it on re-marriage. Thus, women whose husbands have died of HIV/AIDS tend to lose their rights to access and use of land, and are sometimes sent back to their homes after the death of the spouse. Where such women were married without children, the norm was to send them back to their families as soon as the spouse was buried. The Kenyan report thus argues that women were often used by their families to provide care for the dying husband, only to be dispensed with without property soon after the death of the spouse. Furthermore, where widows, as trustees of the land, could have used their husband's title deeds to acquire credit, the marginalisation of AIDS constrains their ability to access financial resources through their most valuable asset.

Another dimension relates to the situation of female-headed households, which is in the range of about 45 percent of total households in the rural areas considered by the

Kenyan study. Ordinarily, single mothers in rural communities were apportioned land with user rights in order to build a house and to provide for the family. In both Nyeri and Bondo, sons in such households could inherit land from their grandfathers. However, in the event that a single mother died of HIV/AIDS or related causes, and left young orphans, the inheritance for her children was at great risk due to the single mothers "questionable" position in her community and the stigma associated with HIV/AIDS.

Children, irrespective of their ages, were the most affected when it came to the impact of HIV/AIDS on land. Most informants in the Kenyan study were aware of the practice of dispossessing orphans of their land and property under the pretext that they are custodians or guardians (in most cases men). A further complication was the legal right of orphans to property and their special vulnerability. The orphans' rights to land have been infringed on in several cases where land "grabbing" has taken place.

One key informant in the Kenyan study predicted that with increasing financial costs as a result of HIV/AIDS there was a likelihood that land will begin to be sold, with a potential of increasing land-related disputes. It must be acknowledged, however, that the study only reported a few incidents of land conflicts that had resulted from HIV/AIDS-related deaths. In one case, the community had decided that the surviving daughters could not inherit their father's land, which was subsequently given to their uncle. The dispossessed daughters believed that they had a clear right to their father's land and therefore challenged the decision. It was apparent though, that potential for conflict was higher when both spouses had died and left young dependents. A number of interviews in the Kenyan study reiterated that this could potentially lead to abuse as family members take control over land.

6.2.3. South Africa

Some women in the KwaZulu-Natal study reported that they had encountered problems with levirate or widow inheritance, a traditional practice in which the late husband's brother assumes a married relation with the widow, usually as a second wife, and takes over the responsibility of running and supporting the household of the deceased brother. It is expected that the arrangement would guarantee the support of the widow and her children, although in return the surviving brother would take over the late brother's assets, as well the control of other resources and of the personal lives of the widow and her children.

In one particular case in Mzinto, a male cousin arrived to assume the head of the household when his relative died leaving a widow and several children. The large tract of land continued to be used for extensive agricultural production although the earnings were subsequently channelled to the cousin's family rather than to the original household. Only when the cousin sold off some head of cattle belonging to the deceased was the situation reported to the traditional authority. The cousin was forced to leave the household and repay the money. In this case, it was the perceived abuse of the cousin that led to the household regaining the rights to their land, not the institution of levirate itself that was challenged.

In Muden, a woman recently widowed through an HIV/AIDS-death was approached by two men who claimed to be the man's cousins and who demanded that the family

vacate their house because she had killed their relative. The traditional authority was summoned and when the men could not show their credentials were told to leave. It later transpired that the men had been hired by someone who wanted to extend his land possession. The men were all arrested. In another two cases in Muden, households unable to utilise their land as effectively as before the impact of HIV/AIDS were asked to enter into leasehold arrangements with other community members. In both cases this request was refused due to fear that the land would not be returned. The fear of land grabbing and insecure tenure has resulted in many potentially productive relations being ignored.

In several cases in Mzinto, HIV/AIDS-affected households were forced to resort to borrowing money from moneylenders in an attempt to support sick members of their households. In one case, an HIV/AIDS widow was compelled to borrow money at steep interest rates from a moneylender, which threatened her rights to land when she failed to repay. The lender threatened to confiscate her assets, including her land, in order to get something against the interest she owed him. The women refused to concede her land right and attempted to find money elsewhere.

In another case, a widower with an infected son was forced to hand over a large portion of his land to a moneylender who refused to accept a smaller portion of land as an installment to the loan. Only after an intervention by the traditional authority was the lender warned about further encroachment onto the widower's land. As a result of an HIV/AIDS-infected son, the widower was forced to hand over a significant portion of his land under production when he could not service a loan borrowed to improve his sick son's diet. The loss of this land has affected his agricultural output and cut into both his food security and cash income.

6.2.4 Commentary

It is clear from the case studies explored in Kenya, Lesotho and South Africa that traditional land management institutions are central in the adjudication between overlapping claims to land rights. They have, however, played mixed roles in these diverse case studies. For example, in Lesotho, traditional authorities were seen to protect vulnerable households from losing land left to fallow. However, although they claimed that orphans' land rights were protected until they were of age to take over the land this was contradicted by other members of the community who raised the issue of land grabbing by unscrupulous family members. In a few cases in KwaZulu-Natal, traditional authorities ultimately ensured that land rights were upheld and acted to protect households left in a vulnerable situation, accentuated in a context of increased land grabbing and the breakdown of trust. These actions were, however, in the framework of a patriarchal system that often upheld gender inequalities. What is clear is that women's and orphan's rights are often dependent on the compassion of the traditional authority, a particularly sensitive issue in the context of the stigma attached to HIV/AIDS. These groups are particularly vulnerable to losing their land rights as households are impacted by the epidemic, an issue that must be acknowledged in policy processes.

7. Developing solutions

With reference to Delville's paper, an effective land policy is one which, in a given history and political context, can build an efficient land administration system that is a mix of rules, authorities and rights, which traverses state and customary bases. In Delville's view, a "modern" land administration system, which fits with the reality of contemporary democratic states in Africa, is a system in which the state offers a warranty of rights to all its citizens. This system would provide a broad set of solutions that meet the specific needs of diverse stakeholders in specific locations. It is undoubtedly clear that any such framework that attempts to invoke change on different land right systems has to factor in the increasing impact of HIV/AIDS on diverse communities in different settings across Sub-Saharan Africa.

In the context of this devastating epidemic, an attempt should be made to build on the existing systems, and provide support services for land tenure that underpin and support strong social networks and inter household co-operation. Further disruption to land systems could potentially destroy the social fabric that is often keeping affected households afloat. From other studies and the land literature in general, it is evident that in many countries there is a lack of cohesion between planning and implementation of policies, between policy makers, land officials and the communities they serve. There is a need to galvanise research, policy and implementation and to bring these areas together in a more co-ordinated manner to provide a more effective response to HIV/AIDS and its impact on land issues.

In conclusion, it should be acknowledged that the task of formulating modifications in substantive rules of tenure in order to meet the needs of the modern economy, while at the same time ensuring that such modifications do not marginalise the more vulnerable groups, is an extremely difficult challenge. Delville has recognised such challenges in his paper. This response is intended to build on Delville's outline of processes of transition, emphasising in particular the definite need for more information around the impact of HIV/AIDS on diverse systems of land rights. Far more research and thinking is needed in order to make informed recommendations around policy reforms pertaining to land rights that would result in HIV/AIDS sensitive land policies that are effective in reaching their objectives.

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