



PROPERTY RIGHTS BELONG TO ALL

WOMEN AND PROPERTY RIGHTS
IN SUB-SAHARAN AFRICA

 **IRR**
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The power of ideas

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The cover image is of Edith Mmusi, Bakhani Moima, Jane Lekoko, and Mercy Ntsehkisang; their resistance to their eviction was a landmark event in affirming women's property rights in Botswana. An account of this case is provided in this report.

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TABLE OF CONTENTS

PROPERTY RIGHTS BELONG TO ALL: WOMEN AND PROPERTY RIGHTS IN SUB-SAHARAN AFRICA.....	4
Introduction.....	4
Women’s property rights in Africa, officially speaking.....	4
...and in reality	6
Pushing for progress.....	9
Turning to the courts	9
Beyond the law	11
Moving forward	12
Concluding thoughts	13
<i>References.....</i>	13

PROPERTY RIGHTS BELONG TO ALL: WOMEN AND PROPERTY RIGHTS IN SUB-SAHARAN AFRICA

Introduction

Where a part of a population is marginalised and unable to participate in the economic life of the society in which it lives, it is not only those who are so affected who pay the price for it. Ultimately, by restricting or undermining any potential contributions, the whole of society is left at a disadvantage – poorer in wealth never created and forgone, or in innovations and ideas never conceptualised. It also erodes the sense of participation and citizenship upon which democracies depend.

Writing in one of his weekly letters during Women's Month, South African president Cyril Ramaphosa declared that it was part of his government's agenda to ensure that women had 'access to productive resources such as land', and that this would feature prominently in the country's land reform efforts.¹ In saying this, he referred to the United Nations' *Generation Equality Initiative*; this is intended to enhance the position of women and 'ensure equal participation in political life and decision-making in all areas of life.'²

The notions of participation and decision-making are important here. They speak to something more profound than assets, or mere 'access' to them. Rather, what is implied are systems, institutions and agency. The concept at issue here is women's property rights.

Property rights – the institution that defines the ownership and use of assets – is a critical locus of inclusion and exclusion in any society. Who may hold and benefit from assets, on what terms, and how this is recognised and valued by others are profoundly important questions. They influence and can determine economic opportunities and social status. Yet, for millions of women across the world, property rights are restricted relative to men – or are denied them altogether.

It is an issue that holds particular significance for Africa, and the Sub-Saharan region, which is the focus of this study. Overall, the world's poorest and least developed region, it is also one of hopeful aspirations. Achieving these, and allowing all of Africa's people to share in this future, will require that the energies and imagination of all the continent's people are empowered to play a role in constructing it. At present, gender inequalities in the Sub-Saharan African region – as measured by the Gender Inequality Index in the United Nations Development Programme's *Human Development Report*³ – are more pronounced than any other on the planet.

This publication explores this issue from the perspective of property rights, and the disadvantages that Africa's women experience in this regard. It seeks to understand how and in what way women in Africa are unable to exercise, or are restricted in exercising, property rights. It is an often difficult and frustrating account, but there are indications – some long in the making – of positive change. These will be explored too.

Women's property rights in Africa, officially speaking...

'Gender equality' is arguably one of the least controversial issues on Africa's governance and development agenda, at least in an ideological sense. The African Union has repeatedly endorsed it, it is codified in various instruments, and is a high-profile theme in the continent's governance assessment system, the African Peer Review Mechanism (APRM).⁵ In a 2016 discussion paper by Ugandan president Yoweri Museveni, 'gender chauvinism' was flagged prominently as a 'bottleneck' for the continent's development.⁶

The normative importance of this aside, there is further a large body of evidence on the practical and developmental importance of women's property rights. These include the impact on family nutrition when

these are improved,⁷ and the opening up of opportunities for off-farm entrepreneurship.⁸ On the health improvements, one analysis found: ‘Land rights create greater investment in agriculture, water, and sanitation, which subsequently improves food security and health. Property rights give women and children a secure place to live, as well as rental and entrepreneurial income, bringing physical and financial security that benefits child health.’⁹

Despite this, the position of women’s formal, legally defined property rights remains variable across the continent, and in general somewhat below that of men. The World Bank’s *Women, Business and the Law* index tracks a number of indicators of women’s ability to participate in economic activity, one of which (this part of the index is headlined ‘Assets’) is essentially a measure of property rights. The constituent elements of the ‘Assets’ index are set out below.

