



Women's Land Rights and Extractive Industries in Southern Africa

Edited by: Claude Kabemba, Edward Lange and Masutane Modjadji



CONTENTS

Page No.

ACKNOWLEDGEMENTS	4		
CONTRIBUTORS	5		
FIGURES AND TABLES	9		
ABBREVIATIONS	10		
FORWARD	12		
Introduction	14		
PART 1: CUSTOMARY LAND, WOMEN'S LAND RIGHTS AND EXTRACTIVE INDUSTRIES	16		
Institutional frameworks for the management of customary land, and the impact on women's land rights by Patricia Kameri-Mbote	16		
Large-scale agricultural investments on customary land in Southern Africa: Rural development or violation of women's customary land rights? by Phillan Zamchiya	33		
The impact of Privatisation of Customary Land and its Implication for Women: The case of Kalumbila Mine in Zambia by Chuma Himonga and Doctor Tinenenji Banda	42		
Marriage and succession regimes in Southern Africa: Has law reform addressed the rights of women and girls to customary land? By Anneke Meerkotter, Brigadier Siachitema and Tambudzai Gonese-Manjonjo	53		
Legacy impacts of lead mining and Climate Change on women's land rights and climate change: The case of Kabwe mine in Zambia By Liseli Lisulo	84		
PART 2: COUNTRY PAPERS	97		
Angola: Overview of Women's land rights and extractive Industries By Rev. Josefina I. C. Sandemba	97		
Botswana: Overview analysis of women's land rights and extractive industries (diamond mining) By Chanda Fidelia Mutale	105		
		Eswatini: Overview of Women's land rights and extractive industries By Mandisa Mcanyana	112
		Lesotho: Overview of Women's Land Rights and the Extractive Industries By Booï Mohapi	129
		Madagascar: Overview of women's land rights and extractive industries, the case of artisanal and small-scale mining in Sakaraha (south west region) By Harisoa Eulalie Tanteliniony	134
		Malawi: Overview of Women's land rights and the extractive industries By Kossam Munthali	150
		Mozambique: Overview of Women's land rights and extractive industries By João Nhampossa	165
		Namibia: Overview analysis of women's land rights and extractive industries in Kunene Region By Chanda Fidelia Mutale	184
		South Africa : Overview of women's land rights and extractive industries: By Khethokuhle Khuzwayo	197
		Zambia: Overview analysis of women's land rights and extractive industries By Dyles Mbewe	222
		POLICY RECOMMENDATIONS	231
		CONCLUSION	232

ACKNOWLEDGEMENTS

The Women's Land Rights and Extractive Industries in Southern Africa report has been prepared jointly by the Advancing Rights in Southern Africa Programme (ARISA) in partnership with the Southern Africa Resource Watch (SARW). The team was led by Claude Kabemba and included Georges Bokonde and Edward Lange and Masutane Modjadji from SARW who worked hand in hand with the ARISA team led by Tiseke Kasambala and Roshnee Narrandes. The work would have not been accomplished without the unwavering support and commitment from the researchers including institutions such Southern Africa Litigation Centre, University of Zambia -Law School, Institute for Poverty, Land and Agrarian Studies. To our unsung heroes, the participants of the planned regional round table who include the various actors in the civil society, research institutions and community activists working to protect or promote the land rights of women, local marginalised communities, and extractives.

This report is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of ARISA and SARW and do not necessarily reflect the views of USAID or the United States Government.

Published: March 2021

Southern Africa Resource Watch

President Place, 1 Hood Avenue / 148 Jan Smuts Avenue (corner Bolton Road)
Rosebank, PO Box 678, Wits, 2050, Johannesburg, South Africa

www.sarwatch.org

Edited by: Claude Kabemba, Edward Lange and Masutane Modjadji

Design and Layout: Charcoal Ink

Cover Photography: Phil Dolby

COPYRIGHT STATEMENT

© SARW (2021) & © ARISA (2021)

This publication was produced by the Southern Africa Resource Watch (SARW) and Advancing Rights in Southern Africa (ARISA). Copyright is vested in SARW and ARISA. This publication can be reprinted in whole or in part as long as correct attribution is followed.

CONTRIBUTORS:

Prof. Chuma Himonga

is a Professor of Law at the School of Law, University of Zambia (UNZA) and a Professor of Law Emeritus, University of Cape Town where she worked until her retirement in 2017 and a member of the College of Fellows of the University of Cape Town.

Dr. Tinenenji Banda

is a lecturer in the Private Law Department of the University of Zambia and currently serves as Assistant Dean for undergraduate studies at the School of Law. A dual-qualified attorney (New York and Zambia), she completed her doctoral studies at Cornell University in 2016 and holds LLM and LLB degrees from Cornell University and the University of Cape Town, respectively. She is a member of the Board of Trustees of the African Forum on Debt and Relief (AFRODAD) and a Research Fellow at the Southern African Institute of Policy and Research (SAIPAR).

Prof. Patricia Kameri-Mbote

is a Professor of Law and the Dean of the School of Law, University of Nairobi. She is an advocate of the High Court of Kenya and was conferred the rank of Senior Counsel in 2012. She previously served as chair of the Department of Private Law and Acting Dean at the School of Law, University of Nairobi. She has also served as the Director of Research and Policy Outreach and acting Executive Director at the African Centre for Technology Studies, Nairobi.

Anneke Meerkotter

is the Litigation Director at the Southern Africa Litigation Centre (SALC) and previously worked as the Executive Director at the Tshwaranang Legal Advocacy Centre. She has specialised in public interest litigation and advocacy on gender-based violence, sex worker rights, rights of people living with HIV, sexual and reproductive rights, access to justice and child justice.

Brigadier Siachitema

is a lawyer at the Southern Africa Litigation Centre (SALC) and has over 7 years of experience on litigating land rights disputes, property grabbing and gender-based violence (GBV). Prior to joining SALC, he spent 6 years as an advocate at the International Justice Mission (IJM) protecting indigent victims (mostly widows and orphans) of succession and inheritance land rights violations in Zambia. At IJM, he trained and equipped over 8,000 police officers, prosecutors, magistrates, church leaders and community members at over 800 training events in responding effectively to property grabbing and other forms of GBV.

Tambudzai Gonese-Manjonjo

holds a law degree from the University of Zimbabwe and has practiced law in Zimbabwe since 2004, litigating and advocating for women's rights. She previously worked as a prosecutor, and, among others, prosecuted sexual offences and other offences involving violence against women. She has instigated and participated in strategic litigation aimed at law reform, including litigation around criminalization of HIV exposure/transmission. Tambudzai has been working at the Southern Africa Litigation Centre, a regional organisation based in South Africa since 2017 and is the Programme Lawyer heading the Equality Rights Programme. Her work involves using strategic litigation and advocacy to advance Sexual and Reproductive Health Rights, health rights, disability rights and gender equality in the Southern Africa region, providing technical and financial assistance and support to local lawyers and organisations.

Dr. Phillan Zamchiya

holds a Doctor of Philosophy (D. Phil) degree in International Development from the University of Oxford in the United Kingdom. He is currently a senior researcher and the Southern Africa Coordinator for the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape. He is also the academic convener of the post-graduate module on the Political Economy of Land and Agrarian Reform in Southern Africa. His interests focus on elections and democratic transitions in post-colonial Africa and contemporary trajectories of state politics, tenure regimes, gender, rural livelihoods, and agrarian change in Southern Africa. He also works extensively with progressive civil society in Zimbabwe, South Africa, Mozambique, and Zambia.

Liseli Lisulo

holds Bachelor's degree in Development Studies and is the founder and leader of a women's rights group for students at Mulungushi University. She has worked on the *Effects of the E-Voucher System on the Social and Economic Livelihoods of Small -Scale Farmers in Zambia* and was a Social Economic Planner for Ndola City Council. She is currently doing an internship at Southern Africa Resource Watch, Zambia office.

Rev. Josefina I. C. Sandemba

is a pastor and leader of a faith-based movement in Angola with a passion for women's rights and natural resource governance.

Chanda Fidelia Mutale

holds a bachelor's degree in Development Studies and has worked for the Ministry of Community Development as a planner and researcher. Her interests focus on women's rights.

Mandisa Mcanyana

is a lecturer of Law at the University of eSwatini and a researcher and community worker.

Booi Mohapi

is the Executive Director of the Lesotho Catholic Commission for Justice and Peace, which specializes in social research and advocacy.

Harisoa Eulalie Tantelinony

has a background in geography and Master's in Environmental Management from the University of Queensland/Australia. Her strengths are stakeholder liaison and community capacity building in environmental and social issues relating to vulnerable communities in extractive industries with specialized experience in the mining and natural resources sector. She has more than 16 years of experience working directly with a range of stakeholders focusing on empowering marginalised communities, especially women and vulnerable groups by supporting community-based structures leading to self-sufficient local organizations.

Joao Nhampossa

Is a senior human rights lawyer duly registered with the Mozambican Bar Association and has experience in litigation, legal assistance to the local communities, including the destitute and other vulnerable groups, affected by business in Mozambique. He has done a short course on Mining, Oil & Gas and Power with the African Legal Support Facility (ALSF) in October 2018. He is currently the coordinator of the Land Grabs & Community Rights Project at the Mozambican Bar Association which works on extractive industry and agribusiness in Mozambique.

Kossam Munthali

is the chairperson of the Natural Resources Justice Network in Malawi and is an activist and researcher.

Dyless Mbewe

is a Project Officer at the Zambia Land Alliance and is involved in community mobilization, education and research on land rights matters.

Khethakuhle Juba Khuzwayo

is a social scientist who holds a Masters' Degree in the Social Sciences from the University of KwaZulu-Natal and holds a B.A Degree in Psychology (Andrews University, Michigan), a Psycho-social Evaluation Certificate (INCORE, Northern Ireland) and an Advanced Trauma Counselling certificate (South African Institute of Traumatic Stress). She has been working in research, gender-based violence, trauma, fundraising and project management in the NGO sector in South Africa for nearly 20 years. Recently she worked in the land and food security sectors. She has written journal articles and made numerous presentations at workshops- both locally and internationally in the area of trauma, conflict, women and land as well as peace-building. She was previously involved in coordinating high level regional cleansing ceremonies that have had an impact on peace and reconciliation processes in KwaZulu-Natal. Presently she is pursuing her PhD exploring the "Trans-generational Transmission of Apartheid Trauma and its wider Societal Impact" and is extensively involved in women's rights issues, having a soft spot for the abused and vulnerable girls.

FIGURES AND TABLES

Page No.

Table 1: Gender critique of regulatory instruments	37
Map 1: Map of Atsimo Andrefana	136
Photo 01 Training provided to women's group "Roakemba mahavelom-po" focused on (1) association life, entrepreneurship in 2019, (2) gemstone faceting and polishing in 2018, (3) custom jewellery in 2016 / By Eulalie	142
Figure 1: Environment destroyed by Mwabulambo Coal where women used to draw water and farming	154
Figure 2: "The pipes were right by my house, {with running water} in the kitchen and bathroom, and then they destroyed everything" said Nagomba E. (75) resident of Mwabulambo, a village in Karonga District-Northern Malawi. As an old woman I find it very difficult to walk to the river all the time." © 2016 Lauren Clifford-Holmes for Human Rights	155

ABBREVIATIONS

ADB-African Development Bank
 ADB-African Development Bank
 ARDA- Agriculture Rural Development Authority
 ARISA-Advancing Rights in Southern Africa
 ASM-Artisanal and small-scale mining
 ASM-Artisanal and small-scale mining
 AU-African Union
 BBEE- Broad Based Economic Empowerment
 BEAC-The Business and Economic Advisory Council
 CEDAW-Convention on the Elimination of All forms of Discrimination Against Women
 CEDAW-Convention on the Elimination of all forms of Discrimination Against Women
 CEEC-Energy Efficient Communitation
 CKGR-Central Kalahari Game Reserve
 CKGR-Central Kalahari Game Reserve
 CLTP-Communal Land Tenure Policy
 COMESA- Common Market for Eastern and Southern Africa
 CPAs-Communal Property Associations
 CSO- Central Statistics Office
 CSOs-Civil society organisations
 DMRE-Department of Mineral Resources and Energy
 EDD-The Economic Diversification Drive
 EIAs-environmental impact assessments
 EITI-Extractive Industries Transparency Initiative
 ESF-Environmental and Social Framework
 FGM- female genital mutilation
 FISP-Farmer Input Support Programme (FISP)
 FPIC-Free Prior Informed Consent
 GDP- Gross Domestic Product
 GMB-Grain Marketing Board
 IBAs-impact and benefit agreements
 ICESCR-International Covenant on Economic, Social and Cultural Rights
 ICOME-Institute for Community Mobilisation and Empowerment
 IFAD-International Fund for Agricultural Development
 ILC=International Land Coalition

ILUAs-indigenous land use agreements
 IPLRA-Interim Protection of Informal Land Rights Act
 LPR-National Land Policy Review³²
 LSLBI- Large-Scale Land-Based Investments
 LSLIBI-Guiding Principles on Large Scale Land Based Investment in Africa
 MGECW-Ministry of Gender Equality and Child Welfare
 MHSA-Mine Health and Safety Act
 MPRDA-Mineral and Petroleum Resources Development Act
 MRC-Minerals Resource Commodities
 NEPAD- New Partnership for Africa's Development
 NGMP -The National Gender Mainstreaming Programme
 NGOCC-Non-Governmental Organisation Coordinating Council
 NLACW-National Legal Aid clinic for Women
 NRJN-Natural Resources Justice Network
 OECD-Organisation for Economic Co-operation and Development
 PRAI-Principles for Responsible Agricultural Investment
 RBHD-Rhodesian Broken Hill Development Company
 RBHD-Rhodesian Broken Hill Development Company
 SADC- Southern Africa Development Community
 SARW- Southern Africa Resource Watch
 SDGs-Sustainable Development Goals
 TEM-Transworld Energy Mineral Resources
 TLGFA-Traditional Leadership and Governance Framework Act
 TNCs-transnational corporations
 UN -United Nations
 UNCTAD-United Nations Conference on Trade and Development
 UNDAF-United Nations Development Assistance Framework
 UNDP- United Nations Development Programme
 UNEP- United Nations Environmental Programme
 WFC-Women for Change
 WHO-World Health Organisation
 WHO-World Health Organisation
 ZCCM-Zambian Consolidated Copper Mines
 ZLA-Zambia Land Alliance
 ZNWL-Zambia National Women's Lobby Group

FORWARD

The global discourse on the social economic impact of extractive industries has emphasized the significance of women's rights in reforms addressing the effects of natural resource extraction on communities. The importance of a feminist perspective in such efforts cannot be overstated, in the face of the negative impacts that the extractives industry has wrought on women and their access to resources such as land. Southern Africa is no exception. The region's large mineral resources and discoveries of oil and gas reserves whilst widely touted by governments and multi-national corporations as the key to development, pose a significant threat to women's social and economic empowerment. Wide-scale mining and the industrialization of agriculture have already severely impacted communities, particularly women leaving them food insecure and displaced from their land.

The UN has regularly expressed concern about how the rush for land and extracted resources has led to violations against women in relation to their rights and access to land. In Southern Africa, large-scale land grabs have displaced communities without due compensation; and extractive industries have encroached on indigenous and communal lands. Women who already face patriarchal challenges in access to land and property because of discriminatory laws and practices at all levels have been the most harshly affected. Whilst communities in general have felt the impact of extractive industrialization such as loss of land, evictions, environmental degradation, food insecurity, and social disruption, the gendered nature of these effects must be highlighted.

Projects engaged in land-consuming industries such as extractives, agribusiness and dam construction, impact women and men differently, and affect women more negatively. Despite constituting the majority of people living in rural areas and representing a large proportion of those working on land for subsistence, women are rarely consulted when access to their land is negotiated nor during compensation processes. Where there is compensation, it is often paid directly to men. Evictions and land displacement also place women at heightened risk of sexual and gender-based violence and pollution of water sources forces women to travel further to access clean water.

Women also face additional barriers in seeking access to effective remedies when their rights have been violated. Most remedial mechanisms operate within existing patriarchal norms, ignoring the particularities of the obstacles women face and often deprive women of their agency to seek enforcement when remedies are provided. At a local and communal level, women who defend their rights in accessing their resources are often seen as challenging traditional notions of family and gender roles in society, leading to hostility by communities, chiefs, and other officials.

The international human rights framework places an obligation on states to ensure the meaningful participation of people and communities in decision-making concerning their territories, natural resources, and environment. This includes eliminating obstacles to the participation of all affected people in decision-making about control of their territories and resources, including barriers based on gender, race or ethnicity, economic status, or any other factor. It also places an onus on Corporations to ensure that their engagements with affected communities are conducted in good faith and in compliance with international and regional human rights standards, including the International Covenant on Civil and Political Rights, the United Nations Declaration on the Rights of Indigenous Peoples and voluntary initiatives aimed at clarifying the responsibility of businesses to protect human rights, such as the United Nations Guiding Principles on Business and Human Rights. These obligations are often not met nor enforced by governments and Corporations alike.

Through the lens of women's land rights, this publication by the Southern Africa Resource Watch, featuring a series of papers by academics, civil society activists and land rights and environmental rights experts in the region, examines the broader challenges that women face in owning customary land and the impact of the extractives industry on women's land rights. Covering 10 countries in the region, it provides key recommendations for addressing these challenges. It serves as an important guide for governments, policymakers, multi-national corporations, business leaders, civil society activities and citizens in the region on how to ensure that gender justice remains a central issue for extractive sector reform efforts and the realization of women's rights.

Tiseke Kasambala
Chief of Party
Advancing Rights in Southern Africa program at Freedom House

Introduction

Land tenure, access and security are important to the dignity and empowerment of every human being. The main land tenure systems in the SADC region are freehold, leasehold, and communal systems.

Southern Africa is endowed with valuable mineral resources such as diamonds, gold, copper, coal, platinum, and uranium, and some countries also possess large mineral reserves. The extraction of these minerals requires large tracts of land. Women the world over have been at the centre of economic production, including agriculture, livestock and other businesses. However, there are numerous cultural and institutional constraints that women face when it comes to accessing land, and this renders their involvement in most value-bearing aspects of land non-existent. The denial of land rights to women and girls is discriminatory considering that land is a fundamental resource for women's economic empowerment, and land rights are an essential aspect of ending women's inequality within a patriarchal society.

This report is a culmination of several research reports commissioned by Southern Africa Resource Watch (SARW) in partnership with Advancing Rights in Southern Africa (ARISA), to extensively interrogate the land question in the context of protecting the interests of women in the SADC region.

Initially, these research reports were intended to be presented to a regional conference, but due to the challenges caused by the Covid-19 pandemic it has been resolved to compile and publish this thought-provoking body of work apart from the conference. The aim of this initiative is to seek a sustainable solution to land rights that is inclusive of women and to identify the real impact of the extraction of natural resources on women, focusing on the relationship between land and women. The research provides insight into the ways in which women can reclaim and protect their rights.

In Africa, the mainstay of most economies is farming or agriculture and livestock production, and women contribute over 80 percent of the workforce.¹ The rush for these resources has paved the way for large-scale extractive industry and ag-

¹ Ester Boserup, *The Role of Women in Economic Development* (1970).

ricultural projects in the region. These activities have often resulted in adverse impacts on the land rights of adjacent marginalised communities. Laws in several African countries restrict women's full enjoyment of equal rights, especially for married women. SADC customary land tenure dictates that women's direct access to land is only possible through their relationship with men such as their husbands and sons, while the statutory land tenure does not adequately protect women's independent land rights.

This report is, therefore, a mirror that projects the shortcomings of current legal frameworks in their support for women's rights by putting together research reports divided into two sections: main papers and country reports.

The main papers include the following subjects: Institutional Frameworks for Management of Customary Land and Impact on Women's Customary Land Rights; The Privatisation of Customary Land in Zambia: Implications for Women and their Livelihoods in Kalumbila; Marriage and succession regimes in Southern Africa: Have law reforms addressed the rights of women and girls to customary land? Large scale agricultural investments on customary land in Southern Africa: Rural development or violation of women's customary land rights? Legacy Impacts of Lead Mining on Women's Rights and Climate Change in Kabwe.

The second part of the report has attempted to capture local and national perspectives and country overviews, focusing on the following countries: Angola, Botswana, Eswatini, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, and Zambia.

The report brings to the fore some pertinent issues regarding the relationship between the extraction of minerals and the enjoyment of land rights by women. This publication identifies the role played by African customary law and western "received law" with their different norms, regulations and institutions. These two legal systems exist side by side in an uncomfortable (and contested) relationship. The centrality of land to economic prospects and conquests has meant that customary notions of land ownership have undergone significant interference and manipulation, but marriage and inheritance remain the main pathways through which women and girls access customary land in Southern Africa.

Even though many countries in the SADC region have implemented legal reforms to strengthen women's land and property rights, very little has been done to change the patriarchal customs and practices under which customary land is held. Mining activities demand more land, and the associated activities are destructive by nature, contributing to climate change through greenhouse gas emissions, acid water drainage, and damage to land, water, and air. This directly impacts on women's activities in their quest to contribute to food security as crop yields and food quality is affected, thereby threatening household food security.

PART 1: CUSTOMARY LAND, WOMEN'S LAND RIGHTS AND EXTRACTIVE INDUSTRIES

Institutional frameworks for the management of customary land, and the impact on women's land rights

By Professor Patricia Kameri-Mbote

Introduction

Women the world over have been at the centre-stage of economic production, including agriculture, livestock and business sectors. In Africa, where the mainstay of most economies is farming or agriculture and livestock production, women contribute to over 80 percent of the workforce.¹

Laws in several African countries restrict women's full enjoyment of equal rights, especially married women. In 15 African countries, women lack the freedom to choose their domicile, in 35 other countries women are obliged to obey their husbands, while in nine countries women are not able to apply for a passport in the same way as their husbands.² Astoundingly, women constitute two-thirds of the agricultural labour force on the continent, producing the majority of Africa's food yet, they constitute only 15 percent of leaders in agriculture or as owners of the means of production.³ Furthermore, customary land tenure systems widely exclude women from ownership or control of land or restrict their right to inherit

¹ Ester Boserup, *The Role of Women in Economic Development* (1970).

² World Bank, *Women, Business and the Law 2016: Getting to Equal*.⁴

³ *Ibid.*

land, making divorced and widowed women particularly vulnerable to dispossession, even in situations where the formal legal system and state policies provide for gender equality.

Where women have landholdings, these lands tend to be smaller and of poorer quality than those held by men. Women have less access to essential inputs such as land, credit, fertilisers, new technologies and extension services. Thus, their yields tend to be significantly lower than that of men. This kind of inequality has serious consequences on women's economic empowerment and food security.⁴ The African Development Bank notes that while African women are highly entrepreneurial and own a third of all businesses across Africa, up to a high of 62 percent in some African countries, they tend to be necessity entrepreneurs rather than opportunity entrepreneurs.⁵ By deduction, most of these women entrepreneurs are driven into small businesses by the lack of economic alternatives. Significantly, lack of access to credit and financial infrastructure is a big constraint for women entrepreneurs.⁶ This in turn is linked to the absence of clear laws and policies to level the playing field for women. On the other hand, initiatives to eradicate discrimination against women and adopt inclusive governance that guarantees the place of women at the decision-making table have been on the rise from both the international community and individual countries. It is heartening to note that all African countries except two have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁷ and the Protocol to the African Charter on Human and Peoples' Rights on Women's Human Rights (the Maputo Protocol)⁸. Many countries have also enacted constitutional legislation or policy guarantees of equality.

In most parts of Africa, women are closely associated with the production of food and raw materials for the industrial sector. Indeed, women are also more directly involved in small-scale crafts and localised industries, trade and general business. Until recently this has been ignored or obscured in national production statistics.⁹ The place and role of women in economic development have become an issue of concern with the rise in the importance of extractive industries the world

⁴ African Development Bank Group, *Empowering African Women: An Agenda for Action*, Africa Gender Equality Index 2015.

⁵ *Ibid.*

⁶ IDLO, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment* 19 ILM 33 (1980).

⁷ 19 ILM 33 (1980).

⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol Text). African Union; 2003.

⁹ See Society for International Development, *Pulling Apart: Facts and Figures on Inequality in Kenya 2004*.

over. It is not contested that sustainable development and the mitigation of social and cultural devastation associated with mining, oil and gas would benefit from strengthening women's involvement. It is notable however that the discussion on women's role in natural resource management has steadily moved away from the question of participation and involvement to identifying and expanding opportunities for women whose lives are impacted by the industry.

In Africa, where women provide the bulk of agricultural labour (notwithstanding the fact they do not own the land they work on), the link between land tenure and food security is critical. It is noted in the 2015 Africa Gender Equality Index that

Women are more active as economic agents in Africa than anywhere else in the world. They perform the majority of agricultural activities, own a third of all firms and, in some countries, make up some 70% of employees. Over and above their income-earning activities, they are central to the household economy and the welfare of their families, and they play a vital — if sometimes unacknowledged — leadership role in their communities and nations.¹⁰

Not surprisingly, the Maputo Protocol¹¹ provides for the right to food security (Article 15) and requires states to take appropriate action to provide women with land and the means of producing nutritious food. It also provides for the right to sustainable development which entails the introduction of a gender perspective in national development; the participation of women at all levels of decision making; and the promotion of women's access to and control over productive resources such as land.¹² The African Union Agenda 2063,¹³ the strategic framework for the socio-economic transformation of the continent, also includes gender equality in its aspirations. This calls for engendered land tenure systems. These provisions are buttressed in the African Union Solemn Declaration on Gender Equality,¹⁴ which (paragraph 7) calls on governments to actively promote the implementation of legislation to guarantee women's land, property and inheritance rights, including their rights to housing.

¹⁰ African Development Bank Group, *Empowering African Women: An Agenda for Action*, Africa Gender Equality Index 2015 p. 5

¹¹ *Supra* note 8

¹² Article 19.

¹³ *African Union Agenda 2063: The Africa We Want*, African Union 2019.

¹⁴ *Adopted by Heads of State in July 2004, Addis Ababa, Ethiopia.*

This paper looks at institutional frameworks for the management of customary land and their impact on women's customary land rights. My argument is that we cannot address women's rights to land for extractives without assaulting the gendered way in which land is owned, controlled, and accessed. "Extractive industries" is a catch-all term that has come to refer to operations by private or state actors in mining or extraction of natural resources for economic gain, usually on a commercial basis. The dependence on land-based resources by many African nations for economic growth and the livelihood of their people makes land a critical factor of production.

To overlay extractive industries' discussions in a desk research-based paper on institutional frameworks for management of customary land and their impact on women's customary land rights is, in my view, a shot in the dark. We need to understand the frameworks and whether they admit women's claims. With this information, we need to define extractive industries. Both renewable and non-renewable natural resources have been extracted for commercial gain since colonisation. Indeed, colonisation was about the commercial exploitation of resources from the colonies. Forest and wildlife resources have been extracted and sold in international markets, and water has been channelled to other more developed countries in sub-regions or its benefits (such as hydro-electricity and irrigation agriculture) used for export markets. These activities can only be aptly studied through fieldwork and not a desk review. This study therefore focuses on institutional frameworks for the management of customary land and their impact on women's customary land rights as a prelude to what should then follow, namely a choice of specific extractives to focus on and incisively address the question of women's involvement within the customary land governance frameworks. The researcher's hunch is that different issues will arise for different renewable and non-renewable resources.

Part I of this paper comprises the introduction. Part II outlines the theoretical and conceptual basis undergirding women's customary land rights. Part III looks at customary land rights' frameworks in particular Southern African countries and their implications for women's enjoyment of land rights. Part IV concludes the study.

Theoretical and conceptual basis for women's customary land rights

'Tenure' is derived from the Latin word *tenere*, which means to hold, connoting the nature of the relationship that exists between individuals in relation to a specified thing.¹⁵ In particular, tenure denotes the methods by which individuals or groups acquire, hold, transfer or transmit property rights in land.¹⁶ It is a system used to determine who can use land, the period for use, and under what terms and conditions. Tenure is based on official laws and policies and even on informal customs.¹⁷ In essence, land tenure means a system that outlines how land is held by an individual or by the actual user of the land.¹⁸ It stipulates the rights and responsibilities that owners enjoy with regard to their holding.¹⁹

To understand the interface between gender, customary law and tenure, one has to look at gender as a social construct, and particularly at patriarchy and the role that it plays in communities. The patriarchal ordering of many traditional societies provides useful insights into the roles that men and women play in society. It is also critical to look at the legal rules that govern the relations between men and women in society as well as the interface between gender and these rules. In this part, we will look at the concepts of gender, patriarchy, and the legal system. Our aim is to underscore the dominance of men in the traditional realm, and the validation of that dominance in the legal realm.

Patriarchy

In its traditional conception, 'patriarchy' literally means the rule of fathers. However, it goes beyond the "rule of fathers" and includes the rule of husbands, of male bosses, of ruling men in most societal institutions, in socio-political and economic dimensions of the society. The contemporary conceptualisation of patriarchy encompasses all forms of male dominance. Patriarchy is equated to male domination, a system of socio-cultural and legal relations in which men as a class have power over women as a class. These power relations are social constructs and not biological nor natural, and power can be ideological, social, political and economic. The cultural aspect of patriarchy in most cases takes the form of the

¹⁵ E. Field, 'Property rights and investment in urban slums' (2005) *Journal of the European Economic Association*. 3 (2–3): 279–290. [CiteSeerX 10.1.1.576.1330](https://doi.org/10.1111/j.1468-0297.2005.01162.x) doi:10.1162/jeea.2005.3.2-3.279

¹⁶ See H. W. O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991).

¹⁷ Simon F. R. Coldham 'Land-Tenure Reform in Kenya: The Limits of Law' (1979) *The Journal of Modern African Studies*, Vol. 17, No. 4 (Dec., 1979), pp. 615–627 Cambridge University Press <https://www.jstor.org/stable/160742> Accessed: 28-05-2020 08:10 UTC

¹⁸ D. B. Ogolla & J. Mugabe 'Land Tenure Systems', in C. Juma & J.B. Ojwang *In Land We Trust: Environment, Private Property and Constitutional Change Initiative Publishers*, Nairobi Kenya (1996) 85

¹⁹ Ondiege P; 'Land Tenure and Soil conservation: in C. Juma & J.B. Ojwang *In Land We Trust: Environment, Private Property and Constitutional Change Initiative Publishers*, Nairobi Kenya (1996)

devaluation of women's work or achievements, while the ideological aspect portrays women as natural, biological creatures, inherently different and inferior vis a vis men.²⁰ Patriarchy also describes the form of male domination in terms of the household authority of the father. It denotes the historical depth of women's exploitation and oppression. Its contemporary manifestation is capitalism and all its attendant facets, especially in terms of access to and control over a society's productive resources.²¹ Thus conceived patriarchy is a 'struggle concept' that denotes the totality of oppressive and exploitative relations which are viewed from the gender angle.

Patriarchy is the framework within which gendered relations of power are played out, and has assumed a dominant role vis a vis other forms of social organisation to the extent that, even where matrilineal forms of social processes survive, it is the patriarchal power relations which underpin and strongly influence the manner in which men and women live together in such societies.²² It is conceded that, in most societies, male power is embedded and rooted in the maintenance of patriarchal social relations and institutions, which are underpinned by an ideology that defines the adult male as the ultimate decision-maker and controller of material resources and controller (user) of women and children's productive and reproductive capacities. Patriarchy thus refers to a social system where power is centred in the hands of men. From a feminist standpoint, it is an unjust social system that enforces gender roles and is oppressive to both men and women.²³

Gender

The term 'gender' is a neutral term, which accommodates the view that women's issues are part of broad social issues, many of which arise out of basic social-class differences as opposed to purely sexual differences. When one talks about gender today, one is not merely talking about the *physical difference* that being biologically male or female entails. The term 'gender' has increasingly acquired a social meaning where it defines how the male and the female genders relate in society. This is referred to as social constructionism, where the meanings of things are not given and fixed, but rather that society generally informs the way in which people understand various phenomena, and because societies are different the

²⁰ Hanne Petersen, "Discard Yet Embrace-Customary Law", in *Changing Families: Changing Laws*, 1994.

²¹ Signe Anfred, "Gender, Power, Knowledge", in *Changing Families: Changing Laws*, 1994.

²² Patricia McFadden, "Gender, Power, Patriarchy", in *Changing Families: Changing Laws*, 1994.

²³ Vrushali P, "From patriarchy to Intersectionality: A transnational feminist assessment of how far we've really come," (2013) 38 *Signs: Journal of women in culture and society* 847 – 867.

meanings of things or phenomena will differ from one society to the next.²⁴

The social meaning of gender thus refers to social characteristics associated with one's biological sex. These characteristics include the gender-based division of labour, whereby duties are allocated on the basis one's sex. Gender also connotes *social constructions of maleness and femaleness*, which often translate into *power relations* between men and women. Culturally determined patterns of behaviour, which are varied even within the same society, inform the rights, duties, obligations and status assigned to women and men in society (gender roles). Women's studies analyse the condition of women in the society, and when directed to changing of women's condition in the society, give rise to feminist studies. Feminism is a political movement, which aims at transforming gender relations, that are oppressive to women.²⁵ Feminist scholars use gender as an analytical variable denoting the relational way in which women and men are differentiated and ordered in a given socio-cultural context.

Law

Studies on gender and legal change in former African colonies have to take into account that the lives of women and men are affected by a plurality of norms. Legal centralism and legal pluralism are analytical frameworks that provide different understandings of the law. While the former denotes a unified system of rules that are enforced through state machinery, the latter describes a system where the tiered and interactive normative systems operate within a system either within or without the formal state legal system. Legal centralism starts from the standpoint that state law (or state-recognised and enforced law) is the most important normative order and that all other norm-creating and enforcing social fields, institutions and mechanisms are either illegal, insignificant or irrelevant.²⁶

Legal pluralism may be divided into two types, namely juristic and diffuse. Juristic legal pluralism arises in situations where the official legal system recognises several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official legal system provides an operating environment for the plural legal orders. For example, a constitution may provide for the operation of certain religious or customary laws for particular ethnic or religious

²⁴ Hacking I, *The Social Construction of What?* (1999) Harvard University Press.

²⁵ "Feminists Theories and Study of Gender Issues"

²⁶ Pursuing Grounded Theory in Law

groups. In juristic legal pluralism, which is common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders. Diffuse legal pluralism arises where a group has its own rules regulating social behaviour whose operation is neither sanctioned nor emanates from state law. Customary land rights exist alongside state-sanctioned laws in many African countries.

While constitutions increasingly recognise the role of customary law in relations between people, the jaundiced view of colonialists (whose perception of customary law was that it was backward and savage) still survives. As Cousins notes, the promise of the South African government at independence in 1994 to provide secure rights for black South Africans has not been realised, with a majority of South Africans recorded in 2011 as holding land or dwellings outside the formal property system.²⁷ Colonial subjugation of traditional tenure was geared towards extinguishing the claims of prior holders. The colonisers negated pre-existing traditional tenure rights using laws and policies granting settler communities modern tenure rights that were accorded higher status than the traditional ones. Law was used as a sword to wrest colonised communities of rights to their land.²⁸ In this process, assured rights of access to land for women were also annihilated as new forms of ownership were introduced which favoured the dominant members of the community. In many African communities, rights to land related to functions one had in society although overall ownership vested in the community.²⁹

Customary Land Rights

Customary land rights are also referred to as 'communal' rights. They differ from modern tenure systems predicated on individual rights. Snyder notes that customary law is an ideology of colonial domination.³⁰ As a 'law' of small-scale communities, most members of the communities take it for granted as a way of life, which colonisers had difficulty understanding and accommodating. As outsiders, colonisers were either told about or read the content of 'customary law'.³¹ Narrations and documented accounts of customary law were removed from the source

²⁷ Ben Cousins, *Beyond Private Property*, in P. Kameri-Mbote & Collins Odote eds., *The Gallant Academic: Essays in Honour of HWOO Okoth Ogendo*, University of Nairobi School of Law, Nairobi (2017) pp. 79-102 at 81, 83

²⁸ Gamaliel Mgongo Fimbo, *In Search of Thematic Unity in Land Law: Tenure Security*, in P. Kameri-Mbote & C. Odote eds., *The Gallant Academic: Essays in Honour of HWOO Okoth Ogendo*, University of Nairobi School of Law, Nairobi (2017) 59

²⁹ See Krishan M. Maini, *Land Law in East Africa* (1967).

³⁰ F. Snyder, 'The Creation of African Customary Law in Senegal' in Y. Ghai et al *The Political Economy of Law* (Oxford University Press, 1987) 154

³¹ G. R. Woodman 'A Survey of Customary Laws in Africa in Search of Lessons for the Future', in J. Fenrich et al *The Future of African Customary Law* (Cambridge University Press, 2011) pp 9-30

and incorporated biases and preconceptions of the informants or documenters.³² Indeed colonising powers sought to dismantle the traditional customary land tenure system and replace it with their own. This scheme failed, and close to a decade after the first African countries gained independence, many states have operative customary land rights systems.³³ Customary land rights systems are diverse and diffuse.³⁴ The history of subjugation to alien ways of owning land (previously unknown to African communities) developed as colonial and post-colonial states sought to interpret African legal forms through European categories.³⁵ New functions were assigned to community institutions to support the new rights. Alden-Wily, writing about community or customary land rights, notes that

This is a specie of property that exists in sufficiently diverse form and nuance that for many... it is easier to simply stipulate that real property may only exist as an absolute right to an equally absolutely fixed area of land, owned as absolutely by a single individual or registered entity, and regulated as absolutely by fixed provisions of state law administered by state bodies through registration of possession in inherited European forms.³⁶

One major hallmark of customary tenure is the dispersal of rights and entitlements. Unlike the bundling of ownership rights under European systems,³⁷ there is the possibility of rights for different persons or entities subsisting in the same *terra* under custom.³⁸ In some communities, ownership of soil and trees can subsist apart from land ownership.³⁹ The resilience of customary claims to land (despite the onslaught) has resulted in legal systems' provision for them addressing jurisdiction; entitlements; decision-making; and interaction between these rights and those based on European laws.⁴⁰

³² See e.g. Eugene Cotran, *Restatement of African Law* (Sweet & Maxwell 1969)

³³ AU Guidelines on Land Policy.

³⁴ G. R. Woodman 'A Survey of Customary Laws in Africa in Search of Lessons for the Future', in J. Fenrich et al *The Future of African Customary Law* (Cambridge University Press, 2011) pp 9-30.

³⁵ F. Snyder, 'The Creation of African Customary Law in Senegal' in Y. Ghai et al *The Political Economy of Law* (Oxford University Press, 1987) 154.

³⁶ L. Alden-Wily, 'The Fate of Res Communis in Africa: Unfinished Business', in P. Kameri-Mbote & C. Odote eds., *The Gallant Academic: Essays in Honour of HWO Okeoth Ogenio*, University of Nairobi School of Law, Nairobi (2017) 105

³⁷ A.M Honore' 'Ownership' in Oxford Essays in Jurisprudence 107 (A.G. guest ed., 1961.

³⁸ Kwamena Bentsi-Enchill, *Do African Systems of Land Tenure require a Special Terminology?*, 9 J. AFR. L. 114-139(1966).

³⁹ K. Akuffo, 'The Conception of Land Ownership in African Customary Law and its Implications for Development', 2009 17 African Journal of International and Comparative Law 57

⁴⁰ *Ibid.*

Patriarchy and male dominance are a feature of customary tenure systems. Women's land rights are subsumed in the rights within the body politic but are not delineated. Women enjoy their rights through relationships as wives and daughters. These rights are predicated on the subsistence of the relationship. For daughters, there is the expectation that they will get married and move out of their natal homes, and when that does not happen their rights to land are not guaranteed. Courts have had to come in to enforce constitutional equality provisions with respect to land in succession matters where customary law is raised as a barrier to women's rights. In the Kenyan case of *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir*⁴¹ a petition related to the estate of Joel Cheruiyot Korir who died intestate, Rachel Korir protested against the mode of distribution of the estate that discriminated against her and her sisters. The petitioner alleged that minutes of a clan meeting that was held to resolve the issue of inheritance indicated that under Kipsigis culture, girls have no clans until they are married. Further, they have no right to inherit property from their parents once married, and it is trespass for the daughters to be on land owned by their father. The clan, therefore, resolved that no land would be allocated to the married daughters. The judge dismissed the findings of the meeting as they promoted discriminatory practices against women, which contravenes section 38 of the Law of Succession Act providing for equal division of a net intestate estate among surviving children. It also contravened Article 27 of the Kenyan Constitution that prohibits discrimination on the basis of sex. Judge Mumbi Ngugi found that the protest in the case was merited. Accordingly, she ordered that the estate of the deceased to be distributed equally among the eight children of the deceased. The gender-biased determination of the traditional institution (the clan) was reversed by the court.

Institutional forms in different countries

Some countries adopted a uniform national legislative framework to secure customary land rights and set up bodies that administer communal land on behalf of the community members. The law often specified the responsibilities and the powers of these bodies, and the type of land rights that can be granted in the communal lands. This type of system is mainly used in countries that have uniform customary practices such as Namibia and Botswana.

⁴¹ *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir* [2017] eKLR.

In Namibia, the Communal Land Reform Act, 2002, established Communal Land Boards to administer communal lands.⁴² The boards grant and revoke customary rights. Traditional leaders can also grant and revoke customary rights with the approval of the land boards.⁴³ The boards are required to set aside communal land for use by the whole community. They are also authorised to lease out land to other parties. Customary rights exist until death when they revert to the community for redistribution, mostly to spouses and children.⁴⁴ Customary right holders are given certificates as proof of their rights.

In Botswana, the Tribal Land Act provides the framework within which customary land rights are protected.⁴⁵ It creates three types of land rights within tribal lands: freehold, customary, and common law land rights.⁴⁶ It also establishes a system of decentralised tribal land boards (corporate bodies with the ability to sue and be sued) to administer community lands (tribal areas) for the benefit and advantage of Botswana's citizens. Since the enactment of the statute, no freehold titles have been issued in tribal areas. Customary land rights are only available to the citizens of Botswana. They give holders the exclusive right to use a certain portion of land.⁴⁷ Once granted, customary land rights cannot be taken away without just causes. The application for a customary land right is made to a tribal land board. Customary land rights are further secured by the fact that holders can acquire an inheritable customary land certificate. Common law land rights are forms of leases for both Botswanans and foreigners for residential, commercial, farming, or industrial land use. The land rights are mortgageable and transferable.⁴⁸ Common law land rights can be registered under the Deeds Registry Act.⁴⁹

Mozambique allows communities as titleholders to set up their own customary rules and governance structures to oversee the customary land tenure.⁵⁰ The state demarcated each community's boundaries and let it decide the types of

⁴² Rachael Knight, 'Statutory Recognition of Customary Land Rights In Africa An Investigation Into Best Practices For Lawmaking And Implementation' (2010).

⁴³ Anna Knox and others, *Integrating Customary Land Tenure into Statutory Land Law* (2016) <https://land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_PRRG_Integrating_Customary_Land_Tenure_Into_Statutory_Land_Law.pdf> accessed 8 August 2020.

⁴⁴ Andf J. Hoekema, Janine M. Ubink, and Willem J. Assies *Legalising Land Rights. Local Practices, State Responses, And Tenure Security In Africa, Asia, And Latin America* (Leiden University Press, 2009).

⁴⁵ Faustin Tirwirukwa Kalabamu, 'Divergent Paths: Customary Land Tenure Changes In Greater Gaborone, Botswana' (2014) 44 *Habitat International*.

⁴⁶ Rachael Knight, *supra* note 42.

⁴⁷ Anne Griffiths, 'Delivering Justice: The Gendered Changing Dynamics Of Land Tenure In Botswana' (2011) 43 *The Journal of Legal Pluralism and Unofficial Law*.

⁴⁸ Martin Adams, Faustin Kalabamu and Richard White, 'Land Tenure Policy And Practice In Botswana - Governance Lessons For Southern Africa' (2003) 19 *Journal für Entwicklungspolitik*.

⁴⁹ Cap. 33:02.

⁵⁰ Anna Knox and others, *supra* note 43.

rights to allocate to its members. The only restriction on a community power to administer its communal land is the constitutional provision on gender equity. The communities are not allowed to discriminate against people based on their gender.⁵¹ The communities are not allowed to discriminate against people based on their gender.

Most of the other Southern African states do not have a uniform national framework to protect customary rights. In most of these states, a patchwork of laws and the informal recognition of customary rights among residents protect their citizen's customary rights. For instance, in Zambia the independence government continued to recognise chiefs' rights to regulate the use and allocation of trust and reserve land.⁵² In these communal lands, chiefs allocate and revoke customary rights based on the customs of their communities. It can be said that customary rights' security relies on the state of the mind of the chief. Customs, however, play a significant role in regulating how chiefs make their decisions. Overall, studies have shown that customary right holders have security of tenure.⁵³

In South Africa, the constitution requires parliament to enact laws that provide tenure security to communities as noted above. The South African government enacted the Traditional Leadership and Governance Framework Act, 2003, and the Communal Land Rights Act (CLaRA), 2004, to provide a framework in which customary land rights would be protected by law. CLaRA was subsequently declared unconstitutional by the constitutional court.⁵⁴ South Africa, therefore, lacks a unified legal framework to protect customary land rights. This has forced parliament to annually renew the Interim Protection of Informal Land Rights Act of 1996 to protect 17 million residents on communal lands.⁵⁵ The community's customs guide land rights in communal properties. In most of these communities, traditional leaders (such as chiefs) decide how customary land rights are allocated. This system has led to tenure insecurity.⁵⁶ Chiefs have been known to manipulate the customary tenure system to benefit themselves and their associates.

⁵¹ Simon Hull and Jennifer Whittall, 'Filling The Gap: Customary Land Tenure Reform In Mozambique And South Africa' (2018) 7 *South African Journal of Geomatics*.

⁵² Anthony Mushing and Sharon Mulenga, 'Legal Pluralism And Tenure Security: Exploring The Relationship Between Statutory And Customary Land Tenure In Zambia' (2016) 4 *International Journal of Social Science Studies*.

⁵³ Van Loenen, *Land Tenure In Zambia* (1999) <https://www.researchgate.net/publication/242672704_Land_tenure_in_Zambia> accessed 8 August 2020.

⁵⁴ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741

⁵⁵ Yovanka ARI, 'Land, Law And Traditional Leadership In South Africa - Africa Research Institute' (Africaresearchinstitute.org, 2016) <<https://www.africaresearchinstitute.org/newsite/publications/briefing-notes/land-law-and-traditional-leadership-in-south-africa/>> accessed 8 August 2020.

⁵⁶ Ben Cousins, *supra* note 27.

In other areas (such as the former black reserves or Bantustans), the community members have developed informal ways to recognise their customary land rights. Communal Property Associations have been formed to regulate the allocation of customary rights on these lands.⁵⁷

The Zimbabwe Communal Lands Act, 1982, vests all community land (formerly tribal trust land) in the president. The president is allowed to grant user rights on these lands. In practice, headman, chiefs, and ruling party village chairpersons are the ones who allocate user rights on communal lands.⁵⁸ In general, many owners of customary land rights experience land tenure insecurity. Other Southern African countries (such as Lesotho and Swaziland) recognise customary land tenure governed by traditional rules and administered by traditional leaders (chiefs). In such communities, chiefs grant and revoke customary land rights following their communities' customs.

It is clear from the foregoing that Southern African states have realised that they must secure customary land rights in order to achieve sustainable and equitable development. Many economic activities occur on communal lands. As seen above, countries have adopted different strategies to achieve customary land tenure security. Further afield, in countries such as Kenya, the need to protect community land rights has been expressed through constitutional provisions recognising communities as owners of land.⁵⁹

Protection of women's land rights in customary land contexts

Customary land tenure systems widely exclude women from ownership or control of land or restrict their right to inherit land, making divorced and widowed women particularly vulnerable to dispossession, even in situations where the formal legal system and state policies provide for gender equality.⁶⁰ The Kiprono case discussed above shows how progressive constitutions can check gender discrimination couched as cultural norms. Woodman, writing on the characteristics of customary laws notes that "... in virtually all communities, disproportionate ad-

vantages are held and disproportionate influence is exercised by males"⁶¹. Many African countries have put in place gender equality laws and ratified international treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women⁶² and regional instruments such as the Maputo Protocol to the African Convention on Human and Peoples' Rights⁶³. We will give a few examples here.

Mozambique has enacted numerous laws to protect a woman's customary land rights. The country's constitution provides that men and women are to be treated equally in all spheres of life.⁶⁴ The country's land law protects the right of women to own property. The law also guarantees the right of women to enjoy customary land rights. The law states that all members of a particular community, regardless of gender, can apply for a title to land if the community decides to partition its land.⁶⁵ Besides the land law, the family law (No 10/2004) also contains provisions protecting women's customary land rights. The law recognises civil, customary, and informal marriages.⁶⁶ As long as a couple lives as man and wife for a year, they are considered legally married. The law states that women are entitled to inherit their husband's property after their death. Women's right to be involved when making decisions on land is also guaranteed. The law states that no immovable property belonging to one spouse may be transferred without the express permission of both spouses. The country's land law also provides that women must be involved when communities are deliberating on communal land.

Despite all the above legal protections, women still face discrimination when dealing with land matters. The customary practices of some communities, especially in the southern and central provinces, restrict women's rights to customary land.⁶⁷ These patrilineal societies do not include women in discussions about community land despite the land law restricting the application of customs that contradict constitutional provisions. Many women, especially in rural areas, are unaware of their legal rights. In addition, many of these women lack the resourc-

⁵⁷ Yovanka ARI, 'Land, Law And Traditional Leadership In South Africa - Africa Research Institute' (*Africaresearchinstitute.org*, 2016) <<https://www.africaresearchinstitute.org/newsite/publications/briefing-notes/land-law-and-traditional-leadership-in-south-africa/>> accessed 8 August 2020

⁵⁸ Prosper Matondi and Marleen Dekker, Land Rights And Tenure Security In Zimbabwe'S Post Fast Track Land Reform Programme (2011) <https://www.humanitarianlibrary.org/sites/default/files/2013/08/Zimbabwe_RuzivoTrust_ASC_0.pdf> accessed 8 August 2020.

⁵⁹ CoK 2010 Arti 63 and the Community Land Act 2016

⁶⁰ See Ruth Meinzen-Dick et al, "Property Rights for Poverty Reduction", in Joachim Von Braun et al, *The Poorest and Hungry: Assessments, Analyses, and Actions: An IFPRI 2020 Book*, IFPRI, (2009) pp. 227-235

⁶¹ G. R. Woodman 'A Survey of Customary Laws in Africa in Search of Lessons for the Future', in J. Fenrich et al *The Future of African Customary Law* (Cambridge University Press, 2011) p 12.

⁶² CEDAW *supra* note 7.

⁶³ *Supra* note 8.

⁶⁴ Rachael Knight, *supra* note 42.

⁶⁵ Gladys Mutangadura, *Women And Land Tenure Rights In Southern Africa: A Human Rights-Based Approach* (2004) <<https://pubs.iied.org/pdfs/G00173.pdf>> accessed 9 August 2020.

⁶⁶ Tinyade Kachika, *Women's Land Rights In Southern Africa* (2009) <<http://www.bibalex.org/Search4Dev/files/422893/448443.pdf>> accessed 9 August 2020.

⁶⁷ Uchendu Eugene Chigbu, 'Anatomy of Women's Landlessness In The Patrilineal Customary Land Tenure Systems Of Sub-Saharan Africa And A Policy Pathway' (2019) 86 Land Use Policy.

es to fight for their customary land rights in the legal system. This situation is not unique to Mozambique.

The South African constitution contains provisions that prohibit the discrimination against people based on gender.⁶⁸ The constitution also requires parliament to enact laws that provide tenure security to those living on land that has no tenure security. The complex system of land laws that govern communal lands mainly devolves to traditional leaders the function of administering community land. Most of these communities are traditionally patrilineal, so women are often not involved in community land discussions.⁶⁹

In Zambia, communal land is administered under each community's customary laws but has statutory protection of women's rights to inheritance.⁷⁰ Further, laws relating to matrimonial property protect the rights of spouses after a divorce for marriages conducted under statute. Despite these provisions protecting women's customary land rights, many women still experience tenure insecurity. This is mainly as a result of discriminatory customary practices of society. Zambia has two forms of marriages; uxori-local and viri-local.⁷¹ In uxori-local marriages, the husband settles in the wife's community's land. Under this type of marriage, the wife retains all land rights throughout the marriage. In the case of divorce, the husband goes back to his ancestral land. Even in this form of marriage, women are often denied the right to control this land because of customary practices. In viri-local types of marriages, women settle in their husband's communal land. Despite legal provisions protecting their rights to property, in reality most women are rendered landless after their husband's deaths. Lack of awareness of statutory provisions protecting their rights and resources to mount legal challenges has denied most women their right to customary land rights.

Despite Botswana having one of the best legal systems for protecting customary land rights, it still lags behind in safeguarding women's customary land rights.⁷² Contrary to customary norms, the nation's land laws allow for the registration of one person as the holder of customary land rights. Such legal provisions, coupled with patrilineal customs, have led to discrimination against women on customary

⁶⁸ Gladys Mutangadura, *supra* note 65.

⁶⁹ Tinyade Kachika, *supra* note 66.

⁷⁰ *Ibid.*

⁷¹ Gladys Mutangadura, *supra* note 65.

⁷² Rachael Knight, *supra* note 42.

land matters. Studies have shown that women are still required by the land board to present a male relative's consent before the board grants them a customary land right registration certificate.⁷³ In addition, unmarried women below the age of twenty, one must obtain parental consent in all property transactions.

Conclusion and way forward

Despite the presence of legal provisions to protect women's right to customary land rights, many women in Southern Africa do not enjoy these rights. The social ordering of society which privileges men affects the enjoyment of rights even when they are clearly articulated in law. The problem is not the absence of laws; even in countries where the rights are clearly articulated in law, women's rights to land are still lagging behind. Lack of awareness of their legal protections, discriminatory customary practices, and lack of resources to fight for their rights legally have led to many women being denied their customary land rights.

The failure to unpack land rights to excavate different levels of entitlements for different community members is also problematic because it does not align entitlements to functions. Women's roles on land as labourers should entitle them to a larger share of rights but it does not. The infiltration of western norms into African ways of viewing and managing land have informed many countries' legislation on community land. This includes the requirement for registration which hoists men over women and the construction of allodial right holders' roles as ownership, which has resulted in chiefs taking over community land and assuming rights that belong to the community as a whole. The rights of men and women to land in that context are affected. Women have to deal with the additional problem of social constructions of maleness (powerful) and femaleness (powerless) because the subject matter is land which is a critical resource for the community, and in most cases, women are not entrusted with important things.

To address women's rights within extant institutional frameworks for management of customary land, I propose that empirical studies be carried out across Southern African countries, focusing on different renewable and non-renewable resources. These studies should focus on women's lived experiences in relation

⁷³ Gladys Mutangadura, *Women And Land Tenure Rights In Southern Africa: A Human Rights-Based Approach* (2004) <<https://pubs.iied.org/pdfs/G00173.pdf>> accessed 9 August 2020.

to the land, the natural resources and the national and customary laws and institutions dealing with these resources. A comparison can then be done across countries, including renewable and non-renewable resources. Such a study will guide targeted interventions informed by the lived realities of women living in communities and their experiences with the extractive industries for livelihood and commercial purposes.

Large-scale agricultural investments on customary land in Southern Africa: Rural development or violation of women's customary land rights?

By Phillan Zamchiya

Introduction

This study challenges gender-blind rural development models that justify the continued rise of large-scale acquisitions of customary land for big agricultural investments in Southern Africa. Powerful policy-makers and neo-classical economists often romanticise such land acquisitions as a vehicle to utilise vacant customary land, improve food security, modernise agricultural production, commercialise the agrarian sector, create decent jobs, and improve the rural condition for women and men in line with new global regulations that afford communities the right to self-determination. Conversely, they portray smallholder land-based livelihoods on customary land as unproductive and unable to support rural development. This approach is problematic, since losses by smallholder farmers (who are mainly women) are narrowly examined in the context of the new rush for land in Africa.

Empirical data from across Mozambique, South Africa, Zambia, and Zimbabwe show that the losses (with little or no compensation) include field crops, vegetable gardens by the homestead and river banks, natural water sources for household use and crop irrigation, and access to a range of natural resources. There are also non-material losses which are central to human development, such as cultural rights, identity and citizenship, belonging, history and memory. The process of land acquisition is hardly regulated by the array of international, regional and national guidelines on responsible investments. This is because of the intersection of the state, patriarchal traditional leaders and private sector interests stacked against rural women in coercive hierarchical relationships. Big agricultural investors may create some accumulation opportunities and jobs with some differential benefits, but mainly just for the local elites.

This study challenges the notion of an agrarian trajectory based on a teleological transition to large-scale farms and co-existence premised on voluntary regulation in the context of weak governance and unequal power relations, opting instead for an evidence-based alternative path. This will require promoting a gender sensitive alternative rural development model that protects customary land rights for women; research to strengthen women's land rights; national, regional and global policy campaigns to improve land policy and legislative frameworks and enforcement mechanisms; and civic engagement and mobilisation to raise awareness and facilitate women's access to justice.

This study is presented in six interrelated parts. First, is a critique of the theoretical approach that overly promotes an ahistorical rural development model based on large-scale agricultural investments on customary land. Second, is an outline of the gender-blind spots of the regional and international guidelines for responsible investments, and how national laws are weak on the principle of consent and fair compensation. Third, this study draws on case studies across four countries (Mozambique, South Africa, Zimbabwe and Zambia) and provides the context. Fourth, is an in-depth exploration of the wider losses incurred (mainly by women) in the acquisition of land for big agricultural projects, and a synopsis of related benefits. The sixth section motivates for an alternative path to rural development and related strategies as a conclusion. In the next section, the researcher elaborates on the theoretical perspective.

Situating the developmental pathway

I argue for an approach that goes beyond analysing land deals through an insular focus on efficiency in economic returns to land, labour and capital premised on scale (Cousins and Scoones 2010)¹. I am convinced that large-scale land deals for agricultural investments in Southern Africa must be understood in terms of the livelihoods of smallholder farmers that are complex and anchored on land. At the centre of this approach is to factor in the gendered impact of the investments, noting that these are typically unequal between men and women. The mainstream transitional path ignores this gendered impact. The transition path envisions industrial farming in the countryside as the future, and reflects the modernisation narratives of the colonial era. To some, de-peasantisation will happen

¹ Cousins, B., and Scoones, I. 2010. Contested paradigms of viability in redistributive land reform: perspectives from southern Africa. *Journal of peasant studies*, 37 (1), 31-66.

– “the loss or disappearance of the peasantry” through loss of their access to the means of production (van der Ploeg 2013). Under this transitional development path, small-scale farming is not considered as an alternative (de Schutter 2011)². The interventions must go beyond a narrow ahistorical conceptualisation of a teleological capitalist transition to large-scale farms in the countryside leading to de-peasantisation.

The first alternative is the co-existence developmental path. This refers to the possibility of achieving both the establishment of large-scale plantations and protecting the smallholder farmers. Under this model, regulations are considered key. A proposition for co-existence based on regulation is possible but difficult given weak governance, gender-blind regulations, and the unequal power relations in Southern Africa. State elites, patriarchal chiefs, and investors involved in land deals have juridical, economic and social power.

The second alternative is a development path based on de Schutter's formulation. This is a scenario,

in which governments seek to channel agricultural investment into the support of small-scale farming. This, it should be emphasized, is not equivalent to the status quo, or to preserving subsistence agriculture – with low productivity, and few possibilities for the farmer to climb his or her way out of poverty. Nor is it a way of saying that investments in agriculture, and particularly the arrival of foreign investors, should be shunned: rather, it is a way of ensuring that investment will be directed towards ends that are most poverty-reducing (de Schutter 2011: 261).

The alternative path would require an emphasis on developmental projects that ensure that rural men and women do not lose their customary land. It would also require non-extractive investments in the countryside. Of course, there will always be losers and winners across gender and class. This article is important in regenerating debate beyond the narrow acceptance of large capitalist estates as the only vehicle for emancipation of rural livelihoods despite evidence of their

² de Schutter, O. 2011. How not to think of land-grabbing: Three critiques of large-scale investments in farmland, *The Journal of Peasant Studies*, 38:2, 249-279.

detrimental effects on livelihoods. This is important in view of the current rush of global capital into land-based investments, prevailing gender-blind regulations, and national laws weak on the right to self-determination.

Context

Globally, Africa remains the continent attracting the most land-based investments. Data from the Land Matrix indicates that there were 422 transnational land deals concluded in the agricultural sector (42 per cent of all global deals) on 10 million hectares of land in Africa. Investors also acquired water, as their projects were concentrated along rivers. The investments were mostly for food and agro-fuels. Before these investments, smallholder farmers – who are mainly women – owned and used that land and water to sustain their livelihoods. Within this context, there are three major sets of policies meant to *regulate acquisition*: global regulations, laws on consent, and compensation. I start with a review of global regulations.

As multinational corporations continue to invest in large-scale land-based commercial ventures in Africa, a number of stakeholders have intensified efforts since 2009 to promote ‘responsible’ investment in land using regional and international principles and guidelines on large-scale land-based investments. There are seven widely referred to regulations. As shown on the next table, only three instruments have specific principles on the need to promote gender and women’s land rights, and these are commendable. Nevertheless, they face common problems in promoting customary land rights. First, it is evident that the guidelines are voluntary and non-binding, so they constitute soft law (Wise and Gilbert 2016).³ Second, rural women who live on customary land have little information about the existence and content their rights – those least informed of these guidelines are the people directly affected by the large-scale based investments (Hall et al 2015).⁴ Third, they seem difficult to implement in governments with weak governance systems and without progressive gender policies and laws. Fourth, they are difficult to implement in African societies differentiated across gender, social status, and class.

³ Timothy A. Wise and Gilbert, R. 2016. ‘Global Initiatives to Promote Responsible Agricultural Investment’ presented at the PLAAS regional workshop from 0-8 April 2016, University of the Western Cape, South Africa

⁴ Hall, R, Zamchiya, P., Gausi, J., Matondi, P., Muduva, T., Nhancale, C., Phiri, D. 2015. *Large Scale Land Deals in Southern Africa: Voices of the people*, Cape Town: Institute for Poverty, Land and Agrarian Studies (PLAAS, University of the Western Cape).

Table 1: Gender critique of regulatory instruments

Instrument	Critique
The Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (PRAI) developed by FAO, International Fund for Agricultural Development (IFAD), UN Conference on Trade and Development (UNCTAD) and the World Bank (2009).	No specific principle on promoting gender and women’s rights
The FAO’s Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of the Committee on World Food Security (VGGT) (2012).	Ensure gender equality
The Principles for Responsible Investment in Agriculture and Food Systems of the Committee on World Food Security (CFS-RAI Principles) (2014).	Foster gender equality and women’s empowerment
Guiding Principles on Large Scale Land Based Investments in Africa (LSLBI) (African Union, 2014).	LSLBI respects the land rights of women, recognises their voice, generates meaningful opportunities for women alongside men, and does not exacerbate the marginalisation of women.
LSLBI respects the land rights of women, recognises their voice, generates meaningful opportunities for women alongside men, and does not exacerbate the marginalisation of women.	No specific principle on promoting gender and women’s rights

Table 1: Gender critique of regulatory instruments

Instrument	Critique
The G8's Analytical Framework for land-based Investments in African Agriculture (2015).	No specific focus on gender and women's rights
OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016).	No specific focus on gender and women's rights

In addition to global guidelines, the principle of free, prior, informed consent (FPIC) is on the rise as a way to protect vulnerable communities in the context of a renewed global rush for land. FPIC is an international principle that gives people the right to say 'yes' or 'no' to developmental projects, upholding the universal right to self-determination (FAO 2014, p.12). FPIC at a policy implementation level entails that the rights-holders (both men and women) must make decisions free from undue influence, coercion, bribes or fear (Franco 2014). Prior means that consent must be sought before the project starts, and that there should be sufficient time to make a decision before the commencement of the investment project. The rights-bearers must be informed before making a decision. That means having accurate, understandable, accessible and complete information about the investment on an ongoing basis. Finally, consent refers to a collective decision made by the rights-holders (including women, young people, and people with disabilities) which can be a Yes or a No, or a conditional Yes, and can be revisited during the different stages of the investment project (FAO 2014, p.13). It applies to both men and women in the context of the acquisition of agricultural land. It is also important to note the extent to which national level legislation reflects this principle.

South Africa has an explicit law that entrenches the FPIC principle that governs the acquisition of customary land. The Interim Protection of Informal Land Rights Act (IPLRA) of 1996 is meant to protect informal rights to land, such as the right to use, gain access to, or to occupy land under customary law in the former homeland areas. IPLRA requires that the holder of informal land rights must consent to dispose of such a right. The subsequent section 4 notes that the land right "... can only be disposed by a majority of the holders of such rights pres-

ent or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate" (IPLRA 1996)⁵. South Africa's jurisprudence has strengthened the right to free, prior and informed consent. In 2018, the North Gauteng High Court ruled that the Xolobeni community has a right to say no to a development project, in line with IPLRA and the international principle of FPIC (Zamchiya 2018)⁶. However, the right to give consent is still undermined through a wrong application of the Traditional Leadership and Governance Framework Act (TLGFA) of 2003, whereby traditional leaders are seen as the authority to sign agreements to cede communal land with investors and the mining act. Communal Bills being debated in parliament still prioritise traditional councils to constitute the land administration committees leaving land rights holders with no choice.

In Zambia, the law, unlike IPLRA in South Africa, is not explicitly clear on the need for the investor to seek community consent. Nevertheless, one might argue that the fact that customary law must guide land acquisition means that consent has to be sought because it is a principle embedded in customary law. Traditional leaders have explicit powers to say yes or no to development projects enshrined in the 1995 Land Act. The Act does not make it explicitly clear whether consultation with the traditional leaders means getting consent from the community. Traditional leaders and investors interpret this to mean that the traditional leader has power to make decisions on behalf of the community. That interpretation, however, could be based on a colonial understanding of customary law that sought to elevate chiefs over the people (see Mamdani 1991)⁷. Written consent of chiefs is also required. Zambian laws are therefore thin on the right to FPIC, and provide contested interpretations.