Women’s formal property rights in Sub-Saharan Africa						
Country	Do men and women have equal rights to immovable property?	Do sons and daughters have equal rights to inherit assets from their parents?	Do female and male surviving spouses have equal rights to inherit assets?	Does the law grant spouses equal administrative authority over assets during marriage?	Does the law provide for the valuation of non-monetary contributions?	Score out of 100
Angola	Yes	Yes	Yes	Yes	Yes	100
Benin	Yes	Yes	Yes	Yes	No	80
Botswana	Yes	No	Yes	Yes	No	60
Burkina Faso	Yes	Yes	Yes	Yes	Yes	100
Burundi	Yes	No	No	Yes	Yes	60
Cabo Verde	Yes	Yes	Yes	Yes	Yes	100
Cameroon	No	Yes	Yes	No	Yes	60
Central African Republic	Yes	Yes	Yes	Yes	Yes	100
Chad	No	Yes	Yes	No	Yes	60
Comoros	Yes	No	No	Yes	No	40
Congo, Dem Rep	No	Yes	Yes	No	Yes	60
Congo, Rep	No	Yes	Yes	No	Yes	60
Cote d’Ivoire	Yes	Yes	Yes	Yes	Yes	100
Equatorial Guinea	No	Yes	Yes	No	Yes	60
Eritrea	Yes	Yes	Yes	Yes	Yes	100
Eswatini	Yes	No	No	Yes	Yes	60
Ethiopia	Yes	Yes	Yes	Yes	Yes	100
Gabon	No	Yes	Yes	No	Yes	60
Gambia, The	Yes	No	No	Yes	Yes	60
Ghana	Yes	Yes	Yes	Yes	No	80
Guinea	Yes	Yes	No	Yes	No	60
Guinea-Bissau	No	Yes	Yes	No	Yes	60
Kenya	Yes	Yes	No	Yes	Yes	80
Lesotho	Yes	No	Yes	Yes	Yes	80
Liberia	Yes	Yes	Yes	Yes	No	80
Madagascar	Yes	Yes	Yes	Yes	Yes	100
Malawi	Yes	Yes	Yes	Yes	Yes	100
Mali	Yes	Yes	Yes	Yes	No	80
Mauritania	No	No	No	No	No	0
Mauritius	Yes	Yes	Yes	Yes	Yes	100
Mozambique	Yes	Yes	Yes	Yes	Yes	100
Namibia	Yes	Yes	Yes	Yes	Yes	100
Niger	No	No	No	Yes	No	20
Nigeria	Yes	Yes	Yes	Yes	No	80
Rwanda	Yes	Yes	Yes	Yes	Yes	100
Sao Tome and Principe	Yes	Yes	Yes	Yes	Yes	100
Senegal	Yes	No	No	Yes	No	40
Seychelles	Yes	Yes	Yes	Yes	No	80
Sierra Leone	Yes	Yes	Yes	Yes	No	80
Somalia	Yes	No	No	Yes	No	40
South Africa	Yes	Yes	Yes	Yes	Yes	100
South Sudan	No	Yes	No	Yes	No	40
Sudan	Yes	No	No	Yes	No	40
Tanzania	Yes	No	No	Yes	Yes	60
Togo	Yes	Yes	Yes	Yes	No	80
Uganda	Yes	No	No	Yes	No	40
Zambia	Yes	Yes	Yes	Yes	No	80
Zimbabwe	Yes	Yes	Yes	Yes	Yes	100

An overall score of 100 in this area would denote that, with respect to holding and owning property, women and men are on an equal footing. Across the world, some 40% of economies impose some discrimination on women in this regard.¹¹ Across the 48 countries in Sub-Saharan Africa, meanwhile, the proportion is fully two-thirds.