Zimbabwe's land laws do not explicitly mention the right to consent. The laws give power to the president, local authorities, traditional leaders and responsible ministers according to Section 26 (1) of the Traditional Leaders Act (Chapter 29:17) of 1998. Section 26 (4) states that "no inhabitant shall dispose of communal land used by him, or subdivide such land for any purpose, without the approval of the village head". Section 5 (19) and section 9 (19) provide for chiefs and headmen

⁵ The Interim Protection of Informal Land Rights Act (IPLRA) of 1996.

⁶ Zamchiya, P. 2018. Foreign investments and livelihoods in Northern Zambia. Working Paper 55, PLAAS, University of the Western Cape.

⁷ Mamdani, M.1991. Citizen & Subject: Contemporary Africa and the Legacy of Late Colonialism, Princeton University, Princeton NJ.

to have a role in land allocation. The Zimbabwe constitution also recognises the institution of traditional leadership in land governance. Despite contestations in interpretation, in practice, the traditional leaders allocate land (Goebels 2005)⁸. Rural District Councils are also given powers to act on behalf of those who live on customary land. This limits the land rights holders' power to say yes or no to development projects. The minister in charge of the Communal Lands Act also has explicit power to alienate land for public interest. The Communal Lands Act does not mention the need to consult communities, let alone seek free, prior, or informed consent from the communities.

In Mozambique, the law was previously not explicit on the need for investors to consult communities, as all land is vested in the state. However, from 2012, at least two consultation meetings must now be held with affected communities. Investors must first ask the community if the land is available. The community has 30 days to give their view, but their consent is not explicit. Nevertheless, in actual practise, men dominate the consultation processes and women's voices are drowned. The laws are not explicit on the principle of consent, with exception of South Africa's IPLRA.

Another related issue is the aspect of compensation for customary land acquired for large-scale agricultural investments. A central observation is that there is an inherent bias towards investors in the policy approaches across the Southern African region, including those used to determine compensation for affected rural communities. Where rural inhabitants have lost land held under customary tenure, state officials in all the four countries, have routinely contended that foreign investors are only obliged to pay for improvements on the land, rather than for the land itself. This practice prevails despite constitutional recognition in each county of customary land rights. Policy-makers mistakenly fail to recognise customary land rights because such rights are not formally registered, ultimately depriving affected communities of compensation. However, not only is land undervalued, but so too is the value of agricultural and other productive activities in a context where neither the market value nor the cost of restoring rural livelihoods is clear. Policy-makers ignore the diverse land uses of smallholder producers, underestimate the value of water and natural resources to rural livelihoods, overlook pre-existing processes of economic development and accumulation,

⁸ Goebels, A. 2005. Zimbabwe's Fast Track land reform. *Gender, place and culture: a Journal of Feminist Geography*, 12 (2), 145-172.

underplay losses in the wider ecosystem, and understate non-monetary losses. The practice reinforces a pervasive policy line in the region that casts rural land – especially land under customary tenure – as being of little or no economic value, what De Soto (2002) infamously terms 'dead capital'. Before I delve into empirical substantiations, I provide the methodological approach and a summary of the case studies.

Methods and case studies

The author's field-based qualitative study conducted in nine provinces across Mozambique, South Africa, Zimbabwe and Zambia in different periods from 2013-2019 largely informs this paper. Three cases are on mining projects. Their importance for this paper is to show the nexus between mining and agricultural land. The next table outlines the case studies across the region.

The impact of Privatisation of Customary Land and its Implication for Women: The case of Kalumbila Mine in Zambia

By Professor Chuma Himonga and Doctor Tinenenji Banda

Introduction

Like most sub-Saharan African legal systems, the Zambian legal system is pluralistic in nature. African customary law and “received law” (with their respective norms, regulations and institutions) exist side by side in a somewhat uncomfortable (if not contested) relationship. Nowhere is this contestation more apparent than in land tenure and ownership regimes. The “indirect rule” system of government employed by the British colonial authorities meant that aside from conflicts between customary law and the common law, and besides those customary norms or practices considered “repugnant” by the colonial regime, many aspects of customary law were allowed to develop unimpeded. Such was not the case with land, however. The centrality of land to economic prospects and conquests (past, present, and future) has meant that customary notions of land ownership have undergone significant interference and manipulation.

In Zambia, land acquisition designs, no matter the political or capital regimes within which these designs historically operated, have always had to contend with and ultimately overwhelm the inconvenient and thorny issue of customary land tenure. The acquisition of customary land for private use has oscillated between “negotiated” and “forceful” acquisitions. Indeed, the boundary between negotiated and forceful acquisitions has often been fluid, if not tenuous. The privatisation of land has been an important focal point of national development in Zambia since the 1960s. Discussions on land reform continue to reflect this developmental trend as the government seeks to increase private sector development and foreign investment. These macro-level, land-related, economic development drives extend to all categories of land, including land held under customary tenure (i.e. “communal land”). Communal land continues to be a critical source of livelihoods for poor rural communities, and women in particular. As much as privatisation of land held under customary tenure through registration of title secures the landholder’s property rights, this process disproportionately threatens the livelihoods of women living on customary land.

Using the Kalumbila Trident Mining Project as a case study, this paper examines the privatisation of land regulated by customary law and its impact on the livelihoods of women living in poor rural communities. The paper argues that individualisation (also referred to as privatisation of ownership of land held under customary law tenure) and the uncontrolled power of traditional authorities to allocate this land threaten rural livelihoods in various ways. The argument focusses on the following threats: the appropriation by traditional authorities of the power of alienation of land; the accentuated insecurity of tenure of customary land occupied by villagers; the villagers’ lack of economic power to compete with foreigners in the privatisation of their land; the depletion of customary land for rural communities; the privatisation by “foreign”¹ investors of land already occupied by villagers.

Our analysis is based on the experiences of women recorded by the media as well as by human rights and activist groups in recent years. The dearth of empirical research on a variety of subjects on customary (and other categories of) land in Zambia is acknowledged by existing literature. Research is needed into land rights and their intra-household distribution, land tenure security, land use patterns, land management practices, privatisation of land practices, and gender biases at all levels of land administration. We believe that this case study will provide a glimpse into the significant problems that arise from the current system of customary land regulation and practices in Zambia.

The paper proceeds as follows: First, the paper provides an overview of customary land tenure in Zambia and the procedure for the privatisation of customary land. Thereafter, the paper provides the socio-economic context for the privatisation of customary land generally, and then for mining activity specifically, showing in both cases how privatisation conflicts with the protection of rural livelihoods, particularly the livelihoods of women. Next, the privatisation of customary land for the Kalumbila mining project and its disparate impact on the livelihoods of women is explored. Based on an analysis of the experiences in the preceding section, the paper ends by summarising the threats to rural livelihoods that emerge when privatisation of customary land is allowed to continue.

¹ Unless the context indicates otherwise, this term refers to both Zambians who are outsiders to the land and non-national investors.

Overview of land tenure systems and the procedure for privatisation of customary land

This section is divided into two parts. The first part is an overview of land tenure systems in Zambia. The second outlines the official procedure for allocation and privatisation of land held under customary tenure.

The land tenure system

The system of land tenure in Zambia was changed by the Lands Act of 1995². Before this Act, land was divided into state land, reserve land, and trust land. While state land was regulated by the general (received) law, the latter two categories were regulated by customary law. The 1995 Act repealed all the laws that regulated all three categories of land.³ It has retained some features of the old tenure systems but has changed others.

The Act continues to deem the president as the owner of land in the republic. He or she holds the land in perpetuity on behalf of the people of Zambia.⁴ Consequently, section 5 of the Act requires the consent of the president for any sale, transfer or assignment of land in the republic. Furthermore, the Act continues to recognise leasehold property held for 99 years (formerly state land) and customary land (i.e. land held under customary tenure). However, the Act has fused the former trust and reserve lands into customary land. Customary land continues to be regulated by customary law, while leasehold property is regulated by the general (received) law.

The allocation of leasehold property is delegated by the president to the Commissioner of Lands located in the Ministry of Lands. On the other hand, the allocation of customary land for settlement is left to the jurisdiction of the chief of the area in which the land is located. The allocation is done in accordance with customary law and is free of any financial charges. In principle, anyone can settle on customary land provided they obtain the consent of the chief.

The president has the power (through the Commissioner of Lands) to assign leasehold property to individuals under registration of title in both categories of land (i.e. leasehold property and customary land). However, the procedure for acquisition of title in the two categories of land is different. The first major

² Cap 184 of the Laws of Zambia.

³ That is, the Conversion of Land Titles Act, The Reserve Trust orders and the Trust land orders.

⁴ S 3 of the Act.

difference is that the acquisition of title in leasehold property does not involve traditional authorities, while these authorities are central to the acquisition of individual title in customary land. Secondly, the acquisition of title to customary land requires that this land be first converted into leasehold land. In this paper we concern ourselves only with the acquisition of individual title in customary land, or what we have called the privatisation of customary land.

The Act now defines land as an interest in land whether the land is virgin, bare or has improvements.⁵ This definition, together with the liberalisation of the land market, entitles holders of registered leasehold titles to sell the land on the basis of the willing-seller, willing-buyer principle. What this means in practice is that once a person acquires title to leasehold land or to customary land that has been converted into leasehold property, he or she has the right to sell it to anyone at market value. Leasehold land has, therefore, tremendous value in Zambia. It is not uncommon to find an acre of land in prime areas of the capital city of Lusaka selling for US\$400 000. This sits in stark contrast to the pre-1995 position. At that time, land had no value apart from the improvements on it. For this reason, unimproved land could not be sold.

Procedure for conversion and privatisation of customary land

The Act provides that no conversion of customary land will take effect without the consent of the chief and the district council in whose area the land is located. The Commissioner of Lands requires both the written consent of the chief and of the local council before the person seeking to privatise the land can be issued with a certificate of title. The issuance of the certificate of title effectively converts customary land to leasehold property, and the new owner can sell it on the market like any other leasehold property. Indigenous Zambians who are settled on customary land are also entitled to convert their traditional interest⁶ in the land they occupy to leasehold property under the same procedure described above.

The procedure for privatising customary land is simple. The person seeking to convert the land obtains a letter from the chief attesting his or her consent to the conversion of the land to leasehold property. The land is then surveyed by the district council of the area in which it is located. The surveyors produce diagrams

⁵ (i.e. the interest of occupancy and use of land they acquire upon being allocated land by the chief to settle on in his area)

⁶ (i.e. the interest of occupancy and use of land they acquire upon being allocated land by the chief to settle on in his area)

of the portion to be converted or privatised. The district council then interviews the applicant on his or her resources and ability to develop the land in question. If he or she qualifies, it gives him or her a letter to this effect. This letter is taken to the Commissioner of Lands, together with the survey diagrams and the chief's consent for issuance of the certificate of title to 99-year leasehold property to the applicant.

The procedure for privatising customary land is simple. The person seeking to convert the land obtains a letter from the chief attesting his or her consent to the conversion of the land to leasehold property. The land is then surveyed by the district council of the area in which it is located. The surveyors produce diagrams of the portion to be converted or privatised. The district council then interviews the applicant on his or her resources and ability to develop the land in question. If he or she qualifies, it gives him or her a letter to this effect. This letter is taken to the Commissioner of Lands, together with the survey diagrams and the chief's consent for issuance of the certificate of title to 99-year leasehold property to the applicant.

However, it must be emphasised that chiefs have no power whatsoever to sell customary land. Their power is limited to providing consent for the conversion of customary land to leasehold property. The only other powers that chiefs have are those of administration and allocation of land to settlers on customary land within the jurisdiction of the chief in accordance with customary law.

The 1995 Act has not changed the procedure for privatisation of customary land that was in operation before the Act came into force.

Socio-economic contexts of privatisation of customary land and threat to rural livelihoods

In this section, we provide the socio-economic context for the privatisation of customary land generally, and then look at the mining context specifically, focusing on the Kalumbila mining project in North Western province.

For reasons connected to, among other things, issues of development at national level and the shortage and high cost of leasehold property, there seems to be an increased interest among citizens and "foreign" investors in private, individual-

ised ownership of land held under customary tenure, with chiefs and headmen (hereafter referred to as traditional authorities) as the main agents of the privatisation process at the local level.

Two other reasons for increased interest in the privatisation of land under customary tenure require comment here. Firstly, it has been observed that market reforms (which have increased the profitability of agriculture and the demand for agricultural holdings) have contributed to increased demands for residential property in peri-urban and rural areas.⁷ Improvement in wealth among Zambians, population pressures, and the waning of historical, political and economic conditions that motivated rural-urban migration have also increased the pressure to privatise customary land. The people who settle in these areas want security for their property through registration of title to their land⁸.

Secondly, some urban dwellers have, over generations, lost links to their ancestral lands, with the result that they encounter difficulties when trying to acquire sufficient land in rural areas through traditional authorities.⁹ They therefore seek to gain access to this land through state allocations by way of registered leasehold title. In this way, privatisation, through state law serves as a conduit for reconnection to ancestral lands.

This surge of interest in the privatisation of land is in tension with the critical role that land held under customary tenure plays as a source of livelihoods for poor rural communities living on this land. The majority of families and individuals living on customary land still derive their livelihoods solely or largely from the land through subsistence or improved farming.

Equally important to the livelihood of people living on customary land is the fact that their occupation and use of the land is free of any of the financial obligations associated with the privatisation of ownership through registration of title. Both the process of privatisation and retention of title to privatised customary land involve financial obligations, such as survey fees, conveyancing fees, ground rent or various service charges payable to the state that the majority of people living

⁷ See Ng'ombe, Austine & Keivani, Ramin & Mattingly, Michael & Stubbs, Michael. (2014). Impacts of Privatization of Customary Land Rights in Zambia: A Comparative Study of Rural and Peri-urban Locations. *International Journal of Urban and Regional Research*; and, Horman Chitonge, Orleans Mfune, Bridget B. Umar, Gear M. Kajoba, Diana Banda & Lungisile Ntsebeza (2017) Silent privatisation of customary land in Zambia: opportunities for a few, challenges for many, *Social Dynamics*, 43:1, 82-102.

⁸ *Ibid.*

⁹ M. Roth, A.M. Khan, and M.C. Zulu. *Legal Framework and Administration of Land Policy in Zambia* at 1. Available at 1

on customary land cannot afford.

Furthermore, privatisation entails the development of the land concerned according to specified state-approved plans, standards and timelines – all of which add to the cost of maintaining one’s livelihood on privatised land holdings. Moreover, failure to meet the prescribed financial obligations and development plans and standards leads to the repossession and redistribution of the land concerned. On the other hand, the opening up of their land to privatisation by foreign investors threatens the livelihood of local communities because it depletes the land available for their occupation. The fact that the privatised land is not developed by investors due to the phenomenon of “absentee landlords” further removes any economic benefit the rural communities might derive from the development of the land by the new owners or investors through employment and other economic activities.¹⁰

Thus, for the majority of rural people, privatisation is simply not an option. Ironically, their livelihood is more secure without privatisation than with the security of land tenure that comes with privatisation. Put differently, their livelihood is more secure on cost-free customary land than on privatised land, which might eventually be lost through a failure to meet the state lease conditions imposed on title holders.

Of course, there are some rural people whose livelihood may benefit from privatisation within this setting, either because they have sufficient economic power to privatise and retain their plots, through perhaps employment by investors, but these are most likely comparatively few in number.

Privatisation of customary land for extractive industries: the case of Kalumbila

In terms of the extractive industries, Zambia’s national development agenda has from time to time included plans to diversify the mineral economy from mining in the Copperbelt region to mining in other regions of the country. Mining development in these other areas is canvassed through, among other things, the utilisation of customary land for new mining projects. This has aroused the interest of foreign companies in customary land acquisitions. A case in point is the Kalumbila mining project. Kalumbila is a copper mine in the North Western Province of Zambia. It is a subsidiary of mining conglomerate, First Quantum Minerals (FQM).

¹⁰ *Ibid* at 8.

To provide land for the mining project, FQM acquired 518 kilometres of customary land after “negotiating” the acquisition with Chief Musele of North-Western Province.¹¹ The deal between FQM and Chief Musele was later revoked by the government¹² and superseded by an agreement (between FQM and the government) to convert an undisclosed amount of customary land for the mining venture. Indigenous communities were largely excluded from decision-making during this conversion that displaced hundreds of households, who were subsequently resettled in the absence of an official resettlement policy.¹³

While resettlement packages were disbursed, women did not always fully benefit due to power dynamics within the family. As noted elsewhere:

[M]ost of the women interviewed did not seem to know the compensation packages paid, legal status of the land provided to families in the resettlement areas and whether the new land was registered in both their names and that of their husbands. This situation potentially marginaliz[ed] women from land ownership and control.¹⁴

The gendered impact of the extractive industries on women’s livelihoods is well documented, and Kalumbila is no exception. Speaking of their changed fortunes after the acquisition, one displaced woman noted:

We had a vast land and we could do anything... [But on the resettled land] we are confined to 40 by 40-meter plots and our movements have been restricted because certain areas are now no-go areas.¹⁵

The privatisation of customary land for mining activities often means the enclosure of key resources on the land. This certainly was the case in Kalumbila, where fresh water and forests were fenced off for exclusive use of the mine. Speaking of the impact on women of these enclosures, Action Aid notes:

¹¹ A copy of the purported agreement can be viewed on Mining Watch at https://miningwatch.ca/sites/default/files/fqm-musele-agreement-dated-14-july-2011_1.pdf.

¹² *Lusaka Times*. 2013. “Huge Land Acquisition Must Be Approved by President – Luo.” February 16. <https://www.lusakatimes.com/2013/02/16/huge-land-acquisition-must-be-approved-by-president-luo/>

¹³ Chu, Jessica, and Dimuna Phiri. 2015. “Large-scale Land Acquisitions in Zambia: Evidence to Inform Policy.” Research Report 50, Institute for Poverty, Land and Agrarian Studies, Faculty of Economic and Management Sciences, University of the Western Cape, Cape Town, South Africa. A resettlement policy was later finalised in 2015.

¹⁴ ActionAid. 2015. “Impact of Mining Extractive Industries on Women in Zambia”.

¹⁵ Reuters. 2015. “Women Pay the Price for Zambia Mining Expansion.” September 15, 2015 at <https://www.reuters.com/article/us-zambia-mining-women-idUSKCN0RF02D20150915>.

In Kalumbila, the Musangezhi River was dammed and fenced off by the mine. The fencing of the dam especially near the fish breeding areas has excluded [the] community from accessing this common resource for fishing. The women [complain] that they are having difficulties in accessing the river for processing of cassava, which they have traditionally done by soaking it in rivers or streams... [S]imilarly, fencing of large tracts of forest land with restrictions of entry has excluded women from accessing non-timber forest resources such as mushrooms, caterpillars, firewood, herbs for medicinal use and grass for thatching. These are important nontimber forest resources which women have depended on for many generations for food, medicinal use and income... The Kalumbila case reveals several aspects of privatisation of customary land that impact on the livelihoods of people living on customary land, and that call for reform.¹⁶

Land privatisation for the mining industry, as exemplified by Kalumbila, raises several issues for the livelihoods of rural women. The case shows that traditional authorities are important agents of the land distribution process and privatisation at the local level. While the legal framework restricts chiefs' powers to mere consent for privatisation, in practice, traditional authorities exercise powers of sale of the land, by demanding unregulated prices. In this respect, they seem to adopt the willing-seller, willing-buyer model applicable to the sale of titled land. In effect, the chiefs behave as though they hold legal title to the customary land in their area, which they sell to willing buyers at a price according to their discretion. Some of these authorities can clearly no longer be relied upon to discharge their traditional roles of protecting communities from predatory outsider interests.

Furthermore, chiefs that sell huge tracts of land are rarely accountable to their communities. Under the draft land policy, conversion of customary land in excess of 250 hectares must be approved by the Commissioner of Lands, who must seek "endorsement of the Minister responsible for land before approving the application"¹⁷. While this policy is ostensibly protective of customary land, it is actually a unilateral alteration to the dual land-administrator system that gives the state

¹⁶ Action Aid op cite note 14 at 5-6.

¹⁷ Government of Zambia. 2017. "Draft National Land Policy." Ministry of Lands and Natural Resources.

a free hand in the conversion of customary land and thereby deprives local communities of their land rights. While the size of the Kalumbila "sale" (518 km) attracted national attention, it is quite conceivable that other smaller conversions of customary land for small-scale mining projects happen under the radar and without accountability.

As seen in Kalumbila, these conversions deplete the amount of land available for livelihood use by women, many of whom depend on the land. More importantly, land already occupied by rural communities is not excluded from privatisation, thereby directly impinging on the livelihood of the occupiers of customary land. It is noteworthy that the privatisation of land entails that resettled communities vacate the land and continue their life on new land, which may take several years to clear and cultivate before it is capable of availing a decent livelihood.

While the privatisation of land is an option that can also be exercised by local communities to secure their tenure, the exorbitant prices of land put it out of reach of women who may wish to protect their tenure from acquisition by investors. In other words, the majority of rural women lack the purchasing power to participate in the privatisation process to secure their source of livelihoods. .

In reality, the privatisation of customary land for mining ventures is a sure-fire way of stripping poor, rural women of their livelihoods and increasing their impoverishment. This is because privatisation in the economic context of rural areas leads to loss of livelihoods that is disproportionate to the economic gains of the privatisation process.

Another aspect of the impact of privatisation of land on rural livelihoods concerns the privatisation procedure. The issue of unaffordability of the privatisation option to local communities is aggravated by the length and complexity of the privatisation procedure in practice, as well as the bureaucracy involved. But even for investors, this laborious and protracted process at the inefficient Ministry of Lands (that can take several years) results in vast amounts of land lying idle while "investors" are pursuing their title deeds or fighting court challenges regarding the land. The result is that local communities are neither able to utilise the land in question nor benefit from the investor development. This problem is aggravated by the phenomenon of absentee landlords, who privatise land and leave the land to the management and operation of relatives who lack basic farm management

skills, coupled with undercapitalisation and varied degrees of indebtedness.¹⁸ Although this observation is not specific to privatised land in rural areas, the privatisation of land in rural areas is similarly affected

Conclusion

This paper has attempted to identify various threats to the livelihoods of communities living on customary land, in the context of privatisation under state-defined legal frameworks and procedures, as well as privatisation as it happens in practice, particularly privatisation that paves way for mining ventures. These threats are related to the reduction of cost-free (customary) land available for local communities and the disproportionate impact on the livelihoods of women.

This paper has also demonstrated the role that resettlement policies play in further entrenching inequalities between men and women. In terms of recommendations, it is unfortunate that Zambia's resettlement policy (which came into effect in 2015) did not provide for the joint registration of land allocated by resettlement schemes to married persons. While the policy does provide for the prioritisation of women-headed households when paying compensation, and for the equal allocation of compensation plots between men and women¹⁹, the policy does not address the power dynamics that often deprive married women of joint ownership of allocated land.

More crucial though, is the fact that whatever modifications are made to the resettlement regime, the reality remains that the most effective interventions must happen before privatisation occurs. However, to do so, grounded research into the privatisation of communal land is required, and into its impact on rural women's livelihoods in Zambia. As noted above, there is a dearth of empirical research in the area, and an even greater lack when it comes to gender disaggregated data.

All in all, what emerges from the analysis is that privatisation of customary land for mining activities and other investments constitutes a considerable threat to rural women's livelihoods and has the potential to exponentially increase their poverty.

¹⁸ Roth et al op cit note 9.

¹⁹ Government of Zambia. 2015. National Resettlement Policy." Ministry of Lands and Natural Resources.

Marriage and succession regimes in Southern Africa: Has law reform addressed the rights of women and girls to customary land?

By Anneke Meerkotter, Brigadier Siachitema, Tambudzai Gonese-Manjonjo

Introduction

Although many Southern African countries have implemented legal reforms to strengthen women's land and property rights, very little has been done to change the patriarchal customs and practices under which customary land is held. Standard features of these customs include marital power and the rules of male primogeniture. Women's position in society is often influenced by particular cultural scripts, such as that the husband is the head of the family. These scripts are more entrenched in patrilineal societies.¹ Women and girls usually gain access to customary land through their affiliation to men as wives, daughters, nieces and sisters. Thus, marriage and inheritance are the main pathways through which women and girls access customary land in Southern Africa. Many African rural women lose their rights to customary land when their relationship with men ends, particularly upon divorce or death of the husband or male relative.

It should be noted that customary laws relating to succession and marriage differ depending on whether societies are matrilineal or patrilineal. Matrilineal societies are present in some parts of Namibia, Angola, Zambia, Malawi, Mozambique and Tanzania, although they are increasingly in the minority. Matrilineal societies generally follow the rule of uxori-local residence, where the husband moves to his wife's village and cultivates her land. In such cases, the husband has no right to his wife's land and is expected to return to his own village after divorce or the death of his wife.² In patrilineal societies, the opposite applies. The norm in matrilineal societies is that daughters have priority over land and access to

¹ Mbweza, E. Norr, K.F. and McElmurry, B, 2008, "Couple decision making and use of cultural scripts in Malawi", *Journal of Nursing Scholarship*, Vol. 40, No. 1, 12–19.

² Takane, T, 2008, "Customary land tenure, inheritance rules, and smallholder farmers in Malawi", *Journal of Southern African Studies*, Vol. 34, No. 2, 269–291, 274.

land through customary inheritance, although their male relatives often retain significant control.³ The gradual attrition of women's status in matrilineal societies can be traced to several interwoven factors: slavery, migration of patrilineal societies,⁴ religion, colonisation,⁵ and the money economy. Increasingly, land acquisition in matrilineal societies is influenced by patrilineal traditions, by land use practices,⁶ and by the flexible allocation of land.⁷

This paper focuses on the growing demand for land, including by extractive industries, directed towards customary land, and the need to strengthen customary land rights. Increasingly communities face eviction from areas which they have occupied under customary tenure for generations.⁸ The dispossession of customary land is facilitated by a discourse of "modernisation", weak customary land rights, and weak governance, including systemic corruption, unbridled capitalism, and elite capture.⁹ Horman Chitonge explains that the increased encroachment into customary land results from the lack of other available lands for economic development, and communities dispossessed of such land are in turn unable to find land elsewhere.¹⁰

The clamour for customary land throughout Southern Africa¹¹ has worsened the

³ Semu, L, 2002, "Kamuzu's Mbumba: Malawi's women's embeddedness to culture in the face of international political pressure and internal legal change", *Africa Today*, 77-99, 79. She notes that the matrilineal system is inherently contradictory with regard to the status of women in the following ways: Women in matrilineal societies, such as the Chewa, are viewed as the root of the lineage, but they are also deemed dependents (mbumba); Although matrilineal society provides women high status, they generally remain dependent on and controlled by their uncles and brothers (nkhoswe) who have total power and authority over her irrespective of whether she is single or married; and women in matrilineal societies largely remain subject to discriminatory cultural practices such as ritual intercourse during initiation, early marriages, polygyny, and abusive widowhood rites.

⁴ For example, with the arrival of more patrilineal societies in Malawi from the 1870s some indigenous matrilineal societies adopted the new patrilineal practices such as payment of bride wealth (lobola). Semu, L, 2002, "Kamuzu's Mbumba: Malawi's women's embeddedness to culture in the face of international political pressure and internal legal change", *Africa Today*, 77-99, 79.

⁵ Semu, L, 2002, "Kamuzu's Mbumba: Malawi's women's embeddedness to culture in the face of international political pressure and internal legal change", *Africa Today*, 77-99, 79.

⁶ Holden C. and Maze R, 2003, "Spread of cattle led to the loss of matrilineal descent in Africa" *Proceedings of the Royal Society of London* 270: 2425-2433.

⁷ Takane, T, 2008, "Customary land tenure, inheritance rules, and smallholder farmers in Malawi", *Journal of Southern African Studies*, Vol. 34, No. 2, 269-291, 280.

⁸ Schoneveld, G, 2017, "Host country governance and the African land rush: 7 reasons why large-scale farmland investments fail to contribute to sustainable development" *Geoforum* 83 (2017) 119-132. The paper synthesises research on 38 farmland investment projects in Ethiopia, Ghana, Nigeria and Zambia, and concludes that large-scale farm-land investments is "typically accompanied by displacement, dispossession and environmental degradation".

⁹ Schoneveld, G, 2017, "Host country governance and the African land rush: 7 reasons why large-scale farmland investments fail to contribute to sustainable development" *Geoforum* 83 (2017) 119-132, 120.

¹⁰ Chitonge, H, "Customary Land in Zambia: The New Scramble and the Evolving Socio-political Relations" in Moyo, S. et al (eds) *Reclaiming Africa: Scramble and Resistance in the 21st Century*, September 2019, Springer.

¹¹ Schoneveld, G, 2017, "Host country governance and the African land rush: 7 reasons why large-scale farmland investments fail to contribute to sustainable development" *Geoforum* 83 (2017) 119-132.

¹² In this paper we refer to the "extractive industries" broadly to include the "operations by private or State actors, usually at a commercial scale, of mining or extraction of natural resources for economic gain." African Commission's State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment, 2018.

challenges faced by women and girls in accessing and retaining customary land.¹² The African Commission on Human and Peoples' Rights,¹³ as well as Human Rights Watch,¹⁴ Action Aid Zambia¹⁵ and Reuters¹⁶ have all observed that women and girls are disproportionately impacted when the land they occupy and use is taken over for the operations of extractive projects.¹⁷ With weak secondary rights over customary land, women are often excluded from decision-making roles. They thus are not involved in the negotiations around the extractive industries, which would negatively impact on their lives and those of their children.

This paper focuses on legal developments surrounding women's equality in marriage and succession. The development of extractive industries often displaces rural communities from land that they have lived on and used for decades. Replacement land, if any is granted, is usually smaller, less fertile, and further away from natural resources. While this displacement harms all members of the community, due to social and cultural gender norms, patriarchal beliefs and attitudes and division of labour, women and girls are disproportionately affected.¹⁸

SADC states have agreed to protect women's customary land rights

Existing customary laws and prohibitive statutory and policy frameworks which limit women's customary lands rights are incompatible with the regional legal framework agreed to time and again by SADC States.

The most unambiguous affirmation of women's customary land rights on succession is set out in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Maputo Protocol.¹⁹ Article 21 of the Protocol provides for the equitable right to inheritance of widows, including the right to continue to reside in the marital home. Article 21(2) explicitly provides that "women and men shall have the right to inherit, in equitable shares, their parents' properties." More recently, article 9 of the Protocol to the African

¹³ The African Commission on Human & Peoples' Rights (ACHPR), Draft Background Study on the Operations of the Extractive Industries Sector in Africa and its Impacts on the Realisation of Human and Peoples' Rights under the African Charter on Human and Peoples' Rights, 2019, 23, 26.

¹⁴ Human Rights Watch Report, 2017, "They Destroyed Everything", Mining and Human Rights in Malawi", 11-13.

¹⁵ Action Aid Zambia Study Report, 2015, "Impact of Mining Extractive Industries on Women in Zambia" 6.

¹⁶ Mis, M, 2015, "Women pay the price for Zambia Mining Expansion" *Reuters*.

¹⁷ Schoneveld, G, 2017, "Host country governance and the African land rush: 7 reasons why large-scale farmland investments fail to contribute to sustainable development" *Geoforum* 83 (2017) 119-132, 128.

¹⁸ Oxfam International, 2017, "Position Paper on Gender Justice and the Extractive Industries" 5. They note that women "disproportionately bear the costs – such as social and family disruption, health and safety risks (such as increased violence against women and girls), and environmental degradation (loss of land, pollution, increasing resource scarcity)".

¹⁹ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003 (the Maputo Protocol).

Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa requires that state parties (2) "put in place legislation and other measures that guarantee the protection of older women against abuses related to property and land rights; and (3) adopt appropriate legislation to protect the right of inheritance of older women."²⁰ Article 10 of the SADC Protocol on Gender and Development, 2008, instructs states to "enact and enforce legislation to ensure that:... (c) a widow shall have the right to continue to live in the matrimonial house after her husband's death;... and (e) a widow shall have the right to an equitable share in the inheritance of the property of her husband."

These commitments by African states are again affirmed in article 3 of the African Charter on the Rights and Welfare of the Child, which prohibits discrimination based on a child's gender. Article 21 of that charter requires that states take all appropriate measures to eliminate "those customs and practices discriminatory to the child on the grounds of sex or other status." Article 21(2) further requires that the minimum age of marriage is 18 years and that all marriages are registered.

Women's customary land rights during and upon dissolution of marriage are addressed explicitly in the SADC Protocol on Gender Development, leaving no doubt that SADC states have agreed to the abolishment of discriminatory and harmful policies and cultural practices by 2015. The Protocol requires that state parties harmonise their constitutions, laws and policies with regional and international instruments to ensure gender equality and equity.²¹ Article 8(1) of the Protocol requires that state parties shall "abolish the minority status of women by 2015"²² and ensure equal rights of women under both civil and customary law, including

²⁰ Adopted by the 26th Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 31 January 2016.

²¹ Article 2 (General Principles) "(1)(a) States Parties shall harmonise national legislation, policies, strategies and programmes with relevant regional and international instruments related to the empowerment of women and girls for the purpose of ensuring gender equality and equity;" Article 4 (Constitutional Rights) "(1) States Parties shall endeavour, by 2015, to enshrine gender equality and equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices;" Article 6 (Domestic Legislation) "(1) States Parties shall review, amend and or repeal all laws that discriminate on the ground of sex or gender by 2015."

²² Article 2 "States Parties shall enact and enforce legislative and other measures to:
(a) Ensure equal access to justice and protection before the law;
(b) Abolish the minority status of women by 2015;
(c) Eliminate practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto."

²³ Article 7(e) "... equal legal status and capacity in civil and customary law, including among other things, full contractual rights, the right to acquire and hold rights in property, the right to equal inheritance and the right to secure credit."

the right to acquire and hold rights in property and inheritance.²³ The Protocol is not limited to women's land rights under marriage and succession. It seeks the review of all policies and laws to end the discrimination of women in accessing any property.²⁴

The African Commission's Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights consider the ambit of the right to property guaranteed in article 14 of the African Charter. The principles require states:

to ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women. This includes the obligation to take measures to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land.

The African Commission's State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment²⁵ also set some crucial guidelines for states concerning women's land rights.

The Guidelines require that states provide "legal guarantees to people, and women in particular, to live on, access, develop and use the land, vegetation, water sources and the aquatic resources on which they depend for their survival and livelihoods as per Article 21(1)." The Guidelines further require states to report on the legal frameworks which guarantee ownership of land and natural resources to people, including women, and to introduce safeguards against land acquisition without compensation and arbitrary and forced evictions.

Noting that SADC states have set themselves the target of 2015 to reform their laws and policies to address discrimination against women, including in custom-

²⁴ Article 18 (Access to Property and Resources) "States Parties shall, by 2015, review all policies and laws that determine access to, control of, and benefit from, productive resources by women in order to:

(a) End all discrimination against women and girls with regard to water rights and property such as land and tenure thereof;

(b) Ensure that women have equal access and rights to credit, capital, mortgages, security and training as men."

²⁵ The final guidelines and principles were adopted by the Commission at its 62nd Ordinary Session in May 2018.

ary land rights, this paper considers the extent to which these commitments have translated into increased access to land for women, at least on paper, in six SADC states: Eswatini, Botswana, Lesotho, Zambia, Zimbabwe and Malawi.

What do these regional undertakings mean in practice?

A frequent argument used against the reform of customary law is that the state is dualist and that unless regional and international instruments have been domesticated, they are not applicable.²⁶ Monist states are those where international law is automatically part of the domestic legal framework, and dualist states are those where international treaty obligations only become local law once they have been enacted by the legislature. States with common law systems are dualist, whilst countries like Angola and Mozambique are monist. In practice, the distinction has become obsolete as various courts have pronounced on how to use international law in domestic adjudication.

In more recent constitutions, the text itself has stated the importance of international law in interpreting local laws. The Malawi constitution, 1994, requires that, when interpreting the provisions of the constitution, courts should “have regard to current norms of public international law and comparable foreign case law”.²⁷ In *Re Adoption of Chifundo James*,²⁸ the Malawi Supreme Court re-affirmed the principle of avoiding conflict between domestic law and international law. Similarly, Zimbabwe’s constitution, 2013, requires that when interpreting the rights provisions in the constitution, a court or body “must take into account international law and all treaties and conventions to which Zimbabwe is a party”.²⁹ The Zimbabwe Supreme Court, in *Mildred Mapingure v Minister of Home Affairs and Two Others*,³⁰ went a step further to explain that this means that treaties which have not yet been domesticated should also be taken into account when interpreting municipal law, even though they are not strictly binding.

²⁶ Sloss, D, 2011, “Domestic Application of Treaties”, Santa Clara Law Digital Commons”, Faculty Publications, <http://digitalcommons.law.scu.edu/facpubs/635>.

²⁷ Section 11(2)(c) of the Constitution of Malawi.

²⁸ *Re Adoption of Chifundo James* [2009] MLR 220. “In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution.”

²⁹ Section 46(1)(c) of the Zimbabwe Constitution.

³⁰ *Mildred Mapingure v Minister of Home Affairs and Two Others*, SC22/14. The appellant in this case was supported by the Southern Africa Litigation Centre and Zimbabwe Women Lawyers Association.

³¹ *Khasake-Mokhethi v Moloi (CIV/APN/73/13)* [2013] LSHC 86 (22 August 2013), para 48. “Because Lesotho uses a dualist approach to international law, in the absence of any national law which domesticates international human rights instruments such as CEDAW, the Court cannot declare the laws of Lerotholi discriminatory.”

The Lesotho courts continue to follow a strictly dualist approach.³¹ In Zambia, the High Court³² held that the state had indicated its willingness to be bound by the Convention on the Elimination of All Forms of Discrimination against Women by ratifying the Convention without reservations.³³ However, a later decision by the Supreme Court of Zambia indicated that such instruments remain only of persuasive value until they are domesticated.³⁴ This position was also taken by the Eswatini High Court when it held that international law is only relevant when it is not inconsistent with national legislation and when it would assist in determining a matter that is not provided for in domestic law. Even then, unincorporated treaties may not be treated as part of municipal law.³⁵

The Botswana Court of Appeal, in the seminal case of *Attorney General v Dow*,³⁶ held that it was obliged to interpret domestic legislation so as not to conflict with the country’s obligations under international law since the state has undertaken to abide by such standards of conduct. The Botswana Court of Appeal in *Ramantele v Mmusi* confirmed that the provisions of the constitution should be constructed with the aid of international instruments to which the country has subscribed.³⁷

Customary land rights, in general, remain precarious.

Before considering the difficulties faced by women in asserting customary land rights, it is essential to consider the inherent weakness of customary land rights before and after independence throughout Southern Africa. The increased demand for customary land for economic development has brought these weaknesses in tenure rights to the fore.

In Zambia, for example, the Lands Act No. 29 of 1995, enables the conversion of customary land to state land.³⁸ Whilst the Act makes such conversion easier, even the minimum requirements before conversion are often not met.³⁹ In the case of

³² *Sara Longwe v International Hotels* 1992/HP/765.

³³ *Sara Longwe v International Hotels* 1992/HP/765, 119.

³⁴ *Attorney General v Clarke* 2008 (1) ZR 38 (SC).

³⁵ *Sithole N.O and Others v Prime Minister of the Kingdom of Swaziland and Others* [2007] SZHC 123.

³⁶ *Attorney General v Dow* 1992 BLR 119 (CA), 153-154. See also the Kenya Court of Appeal case *Rono v Rono* (2005) AHRLR 107, para 21.

³⁷ *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CA), para 69. The respondents in this case were supported by the Southern Africa Litigation Centre.

³⁸ Chitonge, H, “Customary Land in Zambia: The New Scramble and the Evolving Socio-political Relations” in Moyo S. et al (eds) *Reclaiming Africa: Scramble and Resistance in the 21st Century*, September 2019, Springer, 206.

³⁹ Human Rights Watch Research Report, 2017, “Forced to Leave: Commercial Farming and Displacement in Zambia”.

⁴⁰ *Molosoni Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others*, 2017/HP/2201, judgment from High Court of Zambia, 30 April 2020. The petitioners are supported by the Southern Africa Litigation Centre.

*Chipabwamba and Others v Yssel Enterprises Limited and Others*⁴⁰ a community was violently displaced from their ancestral land in Mulembo, near Mulembo River in the Serenje District of the Central Province of Zambia. They are one of the communities within the Muchinda chiefdom whose customary land was transferred to large farm blocks.⁴¹ The matrilineal community sought refuge in the Musangashi Forest Reserve, where they live in tents and endure chronic food and water insecurity, ill health, lack of options for an income and livelihood, and inability to send their children to school.⁴² Since their displacement, the community has lost its ability to generate income and grow food. The community challenged their forced eviction, destruction of their properties and assets, and the taking of their customary land without compensation. In April 2020, the High Court of Zambia ruled in their favour, stating that for land to be converted from customary to statutory tenure, the community who holds the land under customary tenure must be consulted, and the Commissioner of Lands must decline a conversion where the requirements of the Lands Act were not met.⁴³ The High Court held that the “petitioners have the freedom to practice their customary rights, which include land rights held under customary tenure.”⁴⁴

In the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*⁴⁵ the Constitutional Court of South Africa weighed up two competing rights in the context of evictions – the right of the applicants to occupy and enjoy the farm which they and their predecessors-in-title had occupied for nearly a century, and the right of the respondents to mine on the farm in terms of their acquired mining rights on the same land. The court noted that the recognition of customary law in the constitution was a remarkable assertion of people’s rights to dignity and equality, and the need to redress injustices of the past.⁴⁶

The precariousness of customary land rights was considered in some detail by the Supreme Court of Namibia in the case of *Kashela v Katima Mulilo Town Council and Others*.⁴⁷ The Supreme Court’s judgment provides a useful framework within

⁴¹ Juliana Nnoko-Mewanu, J, 2020, “After seven years, displaced Zambian villagers might get land” *Mail & Guardian*.

⁴² “Displaced Serenje Families in Anguish”, *Zambia Daily Mail*, 13 September 2013.

⁴³ *Molosi Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others*, 2017/HP/2201, judgment from High Court of Zambia, 30 April 2020, J139-140.

⁴⁴ *Molosi Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others*, 2017/HP/2201, judgment from High Court of Zambia, 30 April 2020, J125, J130.

⁴⁵ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC). The applicants were supported by Lawyers for Human Rights.

⁴⁶ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41, para 95.

⁴⁷ *Agnes Kahimbi Kashela v Katima Mulilo Town Council and 7 Others*, 2018 All Nam 135 (SC), judgment by Damaseb CJ, Chomba AJA and Mokgoro AJA, 16 November 2018. The appellant was represented by the Legal Assistance Centre in Namibia.

which to assess current customary land rights. The court had to determine what rights an occupier of communal land has when the state transfers the land which she occupies under customary land tenure to a local authority. Acknowledging the fragility of customary land rights before independence, which could be taken away at will by the state or the traditional authority,⁴⁸ the court determined that the new constitutional framework post-independence necessarily created a new relationship between the state and persons who hold customary land tenure.⁴⁹ Thus, even if the state took ownership of customary land rights after independence, it retained obligations to the persons who hold customary land tenure, and the occupiers of customary land remain protected despite the land being converted to state land.⁵⁰ The court acknowledged that post-independence states sought to develop land through local authorities, but this could not be done at the cost of the state’s duty “to look after the wellbeing of its marginalised communities”⁵¹ and its duty to respect communities’ reliance on communal land for their “livelihood and survival”.⁵²

In many countries, the occupiers of customary land remain in a tenuous position when their land is converted to state land and transferred to the control of development projects, local authorities and large-scale extractive and agricultural projects. The task of states to read the legislative framework in line with the constitutional obligations on the state to respect customary land rights, as urged by the Supreme Court of Namibia, is seldom exercised. In practice, it remains hard for communities which have resided on customary land for generations to prove that their rights transcend those of the persons who now hold that same land under a registered title.

To remedy the effects of colonisation, recognition must be given to customary law and to the choice of people to abide by customary processes and practices. However, it would be wrong to assume that such customary law has retained its character throughout centuries or to assume that documented forms of customary law, often written during colonial times, reflect its true nature.⁵³

⁴⁸ *Agnes Kahimbi Kashela v Katima Mulilo Town Council and 7 Others*, 2018 All Nam 135 (SC), para 44. The appellant was represented by the Legal Assistance Centre in Namibia.

⁴⁹ *Agnes Kahimbi Kashela v Katima Mulilo Town Council and 7 Others*, 2018 All Nam 135 (SC), para 60, 65, 67.

⁵⁰ *Agnes Kahimbi Kashela v Katima Mulilo Town Council and 7 Others*, 2018 All Nam 135 (SC), para 68, 78.

⁵¹ *Agnes Kahimbi Kashela v Katima Mulilo Town Council and 7 Others*, 2018 All Nam 135 (SC), para 80.

⁵² *Agnes Kahimbi Kashela v Katima Mulilo Town Council and 7 Others*, 2018 All Nam 135 (SC), para 73-74.

⁵³ *Aninka Clasens & Geoff Budlender*, 2018, “Transformative Constitutionalist and Customary Law” *Constitutional Court Review*, 6, 75-104.

Legislative reforms to protect customary land rights.

Traditionally, customary land and natural resources were under the control of traditional leaders who were the ones responsible for determining the use of customary land and communal resources. However, because of the insecurity of tenure of customary land, such land can be converted to state land or title deed land, often with little transparency, consultation or compliance with statutory requirements. Many of the large-scale evictions that have taken place are accordingly at the instance of agricultural and other companies.⁵⁴

In the Kingdoms of Eswatini⁵⁵ and Lesotho,⁵⁶ all land that is not title deed land, including customary land, belongs to the nation.⁵⁷ In both countries, customary land vests in the king who holds it in trust for the nation, and is distributed through chiefs based on a patronage system. In Zambia, land is classified as state land, customary land or such other classification, as prescribed.⁵⁸ Section 7 of Zambia's Lands Act No. 29 of 1995 provides that customary holdings must be recognised and allowed to continue.

In Zimbabwe, under the Communal Land Act, Chapter 20.04, all communal property vests in the president, and can only be distributed and controlled with the authority of the Rural District Council. Although the Rural District Council must consent to any allocation of land, occupation or land use rights in communal areas, customary law and practice must be followed,⁵⁹ the chief must be consulted, and his co-operation must be sought.⁶⁰ When rights to land occupation and use are allocated, a settlement permit is issued by the Rural District Council in the name of the "head of the household".

Gradually, the classification and allocation of customary land is changing. For example, section 211(1) of the Eswatini constitution provides that citizens shall

⁵⁴ Amnesty International, 2018, "They Don't See Us as People": Security of Tenure and Forced Evictions in Eswatini".

⁵⁵ Section 39 of the Constitution of Eswatini. Eswatini's Constitution defines "property" to include "Swazi nation land and any right or interest lawfully held by any person in that property."

⁵⁶ Section 108 of the Constitution of Lesotho, 1993, vests all land in the King, to hold in trust for the Basotho Nation, provided that this power is exercised in accordance with the Constitution and any other law. Section 4(1) of the Lands Act, 2010 confirms that all land in Lesotho vests in the King on behalf of the Basotho Nation, and no person shall hold title except as provided for in the Act.

⁵⁷ The Lesotho Court of Appeal in *Moneuoa v Moneuoa* considered a claim for compensation for land expropriated by Lesotho Highland Development Authority: "The legislation does not talk about ownership of land, because land in Lesotho, cannot be owned by any person individually: The Nation as a whole owns it. The legislation uses the word "owner" only in relation to servitude holders or holders of other rights in land." *Moneuoa v Moneuoa* (C of A (CIV) 42/2014) [2015] LSCA 6 (07 August 2015), paras 10-11.

⁵⁸ Section 254(1) of the Constitution of Zambia, 1991.

⁵⁹ Section 8(2)(a) of the Communal Land Act, Chapter 20.04.

⁶⁰ Section 8(2)(a1) of the Communal Land Act, Chapter 20.04.

have access to land for domestic purposes without regard to gender, whilst in Lesotho, customary law inconsistent with the Lands Act is invalid.⁶¹

In Malawi, the Land Act, No. 16 of 2016 distinguishes between private and public land, but places customary estates and leaseholds under the classification of private land, whilst unallocated customary land is classified as public land.⁶² The Act allows for land to be allocated to a family unit as a customary estate.⁶³ The Land Act requires that in such allocation the land committee must treat all persons equally; an application from a woman or person with a disability may not be treated less favourably. Upon acceptance, the person must be granted with a certificate of the customary estate.⁶⁴ Theoretically, this means that customary land attaches to individual families and is accordingly more secure than land which can be allocated at the whim of a traditional leader. However, in practice, it may not affect the rights that are already vested, which were previously awarded by chiefs. In the absence of the availability of land to make fresh allocations, as is the case in many countries, the status quo remains. Similarly, legislation which gives equal inheritance rights to both women and men will not have retrospective application. Even in the case of new laws which aim to address historical injustices, those who were previously excluded from inheritance may not benefit.

States' policies on land use increasingly acknowledge that land should be distributed equitably, that customary land should be protected, and that vulnerable groups' access to and retention of land should be secured. Botswana's Land Policy, 2013, has as one of its objectives to "promote equity in access to land and natural resources." The Zambian constitution requires that "land shall be held, used and managed in accordance with set principles", including "equitable access to land and associated resources".⁶⁵ Both Malawi and Zambia's objectives include protecting the security of tenure of lawful landholders. This means that where customary land has already been converted to title deed land, it becomes much harder for communities to regain control of their land.⁶⁶

⁶¹ Section 4(3) of the Lands Act, 2010.

⁶² Section 7 of the Land Act of 2016.

⁶³ Sections 20 and 21 of the Customary Land Act of 2016.

⁶⁴ Section 22(2)(c) of the Customary Land Act of 2016.

⁶⁵ Section 253(1) of the Constitution of Zambia, 1991.

⁶⁶ For example, section 211(2) of the Eswatini Constitution provides: "A provision of this chapter may not be used to undermine or frustrate an existing or new legitimate business undertaking of which land is a significant factor or based."

The right to property is usually protected in the national constitution, and such property may only be compulsorily acquired if it is in the public interest and done under a law which provides for prompt and adequate compensation. This is the position in Eswatini,⁶⁷ Botswana,⁶⁸ Lesotho⁶⁹ and Zambia.⁷⁰

These provisions are problematic in countries where they do not apply to customary land, and where what constitutes “adequate compensation” would not be sufficient to place the dispossessed communities in the same position they were before. In some countries, the compensation to be paid has been stipulated in other legislation. For example, section 56 of Lesotho’s Land Act, 2010, specifies that compensation for compulsory acquisition of property shall be at market value, a value which is unlikely to address the range of communal losses suffered by dispossessed communities in addition to losing their land. In Eswatini, where customary land was converted to title deed land, the Supreme Court held that the requirement of compensation only applies to compulsory acquisition by the state and not to a private owner seeking to evict occupiers from the land.⁷¹

The constitution of Zambia goes even further to allow for the acquisition of property without compensation for prospecting or the exploitation of minerals⁷² and the implementation of a comprehensive land policy by the president.⁷³ Zambia’s Mines and Minerals Development Act No. 11 of 2015, requires the holder of a mining license to obtain written consent from the chief and the local authority, but no consent is required from those occupying customary land.⁷⁴

The minimum requirements for compulsory acquisition of property of adequate compensation and public interest are open to manipulation and are often simply disregarded. Additional requirements have been suggested such as reasonable notice; free and meaningful consultations;⁷⁵ and free, prior, and informed

⁶⁷ Sections 19(2)(b) and 211 of the Constitution of Eswatini.

⁶⁸ Section 8(1)(b) of the Constitution of Botswana. In Botswana, land can be compulsorily acquired, not just where it is in the public interest, but also in instances where it is for the purpose of utilising mineral resources.

⁶⁹ Section 17(1) of the Constitution of Lesotho.

⁷⁰ Section 16(1) of the Constitution of Zambia, 1991.

⁷¹ *Umbane Limited vs Sofi Dlamini and Three Others* (13/2013)[2013] SZSC 25 (31 May 2013).

⁷² Section 16(2)(o) of the Constitution of Zambia, 1991.

⁷³ Section 16(2)(y) of the Constitution of Zambia, 1991.

⁷⁴ Section 52 of the Mines and Minerals Development Act No. 11 of 2015. “Restrictions of rights of entry by holder of licence or permit (1) A holder of a mining right or mineral processing licence shall not exercise any rights under this Act— ... (c) upon land occupied as a village, or other land under customary tenure without the written consent of the chief and the local authority for the district in which the village is situated.”

⁷⁵ Article 10 of the Kampala Convention on Internally Displaced Persons, African Union, 2009, requires that State Parties prevent displacement caused by projects, that they examine all feasible alternatives, and that they provide full information and engage in consultation with persons likely to be displaced.

consent. For example, the Committee on Economic, Social and Cultural Rights requires that “States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.”⁷⁶ Development projects which are funded by the World Bank and the African Development Bank have tended to adopt the requirement of consultation, but do not require consent. Such consultations are often more for information purposes as opposed to communities being given a choice in decisions around developments which may already have been made.

In Zimbabwe, in addition to requiring adequate compensation within a reasonable time for compulsory acquisition of property, the constitution also requires that communities be given reasonable notice.⁷⁷

In Malawi, the Land Act No. 16 of 2016 allows the minister to transfer customary land to state land for the public interest.⁷⁸ The Act provides for compensation, but there is no requirement of consent before transfer. There may, however, be no sale of a customary estate without the permission of all persons named on the land certificate.⁷⁹

Ultimately, the colonial legacy of statutory laws trumping customary laws (and customary land rights being undermined by title deed holders) has remained intact. The only way to remedy this untenable situation would be to formalise customary land rights, so that it becomes harder for customary land to be transferred or sold off without acknowledging the rights of communities who may have resided on such land for generations. This should explicitly include the need to obtain their informed consent and to provide them with adequate compensation.

Assuming that the rights of persons holding customary land tenure are more secure than it often appears on paper, this research considers the extent to which constitutional provisions relating to non-discrimination place an additional duty on states to protect women’s customary land rights.

⁷⁶ Committee on Economic, Social and Cultural Rights, 43rd session, 2–20 November 2009, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, para 37.

⁷⁷ Section 71 of the Constitution of Zimbabwe.

⁷⁸ Section 17(1) of the Customary Land Act of 2016.

⁷⁹ Section 28 of the Customary Land Act of 2016.

Customary laws should be open to development

Much criticism has been levelled against the interpretation of customary laws during the colonial period, when courts generally failed to consider that the customary law is dynamic and ignored the living law that was practised by communities.

The Botswana Court of Appeal in *Ramantele v Mmusi and Two Others*⁸⁰ held that “customary law is not static.⁸¹ It develops and modernises with the times; harsh and inhuman aspects of custom being discarded as time goes on...” In that case, the court looked at women’s right to inherit under the Ngwaketse customary law. The customary law in issue had two possible interpretations, depending on whether one ascribed to the rigid articulation of the customary law contained in dated academic writings,⁸² or whether one considered the pragmatic manner in which customary law has been applied in practice.⁸³

Historically, the ability of women to inherit under Ngwaketse customary law has been recognised in practice, but the interpretation of the law has been watered down considerably by colonialism.⁸⁴ *The Botswana Court of Appeal in Ramantele v Mmusi and Two Others*⁸⁵ emphasised that public opinion is merely one component in the public interest enquiry, that it is not the decisive one,⁸⁶ and that ultimately it is the courts’ sacred duty to “strike down any law, including customary law, that does not pass constitutional muster”. However, it might not be

⁸⁰ *Ramantele v Mmusi and Two Others*, CACGB-104-12, para 77, Botswana Court of Appeal. The respondents were supported by the Southern Africa Litigation Centre.

⁸¹ See also *Shiluba v Nwamitwa* 2009(2) SA (CC); *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC), the applicants were supported by the Legal Resources Centre and Women’s Legal Centre; *Mayelane v Ngwenyama and Another* [2013] ZACC 14, 2013(4) SA 415 (CC), where the Constitutional Court of South Africa held that customary law ought to develop to allow for the consent of a first wife before a husband enters into a second marriage.

⁸² *Alexkor Limited v Richtersveld Community* 2003 (5) SA 460 (CC). The respondents were supported by the Legal Resources Centre. The South African Constitutional Court observed that “although a number of textbooks exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied.”

⁸³ In 1913 the Ngwaketse Chief asked men in his kgotla to change inheritance laws because men were dying without sons. Morton explains that this increased acceptance of women’s right to inherit followed Khama’s law. Morton, B, 1998, “The evolution of women’s property rights in colonial Botswana 1890-1966”, *Botswana Journal of African Studies*, Vol 12 No. 1 and 2, 5-21. Subsequently, Schapera was instructed by the Resident Commissioner in Botswana at the time, to compile a code of customary law. Schapera’s Handbook of Tswana law and Custom was finalised in the 1930s. Bennett, TW, 1991, “Customary law in theory”, in Bennett, TW, *A sourcebook of African Customary Law for Southern Africa*, Cape Town, Juta. Morton concludes that “what Schapera’s Handbook of Law and Custom did in matters relating to women’s property rights, unsurprisingly, was to move the clock back to the era before Khama’s Law.”

⁸⁴ *Tokoyame v Bok* 2008 (1) BLR 384 (CA), per Tebbutt JP, Zietsman and Twum JJA. The case concerned the right of a widow to inherit. In this case, the court confirmed the need to take consideration of the interpretation of customary law in the area in which it is practiced, by having regard to the views of the customary elders who are the repositories of customs in their communities.

⁸⁵ *Ramantele v Mmusi and Two Others*, CACGB-104-12, at para 77, Botswana Court of Appeal. The respondents were supported by the Southern Africa Litigation Centre.

⁸⁶ *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CAC).

necessary for the courts to resort to such action if they can interpret customary law in a manner that affirms the rights enshrined in the constitution. The court concluded that “the Ngwaketse Customary Law of inheritance does not prohibit female or elder children from inheriting as intestate heirs to their deceased parents’ homestead”.⁸⁷

Customary law should be developed to be in line with constitutional rights and the principles of natural justice inherent in customary law. This principle is set out in the constitution of Malawi, 1994, which states that “in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.”⁸⁸ The same wording is contained in the constitution of Zimbabwe, 2013.⁸⁹

The constitutional right to non-discrimination and equality before the law

The right to equality before the law and the equal protection of the law is usually either an umbrella provision in the bill of rights or a substantive rights provision (or both).⁹⁰ *The African Commission has held in Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe*⁹¹ that the right, also contained in article 3 of the African Charter on Human and Peoples’ Rights, “guarantees fair and just treatment of individuals within the legal system of a given country.”

Some constitutions, in addition to protecting the general right to equal treatment before the law, go further to explain that this right applies to all spheres of life. This is the case in the constitutions of Eswatini,⁹² and Zimbabwe.⁹³ The Malawian constitution further provides that “each member of the family shall enjoy full

⁸⁷ *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CAC).

⁸⁸ Section 10(2) of the Malawi Constitution.

⁸⁹ Section 46(2) of the Zimbabwe Constitution.

⁹⁰ Sections 4(1)(o) and 19 of the Lesotho Constitution; sections 14(1)(a) and 20(1) of the Eswatini Constitution; section 56(1) of the Zimbabwe Constitution, section 3(a) of the Botswana Constitution; Sections 4, 23 and 24 of the Malawi Constitution; and section 11(a) of the Zambia Constitution.

⁹¹ *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe*, Comm. No. 294/04 (3 April 2009).

⁹² Section 20(1) of the Constitution of Eswatini. The Eswatini constitution provides that all persons are “equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect”. In Section 28(1) the Eswatini constitution goes further to specify that “women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities”.

⁹³ Section 56(2) of the Constitution of Zimbabwe, 2013, provides that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.” Section 80(1) of the Constitution of Zimbabwe provides that “every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities”.

and equal respect”⁹⁴ and that women⁹⁵ and children⁹⁶ have the right to equal treatment.

Constitutions prohibit discrimination, including but not limited to discrimination based on the grounds listed in the constitution itself. The meaning of discrimination was discussed by the Eswatini High Court in *Sacolo* to mean “unjust distinction on the treatment of different categories of people, especially on the grounds of race, sex or age. It could even be based on religion or other categories. The key word is ‘unjust.’”⁹⁷ In most countries, the list of prohibited grounds has been interpreted by courts to be non-exhaustive.⁹⁸ The benefit of a listed ground of discrimination is that it becomes much harder to justify discrimination on that basis. Post-independence constitutions did not always include sex as a prohibited ground of discrimination. This is the case with the Botswana constitution of 1966, where the constitution was amended after the case of *Attorney General v Dow*⁹⁹ to include sex as a prohibited ground of discrimination. The Lesotho constitution also prohibits discrimination on the grounds of sex, whilst the Zambia constitution includes as prohibited grounds of discrimination sex,¹⁰⁰ marital status, and pregnancy.¹⁰¹

The Eswatini constitution specifically prohibits discrimination on the ground of gender,¹⁰² whilst the Zimbabwe constitution prohibits discrimination not only based on gender, but also sex, marital status, age, pregnancy, disability, economic or social status, or whether born in or out of wedlock.¹⁰³ Malawi’s constitution prohibits discrimination on the grounds of sex, birth, or other status¹⁰⁴ as well as on the grounds of gender or marital status.¹⁰⁵ The inclusion of ‘gender’ in these constitutions arguably broadens the scope of the inquiry, incorporating perceptions of gender roles and gender stereotypes. In any event, the prohibited grounds of discrimination are not exhaustive and should be understood to

⁹⁴ Section 22(2) of the Constitution of Malawi.

⁹⁵ Section 24 of the Malawi Constitution.

⁹⁶ Section 23 of the Malawi Constitution.

⁹⁷ *Sacolo and Another v Sacolo and Others* (1403/16) [2019] SZHC (166) (30 August 2019), para 19. The applicant was supported by Women and Law Southern Africa (Eswatini) and the Southern Africa Litigation Centre.

⁹⁸ *Dia v Botswana Building Society*, the Botswana Industrial Court IC Case No. 50 of 2003;

Satellite Investments v Dlamini and Others, [2011] SZICA 5, paras 25-26.

⁹⁹ *Attorney General v Dow* 1992 BLR 119 (CA), 153-154. See also the Kenya Court of Appeal case *Rano v Rano* (2005) AHRLR 107, para 21.

¹⁰⁰ Section 18(3) of the Constitution of Lesotho.

¹⁰¹ Section 23(1) and (3) of the Constitution of Zambia, 1991; Section 266 of the Constitution of Zambia, 1991 as amended in 2016.

¹⁰² Section 20(2) of the Constitution of Eswatini.

¹⁰³ Section 56(3) of the Constitution of Zimbabwe.

¹⁰⁴ Section 20(1) of the Constitution of Malawi.

¹⁰⁵ Section 24(1) of the Constitution of Malawi.

include other characteristics which are inherent to a person’s dignity, including sexual orientation and gender identity.

The more recent constitutions have recognised that property laws discriminate against women in relation to customary land, and that law reform and other measures are required to remedy this. The Eswatini constitution urges parliament to urgently enact legislation to regulate the property rights of spouses, “including common law husband and wife”.¹⁰⁶ The Malawi constitution requires that parliament passes legislation “to eliminate customs and practices that discriminate against women” including “deprivation of property, including property obtained by inheritance”.¹⁰⁷ The Zimbabwe constitution requires the state and all institutions “to ensure that women have access to resources, including land, on the basis of equality with men”,¹⁰⁸ and to “rectify gender discrimination and imbalances resulting from past practices and policies”.¹⁰⁹

Constitutional claw-back clauses should be narrowly construed.

Whilst constitutional rights must be broadly construed, limitations to such rights require a narrow interpretation.¹¹⁰ Women’s rights under customary law have sometimes been read to be excluded from constitutional protection, where a country’s constitution contained a so-called “claw-back” clause. We submit that such an interpretation is unduly restrictive. We are encouraged by legal developments where the position is more clearly articulated. For example, although the Eswatini constitution, 2005, specifically recognises the principles of Swazi customary law (Swazi law and custom) as part of the law of the country, such recognition only applies to those customs which are not inconsistent with the constitution or “repugnant to natural justice or morality or general principles of humanity”.¹¹¹

The “claw-back” clauses concerning customary law are contained in several post-independence constitutions, including the constitutions of Botswana,¹¹²

¹⁰⁶ Section 34 of the Constitution of Eswatini.

¹⁰⁷ Section 24(2)(c) of the Constitution of Malawi.

¹⁰⁸ Section section 17(1)(c) of the Constitution of Zimbabwe.

¹⁰⁹ Section section 17(2) of the Constitution of Zimbabwe.

¹¹⁰ *Amissah PJ in Noor v Botswana Co-operative Bank Ltd* 1999 (1) BLR 443 (CA); *Makuto v the State* 2000 (2) BLR 130 (CA).

¹¹¹ Section 252(2) and (3) of the Constitution of Eswatini.

¹¹² Section 15(4) of the Constitution of Botswana, 1966. Section 15(4) of the Botswana Constitution states that the non-discrimination provision in section 15(1) is not applicable where the law makes provision “(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;” or “(d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not.”

Lesotho¹¹³ and Zambia.¹¹⁴ The provisions are the same in each of these constitutions. We argue that it could not have been the intention of the drafters of the constitution that any law, no matter how offensive, could be saved by the so-called “claw-back clauses” as such an interpretation would be contrary to the state’s obligations under international law.¹¹⁵ Amissah PJ in the Botswana Court of Appeal case of *Makuto v the State*,¹¹⁶ discussing a similar provision, noted that “it must be accepted that section 15(4) of the Constitution, being an exception to the freedom from discrimination, conferred on the people, should be narrowly construed.”

An example of such an approach is the case of *Attorney General v Dow*,¹¹⁷ where the Court of Appeal in Botswana considered the constitutionality of the Citizenship Act of 1984 which denied women the same rights as men to have their foreign-born spouse become citizens upon marriage, and their children attain citizenship. The state argued that the statute was based on “patrilineal customs and traditions of the Botswana people” and that “it was proper for Parliament to legislate to preserve or advance such customs and traditions”.¹¹⁸ The court expressed its respect for the traditions of Botswana but explained that custom must be interpreted to conform to the constitution. The court held that when such an interpretation is impossible, “it is custom [and] not the Constitution which must go”.