The most common issue is a failure to recognise non-monetary contributions. This would include such activities as childcare or other notional ‘woman’s work’ – and their lack of recognition as part of an economic contribution places women at a large disadvantage where, for example, marriages fail and estates are divided. This is lacking in 19 countries. Ten countries have discriminatory property ownership regimes, while 13 do so in inheritance rights for children, and 13 in respect of spouses. Eight countries grant differential rights to spouses in respect of control of family property.

In many instances, a combination of these factors coexist. In eight of them – Comoros, Mauritania, Niger, Senegal, Somalia, South Sudan, Sudan and Uganda – three or more exist simultaneously. In Mauritania, each of the five are found, giving it the lowest score for women’s property rights on earth.

In addition, each of the five North African countries included – Algeria, Egypt, Libya, Morocco and Tunisia – lacked equal treatment on three of the five measures.¹²

These findings broadly match those of the International Property Rights Index. Drawing on data from the Organisation for Economic Cooperation and Development, it examines factors with a bearing on women’s property rights, and discrimination across genders, such as access to land, access to credit and inheritance. The results for Sub-Saharan Africa are not encouraging. No Sub-Saharan African country ranks in the top two quintiles. Only five – Botswana, Ghana, Mauritius, Rwanda and South Africa – are ranked in the third quintile. The remaining countries are in quintiles four and five, and most of them rank in the latter quintile.¹³

Removing discrimination with regard to property rights for women from countries’ constitutional and legal systems remains a work in progress.

All of this suggests that removing discrimination with regard to property rights for women from countries’ constitutional and legal systems remains a work in progress. For example, the index shows that large gaps continue to exist in Uganda – a country whose leadership has emphasised gender equality and women’s participation and reserves parliamentary seats for women. Yet its legislation around marriage, divorce and marital property has been under review since 1964, and works to the disadvantage of the country’s women.¹⁴

There has certainly been ongoing improvement, as in the 2019 change to the marriage laws of Côte d’Ivoire, to grant equality between spouses in the management of marital property.¹⁵ More needs to be done. In a 2015 report, the African Development Bank commented: ‘Exceptions to the principle of non-discrimination are widespread in African constitutions and legislation. In areas such as marital property, inheritance, land ownership and labour, women are treated as less than full citizens.’¹⁶

More concerning, though, is that the index tracks only the formal legal position; it does not consider the state of actual implementation, nor the impact of authority systems outside countries’ constitutional and legal orders. The realities for women’s property ownership are far more restrictive.

...and in reality

One of the most important insights into governance in Africa is the importance of informal processes. As the late Patrick Chabal crisply put it: ‘Despite the formal political structures in place, power transits essentially through the informal sector.’¹⁷ It is a reminder that the visible, legally described systems that exist (and that are measured through such indices as those discussed above) do not represent the day-to-day experiences under which millions of Africa’s women live. This is not only relevant for the conduct of politics

on the continent, but for the manner in which much authority is wielded. This is the case too with regards to property rights.

As markets in land have developed, the need to prove claims of ownership has become increasingly important.¹⁸ Yet a key problem is simply that the systems necessary for the legal protection of property rights – registries and so on – are frequently deficient. Merely registering ownership of a piece of property or obtaining the documentation for it can be a difficult process. A study of the findings related to land and landholding in the Country Review Reports (CRRs)¹⁹ compiled by the APRM has this to say:²⁰

The CRRs demonstrate that this is a widespread malady across Africa. In Ghana and Nigeria, obtaining documentation, such as title deeds, is an arduous process, demanding time and causing frustration – with the Nigeria CRR adding that this is aggravated by widespread corruption. It is not uncommon for officials to demand bribes to supply necessary documents. In Zambia, processes associated with landholding are complex, move slowly and are overseen by an under-capacitated bureaucracy. Information on the distribution of land (what portions are owned by the state and what falls under the control of chiefs) is lacking, as are firm boundaries. Administrative difficulties are likewise noted in the Rwanda CRR.

These difficulties undermine the entire edifice of property rights in Africa. They are, however, especially pertinent to the rights of women, since it is through state policy and legislation – implementation of which assumes a competent bureaucracy – that their rights should, in theory, be safeguarded. And the reality is that practical and administrative hurdles do great harm to women's property rights.