In the case of *Ramantele v Mmusi and Others*,¹¹⁹ the Botswana Court of Appeal held that the derogations contained in section 15(4) of the constitution are not unrestricted, and must be rational, justifiable and in the public interest.¹²⁰ The court held that the so-called claw-back clause in section 15(4) is of no consequence in a case where the customary law itself is repugnant to morality, humanity and natural justice. In reaching this conclusion, the court looked at the defini-

¹¹³ Section 18(4) of the Constitution of Lesotho, 1993. Section 18(4) of Lesotho’s Constitution, 1993, provides that the prohibition against discrimination does not apply to a law “respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or for the application of the customary law of Lesotho.” Lesotho entered a reservation to article 2 of CEDAW in respect of the law relating to success to chieftainship.

¹¹⁴ Section 23(4) of the Constitution of Zambia, 1991. Section 23(4) of the Constitution of Zambia provides that the prohibition against discrimination does not apply to a law that makes provision “c. with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;” and “d. for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other.”

¹¹⁵ See also in *re the Estate of Andrew Manunqyu Musyoka* (2005) eKLR 303/1998, Kenya High Court; *Uke and Another v Iro* (2002) AHRLR 155 (NgCA 2001)

¹¹⁶ *Makuto v the State* 2000 (2) BLR 130 (CA).

¹¹⁷ *Attorney General v Dow* 1992 BLR 119 (CA).

¹¹⁸ *Attorney General v Dow* 1992 BLR 119 (CA), para 112.

¹¹⁹ *Ramantele v Mmusi and Others* CACGB 104-12. The respondents were supported by the Southern Africa Litigation Centre.

¹²⁰ *Ramantele v Mmusi and Others* CACGB 104-12.

tion of customary law in the Customary Law Act No. 15 of 1969, which requires customary law to be compatible with the provisions of written law and not to be “contrary to morality, humanity or natural justice.”¹²¹ The Act further requires courts to determine customary law matters following “the principles of justice, equity and good conscience”.¹²² The court concluded that a customary law which is inconsistent with the principles of natural justice is “unconscionable” and does not qualify for recognition as a “law”.¹²³

The Lesotho courts have taken a markedly different approach, holding that the claw-back clause “effectively sanctions a customary law-based inequality” and that parliament likely felt it served “a legitimate societal purpose for the Basotho”.¹²⁴ The Lesotho Court of Appeal, in interpreting the implication of section 18(4), held that “the framers of the Constitution must be taken to have considered that it was in the public interest of the people of Lesotho that those communities living according to customary law be governed by the rules of that law.”¹²⁵

The constitution of Zambia explicitly states that any written law, customary law and customary practice that is incompatible with the constitution is void to the extent of the inconsistency.¹²⁶ The Supreme Court of Zambia recently confirmed¹²⁷ its ruling in the case of *Chibwe v Chibwe* which recognised customary law only to the extent that it was not repugnant to written law and principles of equity.¹²⁸ The Supreme Court in *Chibwe* explained that the gross disparities resulting from the dichotomy between the two justice paradigms could be remedied by courts upholding the constitution and invoking principles of equity.¹²⁹

The newer constitutions are far less ambivalent when it comes to customary law in relation to the constitution. For example, the Zimbabwe constitution, 2013, explicitly provides that “all laws, customs, traditions and cultural practices that

¹²¹ Customary Law Act, No. 15 of 1969, section 2; *Ramantele v Mmusi and Two Others*, CACGB-104-12, para 47, Botswana Court of Appeal.

¹²² Customary Law Act, No. 15 of 1969, section 10(2); *Ramantele v Mmusi and Two Others*, CACGB-104-12, para 48, Botswana Court of Appeal.

¹²³ Customary Law Act, No. 15 of 1969, section 10(2); *Ramantele v Mmusi and Two Others*, CACGB-104-12, para 48, Botswana Court of Appeal.

¹²⁴ *Ramantele v Mmusi and Two Others*, CACGB-104-12, para 49, Botswana Court of Appeal.

¹²⁵ *Khasake-Mokhethi v Moloi* (CIV/APN/73/13) [2013] LSHC 86 (22 August 2013), para 44.

¹²⁶ *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (C of A (CIV) 29/2013) [2014] LSCA 22 (17 April 2014), para 30.

¹²⁷ Section 1 of the Constitution of Zambia, 1991, as amended in 2016.

¹²⁸ *Connie Munalula v Donald Mwaba*, Appeal No. 20/2017, Supreme Court of Zambia, judgment 31 March 2020, para 7.27.

¹²⁹ *Chibwe v Chibwe* (SCZ Judgment No. 38 of 2000) [2000] ZMSC 59 (4 December 2000).

infringe the rights of women conferred by this Constitution are void to the extent of the infringement.”¹³⁰

Women’s right to inherit under customary law

The application of customary law in succession issues often disadvantages women. Widows face significant barriers to land ownership through the implementation of customary law. They cannot traditionally inherit their deceased husband’s estate. Many who remain on the land have only been able to do so at the pleasure of their in-laws, continually at risk of being evicted.¹³¹

The difficulties faced by the girl-child to inherit were aptly demonstrated in the case of *Magaya v Magaya*,¹³² in which the Supreme Court of Zimbabwe held that only a male child could be appointed heir under customary law. Consequently, eviction of widows and orphans from customary marital land by their in-laws and father’s families has been a widespread practice in the region. Inheritance laws in Zimbabwe have, however, been significantly changed to allow for widows and girl-children to inherit in estates subject to customary law.¹³³

States’ obligations under regional law require them to take measures to ensure that men and women can inherit in equitable shares their parents’ properties, and to provide widows with the right to remain in the matrimonial home and share in the property of her husband after his death. States are further obliged to ensure that older women can inherit and are protected from abuses related to property and land rights. Despite states’ undertakings under regional law, the position of women in relation to inheritance remains skewed in favour of men. The application of customary succession laws remains distinct from the constitutional requirement to develop customary law in line with constitutional rights and principles.

Despite these obligations, colonial-era statutes governing succession remain in place and continue to entrench the dichotomy between civil laws and customary laws. For example, Lesotho’s Intestate Succession Proclamation of 1953 deals with persons who died without a will. According to the Proclamation, where a

¹³⁰ Section 80(3) of the Constitution of Zimbabwe.

¹³¹ United Nations Human Settlements Programme (UN-HABITAT), 2002, “African regional civil society consultation on women and adequate housing”, Nairobi, Kenya.

¹³² *Magaya v Magaya* 1998 ZLR 210 (SC).

¹³⁴ Through amendments in 1997 to the Administration of Estates Act, Chapter 6:01, and the Deceased Estates Succession Act, Chapter 6:02.

marriage was in community of property, and one of the spouses died, the surviving spouse inherits a child’s share.¹³⁴ However, this provision does not apply to “any African” whose estate must be administered following customary law, unless, according to section 3(b) of the Administration of the Intestate Estates Proclamation No. 19 of 1935¹³⁵ the deceased is shown to have “abandoned tribal custom and adopted a European mode of life”.

As offensive and archaic as these provisions might be, the courts in Lesotho have no hesitation in applying them.¹³⁶ The High Court in *Khasake-Mokhethi v Moloi*,¹³⁷ which dealt with section 3(b) of the Administration of the Intestate Estates Proclamation, held that section 18 of the constitution sanctions customary law-based discrimination. The court explained that the foundational scheme is to guard against the alienation of the land from the family.”¹³⁸

according to the laws and customs of the Basotho Nation, a woman is married into the family through her husband. She in that capacity attains the status of a mother of the family and not just a woman. The position spontaneously assigns her the trusteeship over the family assets. This is expected to subsist during and after the lifetime of her husband. The emphasis would be to protect the family assets, particularly the land in the best interest of the future generations of the family concerned.¹³⁹

The case of *Mokatsanyane v Thekison* demonstrates how the Lesotho courts have been willing to adapt customary law only to a minor extent.¹⁴⁰ Referring to a previous author who had noted that “the (customary law) widow has no right of disposition either by allocation during her lifetime or by testamentary instrument”, the court noted that “it is plainly a statement representing the classical tradi-

¹³⁴ Section 1(1)(a) “to the extent of a child’s share or to so much as, together with the surviving spouses share in the in the joint estate, does not exceed one thousand two hundred Rands in value (whichever is the greater).”

¹³⁵ “...Provided that such law and custom shall not apply to the estates of Africans who have been shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life and who, if married, have married under European law.”

¹³⁶ For example, in the case of *Lepule v Lepule* (C of A (CIV) 5 of 2013) [2016] LSCA (29 April 2016), where a couple was in a customary marriage out of community of property, the Court of Appeal confirmed that “under customary law, the surviving widow’s half-share in the erstwhile joint estate was not recognised at all”. As authority, the Court cited the dated case of *Khatala v Khatala* LAC (1955-1969) 73, which held that where spouses were married both under customary law and according to Christian rites, “their intestate succession rights after the death of one of them are governed by Basotho law.”

¹³⁷ *Khasake-Mokhethi v Moloi* (CIV/APN/73/13) [2013] LSHC 86 (22 August 2013).

¹³⁸ *Khasake-Mokhethi v Moloi* (CIV/APN/73/13) [2013] LSHC 86 (22 August 2013), para 28.

¹³⁹ *Khasake-Mokhethi v Moloi* (CIV/APN/73/13) [2013] LSHC 86 (22 August 2013), para 30.

¹⁴⁰ *Mokatsanyane and Another v Thekison and Others* (23/2004) [2005] LSCA 6 (20 April 2005).

tional viewpoint expressed 29 years ago”.¹⁴¹ The court didn’t take the law much further. It simply stated: “the correct legal position is that a customary law widow does have the right of disposition by testamentary instrument provided she satisfied two requirements: 1) that she has abandoned a customary mode of life in favour of a European way of living; and 2) that the heir is not thereby deprived of more than half of the estate.” The court concluded that although customary law makes allowance for testate succession, it “does not permit a testator to deprive a customary heir of more than half of the deceased’s estate”.¹⁴²

In the case of *Ramatlapeng v Jessie*¹⁴³ the Lesotho Court of Appeal considered the right of a married sister to return to her natal home. The Court held that section 14 of the Laws of Lerotholi and section 8 of the Land Act only provide for sharing of movable property, not immovable property.¹⁴⁴ The court confirmed that the rule of male primogeniture meant that the inherited property became the heir’s own, but he was obliged to use it for maintenance of dependants of the deceased as he deems fit.¹⁴⁵ The court concluded that the right to be maintained by the heir depended on whether the person seeking to be maintained is a dependant or minor, and a married woman would not qualify for this right.¹⁴⁶

The Eswatini Supreme Court, dealing with similar provisions on intestate succession and customary law, seems equally uncomfortable developing customary succession laws. In 2014, the Eswatini Supreme Court delivered judgment in the case of *Attorney General v Titselo Dzadze Ndzimandze and Others*,¹⁴⁷ finding section 2(3) of the Intestate Succession Act No. 3 of 1953 inconsistent with section 34 of the Constitution.¹⁴⁸ Section 2(3) of the Intestate Succession Act provides that where spouses were married in community of property, a surviving spouse would be entitled to a child’s share of the deceased estate. Two years later, the Supreme Court reviewed and set aside its own decision.¹⁴⁹ The Supreme Court held that the Intestate Succession Act did not apply since the spouses were married un-

¹⁴¹ *Mokatsanyane and Another v Thekison and Others* (23/2004) [2005] LSCA 6 (20 April 2005), para 23.

¹⁴² *Mokatsanyane and Another v Thekison and Others* (23/2004) [2005] LSCA 6 (20 April 2005), para 24.

¹⁴³ *Ramatlapeng v Jessie* (C of A (CIV) 15 of 2016) [2016] LSCA 39 (28 October 2016)

¹⁴⁴ *Ramatlapeng v Jessie* (C of A (CIV) 15 of 2016) [2016] LSCA 39 (28 October 2016), para 12.

¹⁴⁵ *Ramatlapeng v Jessie* (C of A (CIV) 15 of 2016) [2016] LSCA 39 (28 October 2016), para 15-16.

¹⁴⁶ *Ramatlapeng v Jessie* (C of A (CIV) 15 of 2016) [2016] LSCA 39 (28 October 2016), para 17.

¹⁴⁷ *Attorney General v Titselo Dzadze Ndzimandze and Others* [2014] SZSC 78.

¹⁴⁸ Section 34(1) of the Constitution provides:

(1) “A surviving spouse is entitled to a reasonable provision of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.

(2) Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common law husband and wife.”

¹⁴⁹ *Attorney General v The Master of the High Court* (55/2014) [2016] SZSC 10 (30 June 2016).

der customary law and that section 68 of the Administration of Estates Act No. 28 of 1902 excludes the administration of deceased estates where the spouses were married by customary marriage. The Supreme Court criticised its previous decision for being insensitive by applying common law in a case of Swazi law and custom. The court concluded that it could remind parliament to enact legislation as required by section 34(2) of the constitution, but it cannot usurp parliament’s function.

Whilst statutory laws relating to succession are increasingly gender-neutral, they still provide for different succession regimes. For example, Zambia’s Intestate Succession Act No. 5 of 1989, recognised a woman’s right to inheritance and began enforcing criminal penalties on those who wrongfully deprive rightful heirs of their property. However, the Intestate Succession Act does not apply to customary or family land or chieftainship property.¹⁵⁰

Zimbabwe has taken on the task of reforming its succession laws to treat men and women equally. At present, in terms of the amended Administration of Estates Act, Chapter 6.01, and the Deceased Estates Succession Act, Chapter 6.02, widows and girl-children can inherit more equitably. Also, the Deceased Persons Family Maintenance Act No. 39 of 1978 provides maintenance for those dependants of the deceased, such as widows and children, and protects against the eviction of widows and children by relatives before the estate is finalised. For estates subject to customary law, section 68F¹⁵¹ of the Administration of Estates Act recognises the surviving spouse and children as joint beneficiaries of the estate, with the children inheriting in equal shares regardless of gender. The surviving spouse is entitled to the house she was living in with the deceased husband immediately before his death, together with the household effects, and a share in the residue of the estate with the other heirs. If there is only a surviving spouse and no children, she shares the residue of the estate with the deceased’s parents or siblings. The surviving spouse, in this case, includes a woman married in an unregistered customary law union, thus affording some recognition to these marriages.

¹⁵⁰ Intestate Succession Act of 1989, 2. Application: “(1) Except to the extent specifically provided in this Act, this Act shall apply to all persons who are at their death domiciled in Zambia and shall apply only to a member of a community to which customary law would have applied if this Act had not been passed. (2) This Act shall not apply to— (a) land which at the time of death of the intestate had been acquired and was held under customary law; (b) property which immediately before the death of the intestate was institutionalised property of a chieftainship and had been acquired and was being held as part of chieftainship property; (c) family property.”

¹⁵¹ Also, section 3A of the Deceased Estates Succession Act.

However, problems have arisen in practically implementing these provisions. For example, the provision allowing the surviving widow to inherit the house she was living in has had varying judicial interpretations, and at times has been rigidly enforced by the courts to only include the property in which she was living “immediately” before the death of the husband, leading to a deprivation of property she would otherwise be entitled to as matrimonial property.¹⁵²

In the case of unregistered customary marriages, proof of the existence of the marriage is sometimes at issue when a husband dies. In most cases, it is the husband’s relatives who provide validation of the marriage, leaving the woman at their mercy. In the absence of a surviving spouse and children, it is the deceased’s parents and siblings who would inherit, increasing the temptation to deny the existence of a spouse. A Human Rights Watch report¹⁵³ documented the plight of widows in Zimbabwe, who despite the existence of legal protections that are supposed to ensure equitable access to the property, often find themselves facing severe difficulties, including property grabbing, harassment and eviction by the deceased husband’s relatives. The widows are often unable to benefit from the law in the face of these attacks due to lack of knowledge of the provisions of the law, or in the case that this is known, a lack of resources to enable them to protect their rights through the courts and law enforcement agencies. In addition, they are often pressured to accept the property grabbing in order to comply with expectations in terms of the relatives’ interpretation of customary law or fear of being cut off from the family, especially where there are minor children involved.

Malawi has taken the law reform task furthest, in the Deceased Estate (Wills, Inheritance and Protection) Act No. 14 of 2011, which requires that all distribution of any deceased estate be dealt with under the Act and not any other law or customary law.¹⁵⁴ Where a testator has not made provision for immediate family in his or her will, the court may make reasonable provision.¹⁵⁵ Similarly, in the dissolution of someone’s intestate estate, provision must be made for the protection of dependants from hardship.¹⁵⁶ Upon distribution of the intestate estate, spouses and children will inherit in equal shares.¹⁵⁷ Where there are more than

¹⁵² See the cases of *Chimhova & Others v Chimhova & Others*, HH183-11; *Chinzou v Masomera*, HH593-15; *Chirowodza v Chimbari*, HH725-16; and *Ndige v Matsvange & Others*, HMA 181-20.

¹⁵³ Human Rights Watch Report, 2017, “You Will Get Nothing”: Violations of Property and Inheritance Rights of Widows in Zimbabwe”.

¹⁵⁴ Section 4 of the Deceased Estate (Wills, Inheritance and Protection) Act No. 14 of 2011.

¹⁵⁵ Section 15(1) of the Deceased Estate (Wills, Inheritance and Protection) Act No. 14 of 2011.

¹⁵⁶ Section 17(1) of the Deceased Estate (Wills, Inheritance and Protection) Act No. 14 of 2011.

¹⁵⁷ Section 17(1) of the Deceased Estate (Wills, Inheritance and Protection) Act No. 14 of 2011.

one surviving female spouse, “each spouse and her children by the intestate shall be entitled to a share of the property of the intestate proportionate to their contribution.”¹⁵⁸

Legal developments relating to marital power

Marital power refers to the outdated common law and customary law doctrines that a husband has the definitive right to decide over his wife and the matrimonial property. The doctrine of marital power means that a married woman cannot deal with the marital assets without the knowledge and consent of her husband, yet her husband can do so without seeking and obtaining her approval. Under this doctrine, a wife cannot conclude contracts without her husband’s permission, she cannot represent herself in civil suits, and she cannot administer property. Essentially, the common law and customary law doctrines of marital power relegated married women to the legal status of minors under the supervision of their husbands.

The SADC Protocol on Gender Development specifically called on states to “abolish the minority status of women by 2015”.¹⁵⁹ Not all states have done so yet. South Africa abolished marital power in civil marriages in 1993¹⁶⁰ and in customary marriages in 1998.¹⁶¹ Botswana abolished marital power in civil marriages in 2004.¹⁶² Lesotho abolished marital power in civil and customary marriages in 2006.¹⁶³ Zimbabwe did so in 1981 and also changed the marital property regime for registered marriages to marriages out of community of property.¹⁶⁴

In Eswatini, the courts have had to intervene to abolish marital power. In 2013, the Eswatini High Court, in the case of *Sihlongonyane v Sihlongonyane*¹⁶⁵ weakened marital power for marriages in community of property. The High Court held that the common law doctrine of marital power arbitrarily subordinates the wife to the power of her husband and is therefore unfair and serves no useful or ra-

¹⁵⁸ Section 17(3) of the Deceased Estate (Wills, Inheritance and Protection) Act No. 14 of 2011.

¹⁵⁹ Article 2 “States Parties shall enact and enforce legislative and other measures to:

(a) Ensure equal access to justice and protection before the law;

(b) Abolish the minority status of women by 2015;

(c) Eliminate practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto.”

¹⁶⁰ Section 11 of the Matrimonial Property Act No. 88 of 1984.

¹⁶¹ Section 6 of the Recognition of Customary Marriages Act No. 120 of 1998.

¹⁶² Section 3 of the Abolition of Marital Power Act No. 34 of 2004.

¹⁶³ Sections 3 and 5 of the Legal Capacity of Married Persons Act No. 9 of 2006.

¹⁶⁴ Sections 2 and 3 of the Married Persons Property Act, Chapter 5.12.

¹⁶⁵ *Sihlongonyane v Sihlongonyane* [2013] SZHC 207.

tional purpose.¹⁶⁶ The court held that marital power constitutes unfair discrimination and that its decision applies to “all married women subject to the marital powers of their husbands”.¹⁶⁷

Section 24 of Eswatini’s Marriage Act No. 74 of 1964 stated that where both parties in a marriage are Africans, and the unless the marriage was solemnised under common law, “the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom.” In the case of *Sacolo v Sacolo*,¹⁶⁸ a full bench of the High Court of Eswatini held that the common law doctrine of marital power discriminates against married women. The court noted that “the marital power of the husband is alive and well in this country, pervasive in its discriminatory shackles”. The court struck down the offending parts in sections 24 and 25 of the Marriage Act.

Women’s customary land rights during and upon dissolution of marriage

Regional law requires various legal reforms, including that the minimum age of marriage is 18 years, that all marriages be registered, and that women be afforded equal rights under both civil and customary law, including the right to acquire and hold rights in property.

The SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage of 2016 says that legislation should prohibit marriage where one of the parties is under the age of 18 years. Malawi¹⁶⁹ and Botswana¹⁷⁰ amended their laws to set the minimum age of marriage at 18. In other countries, the position is far less clear, and more recent legal amendments have often muddied the waters.

In Zambia, the Marriage Act, No. 10 of 1918 (1964) sets a minimum legal age of marriage of 21 years. However, a person younger than 21 may marry with parental consent, and a person under 16 can be married with judicial approval.

¹⁶⁶ *Sihlongonyane v Sihlongonyane* [2013] SZHC 207 (July 2013), para 24. “Marital power is unfair discrimination based on sex or gender inasmuch as it adversely affects women who have contracted a specific type of marriage but does not affect the men in that marriage in the same way.”

¹⁶⁷ *Sihlongonyane v Sihlongonyane* [2013] SZHC 144, para 33.

¹⁶⁸ *Sacolo and Women & Law Southern Africa-Swaziland v Sacolo, Ministry of Justice and Constitutional Affairs and Attorney General* (1403/16) [2019] SZHC (166). The applicant was supported by Women and Law Southern Africa (Eswatini) and the Southern Africa Litigation Centre.

¹⁶⁹ Section 14 of the Marriage, Divorce and Family Relations Act of 2015; section 22(7) of the Constitution of Malawi and section 22(8) previously allowed for marriage at the age of 15 with parental consent and encouraged the State to “actively discourage marriage between persons where either of them is under the age of 15 years.” Sections 22(7) and (8) were repealed by Act No. 17 of 2015.

¹⁷⁰ Under the Botswana Marriage Act No. 18 of 2001, the minimum age of marriage in Botswana is 21 years. A minor (someone under 21 years) who has not been widowed may marry at age 18 with the consent of their parents or guardians.

In Lesotho, the Marriage Act of 1974 provides for a minimum age of marriage of 21 years, but girls may be permitted to marry at the age of 16 and boys at the age of 18. The Children’s Protection and Welfare Act, No. 7 of 2011 defines a child as a person under the age of 18 years¹⁷¹ but does not address child marriages. Section 76(1)(b) of the Children’s Protection and Welfare Act states only that “a child is in need of urgent protection if there is reasonable cause to believe that the child is being forced to marry”.¹⁷²

Eswatini’s Sexual Offences and Domestic Violence Act, No. 15 of 2018, says that a person shall not marry a child in contravention of the Marriage Act No. 47 of 1964 or any Act succeeding it. The Marriage Act sets the age of consent to marriage for boys at 18 and girls at 16.¹⁷³ Any party below the age of 21 still requires parental consent.¹⁷⁴ However, the Sexual Offences and Domestic Violence Act criminalises having sex with a child, defined as being under the age of 18, and maintaining a sexual relationship with a child, which means that a person who married a child can be charged with committing sexual offences.¹⁷⁵ Section 151 of the Sexual Offences and Domestic Violence Act also clearly states that any previous or existing relationship cannot be a defence to any offence under the Act.

Provisions similar to those in Lesotho and Eswatini, where the marriage laws provide for different ages of consent to marriage, have been declared discriminatory and unconstitutional in Tanzania¹⁷⁶ and Zimbabwe.¹⁷⁷

In *Attorney General v Aphane*,¹⁷⁸ Eswatini’s Supreme Court declared section 16(3) of the Deeds Registry Act unconstitutional. The provision prohibited women married in community of property from registering immovable property in their name. The applicant was married in community of property, and she and her husband sought to purchase property jointly but were denied the opportunity to do so. The Supreme Court held that section 16(3) of the Deeds Registry Act violated

¹⁷¹ Section 2 of the Children’s Protection and Welfare Act of 2011.

¹⁷² Section 27 of the Marriage Act of 1974.

¹⁷³ Section 3(1) of the Marriage Act of 1964.

¹⁷⁴ Section 3(1) of the Marriage Act of 1964.

¹⁷⁵ Section 37 of the Sexual Offences and Domestic Violence Act of 2018.

¹⁷⁶ *Attorney General v Rebeca Gyumi* (Civil Appeal No.204 of 2017) [2019] TZCA 348 (23 October 2019).

The respondent was supported by Msichana Initiative and the Southern Africa Litigation Centre.

¹⁷⁷ *Loveness Mudzuru and Another v Ministry of Justice, Legal and Parliamentary Affairs and Others* [2015] ZWCC 12: “The African Charter on the Rights and the Welfare of the Child (1990) (ACRWC) imposed on States Parties...an obligation to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and to take effective measures, including legislation, to specify the age of 18 years as the minimum age for marriage. They are obliged to abolish child marriage.”

¹⁷⁸ *Attorney General v Doo Aphane* [2010] SZSC 32.

her rights to equality before the law and her rights as a woman.¹⁷⁹ However, this ruling only applies to women married in a civil ceremony, and with a community of property agreement. About 80 per cent of Eswatini's one million people live on communal Swazi Nation Land under customary law administered by chiefs.¹⁸⁰

Zimbabwe's Married Persons Property Act¹⁸¹ provides that marriages are out of community of property, meaning that parties can legally own property individually but also can decide to jointly own property which is then dealt with as matrimonial property. The Deeds Registries Act¹⁸² stipulates that married women have the right to acquire and register a property in their names.

Upon the dissolution of marriage, the Matrimonial Causes Act, Chapter 5.13, provides for equitable distribution of property and the court will consider several factors in arriving at a just decision in terms of section 7 of the Act, including the individual contribution of the parties to the marriage, length of the marriage, the relative needs of the parties, and whether or not there are any children (and their needs). This law only applies in respect of recognised marriages; unregistered customary marriages are not recognised.¹⁸³ Unregistered customary law unions, in contrast, at dissolution, depend exclusively on customary law, unless a court can be persuaded to apply common-law principles of equity.¹⁸⁴ Under customary law, as married women do not own land or any of the valuable property, they often leave the marriage with nothing. In terms of custom, they will only be entitled to their "*mawoko*" (property made with the hands) or household property.

When customary law is applied in the case of divorce, women will not be apportioned any rights to communal land. The position is the same for registered marriages. The courts have normalised the fact that, in distributing property at divorce, the rural home (regardless of contribution to its development) will almost always be awarded to the husband.¹⁸⁵ Section 3(a) of the Matrimonial Causes Act

¹⁷⁹ Sections 20 and 28 of the Constitution of Eswatini. Section 16(3) of the Deeds Registry Act was since amended by Act No. 2 of 2012 and currently reads: "Where immovable property or other real right that is not excluded from the community is transferred to or registered in the name of a spouse married in community of property neither spouse may, alone deal with the immovable property or other real right unless that spouse has the written consent of the other spouse or has been authorised by an order of the court to so deal with the immovable property or other real right."

¹⁸⁰ *Makhosazane Eunice Sacolo and Another v Jukhi Justice Sacolo and 2 Others* (1403/16) [2019] SZHC (166) 30 August 2019.

¹⁸¹ Chapter 5:12.

¹⁸² Chapter 20:05.

¹⁸³ In terms of section 3 of the Customary Marriages Act, Chapter 5:07, unregistered customary law marriages are only recognised for purposes of custody, guardianship, maintenance and inheritance for children at customary law.

¹⁸⁴ See, for example *Jeke v Zembe* (HH 237-18, HC 11663/17) [2018] ZWHHC 237 (05 May 2018).

¹⁸⁵ See, for example, *Dube v Dube* 2010 ZWBC 149.

also allows the exclusion of assets which are held personally by a spouse in terms of custom, and this could include rights in customary land.

Upon dissolution of a marriage, the Malawi constitution authorises the parties to a fair disposition of joint property.¹⁸⁶ The Marriage, Divorce and Family Relations Act, No. 4 of 2015, recognises civil marriages, customary marriages, religious marriages and marriages by repute or cohabitation.¹⁸⁷ The Act provides for the registration of customary marriages¹⁸⁸ and for the equitable division and reallocation of the property upon the dissolution of marriage.¹⁸⁹

Botswana's Married Persons Property Act of 2014 makes provision for spouses married under customary law to opt for their property to be administered under civil law either in or out of community of property. Furthermore, persons whose joint estate is administered under civil law are empowered to approach the High Court and change their marriage regime where their initial property regime ceases to be of an advantage to them. Despite the Marriage Act No. 18 of 2001 providing for equality between spouses, it does not apply to customary or religious unions, as per section 2 of the Act, which are most of the marriages on customary land.¹⁹⁰

Lesotho's Lands Act, 2010, provides that where persons are married in community of property, whether in civil or customary marriages, any title to property acquired by one spouse shall be held jointly by both.¹⁹¹ Transactions concerning land must be conducted by both spouses in a monogamous marriage in community of property, or with the consent of the other spouse in writing.¹⁹² In the case of polygamous marriages, "each of the multiple wives shall be responsible for land matters relating to her household."¹⁹³ If a spouse unreasonably withholds consent, relief can be sought at the District Land Court.¹⁹⁴ Interestingly, the Land Administration Authority in 2015 noted that the revised land policy had increased

¹⁸⁶ Section 24(1)(b)(i) of the Constitution of Malawi.

¹⁸⁷ Section 12(1) and (3) of the Marriage, Divorce and Family Relations Act of 2015.

¹⁸⁸ Sections 27 and 28 of the Marriage, Divorce and Family Relations Act of 2015.

¹⁸⁹ Section 74 of the Marriage, Divorce and Family Relations Act of 2015.

¹⁹⁰ Botswana Constitution, 1966 (rev. 2002).

¹⁹¹ Section 10(1) of the Lands Act, 2010. *Mota v Mota and Others* (C of A (CIV) 12/15 [2015] LSCA 37 (6 November 2015).

The spouses were married under civil law, and the deceased died intestate. The Court referred to section 10(1) of the Land Act which provides that where persons are married in community of property, whether under civil or customary law, the immovable property shall be deemed to be acquired by both.

¹⁹² Section 10(3) of the Lands Act, 2010.

¹⁹³ Section 10(4) of the Lands Act, 2010.

¹⁹⁴ Section 10(5) of the Lands Act, 2010.

the number of women who hold leasehold, with women now being in the majority.¹⁹⁵

Section 14(2) of Lesotho's Deeds Registry Act No. 12 of 1967 provided that a husband must assist a woman married out of community of property in executing a deed unless marital power had been excluded. Section 14(3) further restricted the transfer of immovable property into the name of a woman married in community of property. Section 14(1), (2) and (3) was amended¹⁹⁶ to make the provisions gender neutral. Section 14(6) previously provided that the "registrar shall refuse" to execute "all deeds and documents in respect of immovable property in favour of a married woman whose rights are governed by Basotho law and custom and where such registration would conflict with Basotho law and custom." This section has since been amended to provide that the registrar shall refuse to execute deeds in respect of immovable property "in favour of any spouse if such registration is in conflict with the rights of others in respect of that property."¹⁹⁷

In Zambia, the Matrimonial Causes Act No. 20 of 2007 applies to marriages under the Marriage Act of 1918 (as amended) but not to customary law marriages.¹⁹⁸ In some rare cases, customary laws, such as Ushi customary law, entitle women to a reasonable share of the marital property. The Supreme Court of *Zambia in Chibwe v Chibwe*¹⁹⁹ held that courts must invoke both the principles of equity and law, concurrently, and apply customary law provided its application is not repugnant or contrary to any written law. In that case, the parties were married under Ushi customary Law, which ensures that if a divorced woman found her husband with few properties and later acquired more properties, she was entitled to a reasonable share after divorce.

Concluding remarks

Despite some legislative reforms, customary law prevails in practice. This is preferable where customary law remains flexible, is not repugnant, and is in line with the national constitution. However, customary land rights do not yet ensure the security of women's land rights. This is because customary land rights, in general, remain precarious.

¹⁹⁵ The Kingdom of Lesotho Combined Second to Eight Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, at para 479 (submitted 30 November 2018)

¹⁹⁶ Section 18 of the Legal Capacity of Married Persons Act No. 9 of 2006.

¹⁹⁷ Section 18(d) of the Legal Capacity of Married Persons Act No. 9 of 2006.

¹⁹⁸ Section 3 of the Matrimonial Causes Act, 2007.

¹⁹⁹ *Chibwe v Chibwe* (SCZ Judgment No. 38 of 2000) [2000] ZMSC 59 (4 December 2000).

There are some promising legal reforms to improve women's rights. Constitutional and statutory provisions on customary tenure rights are favourable, but do not go far enough to secure the rights of communities whose land is sought by developers. There should be adequate space for consultation and free and informed prior consent to such development. Compensation should also be differently construed to consider the communities' loss not only of their land, but their livelihoods, natural resources, food security, and cultural practices.