The cultural milieu in which African women live detracts from their legal rights.

Kenya, for example, adopted legislation on property matters in marriage in the past decade (the Matrimonial Property Act of 2013). This defined matrimonial property and guaranteed equal property rights between men and women in marriage, dealing too with polygamous marriages. It also recognised 'non-monetary' contributions. This legislation was intended to provide protection to women in the case of divorce, since it was common for women to be left with nothing. But an analysis of the functioning of the law – based largely on interviews with women who had found themselves in this situation – revealed that courts were often inaccessible (sometimes as a result of sheer physical distance, sometimes because of financial costs) or were unprepared to deal with these issues. Poorly capacitated courts, confusion over which court had jurisdiction, and the application of inconsistent standards and methodologies for determining the division of property by different courts have dogged the law.²¹

In nearby Rwanda, a country whose efforts at expanding the rights and participation of women have been widely recognised as an exemplar of sorts, the practical implementation of legal reforms (particularly as regards land ownership) since the 1990s have been limited. Judicial officers and civil servants are sometimes poorly informed of the changes or are not conversant with the law, or retain chauvinistic attitudes. Women are frequently not aware of their rights.²²

The cultural milieu in which African women live detracts from their legal rights. A commentary on Rwanda makes the following point: 'Although a series of recent laws and policies have increased women's rights to inherit land, own matrimonial property and take decisions in matters of family property, significant barriers remain. Many of these relate to the lack of independence that women have in other areas of life.'²³

This in turn relates to socio-cultural norms. This is a hugely complex and contested area, but a critical one for understanding the property rights of women on the continent, especially as concerns land rights. The continent's statutory systems of law and statehood – which are often in some way linked to the continent's colonial heritage – typically co-exist with customary ones. The latter refers to systems of governance and law authority and rights developed out of long-term practice. A characteristic that many such systems

share across Africa is that property (chiefly land) tends to be accessed through lineage connections, which for women means fathers, husbands and brothers. This is especially significant in rural parts where the authority of the state is likely weaker. Religious law, too, may play a role.

As one study of Mauritania remarked:²⁴

Although gender-neutral laws introduced in the 1980s have resulted in some success, they included no provisions that address existing systems of discrimination in Mauritanian society, including those against women. In practice, furthermore, national laws are often ignored in rural villages in favour of customary law. In many of these communities, land is viewed as someone's property, regardless of official titles, and previous governments did not see the need to formalize the registration process in a transparent and inclusive manner. Consequently, land rights in these communities are not recognized by the state, and there is little recourse for achieving formal recognition of land ownership except through cooperatives and associations. Furthermore, the vast majority of the population lives according to a common system of customary land law that is not recognized by the state, which, in practice, makes the system more problematic.

Indeed, as Fungisai Sithole, Project Officer at the Friedrich Naumann Foundation in Zimbabwe, pointed out, the subtle assumption of male primacy in property ownership is manifested in documents for registering properties (not only to land, but to assets such as vehicles) which do not provide options for inscribing multiple names – even though these may be household rather than individual assets.²⁵

It is important to note that customary systems are diverse and exist within diverse national contexts – some countries recognise them as sources of authority and attempt to align them with national constitutions. The specific implications of individual customary systems for women or their property rights will vary, some being more accommodating to women than others.²⁶ Yet there is widespread recognition that such arrangements often discriminate against women – in property-holding, management or inheritance – or at least provides a justification for discrimination. This plural legal environment has the effect of placing women outside formal guarantees of equality.

The subtle assumption of male primacy in property ownership is manifested in documents for registering properties (not only to land, but to assets such as vehicles) which do not provide options for inscribing multiple names – even though these may be household rather than individual assets.

There are many examples of this. In Côte d'Ivoire, for example, the marriage law referred to above excludes customary marriages. The manner in which women access land – through clan affinity, lineage or marriage – means that discriminatory divorce and inheritance regimes under customary law, as well as control of assets by men, in countries such as Ghana²⁷ and Nigeria²⁸ place women at a disadvantage relative to men. Indeed, the payment of dowries for marriage among the Acholi people of Uganda has been associated with the idea of wives as the property of their husbands and the consequent notion that 'property cannot own property'.²⁹ In Zambia, activists note that women's limited financial resources and the tendency of traditional courts to favour men as a matter of course undermine their ability to defend their rights in these fora.³⁰

In South Africa, a 2018 postgraduate research project at the University of KwaZulu-Natal interrogated the condition of widows living under traditional authority and customary law in KwaZulu-Natal. It described women left destitute as claims to family properties were not recognised – even, sometimes, where wills had been made. It betrayed the equal citizenship that South Africa's constitutional promise was predicated upon.

In a moving address to a workshop that was published in the *Farmer's Weekly*, the author, Bongi Owusu commented:³¹

Even though the Bill of Rights chapter of South Africa's Constitution clearly states that no person may be discriminated against for reasons of race, gender or religion, my research found that, in

many rural areas, local customary laws take precedence over the Constitution. It is as if the traditional leaders are unaware the Constitution exists. While some do know of anti-discrimination laws, for political reasons they choose not to implement them amongst their subjects. I learnt that some traditional leaders choose to ignore the Constitution because they say they were not consulted when it was drafted and that their leadership was therefore ignored and undermined. In KwaZulu-Natal's rural areas, where patriarchal customary law typically prevails, women are often significantly devalued compared with men. In these areas, most traditional leaders, as custodians of customary laws and culture, have normalised discrimination against widowed women in terms of land and other property inheritance and ownership, and this gendered supremacy has a negative impact on the livelihood of women soon after their husbands pass away.

Pushing for progress

Property rights for African women are all too often precarious. Despite the considerable barriers they often face, African women have not meekly acquiesced in this. Strategies to secure women's property rights abound, with varying degrees of success.

Turning to the courts

One obvious and visible strategy is to litigate, to take individual cases to court to demand respect for women's property rights, and the promise of a gender equal future. This is an option made possible by the development of formal constitutional and legal arrangements, which can be appealed to. Three examples help illustrate this – and are worth considering in some detail.

The first example comes from Botswana. Section 3 of its constitution provides a general guarantee of equality on a number of grounds, including gender – although, interestingly, its anti-discrimination provisions (Section 15) do not specifically list this as one of the grounds.³² However, an important ruling in 1992 by the country's Court of Appeal (*Attorney-General versus Dow*) ruled that gender was not a ground excluded from the protections against discrimination.³³

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The case of *Mmusi and Others versus Ramantele*, in 2012 and 2013, revolved around the principle in customary law among the Ngwaketse people which held that the last-born male offspring may inherit his parents' house.

In 2007, a customary court granted an eviction order for the removal of four elderly sisters, Edith Mmusi, Bakhani Moima, Jane Lekoko, and Mercy Ntsehkisang, from their homestead. The customary court found that the sisters' youngest brother was the rightful inheritor, and, though he had predeceased his sisters, had come to an agreement that his half-brother would inherit the homestead. The eviction was sought by the son of the half-brother, Molefi Ramantele. The sisters were given 30 days to vacate the property. On appeal to the Customary Court of Appeal, the sisters lost again.

The sisters then turned to the civil courts, and eventually the matter landed in the High Court. Interestingly (and tellingly), the country's attorney-general opposed the sisters in court, arguing that the public mood was not supportive of the repeal of the (admittedly) discriminatory rule.

In October 2012, the Botswana High Court held that the customary law prioritising male inheritance was not in line with gender equality in the country's Constitution, with the Court of Appeal upholding the decision almost a year later. Obonye Jonas, legal academic at the University of Botswana and practising attorney, commented: 'It is a great stride for the emancipation of women, generally, and within the rules of inheritance in particular. Principally, the case has bolstered the movement of the empowerment of women and gender parity both at home and abroad. It restates the fundamental argument that it is no longer acceptable (if ever it once was) to subjugate the human rights of women under the cloak of culture.'³⁴

A case in Malawi – *Madikhula versus Goba*³⁵ – showed some similarities to *Mmusi*. Malawi's Constitution affirms gender equality, and explicitly does so in relation to property rights.³⁶ When Mary Goba's father died in 2006, she and her mother took over his plot, on which sugarcane was cultivated. The late father had obtained the land – held under customary tenure – in 1988 from the village headman. As part of the government's plan to enhance production, the land was redistributed in 2012 by the village headman. To her surprise, Goba's three hectares were given to someone else – the family's neighbour, Lois Madikhula. This stripped Goba and her mother of their home and their only source of income, the heart of their livelihood. The village headman refused to reconsider.