Importantly, institutions which allocate land rights must be representative of women, and dispute resolution mechanisms (including civil and customary courts) should be accessible to women. For example, Malawi's Customary Land Act No. 19 of 2016, vests responsibility for the management of customary land in land committees.²⁰⁰ Such committees consists of a group village head and six elected members of the community, three of whom must be women.²⁰¹ The Customary Land Regulations, 2018, set out the functions of the land committees and dispute mechanisms in more detail. The Regulations provide that where compensation is payable for the loss of interests in customary land, such compensation shall be assessed in terms of the Lands Acquisition (Amendment) Act No. 9 of 2017.²⁰²

Ultimately, the requirements of regional law have not been met. Few states have reviewed all their policies and laws to end the discrimination against women in access to property. Developments in providing women with equal rights in civil marriages and formal registration of properties have been positive, but women's rights in customary marriages and women's customary land rights require far more consideration.

²⁰⁰ Section 4 of the Customary Land Act of 2016.

²⁰¹ Section 5(2) of the Customary Land Act of 2016.

²⁰² Section 77 of the Customary Land Regulations of 2018.

Legacy impacts of lead mining and Climate Change on women's land rights and climate change: The case of Kabwe mine in Zambia

By Liseli Lisulo

Introduction

Access to natural resources (such as land) linked to the creation of livelihoods in Africa has been a critical issue for women's development. The land access challenge is a prism through which structural patterns of gender inequality can be revealed. Throughout the world, it is women who overwhelmingly work on the land, producing food for themselves, their families, and their communities.

Over the years, the impact of climate change has been visible in Zambia in the form of long dry spells, intense short rainy seasons, and unique cases of the black and acidic rain in mining areas. In comparison to men, women have had to bear the brunt of severe weather patterns. In some cases, women have been forced to migrate from their land despite the land law allowing women to access land, and as a result women have lost out on opportunities to benefit from Zambia's rich mineral sources.

Women's access to land has remained a consistent challenge in most developing countries. The situation is worse in resource-rich countries with considerable mining activities, where access to land becomes even more challenging. Mining activities demand more land, and the associated activities are destructive, thereby contributing to climate change through greenhouse gas emissions, acid water drainage and damage to land. This directly impacts on women's activities in their quest to contribute to food security as crop yields, and quality are affected, thereby limiting access to other means of household food security. The adverse effects of climate change have impacted women more severely in comparison to men because of their social constructed roles and responsibilities in society.

Zambia is home to a variety of minerals, and is one of the main producers of copper in Africa.

This paper explores the contributions of lead mining to climate change and its impact on women's land rights, and traces the changing weather change patterns in the Zambian town of Kabwe¹. The desk study argues that lead mining in the area is undermining women's rights to land, as most of them are forced to relocate to marginalised locations where land is not affected by mining activities.

This study comes at a time when Anglo-American has been sued for pollution because of its lead mining activities. The lead that was mined in Kabwe has direct and indirect impacts on the health, social and economic status of women who make up approximately 51 per cent of the population in the area. So far, there has been minimal intervention directed at improving the health, land rights, and the social and economic status of women.² More than two decades after mine smelters were closed in the area, toxic waste continues to contaminate the land and remains a source of lead exposure to the community. Over 75 per cent of children in Kabwe suffer from high levels of lead in their blood and are not receiving any treatment.

Lead mining and its effects on the environment in Kabwe

The history of lead mining can be traced back to the industrial mineral revolutions of the late 17th Century and the second half of the 19th Century in Britain and South Africa, respectively. For the industrial revolution to succeed, there was a need for raw materials found in Africa, Asia, and America. Lead deposits were first discovered in Zambia in 1902 when Kabwe became known as Broken Hill, named by TG Davey, an Australian geologist working for what became known as the Rhodesian Broken Hill Development Company.³

Lead mining in Kabwe took place for over a century, and was officially abandoned decades ago. Kabwe is the capital of Zambia's Central Province, and was home to a lead mine from 1904-1994⁴. During that period, smelter fumes covered much of the surrounding soil with lead dust. The first lead mine was opened during the colonial period and operated by Rhodesian Broken Hill Development Company

¹ Kabwe is the capital of the [Zambian Central Province](#) with a population estimated at 202,914 at the 2010 census. Named Broken Hill until 1966, it was founded when [lead](#) and [zinc](#) deposits were discovered in 1902.

² Central Statistical Office, 2019. Zambia Demographic and Health Survey 2018: Key Indicators, Lusaka: Central Statistical Office, Ministry of Health (MOH), and ICF.

³ Machina, 2002. *Women's land rights in Zambia: Policy provisions, legal framework and constraints. In Regional Conference on Women's Land Rights*. Harare.

⁴ Human Rights Watch, 2019. *"We Have to Be Worried": The Impact of Lead Contamination on Children's Rights in Kabwe*, Zambia: Human Rights Watch.

(RBHD), registered in London. Anglo American South Africa took over and operated the mine as part of its group between 1925 and 1974, during which it was considered one of the most productive lead mines in the world. It was thereafter sold to Zambian Consolidated Copper Mines (ZCCM) until 1970, when the Zambian government nationalised the mining industry. The government closed the mine in 1994 and privatised its assets the following year. Since then the community has been experiencing the legacy impacts from the lead mine in the form of seasonal flooding and windblown dust from the mine dump.

Twenty-five years after the mine closed, high lead levels (exceeding international standards) remain in the soil and dust around the former mine, particularly in the townships of Kasanda, Makandanyama, Chowa, Mutwe Wansofu, and Makululu. The former mine area itself still hosts tailings and other waste from the mine and smelter, including a large waste dump known locally as “Black Mountain,” and has become a site for artisanal and small-scale mining.

According to the standards issued by the World Health Organisation (WHO, 2007), the maximum permissible value for the lead concentration in human blood is 10 milligrams per decilitre ($\mu\text{g}/\text{dl}$) for children. In 1994, altogether 866 people living in Kabwe were tested for blood Pb and the mean values ranged from 13.1 to 45 $\mu\text{g}/\text{dl}$ for adults. The highest blood Pb values were found in the youngest group of the population (age 6–16 years; 17.7 to 52 $\mu\text{g}/\text{dl}$).⁵ This is ascribed to the fact that children are generally shorter, closer to the contaminated ground, and therefore tend to inhale and digest larger volumes of contaminated dust particles, particularly when playing outdoors.⁶ In addition, the ferromanganese smelters are still in operation in Kabwe and old tailings, slag deposits and residues left from base metal leaching represent potential sources for metalliferous dust re-suspension.

High contamination of soils due to lead exploitation is more widely distributed and its impact is worse than that of water pollution. The major solid wastes generated by smelting and refining, which may constitute hazardous waste, include process wastes, residuals from air pollution control, and wastewater treatment systems. Material left over after mining is called tailings, which are composed of

wastewater, dithiophosphate, zinc ore and sulphides. Garbage from mine workers is discarded on landscape as well. Tailings accumulate and are dumped along with wastewater into tailing ponds. For example, lead concentrations was found in a suite of plants growing in soils in lead-zinc tailings (with average lead concentrations ranging from 3,760 to 78,914 microgram per gram) at five different sites in Kabwe. Most are primarily composed of sulphide minerals which release into the environment, galena, sphalerite, and related sulphides oxidise, which decompose and release metals. Mobile lead, zinc, and other metals then move into adjacent water bodies, soils, and plants. Most pollutants are stored in or absorbed into sediments, which may act as a secondary source of environmental pollution. These soils are toxic due to their high concentrations of heavy metals.

Heavy metals and chemicals leech into the soil and migrate into the water supply, especially when it rains. Even after mine smelters close, waste continues to contaminate the land and remains a source of exposure in the community. This leads to tremendous geological damage. Contaminated water flows into streams and wells. Animals drink the water; humans use it for recreation and fishing. The aquatic life becomes contaminated.

Lead mining has continued on an artisanal level in Kabwe. The lead mining company may have shut down operations, but different sources have cited failure of access to information concerning lead mining going on at the mining site, due to lack of cooperation by the mining company. Lead mining has continued to contribute to climate change. The rationing of electricity in Kabwe has caused many factories in Kabwe to shut down, even though these provided employment for most of the residents of Kabwe. With the high rate of unemployment in Kabwe, many people have resorted to being self-employed.

Women’s land rights in Zambia

In relation to women’s land rights in Zambia, there have been little efforts. The 2000 National Gender Policy provides for 30 per cent of land available for state distribution to be allocated to women, and for the remaining 70 per cent to be allocated fairly among men and women. This policy has had little effect. The challenges faced by women in accessing and owning land have not gone unnoticed, even by policy-makers. A 2006 draft policy, entitled National Land Administra-

⁵ Křibek, B., Nyambe, I., Majer, V., Kněsl, I., Mihaljevič, M., Ettler, V., Vaněk, A., Penížek, V. and Sracek, O., 2019. Soil contamination near the Kabwe Pb-Zn smelter in Zambia: Environmental impacts and remediation measures proposal. *Journal of Geochemical Exploration*, 197, pp.159-173.

⁶ Machina, 2002. *Women’s land rights in Zambia: Policy provisions, legal framework and constraints*. In *Regional Conference on Women’s Land Rights*. Harare.

tion and Management Policy, recognises that women lack control over land and calls for government measures to address land and gender issues, while the 2016 constitution calls for equitable access to and ownership of land by women.⁷ The current land legislation requires reform to ensure a broad-based consultation that captures the interests of women in all land matters. The Lands Act of 1995 provides for the establishment of a Lands Tribunal to help hasten the resolution of land disputes across the country. The tribunal has had no jurisdiction over customary land tenure, except where a leasehold title conflicts with customary rights, and it has not been effective in securing land rights for women.

Land in Zambia is generally classified as customary or state (statutory) land, with state land defined as land “not situated in a customary area”. Approximately 94 per cent of land in Zambia is classified as customary and 82 per cent of farming households cultivate customary land. Zambia has two important laws that govern land. The Lands Act provides for the documentation and registration of land rights, while the Intestate Succession Act governs the division of an estate where the deceased did not have a will. Both these laws apply only to state land, leaving most Zambians without legal protection for their land rights⁸.

Due to the limitations of Zambia’s formal laws, customary land is administered by traditional leaders. There are 73 recognised tribes in Zambia, governed by 240 chiefs, eight senior chiefs and four paramount chiefs. Land ownership ostensibly lies in the hands of the community. Members of the community have land-use rights to specific plots, and some areas are managed as common property. The constitution and the 1995 Lands Act support property rights and prohibit gender-based discrimination, but this has not prevented customary rules and practices that discriminate against women when it comes to access and control over land.⁹

The Zambian constitution’s amendment number 2 of 2016 explicitly excludes customary law from its prohibition on discriminatory practices, and there are significant limitations considering the vast amount of land held under customary law.

⁷ Mulusa, L., 2017. Seventh National Development Plan, Lusaka: Ministry of National Development Planning.

⁸ Nolte, K., 2013. Large-scale agricultural investments under poor land governance systems: Actors and Institutions in the case of Zambia (No. 221), s.l.: GIGA Working Papers.

⁹ Kepe, T. a. M. S., 2008. Dealing land during poverty: Commercial access to communal land in Zambia. *African and Asian Studies*, 7(2-3), pp. 235-257.

Women usually access land through their natal family or their husband.¹⁰ Zambia has 69 ethnic groups that are matrilineal, but land inheritance predominantly favours male family members. Married women are rarely allocated their own land by the chief, although a single woman with children sometimes may be provided with a land portion.

The Land Policy and The Lands Act of 1995, which vests all land with the head of the state, place more weight on sub-surface rights than surface land rights. This subjects local communities to the risk of land displacement to pave way for mining rights. The “Vestment Clause”, which grants express powers to the president to alienate land for investments as he wishes, is subject to abuse. The provision in the Lands Act of 1995 granting the president powers to compulsorily acquire land in public interest after consulting chiefs further subjects the Lands Law to abuse as it has been evident in the past where vast areas of land have been acquired from customary areas for large-scale land investments without adequate consultation or consent by affected communities (especially women).¹¹

The Extractive Industries Transparency Initiative (EITI) framework adopted by government and other stakeholders in 2012 provides an opportunity for women to engage and claim their rights. Apart from the EITI, improving transparency through better access to information and publication of reports on revenue from extractive industries, it also ensures that the country derives maximum benefits from the extractive industries. Since, the EITI is a multi-stakeholder platform which discusses issues such as how revenues from the mining industry should be used to promote development and poverty reduction, it provides an opportunity for women’s engagement to lobby and advocate for equitable benefit sharing from the extractive industries. However, to achieve this, women groups need to forge collaborations, alliances and partnerships with national civil society organisations such as the Association of Zambian Women in mining who are already members of the EITI to champion the interests and needs of women in relation to the extractive industry.¹²

¹⁰ Imakando, S., 2017. The socio-economic impact of mining: a comparative study of Botswana and Zambia (Doctoral dissertation).

¹¹ Tagliarino, N., 2006. Brief: Conversions of Customary Lands to Leasehold Titles. [Online] Available at: www.focusonland.com/fola/en/countries/brief-conversions-of-customary-lands-to-leasehold-titles [Accessed 15 May 2020].

¹² Muma, D. & Manchisi, J. a. B. W., 2020. Effects of mining operations on air and water quality in Mufulira district of Zambia: A case study of Kankoyo Township. *Journal of the Southern African Institute of Mining and Metallurgy*, 4(12).

In addition to the EITI, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a critical tool to achieve the full realisation of equal rights for women around the world, addressing both *de jure* and *de facto* discrimination in civil, cultural, economic, political and social domains. Adopted in 1979, this treaty, with its thirty articles and subsequent Optional Protocol, provides a framework which enshrines women's rights and outlines the duties of states and the role of the CEDAW Committee.

The absence of legal provisions that prescribe widespread consultation with community members other than the chief disenfranchise women. Most consultation processes followed when acquiring customary land or changing customary land to leasehold do not adequately inform, consult, or even obtain consent from women. The current Lands Act recognises only consultation of the chief in such matters. This inadequacy in legislation disadvantages women because unilateral decisions made by the chiefs do not consider the special interests and concerns of women.

Lead mining and Climate change

To fully grasp the relationship between lead mining and climate change, factors such as weather variability need to be assessed by looking at the impacts lead mining may have on the atmosphere to cause changes in weather patterns. Lead occurs naturally in the environment, but most of the high levels found in the environment come from human activities. Lead can enter the environment through releases from mining lead and other metals, and from factories that make or use lead, lead alloys, or lead compounds. Lead is released into the air during the burning of coal, oil, or waste.¹³ Recently in Zambia several reports have been published on concentrations of lead (and other metals) in vegetation grown in soils contaminated from previous and ongoing mining and smelting operations.

The rainfall in the studied area occurs especially between September and May. Average precipitation in the Kabwe area varies from 900 to 1000mm. The maximum precipitation is 67mm over 24 hours, while the evaporation ranges between 48 and 295mm (on an average 90 mm per year). The temperature measured in Kabwe since 1950 has fluctuated from 14.2 to 26.8°C. The mean annual temperature is 20.2°C. South-easterly to easterly winds prevail in the area.

¹³ Chisanga, P., 2013. *Environmental Degradation in the Extractive and other Industries in Africa*, PowerPoint Presentation.

Westerly winds that blow through the mine and onto Kabwe are unimpeded either by trees nor buildings. These winds take up the lead particles from the effluent coming from the smelter furnace and plant stacks, and in a fumigating plume, blowing them over most of Kabwe Township. The wind also tends to pick up particles from the waste ore deposited on the ground, contributing to the high levels of lead concentration in the air over the township.

These abnormal atmospheric lead levels in Kabwe are attributed to its windward location relative to the mine, and to westerly winds that blow over the town prior to passing over the mine. The atmospheric lead levels in Kasanda (the lead mining area in Kabwe) averaged 0.0968 milligrams per cubic meter (mg/m³) per month, which is well above the US standard requirement of 0.005 mg/m³ for a 30-day period.¹⁴ On the other hand, pollution decay due to distance travelled explains why the Makululu (Kabwe's largest compound) area, which lies further west of Kasanda and on the leeward side of the mine, experiences relatively less atmospheric lead pollution from westerly winds passing over the mine and towards the Makululu area.

Weather patterns in Kabwe have shifted. There is a wide variation in the rainy season duration. Kabwe has had a shorter rainy season than Livingstone, for instance, from about 1995 onwards. Over the entire period examined, the longest rainy season experienced in Kabwe was 246 days in 1985, compared to 223 days in Livingstone in 1995. The shortest period was 104 days for Kabwe in 2016 compared to 112 days in Livingstone in 1991. There were various trends in the rainfall patterns over the 36-year period examined for both areas.

Change and variability are evident in annual rainfall, actual number of wet days, dry days, and dry spells. Generally, change and variability are greater in Kabwe, and if anomalies in rainfall continue with the current trends, rain-fed agriculture is likely to be more constrained as rainfall variability or drought has direct impacts on food-crop production. Farming may become riskier in the future in both agro-ecological zones as the evidence shows a general reduction in rainy season duration. This could increase crop failure rates, food insecurity, malnutrition, and morbidity incidences, causing people to migrate to less fertile places, and placing women in a perpetual cycle of poverty.

¹⁴ Odell, S., 2018. Mining and climate change: A review and framework for analysis. *The Extractive Industries and Society*, 5(1), pp. 201-214.

Lead mine, climate change and the impact on women's access to land

Prolonged lead exposure has severe implications for human health. Once it enters the body it can be distributed to vital organs such as the brain, kidneys, liver and bones. Even though lead affects both male and female reproductive systems, women are more impacted by it. While both genders experience decreased fertility, exposure in pregnancy can result in stillbirths, neonatal deaths and abnormalities in newborns.¹⁵

The mining sector is a significant contributor to greenhouse gas emissions and other risks associated with climate change. According to Zambia's most recent National Greenhouse Inventory, the mining industry is responsible for a large percentage of the country's direct greenhouse gas emissions¹⁶. Climate change poses a risk not only to the environment but also to physical assets and infrastructure, supply chains through disruption to transport networks, the availability of water and energy resources, and the health and safety of site-based employees. These risks are amplified by the already challenging geographies and climates in which many mines are located and which already negatively affect women.

In addition, deforestation and increased land disputes are associated with mining in Kabwe. The environmental problems affect women more severely than men because environmental impacts tend to degrade food and water sources. Since "women are responsible for household food and water needs, they have to spend much more time and effort meeting these needs" when the sources of food and water are degraded or polluted.¹⁷

A study by Chisanga confirms that women rely on the land not only to produce food, but also to generate family income and to support the health care, educational and nutritional needs of their families.¹⁸ This relationship is vital for women in general, but becomes more significant when women are the single head of the household due to men's migration, divorce, abandonment, or the death of a spouse or male relative. The livelihoods and welfare of women is inextricably linked to secure rights to land, and when they lack secure rights to land women are vulnerable to eviction and dispossession (at the hands of the state, family

¹⁵ Human Rights Watch, 2019. "We Have to Be Worried". *The Impact of Lead Contamination on Children's Rights in Kabwe, Zambia*: Human Rights Watch.

¹⁶ Whyte, 2014. Indigenous women, climate change impacts, and collective action. *Hypatia*, 29(3), pp. 599-616.

¹⁷ Odell, S., 2018. Mining and climate change: A review and framework for analysis. *The Extractive Industries and Society*, 5(1), pp. 201-214.

¹⁸ Chisanga, P., 2013. *Environmental Degradation in the Extractive and other Industries in Africa*, PowerPoint Presentation.

members, or mining companies), and are then unable to work their way out of poverty.

The process of land displacement in Kabwe has raised an outcry by affected families. This is because of the non-transparent process used in determining compensation packages as well as the lack of adequate consultations of community members (particularly women) before the families were displaced and resettled. A study that interviewed women in Kabwe showed that women did not seem to know of details the compensation packages paid, the legal status of the land provided to families in the resettlement areas, or whether the new land was registered in their names and that of their husbands. This situation potentially marginalises women from land ownership and control. Joint land ownership or registration of land protects women's rights to land ownership especially in the event of divorce, land inheritance, or transfer of land. More importantly, joint ownership of land empowers women to have a say in all decisions concerning household land. This issue can be addressed by ensuring that the resettlement policy and guidelines provide for joint registration of land allocated in resettlement schemes to married couples, rather than registration of the head of the household alone.

Contamination of common resources such as rivers and forests were observed in Kabwe. This has been reported in a variety of studies. Surrounding communities are accessing contaminated water. The women are unable to lobby effectively, and those who would like to migrate face challenges in accessing new land. Their livelihood sources have been seriously disrupted by the mine.¹⁹ because many households have lost their farming land. In Kabwe, the women are not able to produce their own food because of soil pollution and contamination by the mining activities. Nothing can be grown in the soils of Kabwe because of high lead contamination from the mine. Very little compensation was provided, and there has been a general outcry that consultation of women is inadequate.

Women's customary rights over land are limited and depend on their relationships with others usually men), while men tend to have rights to land by birth right.²⁰ This has increased the vulnerability of the women of Kabwe because they cannot easily access land on their own. Women's rights tend to be secondary

¹⁹ Whyte, 2014. Indigenous women, climate change impacts, and collective action. *Hypatia*, 29(3), pp. 599-616.

²⁰ Chisanga, P., 2013. *Environmental Degradation in the Extractive and other Industries in Africa*, PowerPoint Presentation.

to those of men, and are often vulnerable to changes in a woman's personal status or changes in her family (for example, if her relationship with the male from whom she gains land rights changes because of marriage, separation, or his death). In the case of Kabwe's pollution, women have been displaced because of the contaminated land and waters, and moved to more marginalised areas where the cultural norms are stronger making it difficult for women to access land. Those who are unaware or uneducated have settled close to the closed mine site.

Conclusion

The aim of this paper was to explore the contributions of lead mining to climate change and its impact on women. The paper concluded that the mining sector greatly contributes to climate change, and this tends to negatively impact women as they are more affected by climate change than men. The paper looked at the contribution of lead mining to climate change in Kabwe, with specific focus on how it affects women's land rights. Based on the literature reviewed and researcher's own analysis, lead mining has affected the rainfall, reducing the amount of rain and resulting in a longer dry and cold season.

The study found weak policy and legal frameworks and institutional arrangements in the extractive industry, particularly related to land policy, environmental management, land resettlement and compensation. Fiscal policy on revenues from mines is reinforcing the impacts affecting women in the extractive sector.

Urgent policy and legal reforms are therefore required to enhance the protection of women and other vulnerable groups, and reduce the impacts of extractive industries. Ongoing reform processes involving some of these policy and legal frameworks provide an excellent opportunity to incorporate best practices and international guidelines that would minimise the impacts of extractive industries on women. The impacts of the extractive industries on women are reinforced by inadequate skills, and poor organisation of women to claim and safeguard their rights in the extractive sector.

Local organisations supporting women such as Women for Change, the Non-Governmental Organisation Coordinating Council (NGOCC), Zambia National Women's Lobby Group (ZNWL), Zambia Land Alliance, and National Legal Aid for Wom-

en require institutional capacity to effectively mobilise and support women to claim their rights.²¹

Apart from inadequate and weak policy and legislative frameworks, Zambia faces the challenge of poor legal enforcement. The challenges of poor enforcement are related to many factors, including political interference, weak legislation, inadequate financial and technical capacity by enforcement agents, and rampant corruption.

Efforts have been made to enhance transparency in the mining sector but minimal progression has been made. Similarly, efforts have been made by government to enhance women's access to land, but they still face challenges.

The paper concludes that climate change has led women to migrate to marginalised areas where land is traditionally governed, making it difficult for them to access land for food production. Because of the longer dry spells and contaminated water, land, and air, women cannot produce enough in the informal agriculture sector. Unless the recommended strategies are followed, the levels of inequality in terms of access to land between men and women in Kabwe and in the nation will continue to grow.

Recommendations

The paper strongly encourages the women of Kabwe to work with community-based advocacy organisations. These organisations create community awareness around various environmental issues and injustices caused by the mine. The organisations can provide basic training in human rights and evidence-based advocacy strategies, and provide media liaison and advocacy support to the Kabwe women. However, there are limitations due to limited influence and resources constraints.²¹

A South African law firm, Mbuyisa Moleele, and UK-based Leigh Day have filed a suit "on behalf of a class estimated to comprise more than 100 000 individuals" thought to have been poisoned by lead from the Kabwe mine. The women of Kabwe stand to benefit by joining this legal action. The class action seeks compensation from Anglo American for children, girls and women with lead poi-

²¹ Chisanga, P., 2013. *Environmental Degradation in the Extractive and other Industries in Africa*, PowerPoint Presentation.

soning who may become pregnant, as well as blood lead screening, clean-up, and remediation of the area.

To create changes in the institutional framework, a taskforce comprising civil society, community-based organisations, and the women of Kabwe is needed. The objective of this taskforce should be to implement programmes to enhance women's empowerment, lobbying and advocating for general community concerns that particularly affect women.

In the absence of a revised Zambian constitution that recognises social, economic, cultural and environmental rights, Zambian civil society should lobby and advocate for the respect of these rights based on the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which the country is party to.

Institutions such SARW and ARISA can create linkages with other non-governmental organisations to lobby and advocate for the review of environmental impact assessments (EIAs) and other relevant subsidiary environmental management legislation to strengthen the legal authority and enforcement by ZEMA and compliance by mining firms. This should include the update of penalties for non-compliance, and strengthening broad public consultation, particularly consultation of women to capture their interests and concerns in order to minimise the environmental impacts of mining investments.

PART 2: COUNTRY PAPERS

Angola: Overview of Women's land rights and extractive Industries

By **Josefina I. C. Sandemba**

Introduction

The discussion around issues of women's land rights in rural Angola, focusing on access, security and challenges that accompany general land management, cannot be de-linked from cultural and gender imbalance and oppressive practices. Work on these issues has dominated agendas for many stakeholders in the recent past. Numerous research projects have been undertaken in the country, supported by international institutions. Findings from these studies have contributed to the aspirations of instruments such as Agenda 2030 and Agenda 2063.

Despite having a vast continental impact, these instruments must also be implemented at local and a national level. Agenda 2030 envisions that by the year 2030, all men and women (and particularly those who are poor and vulnerable) should "have equal right to economic resources as well as access to basics services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technologies and financial services, including micro finances". Agenda 2063 envisions women and youth playing an important role as a driving force for change.

The church has dealt with various challenges in its interactions with women of different ranks. One of the prevailing challenges observed by the church has been its witnessing of on-the-spot situations that make it difficult for women to access land. This study is inspired by the work carried out by the council of Christian churches in Angola whose work focuses on the municipalities of Cubal (Benguela), Waku Kungu (Kwanza Sul), and Negage (Uíge) from 2010 to 2014, in which it was found that there was a high level poverty and that one of the biggest causes was the poor distribution of land for cultivation. The following contributing factors were also prominent: literacy, language barriers, cultural conflicts, and women's

lack of access to land. Against this background, this paper aims to promoting the participation of women in land administration by creating awareness of land rights. This initiative gives us an opportunity to learn and share experience with others at the regional (SADC) level. This is not only for purposes of African unity, but also to find long lasting solutions to the issues at hand.

This study has been affected by the coronavirus pandemic. The pandemic has not only affected the realisation of the envisaged results, but has also contributed to the challenges faced in the field. It was a challenge to collect data from women in rural areas at the scale that was needed for a work of this magnitude.

Land rights

According to the Land Law, any adult Angolan citizen, whether woman or man (including ex-combatants, handicapped persons, repatriated or displaced persons, and orphans) may own land. This also applies to state institutions, municipal administrations, local authorities, universities and public institutions, professional associations, foundations, and orders, public companies (for example Sonangol, Endiama etc.) and commercial companies with a head office and representation in Angola¹, foreign natural or legal persons who have their headquarters abroad but are represented in Angola, churches, United Nations agencies², international organisations permitted by law³, and rural communities recognised as such, with or without a recognition title.

Given the fact that many Angolan men lost their lives during the war, most families in urban and rural areas are managed and supported by women.

Women's land rights

The government through local authorities can grant land rights on grantable land integrated in their private domain to private individuals, families and entities as long as they demonstrate the capacity for their useful and effective use.

¹ European Union. 2014, Diagnostico de genero de Angola, Angola.

² United Nations. 2015, General Assembly

³ União Africana. 2014, Agenda 2063 África que queremos, 2nd edition, Addis Abeba.

Reinforcing woman's right to land, the following is established in the law:

Constitutional Law: "equality of women and men in all areas of public, economic, social and cultural life is enshrined".

Attention: Therefore, the woman has the same right as the man to receive land. Disabled ex-combatants from the Liberation War enjoy special protection by the Law.

Gender challenges to land access

In Angola's urban areas most women, whether single, married, divorced, widowed or in polygamous relationships, support their family by selling agricultural and livestock products, clothing or other commercial goods. Some women have small plots for their own use. The economic situation of the peasant woman seems weaker, since she has the responsibility of ploughing, looking for firewood, collecting water and taking care of her children.

Civil Code: The Land Law and its regulations are related to this law, which refers to the terms that regulate land ownership, inherited property, and expropriation by the state for public interest.

Attention: The Civil Code over many years provided some protection for those who informally occupied land, while the new Land Law through its regulations grants a period of three years from the publication of the general regulation for informal occupation to be regularised.

Family Code: To guarantee the equality of women and men within marriage, official marriage recognises the couple's right to share common property or separation of assets and the couple's obligations in the case of separation or divorce. The couple has an equal right to property and, in the case of divesting land, one should consult the other.

Attention: This is of high relevance for women in matters of tenure and access to land. More specifically, it means that female persons, whether single or married (in communion or separation of goods), can apply for and be given land on their own. In the latter case, it may also require that the title be issued in the name of the husband and wife, that is, that the land be registered in the couple's name.

Despite the approval of the new Land Law, most land tenure arrangements in Huambo are governed by traditional law.

In rural areas, families and individuals receive land by inheritance or through distribution by the chief; in most urban areas, access to land depends on land or inheritance markets.

This means that women's access to land is directly linked to traditional customs, which determine the distribution of property within the family, marriage and divorce, polygamy, and above all the rules of inheritance. In the worst cases, people accept traditions that keep women away, removing any possibility of having a space of land for cultivation or other activity. This is justified as the tradition and custom of the area, according to which women depend on their husbands and do not themselves need land.

The research will identify cases studies that demonstrate how traditional law is influencing women's rights and access to land, whether in the countryside or in urban areas.

Most marriages are informal or traditional, meaning that husbands decide to dispose of land without seeking the consent of their wives. It is a custom accepted in both urban and rural areas, which most women do not view as being discriminatory. Socially accepted polygamy remains common in urban and rural areas, and impacts on land access and ownership. In rural areas, each wife and her children may have a house and may be allocated a portion of land for cultivation, even though everything is managed by the man. For women in an urban area, polygamy brings a certain insecurity in that the husband usually has one house as well as a piece of land that remains with the first wife, while the other wives stay with the man's family of origin, not counting on the likelihood that their children will inherit land from their father.

Attention: Women should be made aware of the opportunity to register land or any other property together, that is, that the land can be registered in their name too.

Divorce: In the case of a divorce, the Family Code stipulates that every property, including land owned by a couple, be divided between them, considering the couple's standard of living, children and the causes of divorce. But most people think that the woman is not entitled to her ex-husband's family property and has to return to her original family.

Traditional custom does not provide for the daughter of a couple to receive land in the distribution of inheritance, because it is assumed that she is going to get married and so does not need it because her future husband will have land. For young single women who are divorced or abandoned by the husband, it is the responsibility of the family of origin to decide whether she can inherit the parents' land or not. In the case of the husband's death, the widow's future depends a lot on the family, which by traditional rule does not allow the woman to keep the land that the couple owned. As a result, the widow loses access to land and faces the risk being removed from the community. There are cases where the widow with children may stay on the husband's land with the prospect of keeping it for the children, but without the right to sell it. This is dependent on the husband having recognised the children prior to his death. In instances where the widow returns to her family of origin, she probably does not receive from her parents or siblings a plot to cultivate because she could marry again.

Attention: In the case of the husband's death, a woman who is not married and has not registered the land with her husband according to the Family Law can force the land to be passed in her name.

The chief can play an important role in defending the widow's land interests. There are cases where the chieftaincy has supported widows at risk of being displaced after their husband's death. In both urban and rural areas, women have always had limited rights of access to land, because traditional customs leave them in an inferior condition. According to custom, women are considered only collaborators on the land where their husbands are the owners. This is contradictory to the Land Law that states that women and men have the same rights and opportunities.

Attention: It is up to government institutions and civil society to intervene in urban and rural areas by raising awareness on the prescripts of the Land Law that treats women and men equally in their right to land. It is also up to the chiefs to help women find solutions in the defense of their interests and rights to land.

The position of women in agriculture is inseparable from the situation of women in rural areas. Rural/urban disparities will also influence the position of women in agriculture, increasing the challenges they have to overcome and the gender gap. In rural areas, the preponderance of men in political and economic life is even more visible.

In terms of policies, the government has developed a series of instruments to support rural women. The Rural Women Support Program is, according to the National Development Plan (PND), one of the main policy measures adopted under Planning and Governance. In addition, the Family Ministry and Promotion of Women (MINFAMU) has already presented, through the National Committee for the Promotion of Rural Women, the National Development Plan for Rural Women (PNADEMUR) 2015-2017, which has already passed the validation process.