By imploring other local traditional leaders, Goba managed to get the Nkhunga Magistrates Court to summon the village headman who had expropriated and redistributed her land from under her. On three occasions, the headman failed to turn up to proceedings. When Goba sought further justice, she was told that she needed to buy fuel for the police, so that they could assist her. Once Goba had raised most of the money for the fuel, the traditional headman was duly arrested, but Lois Madikhula paid his bail to have him released from prison. In the absence of the headman, the court then ruled that Goba was indeed the rightful owner of the land. The court even granted a costs order against the headman.

On November 8, 2013, Goba and her mother were served with an injunction from the Mzuzu High Court. Madikhula had convinced the court to bar Goba access to any part of the land. Unable to afford a lawyer and awaiting legal aid, Goba was forced to watch for three years as Madikhula took over the land she, Goba, had inherited from her father.

In December 2016, the Mzuzu High Court found in Goba's favour, concluding that Madikhula had no evidence of having legitimately become the owner of the land. Madikhula immediately launched an appeal. Having travelled the 250km to the High Court, Goba's octogenarian mother told journalists in 2017: 'I don't know if this Madikhula has a human heart. How can he do this to us?'³⁷

One strategy is to litigate, to take individual cases to court to demand respect for women's property rights, and the promise of a gender equal future.

Madikhula managed to keep legal processes going until May 2017,³⁸ when the High Court finally ruled that Goba was the rightful owner of the land. Goba claimed proprietary rights of the disputed land through inheritance from her deceased father. She requested the High Court to declare that she was the rightful owner of the land with exclusive proprietary rights. She further asked for an order of permanent injunction restraining Madikhula from interfering with her constitutional rights to property, and an order for payment of damages for trespass, damages for inconvenience caused by holding on to the land, and costs of the action. All of these were granted.

These circumstances were echoed in another case, this time in Eswatini, that of *Dlamini versus Prince Chief Gasawa Ngwane*.³⁹ Eswatini is a highly traditional society (the continent's only absolute monarchy), but its Constitution recognises gender equality – and also the principle of non-discrimination in 'protection from deprivation of property'.⁴⁰

Ethel Dlamini had been married to Prince Chief Lomahasha since 1977, and lived in Qomintaba Umpakhatsi (administrative region), where her husband had provided her with a field to cultivate. When her husband died, he was succeeded by his brother, Prince Chief Gasawa Ngwane. He proceeded to restrict her access to her field, to prevent a fence from being erected, and even to obstruct the sinking of a new pit latrine.

Dlamini came to the logical conclusion that he was intent on removing her from the land. She complained to the Regional Administrator of the district, but, while awaiting a response, considered herself vulnerable. She therefore sought an interdict from the country's High Court. This was initially unsuccessful, but did succeed on appeal. Despite some flaws in the preparation of the case, the Supreme Court granted

her the interdict, largely on the grounds that it would be essential to do so to protect her dignity.

This was hailed as a remarkable instance of the courts standing up to customary authority – and to a degree, this is true. But the case also demonstrates the limits of the country’s judiciary. The judgment provided temporary relief; the Regional Administrator would still decide the matter. The judgment did not enforce her property rights or dignity as a matter of finality. It is also unclear whether this will serve as a precedent, since the court acted on the facts of the case – Dlamini was an elderly widow. She also had a measure of status as a member of an aristocratic family. These facts may differentiate her from most women in the kingdom.⁴¹

These cases demonstrate that the formal law holds potential to affirm and extend women’s property rights. But they equally point to limitations in this approach. As noted earlier, even if women are aware of their rights, practical access to the courts is challenging. It is notable that in the *Mmusi* and *Madikhula* cases, legal assistance was provided by an advocacy group, the Southern African Litigation Centre.