According to PNADEMUR's national auscultation programme for rural women, the main challenges that rural women face include the following:

- rural women, although the main producers in rural areas, do not own the land.
- the delay in the legalisation processes of cooperatives;
- the high costs and the weak support from administrations, which have been impeding factors in training cooperatives;
- asymmetries in the coastal-inland relationship;
- literacy, energy and drinking water programmes that do not adequately cover rural areas;
- the lack of investment in family farming, which is the main source of income for rural families and a major employer.

To these challenges, we add the lack of documents (personal card and identity card), which, among other issues, prevents recognition of land ownership.

Findings

According to Bernardo, head of the NGO Nhangue in Waku Kungu-Kwanza-Sul, women have access to land, but with the noticeable difference being the division of tasks between men and women. From an economic point of view, men are more concerned with the culture of business of high-income products, while women produce goods mainly for family support. Women's access to land is allowed but presents great challenges because there are many places where the law of the strongest still prevails. Some men, considering themselves unpunishable, sell land belonging to others, thus violating customary law. Buyers legalise this land without the consent of other users or traditional authorities, which usually generates conflicts in the future.

Mr Bernardo highlighted that while the law of the land has been publicised by the Nhangue association, its impact is small. Mr. Kissama Ernesto from Cassongue, Kwanza-Sul, is of the view that women only have the right to land if it is an inheritance from their ancestors, or if they own the land with their husband in case of death or separation. Lazaro Ndongo confirmed the view that women do not enjoy the right to land as freely as men, who in practice own the land by virtue of being the head of the family. Mr Ndongo is of the view that the woman has neither opportunities nor voice, saying that the Land Law is not known in that area. There is a need to promote knowledge of the Land Law in municipal forums, and this should be promoted by women's organisations.

Conclusions

In certain societies in Angola, women have no choice over their own lives. They remain dependent on men even to enjoy their own rights. The law exists and is there for the citizens, but for women if there is no monitoring it becomes null and void. A consensus of this study is that many women continue to be set aside with regard to the right to land because in the eyes of many men this right is directly linked to marriage. Women, in fact, know little about the law since it is not explained to them, which makes its application difficult. As long as there is no effort by the competent authorities to enforce the goals established by national and international agendas, we will remain stagnant, without any visible progress.

Recommendations

We recommend that the law be further disseminated by competent organisations, both governmental and non-governmental, partisans and churches. It would be beneficial to disseminate these laws in local languages for better understanding.

In addition:

1. More mechanisms need to be created to monitor the implementation of women's right to land.
2. Literacy among women must be promoted so that they are able to understand the law and therefore able to assert their rights.
3. Awareness of gender equity must be raised through seminars, workshops and debates aimed at the elimination of all forms of discrimination against women;
4. Municipalities, through their administration, should be responsible for facilitating access to the documents needed for legalisation of the land held by women.
5. Rural women must be supported in their initiatives, strengthening their agricultural survival strategies, assisting them to buy seeds and creating agricultural cooperatives to help vulnerable families.

Botswana: Overview analysis of women's land rights and extractive industries (Diamond mining)

By Chanda Fidelia Mutale

Introduction

Botswana is a peaceful, prosperous, stable country with nearly universal access to clean water, education and health care. However, the high rate of income inequality and poverty concentrated in rural areas is a blemish on Botswana's otherwise superb record of sustained economic growth and social progress (based mainly on the diamond industry).

Harsh climatic conditions limited arable land and a fragile ecosystem make it very challenging to increase the incomes of the rural poor¹. The challenge is even greater because Botswana's legal framework governing rangeland provides incentives to privatise and fence communal grazing land through the development of leasehold ranches. This legal structure favours the concentration of ranching on large tracts by wealthier and more powerful people, causing the poorest households (which are mostly led by women) to lose access to land, water and veld products on which their livelihoods depend. As a consequence, the remaining accessible communal land is vulnerable to overuse and land degradation because of mining.

This paper aims to assess diamond mining's contribution to the protection of women's land rights. The study collects data using desk reviews based on the findings from different sources of literature.

Land is considered the most fundamental resource to women's living conditions, economic empowerment, and their struggle for equity and equality. Most women in Southern Africa are dependent on land for their livelihoods. Despite the importance of land to women in the sub-region, their land rights are still largely subject to discrimination. A combination of statutory and customary laws favouring male ownership of property compromise women's rights to own land.

¹ Adams, M. & Turner, S. 2005. Legal dualism and land policy in Eastern and Southern Africa. United Nations Development Programme (UNDP) International Land Coalition (ILC) Workshop: Land Rights for African Development: From Knowledge to Action. Nairobi, 31 October to 3 November, 2005 (Proceedings) (available at www.undp.org).

The traditional exclusion of women from property and land ownership is the most damaging global human rights violation experienced in many developing countries. Without rights to land, women's economic and physical security is compromised. Botswana has developed because of diamond mining, and the country has strong government policies and regulations. Women, however, are still facing many challenges.

An amendment to the Botswana Land Act will allow women to become equal landowners alongside their husbands. For now, the 2015 law (still in effect) prevents married women from owning or co-owning land if their husbands already have land in their name, which in practice prevents women from owning the land where they work and live². The law "did not give married women the same treatment as men, and [we] wanted to report that this discriminatory treatment has been revoked," wrote the president on his Twitter account. The new law is a great triumph for women's rights groups who demanded this legislative change, something that the president had promised to address during the election campaign.

Objective of the study

- 1) To examine the effectiveness of government policy regulations on women's land rights and the extractive industries.
- 2) To examine the impact of diamond mining on women's land rights.
- 3) Motivation of study

From large-scale land acquisitions that displace communities without due compensation, to the encroachment of extractive industries on indigenous and communal lands, to the unplanned developments that forcibly evicts people living in informal settlements, to the impacts of climate change and natural disasters on land use and productivity, to land and property deprivation by kin or State, women are more harshly affected by land tenure insecurity due to direct and indirect discriminatory laws and practices at the national, community and family level in Botswana. Yet there has been minimal intervention with regards to improving their land rights.

² Efe, *Copyright Plataforma Media*, 2020.

Literature review

The purpose of the literature review is to provide a brief and preliminary overview of the various studies that concentrate on women's land rights and the diamond industry. The goal was to find relevant information available on the topic of study as well as the current state of analysis of the empirical evidence. Studies are drawn from the SADC region, focusing on Botswana diamond mining and how this is contributing to women's land rights. Social contract theorists like Hobbes (1968) and Locke (1960) perceive the state as representing the social collectivity or the common good, portraying the state as an entity that does not privilege the interests of certain individuals or groups over others³.

Extractive mineral industries have played a crucial role in the development of Botswana, and transnational corporations (TNCs) have played an important role in the development of the country's mining sector. As a result of mineral-led economic growth, the country has been transformed from one of the poorest countries in the world at the time of independence in 1966 to an upper-middle income country. Botswana's main mineral export is diamonds, of which it is the world's largest producer in value terms. Other important mineral exports include copper and nickel⁴. The diamond industry is the most important contributor to economic activity in Botswana. Diamonds account for about 60 per cent of Botswana's exports, and about 25 per cent of its gross domestic product⁵.

The rights to use and control land is central to the lives of rural women in countries where their main sources of income and livelihood are derived from natural resources. The lack of land rights for women and girls indicates that they are victims of discrimination. Land is considered the most fundamental resource to women's living conditions, economic empowerment, and their struggle for equity and equality within a patriarchal society. Without rights to land, women's economic and physical security is compromised. They are deprived of a reliable source of food and suffer curtailed access to the other inputs, especially credit, necessary for carrying out productive activities. In Southern Africa, women make up more than 60 per cent of small farmers and provide more than 70 per cent of the workforce in agricultural production. Women's access to land therefore

³ Hobbes, T. 1968. *Leviathan*. Edited with Introduction by MacPherson, C. Baltimore: Penguin Books.

⁴ Gaolathe, B. (1997). "Development of Botswana's mineral sector", in Salkin et al. (eds.), *Aspects of the Botswana Economy*. Gaborone: Bank of Botswana.

⁵ Mineral Commodity Summaries 2020: U.S. *Geological Survey*, January 2020.

determines not only their households' level of living and livelihood, but also food security⁶. The problem of lack of access to land is particularly critical for the increasing number of female heads of rural households, which is now evident in Southern Africa.

In the 21st century Botswana enjoyed the definite but limited fruits of a diamonds-based, undiversified, high growth economy. Based on this was a highly centralised state system, and an elitist and authoritarian form of liberal democracy. Revenues from diamonds had been successfully directed into national and infrastructural development. But the over-concentration on diamonds led to the non-diversification of the economy, the worsening of poverty and inequalities, the continuance of ethnic discrimination, and other forms of social injustice⁷. Botswana is a relatively rich country, with the resources to deal with these problems, but its centralised governmental system, and its elitist, restrictive democracy, facilitates their continuance. In forty years of free, open but largely unfair or unequal elections in the narrowly based economy, no change of government occurred. Wealth, stability and apparent success promoted complacency among the centralised elite, and social rigidity resulted. Change could only come slowly, and from the bottom up.

Artisanal and small-scale mining (ASM) has grown significantly. Although cultural and historical aspects have relegated women's participation to the periphery, women have always been part of the mining workforce⁸. Women have primarily been involved in crushing, sluicing, washing, panning, sieving, sorting, mercury-gold amalgamation, amalgam decomposition and, on rare occasions, actual mining. They are also active in the provision of goods (e.g., food and drink vending, sales of artisanal equipment such as sieves, and credit for mobile phones) and services (e.g., transporting dirt, ores, ore particles and water, cooking, cleaning, laundry, sex, nightclub entertainment, and trading). However, the cultural and institutional constraints that women face have ensured that their involvement in the most value-bearing places (such as pits and fair markets) is practically non-existent.

⁶ International Labour Office, 1996, Women's access to land still restricted by tradition, *Women's International Network News*, Vol. 22, Issue 4.

⁷ Jenny Clover, September 2003, "*Botswana: Future Prospects and the Need for Broad-based Development*", African Security Analysis Programme, Situation Report. Pretoria, Institute for Strategic Studies, p.9.

⁸ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF). (2017). Global trends in artisanal and small-scale mining (ASM): A review of key numbers and issues. Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, Winnipeg: IISD. Retrieved from <https://www.iisd.org/sites/default/files/publications/igf-asm-global-trends.pdf>.

In addition, there are complex formal procedures that exist for the acquisition of land and for obtaining mining contracts for exploration, prospecting and extraction. In reality, mining projects are almost always encouraged and the interests of the mining industries count for more than protecting local communities or natural resources that exist in a mining area. The focus of economic reforms in Botswana is reflected in policy changes on labour, land acquisition, forest conservation and environmental protection that show in general an increasing disrespect on the part of the state and the armed forces towards the rights of communities. Mining has multiplied the exploitation and degradation of women's rights. Rural women completely lose access to land when the mines come. Testimonies of women from mining areas show that displacement and loss of land were the most serious problems affecting their lives⁹.

Underlying most of the analysis of mining governance regime in Botswana is the republic's business-like, investor-friendly approach to mining development. The government of Botswana has chosen to focus on attracting and facilitating mining development, and on investing tax and dividend revenues in developmental priorities. It does not consider that the mining industry should take over its role as provider of basic services in rural areas or local economic development, unlike most resource-rich developing countries. In this light, the government has paid less attention to the impacts of mining on local communities than to other stages of the mineral value chain.

In Tswana traditional society, men regulated women's social and legal sphere, and women were subjected to male control in many areas of their productive and reproductive lives. The age-old statement that "*mosadi ke ngwana wa monna*" ("a woman is a man's child") aptly captures this notion. Pre-colonial education served to perpetuate strict patriarchal control of women and domination over them by men. It consisted of informal and formal ways of socialisation into the norms, traditions and practices of their communities¹⁰. This socialisation mainly comprised behaviour modelling of adults, and formal initiation ceremonies, which were conducted at a young person's coming of age. Patriarchal regulation of women's work and women's roles underwent fundamental changes during missionary and colonial periods, as a result of transformations that were unleashed onto the Tswana political economy and society.

⁹ Mining watch Canada http://www.miningwatch.ca/index.php?Newsletter_16/AIMES_stmt_2004

¹⁰ Comaroff, J. 1985. *Body of Power and Spirit of Resistance: The Culture and History of a South African People* (Chicago: University of Chicago Press). a.

Education and migration were critical mediating processes to the changes that occurred. Moreover, in the changing circumstances, customary regulations and restrictions over women's lives and socio-economic status were irrevocably affected. The reduction of powers in particular, was an important aspect of the transformation of Tswana socio-political structures, deriving largely from their political role under the policy of indirect rule. Traditional structures were allowed to carry on exercising jurisdiction over all civil cases involving Africans, while Roman-Dutch Law governed cases involving Europeans, or in cases that had no precedence in customary law. The influence and interference of missionaries and the colonial government brought about irrevocable changes to customary laws .

Current state

The United Nations Development Programme¹¹ claims that poverty is a major problem behind the over-exploitation of resources, including land, in Botswana. To help change this the UNDP joined in on a project started in the southern community of Struizen dam, with the purpose of drawing from "indigenous knowledge and traditional land management systems". The leaders of this movement are supposed to be the people in the community, to draw them in and increase their opportunity to earn an income, thus decreasing poverty. The UNDP also stated that the government has to effectively implement policies to allow people to manage their own local resources while giving the government information to help with policy development.

Many of the indigenous San people have been forcibly relocated from their land to reservations. To force their relocation, they were denied access to water on their land and faced arrest if they hunted, which was their primary source of food. Their lands lie in the middle of the world's richest diamond field. Officially, the government denies that there is any link to mining, and claims that the relocation is to preserve the wildlife and the ecosystem, even though the San people have lived sustainably on the land for millennia. On the reservations, they struggle to find employment and alcoholism is rampant. On 24 August 2018 the UN Special Rapporteur on Minorities, Fernand de Varennes, issued a statement calling on Botswana "to step up efforts to recognise and protect the rights of minorities in relation to public services, land and resource use and the use of minority languages in education and other critical areas."

¹¹ United Nations Development Programme UNDP. Botswana: Environment Programme. <http://www.unbotswana.org/bw/undp/environment.html> (accessed 21 May 2010).

Mining is one of Botswana's key industries, with diamond mining the leading source of revenue. Reports say that women are now dependent on government hand-outs. The ancestral lands of the Bushmen lie in the middle of the world's richest diamond field, and the community believe that they were relocated to make way for a multi-million-dollar diamond mining project.

The New Xade, is a resettlement camp that is now home to southern Africa's first inhabitants, the Basarwa – Kalahari Bushmen, who derive no pleasure in the honour of being the region's first inhabitants. Sisters Boitumelo and Goiotseone Lobelo, kneel in front of a basin of dirty water, washing their children's clothes. Their eyes fill with anger when they speak of their life here, a desolate village half a day's drive from their original home, which is now part of the Central Kalahari Game Reserve (CKGR). They do not enjoy their new lives. They miss their homes and the way they lived, which was easy with lots of fruits and animals. Since their eviction, the two women have tried visiting their former homes a couple of times, but were prevented from staying. When they were aged nine and five, the sisters were moved to New Xade with their parents. They speak fondly of life in the reserve, where they would wake up every morning and join the women in the village in collecting berries, nuts and roots to eat from their own land and practice small-scale mining.

Government Policy and Regulations

Policies and regulations are what govern the nation, and it is through them that there is peace and order. The desk review was able to outline the policies and regulations that protect or impede women's land rights and diamond mining in Botswana.

In contrast to the African Development Bank (ADB), the World Bank's new Environmental and Social Framework (ESF) safeguards policies on the environment, indigenous people and resettlement. Policies that were launched during the 1980s-1990s have hardly addressed gender issues. Supposedly to improve these policies, the ESF became effective in 2018, but the ESF also largely ignores gender issues, including women's rights.

Women's equal rights to land and property are grounded in core human rights instruments, including the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention for the Elimination of All Forms of Discrimination Against Women. Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, and the World Conference on Women's Beijing Declaration and Platform of Action all stress the need to achieve equality in the enjoyment of land and property rights. As established by international standards, women have the right to equality in the enjoyment of all their rights, including the right to access, use, inherit, control, and own land. To achieve gender equality, states must fulfil their obligation to eliminate all forms of discrimination against women.

Like other countries in the region, Botswana inherited a dual system of statutory and customary tenure at independence. Despite the contrasting characteristics of these two systems, the country has developed a robust land administration, which has greatly contributed to good governance and economic progress. Its land tenure policy has been described as one of careful change, responding to particular needs with specific tenure innovations. Botswana continues to adapt its land administration, based on customary rights and values, to a rapidly urbanising economy and an expanding land market. Its approach is of interest because it is finding solutions to problems that continue to elude its neighbours. In Botswana's dual legal system, customary law is applied alongside common law. While there have been several reforms of discriminatory provisions under the common law, customary law remains particularly prejudicial to women's rights, perpetuating unequal power relations between men and women and strengthening stereotypes on the role of women in society.

The Land Act

The Land Act drew mainly on the traditions of Tswana tribes, and customary land rights of non-Tswana ethnic groups have routinely been excluded. Under the Tribal Territories Act, eight Tswana-speaking tribes have been recognised and designated land. Rural non-Tswana people that were not recognised as a tribe

consequently missed out on opportunities to claim land during the early decades of the Act's implementation and were subjected to forced removals because the laws of the country don't recognise them as a tribe. In 1993, an amendment of the Act extended eligibility for customary land rights to all Botswana citizens, but by then much of the land had already been allocated or was being claimed by urban residents.

Botswana's Tribal Land Act (1968) established a system of regional land boards and transferred the land administration and management powers of customary leaders to the boards. Originally the boards included both customary leaders and state officials among their members. The Act also codified the customary practices of the Tswana, and elevated their customary land rights and practices up into national legislation. Customary elected and state-appointed leaders administer and manage land together under both customary and statutory tenure, thereby merging the two systems into one.

In the years since the Tribal Land Act was passed, Botswana has also had the time to hold several commissions of inquiry and policy reviews. A first Presidential Commission on Land Tenure was undertaken in 1983, and a second review and analysis took place in 1992, when the government instituted a Presidential Commission of Enquiry to review the land board's processes. The third review was undertaken from 2001–2002, which included the Second Presidential Commission on Local Government Structure as well as a National Land Policy Review³² (LPR). The reviews have highlighted a wide range of difficulties that have hindered the land board's successful operation. Some of these obstacles include: inaccessibility of board offices; lack of technical expertise and capacity; record fragmentation and information asymmetry; lack of accountability/ corruption; difficulties enforcing board decisions; and problems of gender, ethnicity and class discrimination¹².

The Mining and Mineral Act (1999)

The Ministry of Minerals, Energy and Water resources (MMEWR) oversees the operations and development of the energy, water and minerals sector in Botswana. Mining activities are chiefly administered under the Mines and Minerals Act of 1999, which consists of 14 parts and two schedules. The legislation allows the

¹² Adams, Martin, F. Kalabamu, and R. White. 2003. Land tenure policy and practice in Botswana: Governance lessons for Southern Africa. *Austrian Journal of Development Studies*, 19 (1).

government to acquire a minority stake (generally 15 per cent) as a partner in mining projects, and to seek participation in mining projects by having representation in their boards¹³. The act regulates the issuance of exploration and mining licenses and tries to reach a balance between mining activity and environmental impact. The act states the following:

1. All rights of ownership of minerals are vested in the republic of Botswana subject to the provisions of mineral rights in the Tribal Territories Act.
2. The right to prospect or to mine minerals can be acquired and held only in accordance with the provisions of this act, and no person is allowed to prospect or mine minerals except as provided in this act.
3. The Minister of MMEWR is responsible for the most efficient, beneficial and timely investigation and exploitation of mineral resources of the country.

The Act (and associated environmental impact assessments) helps to increase the effectiveness with which natural resources are used and managed, so that beneficial interactions are optimised and harmful environmental side effects are minimised and land is protected.

Key Findings

Land issues can be the most contentious aspect of mining, particularly when there are sensitive eco-systems and limited productive land available. Botswana's land management system includes rurally based land boards and tribunals that set out requirements for compensation and resettlement when land is required for mining development. Companies have stated that there are clear expectations around their role regarding resettlement and compensation for people or communities displaced by mining activities. Companies have also called for better guidelines around resettlement and compensation for displaced people.

Recent studies are illustrating rural communities' profound desire to leverage the formal system to document and protect their customary lands. With minimal external support, rural communities will learn the formal laws, will take action to pursue their legal rights to customary lands, and will put in the time and ef-

fort to follow the requisite administrative procedures to protect their land claims against the recent trend of granting of vast areas of land to foreign investors. The urgency of placing real ownership in the hands of the people living and making their livelihood upon land held according to custom cannot be overstated. True tenure security will only come from elevating customary land rights into formal law, and making customary land rights equal in weight to registered rights. National governments must take steps to amend their land laws to strengthen protections for customary land claims, as well as devoting the resources necessary to ensure their efficient, just and equitable implementation.

The lack of a policy framework around corporate social responsibility has meant that there is no formal framework to apply across the whole mining sector. The environmental legislation requires that companies spend funds to rehabilitate areas as mining progresses. However, there is no legislated requirement for up-front mine reclamation funds to be captured in a bond or some other form of environmental surety. Further, as noted above, there is no prescribed requirement for corporate social responsibility from a development perspective (as opposed to a mitigation perspective). Combined, these factors result in a low score for this indicator.

In Botswana, there is a strong centralised government with highly developed capacity throughout the national government. There is a traditional system of consultation that links the national level of government down to the "kgotla" or village level on development issues and decisions. However, because there is a somewhat "top down" approach to gathering feedback from local areas, mechanisms to ensure a two-way consultative process may be lacking. Hence, communities may feel that they have provided insufficient input into the economic development policies and strategies that may affect them. Government does provide its socio-economic priorities in the National Development Plans, and may believe that this is sufficient response to input gathered from the public. However civil society and other stakeholders interviewed indicated that the consultative process tends to be "one way" and not iterative. This accounts for the concerns of civil society regarding the process of consultation and the accountability of government within those processes.

¹³ "Botswana – Mines and Minerals Act", *revenue Watch Institute*, accessed 24 September 2013

As on many other continents, the horrors of land acquisition are experienced by mining-affected communities in a similar manner to (or perhaps even more severely than) communities affected by the construction of dams and other big projects. When mining contracts are given, the immediate threat to local communities is displacement and land alienation (loss of property rights). These are inevitable features of large-scale mining. In Botswana, the displacement of the San people from the Central Kalahari Game Reserve, to open the park to large-scale diamond mining, was one recent example.

The impact of diamond mining on women's land rights

Mining has impacted on women's land rights both negatively and positively in a number of ways.

Successes

In successful cases, although the land was tribally (communally) owned rather than privately owned, those who were relocated were compensated for their loss of rights to the land. Rather than displacing people, mining operations tend to attract population movements due to the potential job creation and other economic opportunities and social services.

Rural-to-urban migration is a vital part of the development process, as people move to cities to benefit from agglomeration economies. In spite of urbanisation trends, rural-to-rural migration is very common in some developing countries, especially in Botswana, due to an increase in demand for low-cost of living that requires less investment in new skills. Rural-to-rural migration accounted for approximately 62 per cent of all people's movements from 1999 to 2000. The development of transportation and communication infrastructures has allowed rural migrants to become more mobile than they were in the past, and to live at the interface between rural and urban areas as the distances have shrunk.

In response to loss of traditional land and the cultural loss associated with the central Kalahari reserve, San communities have been organising to gain ownership of land, including the right to hunt on this land. One popular approach has been the formation of government-approved land trusts as a part of community-based natural resource management programmes. In this process, San com-

munities form councils, a constitution and board of directors in order to set up a trust from which they purchase blocks of land as a community. Upon approval from government land boards, the community is then entrusted to oversee wildlife and other activities on the land.

Challenges

Since the mid-1990s and before, the country's biggest challenge has been the HIV/AIDS epidemic. Botswana, having one of the world's highest infection rates, shares with the rest of Southern Africa a history of migrant labor that made the spread of HIV/AIDS especially likely¹⁴. This is offset by a system of open communication, free press, widespread consultation, careful planning, good budgeting, and a well-developed health care system.

There is not much research on women's land rights and extractive industries. The focus is mostly on the government policies in place, and how these policies have focused on gender equality. The policies do not focus on how land is usually inherited, and what women go through when they have been displaced because of mining. Displaced women usually end up in environmentally degraded areas where agriculture cannot sustain them, leading to poverty that predominantly affects women.

The failure to consult with women when negotiating a community's fate, failure to obtain free prior and informed consent to develop a mining project, and lack of consultation about compensation and royalties disempowers women, and may go against traditional decision-making structures.

The payment of compensation and royalties to men on behalf of families and communities denies women access to and control over the financial benefits of mining. This encourages women's economic dependence on men, disempowering them, skewing gender relations, and exacerbating existing inequalities. In addition, women-headed households may not receive payments if they do not have a male representative.

Unequal opportunities: Even when industry does bring benefits like jobs and infrastructure, these aren't shared equally between men and women. A 2009

¹⁴ Fawcus, P. 2000. *Botswana: The Road to Independence*. Gaborone: Pula Press and The Botswana Society.

World Bank study found that men are more likely to benefit from new opportunities, reinforcing existing inequalities in the share of income, resources and power in families and the wider community.

Environmental and health costs: Mining and other forms of extraction can be a dirty business. Local water supplies reduced by overuse, or contaminated by the toxic chemicals used to extract minerals, have health impacts on those who use them. More time spent finding clean water sources for drinking, cooking and cleaning means less women's time available for paid work and education.

Strategies to ensure that women's land rights are protected

Efforts to diversify Botswana's economy include many interwoven strategies. The Business and Economic Advisory Council (BEAC) was established in 2005 and the Economic Diversification Drive (EDD) was introduced in 2010. The BEAC recommended creating an enabling environment that stimulates economic openness, and promotes local and foreign investment. It also encourages a conducive mindset in the population through citizen economic empowerment initiatives that support self-reliant entrepreneurs and producers of goods and services. Policy coherence within the government and the private sector and dynamic institutional and regulatory adjustments are crucial to creating an enabling environment. Botswana's co-management approach should bring about decentralisation of functions and not a nested system where the state is the de facto holder of all legal rights in an area, only partly transferring the management rights over the resources in a specific area to local communities for their benefit.

Development and peace support associations that aim to promote women's participation in decision-making in their daily lives, along with their participation in public life, empowerment, associative involvement, and the improvement of women's economic conditions. These organisations want national authorities to be aware that they are informed on the laws that protect them and govern mining. Women know that they have the right to say no to mining development on their lands, and that they should benefit from the revenues generated if they choose to say yes. Facing the impacts of mining, women have developed other means of subsistence so as not to depend on mining alone.

Gender impact assessment is a tool with enormous transformational potential. It gives a voice to women's perspectives, needs and interests, ensuring that gender is considered in the planning and implementation of mining projects. It enables projects to be more responsive to women's needs and interests. This offers mining companies an opportunity to contribute to the promotion of gender equality and women's empowerment, and will help mining companies fulfil their responsibility to respect human rights.

Advocacy plan

Based on the findings of this study the following are the key advocacy plans for the cause to be implemented and thus to strengthen women's agency to promote and safeguard their land rights:

1. Botswana has ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). CEDAW's Optional Protocol will support community-based local tour operators, crafts cooperatives and other enterprises established by local trusts or organisations. To secure women's land and property rights, it is a critical tool to achieve the full realisation of equal rights for women.
2. Accelerated financing and institutional capacity building can be achieved through advocacy that includes civil society organisations. Building strong institutions (Goal 12 of Agenda 2063) is a key continental objective and is essential to this strategy given the relative weakness and marginalisation of gender-related institutions. The strategy recognises the funding challenges faced by gender structures and programmes aimed at achieving gender equality at a time when their role is more critical than ever, and pledges to support efforts to strengthen these institutions.
3. A taskforce is needed comprising of civil society, community-based organisations for women (both rural and urban) with the specific objective of implementing programmes that enhance women's empowerment, lobbying and advocating for serious community concerns that affect women.
4. Women's association groups should be formed to address how women and their land rights are affected by extractive industries, and to lobby and advocate for the rights of women and minimise environmental impacts,

Recommendations

Even though there is development and growth in the country through mining, there is over-reliance on mineral resources which may depreciate. The government should be able to put up diversification methods and tools that will be beneficial to everyone, including youth and women.

In order to create changes in the institutional framework, a taskforce comprising of civil society, community-based organisations and the women in reconstructed settlements should have the specific objective of implementing programmes to enhance women's empowerment, and to address serious community concerns that affect women where they are relocated.

Botswana should also develop policies to eliminate obstacles to participation in decision-making regarding control over land, including those barriers based on gender status, race or ethnicity, economic status, or any other real or perceived status or identity.

Conclusion

The aim of this paper was to assess the effectiveness of the policies that govern women's land rights and the extractive industry, focusing on diamond mining in Botswana. The paper looks the mining sector and what impact it has on women land rights, and if it is able to promote or inhibit these land rights.

The literature reveals that strong institutional, policy framework and regulations govern the mining sector and women land rights. It demonstrates that efforts have been made to enhance transparency in the mining sector. The government of Botswana should be commended for putting in place a legislative framework that aims to consider environmental protection in the planning and implementation of projects. However, a number of challenges remain that require immediate attention to enhance the effectiveness and efficiency of the policies, especially in the efforts to enhance women's access to land.

The paper concludes that the exploitation of mining has led women to migrate to settlements that the government provides for them and their families. These settlements offer less opportunities for access to land because they are governed by different values and customs. In their new settlements, women and their families

often meet with a reduction in food production, a decline in education levels, and a lack of access to health services. Not only do these conditions result in poverty, but they can decrease the possibility of sustainable development.

Eswatini: Overview of Women's land rights and extractive industries

By Mandisa Mcanyana

Introduction

The Kingdom of Swaziland is a small land-locked country that shares borders with South Africa and Mozambique. The country is divided into four administrative regions: Hhohho, Manzini, Shiselweni and Lubombo. The king is the head of state and appoints the prime minister as the chairperson of the cabinet and the head of the government. The country is divided further into 55 local authorities (Tinkhundla) and 365 chiefdoms. Swaziland has a population of 1.1 million people, of whom 53 per cent are women¹.

Despite the government's ratification of the UN Convention on the Elimination of All Forms of Discrimination against Women² (CEDAW) in 2004, and committing to systematically ensuring women's equal rights to men in both policy and practice, Eswatini still has gaping inequality chasms that require bridging. Progress with implementation remains a challenge.

Gender inequality in Swaziland is exacerbated by strong patriarchal traditions, values and norms. Other factors contributing to gender inequality include un-supportive legislation; poor access to the means of production, education and health; and gender discrimination of different forms leading to increased vulnerability to abuse and disease.

The Beijing Platform of Action (1995) set out twelve critical areas of concern as a basis for a global change, and called upon governments to take action in the following critical areas identified as barriers to women's empowerment³: poverty, education, the economy, power and decision-making, health, violence, armed conflict, institutional mechanisms for the advancement of women, human rights, media, environment, and the girl-child. The Beijing Platform of Action states, "the full implementation of the human rights of women and of the girl child are an in-

¹ United Nations Development Assistance Framework (UNDAF) 2016-2020

² UN Convention on the Elimination of All Forms of Discrimination against Women

³ Beijing Platform for Action, 1995, UN, Beijing

alienable, integral and indivisible part of all human rights and fundamental freedoms". The Beijing Platform of Action is a powerful framework for international agreements in the pursuit of gender equality, calling for fundamental transformation in the relations between women and men to unlock the full potential for economic, social and human development for all.

Women and land rights

The Constitution of the Kingdom of Swaziland (as it was then known) Section 211 calls for equal access to land for all citizens of the country, and Section 16 of the amended Deeds Registry Act allows for women married in community of property to register property or land in the names of both spouses if they so wish⁴. However, women still encounter difficulties in accessing the communal land known as Swazi Nation Land (SNL) due to the contradictory dual legal system. The historical Kukhonta system, whereby people are given usufruct rights to land by a chief, prevented women from securing land rights without a husband, brother or son. However, provisions on land rights in the 2005 Constitution allow for all citizens to enjoy the right to property, including access to land and inheritance (SGDM 2018).

The Kingdom of Eswatini has different land tenures that are best described by M Dlamini in the case of *Sibusiso Nsimbi Shongwe v Ntombikayise Leon Dlamini & Another*⁵. He states that there are two main types of land tenure in Swaziland: land held under customary tenure (Swazi Nation Land or SNL), and land held by freehold tenure commonly referred to as title deed land. SNL in this jurisdiction is held by the Ngwenyama (king) in trust for the Swazi nation. A Swazi national enjoys the right to usufruct over the piece of land. On the other hand, title deed land was held by the colonial masters around 1907. It was first marked as concessions, and consisted of one third of the total land in Swaziland. Concessions that could not be bought back (either due to financial constraints on the government and other entities, or because those holding title were not willing to let go) were converted into title deed land. There still remains an insignificant portion of land under a third tenure system, referred to as concessions.

⁴ The Constitution of the Kingdom of Swaziland, 2005

⁵ *Sibusiso Nsimbi Shongwe v Ntombikayise Leon Dlamini & Another* (1202/2015) [2016] SZHC148 (18th August 2016) M. Dlamini J.