Laura Nyirinkindi, Regional Vice President (for East and Southern Africa) of the International Federation of Women Lawyers, comments: ‘Among the elites it may have an effect. They can lawyer up. But for ordinary people in rural areas, enforcement is an ongoing issue.’⁴²

Beyond the law

Legal challenges do not happen in a vacuum. An account of the evolution of the legal position on gender equality in Botswana argued that the legal victories in the *Dow* and *Mmusi* cases owe a great deal to mobilisation by women which had demanded change and helped to shift public opinion. The *Dow* case was the culmination of a campaign by a group of educated women, *Emang Basadi* (Stand up, Women!) against the discriminatory provisions of the country’s citizenship legislation.⁴³ The importance of activism and demand-

It has also been the experience of activists that commitment to perceived cultural values runs deep, and can be fiercely protected even by those who are disadvantaged by them.

ing change by activist movements has been noticed elsewhere on the continent.⁴⁴

Moreover, the limitations in the reach of judicial authority outlined in the Dlamini case point to the continued resilience of discriminatory practices. This is by no means confined to Eswatini. It may be true that this reflects cultural inertia, and the self-interest of established elites. Kunda Jesinta of the Zambian Land Alliance – an organisation agitating for land rights and providing paralegal services in that country – comments on this: ‘There are fears that if women demand their land rights, they will lose their husbands – men threaten that “if my wife gets land then the marriage will end”. Most typical rural women are not aware of their land rights.’⁴⁵

But it is also not necessarily a matter of coercion. It has also been the experience of activists that commitment to perceived cultural values runs deep, and can be fiercely protected even by those who are disadvantaged by them.⁴⁶ In Mali, an attempt to revise legislation on inheritance – which had support from the government, from the United Nations, and from activists – faced significant resistance from across the society. A march in the country’s capital city, Bamako, in 2009 attracted around 50 000 protesters. This included many women, for whom the proposed changes were seen as undermining precious religious convictions.⁴⁷

This helps to explain the view that the solution is to be found in using customary law as a means for empowering women and guaranteeing their property rights. This would, in theory, respect the cultural traditions of communities, and also avoid the problem of weak administrative systems. But this would seem still to place women (and particularly those arguably most removed from enjoying property rights) under the authority of systems that had often proven unresponsive to them.⁴⁸ More than this, it creates an uncomfortable reality in which some people are effectively removed from full and equal citizenship of their societies.

This has been a major concern in South Africa – a country which prides itself on the excellence and ‘transformative’ nature of its constitutional and legal orders – in view of proposed legislation affirming the power of traditional leaders.⁴⁹ Observers have linked this legislation to political calculations by the ruling party that it cannot afford to alienate traditional leaders.⁵⁰

Political calculations have stood in the way of achieving gender equality, even where gender equality is an announced goal of governance. In Uganda, for example, the expansion of the political participation of women has not been sufficiently matched by reform of the legal and socio-cultural environment. Marriage, inheritance and succession continue to disadvantage women. The government has been reluctant to intrude on this aggressively, largely owing to fears of alienating traditional authorities and the established cultural orientation of many Ugandans, as well as the influential religious institutions. Women parliamentarians, meanwhile, meet in a caucus and have attempted to push these issues. But they have found limited support within their respective parties to get such legislation passed; the country’s politics tends to be dominated by an ‘old boys club’ who are indifferent to these issues. Two important pieces of legislation that would address (among other things) discriminatory property rights – the Marriage and Divorce Bill and the Succession Act – were not supported by any major party.⁵¹

From a different perspective, calls for the expansion of statutory property rights – in the sense of the titling of land – have been made so as to ensure that women are able to hold their assets under the protection of the law and beyond the reach of the discretion of traditional authorities and customary law. This idea has been received sympathetically by some activists, although the underlying assumptions of male primacy have shown themselves in this area too. Laura Nyirinkindi comments that in Uganda this has often been done in the name of the ‘head of household’ – typically a male – who is then empowered to alienate or mortgage it. This has led to the loss of livelihoods to families through reckless behaviour by the legal owner,

Firstly, it is important to continue to acknowledge the importance of constitutional and legal reforms. Even though these remain incomplete and often unimplemented, they provide a critically important platform from which to demand equality in property rights for women.

or the sale of the family property (without the consent of the wife) where companies are seeking to acquire land for investments or mineral extraction.⁵²

Taken together, the situation (and enduring challenges) for women and property rights across the continent is perhaps well captured by the following comment from a study of three countries in East Africa:⁵³

Legal pluralism, poor legal infrastructure, low awareness and limited administrative and technical capacity pose challenges to implementing statutory law which in some cases (such as Rwanda) has a strong gender-equalizing intention. In Uganda and Kenya patriarchal customary law prevails in practice, with consequences for tenure rights and access to land more generally, property rights within and upon dissolution of marriage and laws of succession. Here, however, the praxis of the customary is enabled by the lack of legal enforcement, in turn engendered by corruption and the lack of political interest at the central level.

Moving forward

What then does this suggest about the prospects for advancing women’s property rights?

Firstly, it is important to continue to acknowledge the importance of constitutional and legal reforms. Even though these remain incomplete and often unimplemented, they provide a critically important platform from which to demand equality in property rights for women. To the extent that they establish formal commitments to gender equality and the property rights of women is something that cannot be overstated. The continent’s courts – again, whatever their limitations – provide a forum for relief to individual applicants, for challenging laws that are misaligned with national constitutions, and for setting useful legal precedents.

Secondly, the intensely political nature of striving for women's property rights needs to be recognised. Changing policy requires activists to explain their positions, mobilise support for them and to counter the inevitable resistance and hostility they will encounter. Part of doing so may be to rethink some of the assumptions that have animated policy thinking on gender equality. Laura Nyirinkindi suggests that it is time to think beyond 'critical mass' and look at 'critical actors' – in other words, not to rely on expanding women's representation in politics, and rather on the commitment and energy of individual activists and activist groups.⁵⁴

This is all the more to be expected when the politics involved crosses into customary, traditional or religious realms. To attempt to change this is often to challenge deeply entrenched and powerful systems of authority that are backed by a strong sense of community identity.

This requires, in effect, two connected interventions. One of these is to seek allies within traditional structures and communities who are receptive to change, to influence it from within. This, incidentally, does not inherently exclude traditional leaders themselves – in Malawi, for example, the latter have done much to combat child marriage. The second is driving change through education. Fungisai Sithole argues that this should be done at school level. She says that children should be taught to understand that it is possible to be proudly African in a cultural sense and to embrace equality between the sexes – and so, seeing African women as property owners is just and right, and should be unexceptional.⁵⁵

Thirdly, the move to register land rights is a positive development, and holds promise for women. A move to full titled ownership should be encouraged, although with the understanding that more robust, user-friendly systems will need to be developed. Implementing this, meanwhile, needs to be done with due respect for the social realities of African households, particularly avoiding the 'head of household' mistake, and making it possible for husbands and wives jointly to register their holdings.

The move to register land rights is a positive development, and holds promise for women.

Concluding thoughts

For millions of women in Africa, control over their assets remains precarious. Whether for pragmatic and practical reasons – for livelihood and for economic opportunities – or for reasons of justice, this must change. This is the case both in both statutory and traditional systems. The argument that the subordination of women's property rights is justified on grounds of culture must be rejected. As Kunda Jesinta put it: 'Women's land rights are human rights; as such any custom that hinders women from enjoying their land rights is retrogressive and should be reviewed or abolished.'⁵⁶

Happily, there is a great deal of pushback on this, by activist groups and by ordinary women on the continent, in both high-profile and everyday assertions of their rights. Rhetoric aside, it is something that is not adequately supported by governments, for the latter have not always shown themselves willing to invest the political capital and alienate entrenched interest to do so. This will be a long-term process, and deserves the support of all committed to a brighter future for the continent.

None of this – property rights for women – will be possible if property rights are not themselves first recognised for the crucial institutions that they are. To call, as South Africa's president does, for 'access' to land (rather than explicitly acknowledging ownership) implicitly communicates a distrust of this idea. Property rights are beneficial for economies and are part of a human rights culture. Suitably applied, women will benefit from them.

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