These systems tend to discriminate against women, denying land rights and the inheritance of land based on their gender.

Widows who were not happy with the sharing formula which gave them a child's share lodged an appeal to the Minister of Justice and Constitutional Affairs. They refused to sign the Distribution Account. On 14 July 2014, the Minister of Justice and Constitutional Affairs unveiled the Estate Policy at the Master's Regional Office pursuant to the complaint lodged by the widows. The minister's contention was that the Estate Policy was formulated in accordance with section 34 (1) of the Constitution, which states that the surviving spouse, whether married by civil or customary rites, is entitled to a reasonable provision out of the estate of a deceased spouse⁶. The judgment stated that the Minister of Justice and Constitutional Affairs in conjunction with parliament are directed to expedite the enactment of legislation regulating the property rights of spouses including the common-law husband and wife as required by section 34 (2) of the Constitution of Swaziland within a period of twelve months from the date of this order.

A passage from another case was quoted in the case of *Attorney General v The Master of the High Court*, where it expounded on the realities that still exist today. The case stated that central to the customary law of succession is the rule of primogeniture, the main features of which are well established. The general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is the heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.

The woman's right to property is ignored. The judgment acknowledged the need to review the legislation, but the progress (if any) is slow.

The law as it stands

Section 68 of the Administration of Estates Act, 1902 states⁷:

"If any African who during his lifetime has not contracted a lawful marriage, or who, being unmarried is not the offspring of parents

lawfully married, dies intestate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged; and if any controversies or questions shall arise among his relatives, or reputed relatives, regarding the distribution of the property left by him, such controversies or questions shall be determined by a Swazi Court having jurisdiction."

The statute stipulates that Africans who not having contracted a lawful marriage during their life-time (and who die intestate) shall not have their properties administered under the Act after their demise. This means that deceased estates of Africans married under custom are administered in terms of customary law. Until parliament changes this stipulation, it remains a provision to be given effect by the court. There is an option for those aggrieved by this to approach the High Court constituted as a Constitutional Court to declare this provision unconstitutional as permitted by the Constitution of 2005, but so far this has not happened.

Women's access to land is a problem as they have a subordinate role in the control of land. Under Swazi customary tenure, the power of land allocation is almost always vested in men. The extent to which women have access to the land is limited. Women have little control over the land distribution process, and the customary land tenure system has very little place for women. In cases where women have to make requests from the chief, they are not permitted to represent themselves before the authorities. Women have access only in that they work on the land, but it is men who have control of the land. A myriad of cases attests to the potency of the customary laws that govern a wide range of issues, including family relations, property law, and the use and ownership of land and natural resources in Swaziland. Customary tenure is often intricately bound with local conceptions of kinship, generational descent, and broader social definitions of the role and rights of individuals and groups within the community.

Married women also have challenges when they wish to purchase title deed land, as highlighted by the landmark case of *Mary-Joyce Doo Aphane v. Registrar of Deeds, Minister of Justice and Constitutional Affairs and the Attorney General* (2010)⁸. The case is about a couple married under a community of property regime. The wife's request to register property jointly in both their names was

⁶ *Attorney General v. The Master of the High Court* (55/2014) [2014] SZSC10 (30th June 2016)

⁷ Administration of Estates Act, 1902

⁸ *Mary-Joyce Doo Aphane* (2010) 2010 SZHC 383/2009

not allowed under a provision of the Deeds Registry Act. The High Court upheld Aphane's request and declared the provision unconstitutional. Significantly, the judge used her powers under Section 151(2) of the Constitution that gives the High Court jurisdiction to enforce fundamental human rights and freedoms guaranteed by the Constitution to change the wording of the offending provision to allow registration of community property by women. The Supreme Court in May 2010 upheld the unconstitutionality of the discriminatory provision, but overturned the High Court judge's decision to "severe" and "read in" the Act on this occasion. It suspended the declaration of illegality for a year, allowing married women to register property in the interim, and allowing for parliament to amend the legislation in the meantime. However, two years later, parliament has not amended the legislation and there has been no follow-up action in the courts.

As important as this victory was for gender equality in Swaziland, barriers to land ownership remain. Most women are married under customary law and are still not legally entitled to register property in their name. The court had the jurisdiction only to set aside the discriminatory provisions that the litigants asked it to adjudicate on; it could not carry out wholesale reform of the Deeds Registry Act.

Extractive industry challenges in Eswatini

All minerals are vested in the king (Ngwenyama), in trust for the Swazi nation. The king is advised by the Minerals Committee, which appraises all applications for prospecting licences and mining rights for approval by the king (Section 18 (b): The Mines and Minerals Act). Individually tailored exclusive prospecting licences are granted by the king, and the activities of the prospecting company are monitored by the Geological Survey and Mines Department to whom quarterly reports must be submitted.

A telephonic interview was conducted with a female resident, *Sisi, who requested to remain anonymous (1 October 2020). She resides in Maloma where the Maloma Coal Mine is situated, and revealed that the community is gravely affected by the mining activities. Sisi disclosed that houses that are close to the mine are damaged by the blasting that takes place, and as a result of the extraction of coal the land has become unsuitable for agriculture. The dust residue that erupts from the blasting and extraction processes has left many residents' health in a

questionable state. Community members are marginalised as employees of the mine excavate holes at any location, with no due regard as to whether it is on someone's property. The borehole that the residents got water from was built above the mine drilling systems, and the water source was depleted as a result of the drilling. Sisi stated that the only other source of water is a river that is a few kilometres away, which is a strain for a majority of the families that are made up of the grandparents and grandchildren. The mine does not provide employment for any of the residents there – the youth seek employment in other towns. There are no prospects of employment in and around the area. According to Sisi the families that do not have any form of support from their children resort to begging for food from the other residents for survival. In most instances it is the women who remain behind to take care of the young, as the husbands and youth seek employment elsewhere.

These activities are in violation of the rights of community members. The mine has been approached by members of the community to try to reach an agreement that would allow peaceful and clean cohabitation, but to no avail.

Recommendations

The patriarchy that exists within Eswatini is particularly strong in rural areas, where male dominance is perpetuated by both men and women. A man is considered the head of the household. Even those who do not assist in providing for the family are still revered, but it is left to the women to find employment in order to support the family.

It is therefore recommended:

1. Government must have stringent health and safety policies in place and penalties for non-compliance, to address the health concerns in mining towns.
2. With reference to the coal mining in Maloma, the government should provide alternative areas for community members to stay or halt operations if the rights and livelihoods of community members is grossly

Mary-Joyce Doo Aphane (2010) 2010 SZHC 383/2009 affected. The state in which the land is abandoned after the digging of the minerals leaves it untenable for people to live there.

3. The mining companies must be held accountable by law and seek to uphold human rights. Human rights clauses should be included in the issuance of mining licenses.
4. Clear roles and expectations must be communicated on where and to whom violations may be reported by community members in the event of mining companies not meeting their commitments.
5. It is necessary to build capacity and strengthen networks of women's groups, including associations of lawyers and judges, business organisations, and parliamentary groups. Such networks could together mount successful legal challenges.
6. Parliamentarians should be lobbied through round-table conferences and discussions. In instances where civil society is inexperienced in lobbying, it should seek training. Experience with public-private dialogue has been promising, but it is imperative that women are resolutely included in this process to ensure that issues of importance to women are on the table. Initiatives seeking to promote regional sustainable development should place increasing emphasis on women's access to economic opportunity and the reduction of women's poverty.

Lesotho: Overview of Women's Land Rights and the Extractive Industries

By Booi Mohapi

Introduction

Lesotho is a signatory to many international instruments on gender, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In 2018, the Gender and Development Policy was promulgated into an Act and includes updates to incorporate emerging gender issues as contained in the sustainable development goals (SDGs). A number of laws have also been promulgated to promote gender equality, such as The Legal Capacity of Married Persons Act (which has changed the minority status of married women) and the 2010 Land Act (which reformed the statutory land tenure system).

In Lesotho there is still a lack of adequate provision for women, especially married women, to hold land rights independently of husbands, sons or male relatives as governed by the customary land tenure system. The statutory land tenure system seems to be weak in providing for women's independent rights and the existing legal frameworks are not explicit on the rights of women, although they are better than their customary counterparts. There are no enforcement mechanisms in place, and it appears that the Ministry of Gender does not have a clear policy and programme to ensure affirmative action. Customary land tenure is clear and explicit that women's direct access to land is only possible when husbands or sons are involved.

Extractive legislation seems to be open and shows no apparent discrimination against men or women. However due to the fact that land has traditionally been perceived as a man's area, women are very scarce in extractive enterprises. There is a critical need for robust affirmative action and programmes for women's emancipation in economic affairs, especially extractive industries and agriculture.

The traditional land-holding dynamics, which have for years undermined tenure security for women in Lesotho, determine not just women's access to land in Lesotho, but also how issues of tenure have impacted on their livelihoods and

economic emancipation. This paper provides a brief analysis of the Lesotho land tenure systems and how different types of system affect women's access to land. It also looks into some legal and policy frameworks and how they respond to women land rights and extractive industries in Lesotho. Finally, the conclusion provides recommendations for the promotion of women's access to land as a means for women's social and economic emancipation.

Women and land Rights

Despite a higher literacy rate among women than men in Lesotho and higher numbers of women than men working in professional and technical positions in the formal sector, men are still viewed as the primary decision-makers at the household and community levels.

On a social-cultural level, social acceptance and high poverty levels amongst women are two of the indicators of women's dispossession of land rights. Acceptance of traditional gender roles characterises Basotho society and underpins unequal power in relationships and access to wealth. Men are still viewed as dominant and retain the right to decide on the majority of matters arising in private and public. Women's decision-making is largely restricted to decisions associated with their traditional role as caretakers.¹ Even within the household, married women in Lesotho have a low level of autonomy in decision-making. In fact, the only part of the household where women experience high levels of decision-making autonomy is in relation to the preparation of meals.

Recognition of male dominance in Lesotho is illustrated by a 2005 UNICEF study in which a quarter of Basotho girls surveyed pointed out the inherent superiority of men's opinions and ideas.² The evidence of perceived inferiority of women and girls is a strong example of how gender dimensions are internalised by individuals.

Women experience inequality on structural, social, cultural, and individual levels of Basotho society. On a structural level, gender inequalities are institutionalised in traditional Basotho legal structures (customary law), which treat women as minors in property and inheritance rights. This leaves women in a position of eco-

¹ Lesotho Demographic and Health Survey 2004. Ministry of Health and Social Welfare, Bureau of Statistics and ORC Macro; 2005. pp 40-41.

² "Speaking Out! Views of Young Basotho on Gender, Sexuality, HIV/AIDS, Life Skills and Education in Lesotho," Volume I. UNICEF, March 2005. pp 64-70

conomic dependency that increases their vulnerability to abuse and dispossession. Although the Legal Capacity of Married Persons Act of 2006 improved women's opportunities under common law, the law is barely accessible; many citizens are unaware of these laws or, regardless of their knowledge, are obliged to continue to adhere to customary law. Basotho women also face a patriarchal political structure where vertical movement is difficult (58 per cent of local government leaders are female compared with only 28.8 per cent of national parliamentarians). This is inter alia reflected in service provision infrastructure, which is generally inadequate, and where infrastructure exists it contains only weak support structures to respond to gender inequalities and human rights abuses.

Legal frameworks

The Constitution of Lesotho recognises customary law. In Section 18, the Constitution of Lesotho prohibits discrimination in any form or manner. However, section 18 (4) (c) has proven to be contradictory, as it provides that section 18 (the non-discrimination clause) shall not apply to customary law succession cases of the chieftainship. Unfortunately, succession and inheritance laws are not separable in the customary law of Lesotho. This section, therefore, perpetuates the minority status of women under customary law. Customary land rights of women are adversely affected as a greater portion of the land in Lesotho is customary land, and is therefore traditionally administered by chiefs on behalf of the king. This state of affairs has institutionalised the subordination of women in Lesotho. Customary laws contradict the Constitution and other laws intended to accord equal land rights for men and women.

In addition to the Constitution, Lesotho has enacted the Land Act 2010 and the Legal Capacity of Married Persons Act 2006. These Acts have created a new environment that is intended to give women rights to access, own and inherit land. Women have been taking advantage of this new environment to negotiate secure land tenure, and the number of women who hold title deeds to land has increased. However, according FIDA,³ the coexistence of statutory and non-statutory institutions governing land allocation and inheritance of land, failure to implement laws, limited awareness of the new laws, inconsistencies in the application of the law, and the sustained dominance of patriarchy and male-biased norms continue to undermine women's land rights.

³ FIDA Lesotho is the Federation of Women Lawyers in Lesotho, and this argument was made in the submission to the National Dialogue on Constitutional Reforms in Lesotho in 2019.

How Lesotho's land tenure influences women's access

Land tenure in the mountain kingdom is determined by the dual legal system of customary and Roman Dutch law, which leaves a lot to be desired in the interpretation of the rights of women. The customary tenure system is dominated by the patriarchal culture and traditions. Letuka argues that marriage under this system is both patrilineal and patrilocal.⁴ Under customary tenure, the first-born male child is entitled to the inheritance of the land and any property. If there is no male child in the family, then the inheritance rights go to the son of the brother of the deceased father.

The Statutory land tenure system

The lease is the modern form of tenure for urban areas, while the rural areas still use Form C. Lease or Form C are issued to a woman or man but for married persons it is issued to both spouses. Lesotho's historical male bias in the structuring of access to economic opportunities and control of productive assets have undermined women's capacity to negotiate and control property and land independently in their own capacity under all the tenure systems. This system developed and was supported by years of gender discriminatory legislation and policies.⁵

Extractive Industries in Lesotho

Mining or extractive land is allocated in two categories, depending on the size and type of the extractive land in question. The first level is administered by the chiefs in collaboration with their elected councilors and includes quarries, sand and clay. The second level of extractive land tenure is leased on contract by the central government through the Commissioner of Mines for investments. This too cannot discriminate against any Mosotho who has means and resources to invest in the extractive industry. Most mining activities – be it artisanal and small-scale mining (ASM) or large-scale mining – are traditionally viewed as a male occupation, although women are beginning to venture into the business.

The Lesotho Minerals and Mining Policy provides for affirmative action and inclusiveness. The section on ASM makes reference to the Africa Mining Vision on affirmative action and reforms in the ASM sector. The policy is not specific on the

⁴ Letuka et al 1990 cited from G. Paradza 2018 Women's Access to Land and Housing in Lesotho.

⁵ G Paradza, 2018, Women's Access to Land and Housing in Lesotho a study commissioned by Habitat for Humanity.

opportunities for women except to say that it will ensure that ASM will adhere to gender equality. This may be interpreted as including the issuance of licenses, the allocation of mining leases and capacity building and empowerment of men and women in ASM. There is, however, no mention of women or gender equality in the policy document which was developed in the light of the Africa Mining Vision.

Conclusion and recommendations

Land is a valuable resource and an economic asset, especially in Lesotho where unemployment and other investment opportunities are very scarce; hence, the equitable access to land is to be considered as a fundamental right to be enjoyed by any Basotho, male or female. Promoting and safeguarding women's right to land is essential to women's economic emancipation and will lead to poverty reduction. Lesotho has a poor land tenure system which needs transformation. "Law reform is a necessary basis towards gender equality".⁶

There is also need for a clear land allocation policy which takes into consideration issues of gender equality and women's emancipation in a well-packaged manner. This includes revisiting the Lesotho Minerals and Mining Policy and the Africa Mining Vision to evaluate whether they provide a model for women's emancipation. Should both policies be sufficient to support gender equality in the extractive industry, each state party must ensure that they align themselves accordingly.

⁶ Ministry of Gender Report 2004 The Lesotho Report in preparation for the Beijing + held In Lusaka Zambia

Madagascar: Overview of women's land rights and extractive industries, the case of artisanal and small-scale mining in Sakaraha (south west region)

By Harisoa Eulalie Tanteliniony

Introduction

Artisanal and small-scale mining (ASM) has developed internationally, and millions of people are dependent on this sector. Seven years ago, it was estimated that more than 30 million people worldwide were working as artisanal miners¹, and two decades ago it was suggested that 80 - 100 million people in the world were already directly or indirectly reliant on ASM².

Women have played a significant role, although historical and cultural forces have relegated their participation to the periphery. Usually women have been part of the mining workforce, and very active in food provision and services (transport water, cleaning, laundry, sex, etc.). According to Remy Canavesio³ (2014), in Atsimo Andrefana Region, there were as many women in mining as men, but women's participation in ASM faces key challenges as a result of their lack of access to, use of, and control of land. This situation is made worse by the influence of the traditional legal constraints to inheriting or owning land and mineral rights which result in illegality or non-registration of their activities, which increases their vulnerability.

Throughout history, land is known as a crucial source of wealth, power, and social status. Land provides food, construction materials, and incomes in rural and in urban areas. Access to water and other resources, even to the basic services like electricity and sanitation, is often linked to access to land rights. In a country like Madagascar, land has a vital cultural, religious, and legal importance.

Most of people living in rural areas in developing countries depend on natural resources to ensure their livelihoods. Sweetman and Ezpeleta (2017) state that the

¹ GIZ/PAGE (2014). « *L'exploitation minière artisanale et à petite échelle de l'Afrique Sub-saharienne - Le cas de Madagascar* ». 40pages.

² Hinton, J. J. (2005). "Communities and small-scale mining: an integrated review for development planning". Washington DC, 20433, USA. 195p.

³ Canavesio, R. (2014). "Formal Mining Investments and Artisanal Mining in Southern Madagascar: Effects of Spontaneous Reactions and Adjustment Policies on Poverty Alleviation". Land Use Policy 36: 145–54. doi.org/10.1016/j.landusepol.2013.08.001.

land and water that communities are living on can provide abundant wealth. This is because millions of the world's poorest populations live in places with abundant and valuable natural resources such as forests, oil, gas, and other minerals. Madagascar's natural resources offer potential development benefits, including water, land, and forest, but most of these benefits are limited and inequitably shared amongst the population⁴. It is worth mentioning that women's rights and gender equality are essential to achieving sustainable, just human development. They are critical to securing natural resource justice.

This paper aims to discuss women's land rights in Madagascar, using as a case study the southern west part of the country.

Madagascar is the fourth biggest island in the world, located east of Africa, in the Indian Ocean. It is roughly 400 kilometres off the eastern coast of southern Africa, with a population that reached 26.26 million in 2018., and with a GDP per capita of US\$459.26.⁵

The currency is Malagasy Ariary (MGA) which is approximately US\$3 800. Its economy is a market economy and supported by its well-established agricultural industry, textile, emerging tourism, and mining industries.

The country has 22 regions. One of them is Atsimo Andrefana (south west region), which includes the Sakaraha district (the focus of this paper). This region has a population of roughly 1.4 million with an equal number of men and women. Most of the population is heavily dependent on agriculture with around 70 per cent (72 per cent of females, 68 per cent of males) working in this sector⁶ (Région Sud-Ouest and GIZ, 2018). This is one of the poorest regions in the country with approximately 88 per cent of families living in critical poverty, as measured by the Multidimensional Poverty Index. The region is growing very quickly with a population influx from across Madagascar, but in particular from the South due to climate change and drought. The implementation of land reform in Atsimo Adrefana region is among the slowest on the island (Republic of Madagascar

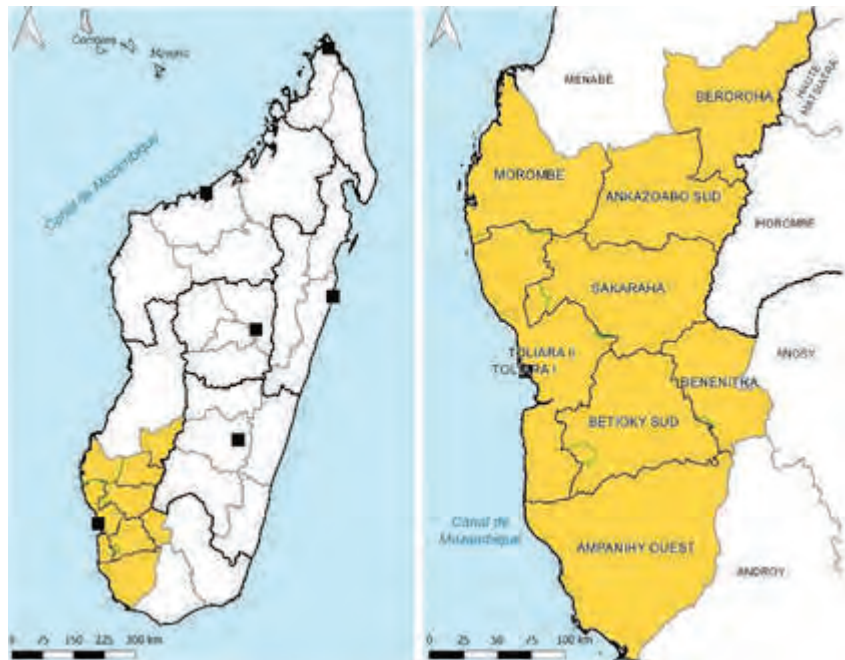
⁴ Sweetman, C. and Ezpeleta, M. (2017). "Introduction: Natural Resource Justice", Gender & Development, 25 (3), pp.353-366. DOI: 10.1080/13552074.2017.1395138.

⁵ <https://www.statista.com/statistics/460331/gross-domestic-product-gdp-per-capita-in-madagascar/>

⁶ Région Sud-Ouest and GIZ (2018). "Regional Plan for Atsimo Andrefana (Schéma Régional d'Aménagement du Territoire de la Région Atsimo Andrefana (SRAT)". 180p.

(2017), cited by Lawson, 2019)⁷.

Map 1: Map of Atsimo Andrefana



Source: Région Sud-Ouest and GIZ (2018)

Madagascar relies mostly on its natural resources for its economy, including mining resources through artisanal and small-scale mining (ASM). ASM is a significant source of livelihoods in rural areas where economic alternatives are extremely limited. Women are estimated to represent 30 per cent of the global ASM population, with the greatest percentages found in Africa (where statistics range from 20 to 90 per cent). In Madagascar, Hentschel et al.⁸ (2002) stated that 50 per cent of the ASM population are women, making ASM a significant source of livelihoods and employment for women (UNEP, UN Women, PBSO and UNDP, 2003)⁹. In Madagascar, more than 500 000 persons work directly on ASM and 2 500 000 are reliant this sector (GIZ/PAGE, 2014). The south-west region is well known for

ASM sapphire mining since the 1990s. In Atsimo Andrefana, there were as many women in mining as men according to Canavesio (2014).

In Sakaraha, one of cities in the south-east region, access to land resources is critical for rural livelihoods and is intrinsically tied to the community, to their culture, their heritage and identity. Unequal access to land resources is one example of gender inequality; women are estimated to own less than 2 per cent of land globally.

Given the restrictions on access to land and resources for women without a husband or other male relative, women often have few options to provide for themselves and for their households, leading them to look for economic opportunities through informal or marginal means, including transporting dirt and ore, prostitution, farm labour, or mining.

Overview of legal frameworks on land access

Since 2005, the land regulations in Madagascar were based on the reform (laws 2005-019 and 2006-031). These reforms aim to certify and register all non-titled private properties in order to legalise local land rights. The land policy lessens the domination of land administration and provides management opportunities to communes through decentralised offices. Ordinance 60-146 of 30/10/1960 abrogates all gender-based facets of Malagasy land rights. Burnod et al. (n.d.) claimed that the certification is accessible for everyone, although participation is still limited to roughly 9 per cent¹⁰. In general, the legal framework on access to land assets provides for around 25 per cent (OECD, 2019)¹¹.

Land belonging to a couple is registered under a husband, even though both wife and husband prefer to have the land registered under both their names. The evidence of inequalities in access to land on gender is overwhelming. In many cases, women are less likely to own and/or operate land; they are also, unfortunately, less likely to have access to leased land. Where it is possible for women to have access on land, it is often the poorer quality and in smaller plots.

⁷ Lawson, L. (2019). "Gender Impact assessment". Base Toliara

⁸ Hentschel, T., Hruschka, F., and Priester, M. (2002). "Global Report on Artisanal and Small Scale Mining, Report commissioned by the Mining, Minerals and Sustainable Development Project". IIED and WBCSD publ., 67p.

⁹ UNEP, UN Women, PBSO and UNDP (2003). "Women and Natural Resources. Unlocking the Peacebuilding Potential". 70p.

¹⁰ Burnod, P. Andrianirina-Ratsialonana, R. & Ravelomanantsoa, Z. (no date). "Décentralisation et certification foncière à Madagascar: avancées et limites. Foncier et développement (Decentralisation and land certification in Madagascar: developments and limits)". CIRAD, Observatoire du Foncier, Programme National Foncier. 12pages.

¹¹ OECD (Organisation for Economic Co-operation and Development) (2019). "Social Institutions and Gender Index". Development Centre. www.genderindex.org.

Moreover, women face extensive discrimination in terms of inheritance rights. In different regions of Madagascar, some ethnic culture does not allow right of inheritance to women, especially in terms of land. OECD (2019) claims that land is regularly divided among the male heirs only, or once a woman has to leave her village to get married, she has to give back the land to families (FAO, n.d.)¹². Despite the current laws, Malagasy customary tradition often means that inheritance that may vary from one ethnic group to another, but often these practices tend to favour men. This is especially the case on dissolution of the marriage, when the wife usually gets one-third or even nothing at all of the joint estate, disregarding the line of succession as stipulated in the law of inheritance (US Department of State 2017; cited by OECD, 2019). This is because 95 per cent of marriages in the region are traditional marriages, in which women have few rights. There are two legal systems, with official law being fine for women but traditional law maybe not.

In some instances where women could access land through markets or from other opportunities (such as redistributive reforms), they stand little chance of getting the allocated land as preference is given to men because of discrimination in incomes, in land markets, and in access to credit, as well as social discrimination. This situation is ubiquitous throughout the country, especially in rural areas where it is exacerbated by the low level of literacy among women.

The statutory law, policies and regulations in Madagascar are gender-blind, and this means that they can be discriminatory to women. In addition, laws related to inheritance, marriage, divorce, widowhood and family relations challenge women's enjoyment of human rights in Sakaraha. The restriction is on women's right to access, acquire, own, administer, use or otherwise control land.

Lack of women's land rights

There is evidence showing that women's lack of land rights is an existing phenomenon and this was captured by Elisabeth et al. (2013) who also provided an explanation of practices that prevent women from owning land and why women's lack of land rights is occurring¹³. The following points encapsulate these challenges:

¹² FAO. (2018). "The gender gap in land rights", Research program on policies, institutions and markets. CGIAR.

¹³ Elisabeth, D. et al. (2013). "Women's land right and gender justice in land governance pillars in the promotion and the protection of women's human right in rural areas". International Land coalition. 21 pages.

1. The root cause of discrimination against women to land access is widespread patriarchy, communicated in "stereotypes, attitudes, perceptions and norms", that leads to legal, political and economic restrictions on women's progress.

2. Women in Sakaraha are mostly limited to traditional gender roles. They accept these discriminatory attitudes because they have been educated to do so because of social pressures. This practice and the perception of women's position in the family as well as in the community affects the degree to which women can exercise their land rights. Amidst these discriminatory attitudes (under statutory and customary law) in rural and remote areas (like in the south east region), access to land is frequently governed in practice by local leaders (hazomanga) who reinforce and reproduce gender discrimination.

3. Women in rural areas are not empowered to claim and defend their land rights as there is a lack of knowledge of their rights in the community. The poor level of education in remote areas further entrenches illiteracy and knowledge of rights. In Atsimo Andrefana more than 50 per cent of women have never been to school (as compared to 37 per cent in the rest of the country) and the literacy level is significantly below the national average (Centre des Recherches D'Etudes et D'Appui L'Analyse Economique Madagascar, 2013). Women have low levels of functional literacy owing to limited access to education. They lack capacity and opportunity to participate in land governance, which reproduces and reinforces the inequalities in access to land.

4. In Atsimo Andrefana, only 4.5 per cent of marriages are "formal" unions, while traditional marriages comprise 60 per cent of marriages and provide women with fewer rights (Republic of Madagascar 2017, cited by Lawson, 2019). There are some female-headed households (often led by women who are either divorced or widowed), most of whom are living in acute poverty. These women are not recognised as heads of their homes, and the rights of the children can take precedence over those of the mother or wife (Widman, 2014)¹⁴. In these communities, women are typically

¹⁴ Widman, M. (2014). "Land Tenure Insecurity and Formalizing Land Rights in Madagascar: A Gender Perspective on the Certification Program Feminist Economics", 20(1), 130-154.

not afforded the option to sell land (Widman, 2014). Access to land is a particularly crucial issue in addressing poverty, as poor, landless, female household heads are the most disadvantaged in Madagascar (Widman, 2014), and the gendered division of labor makes female-headed households worse off.

5. There is a lack of political will to create an enabling environment that promotes women's land rights and builds gender-responsive land institutions, to develop practical, low-cost, and culturally adequate tools. During the current reform of decentralised land administration in Madagascar, there was no consideration of the gender dimension in the implementation of the reform and non-recognition of the barriers to promoting women's land rights by most of the participants in the reform. These barriers include the scarcity of local services and the lack of communication about their existence and their role.

Opportunities

In 2016, during the 16th Francophone Chief of State Summit, delegates concentrated on the role of women, girls and youth, particularly in relation to development, environment, entrepreneurship, jobs and women's representation in decision-making for "impartial growth, sustainable and responsible development".

Under the existing laws, in terms of land ownership and access, women and men theoretically have equal rights. Article 34 in the 2010 Constitution, affirms that each Malagasy citizen is guaranteed the right to individual property. In addition, the ordinance regarding the land regime and registration of 2003 endorses the equal rights of women and men and also protects the woman's property rights. The New Land Policy in 2005 specifies the principles in land governance that authorize the joint registration of land. Furthermore, in the law regarding marriage and matrimonial regimes (2007), there are provisions that permit both spouses to possess individual property where they are entitled to administer the property without restriction or others' consent¹⁵.

¹⁵ Government of Madagascar, (2007). "Law on Marriage and Matrimonial Regimes". Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF). (2018). "Women in Artisanal and Small-Scale Mining: Challenges and opportunities for greater participation". Winnipeg: IISD. 25p.

In Madagascar, the letter of land policy 2015-2030, in the last version of May 2015, the Ministry in charge of presidential projects, territory and equipment planning considered providing women and men the same opportunity and facilitating access to land and property. It has been affirmed that a consultancy land management with transparency, inclusive planning for space use, equitable and secured land access for all men and women would promote sustainable socio-economic growth. Land certificates inscriptions and title deeds in the women's name are being encouraged whether they are owners or co-owners (Groupe de la BAD, n.d.). At regional level there are institutions in charge of land management, such as central services, decentralised services, and the land policy, including government and ministries that should take into account and involve diverse actors in terms of decision-making, security and land distribution and management processes. These institutions should act prudently and transparently, and support those who are excluded or lack processes to mobilise (Groupe de la BAD, n.d.).

Civil society organisations (CSOs), including associations and international and national non-governmental organisations (NGOs) have a duty to advance gender equality, particularly since from 2009 there have been challenges in this regard. There were dialogues, advocacy, sensitisation programmes, implementation, reports by the institutions responsible, follow-ups on the application and recommendations, etc, within different fields, including education, health and land access. Women's federations, platforms, coalitions and associations work together alongside the state as well as private institutions. The networking at international, regional and local levels is progressing remarkably, and has been making positive impacts on gender equality in Madagascar.

Successes

Solutions to the persistent challenges that women continue to face require different institutional support in terms of mechanisms and services. This is because women face several challenges, not only at mining sites but also domestically as they accomplish multiple responsibilities that may limit their engagement to achieve their full capacity. Significant efforts remain to be continued, especially to overcome inherent practices and customs which impede women's empowerment. It is right that some paths have been taken with the aim of attaining gender

equity in the country. Some NGOs provide women's training and capacity building programmes, such as focusing on income-generating activities. CSOs, national institutions, and different state and international stakeholders are striving to achieve a more just society which cares for women's and men's human rights alike, and taking action on how to improve the status quo. Madagascar is now on the way forward to the promotion of women's rights since the equality of women and men has been prioritised. As an example, a gender activist association named "Avenir" is combatting the issue by helping women to officially document their land inheritance with lawyers' assistance.

Many formal and informal conversations have taken place with a women's associations in Sakaraha. ROAM association works with value addition of low value minerals in order to improve livelihoods and to play a constructive role in reducing conflicts. ROAM is the only association that made use of training from institutions such Gender Links and Sambemihy. The training sessions are focused on how to improve women's soft and technical skills. Some of the training offers literacy, foreign languages, entrepreneurship, association life, self-confidence and the ability to speak up in case of women's mistreatment. Compared to others, the trained women are well organised and ready to achieve their goal of independence.



Photo 01: Training provided to women's group "Roakemba mahavelom-po" focused on (1) association life, entrepreneurship in 2019, (2) gemstone faceting and polishing in 2018, (3) custom jewellery in 2016 / By Eulalie

Challenges and limitations

When it comes to land rights in Madagascar, women are disadvantaged compared to men, despite the integration of the country into several international instruments aimed at promoting gender equality, as well as a national framework on women's land rights. The lack of political initiative, non-application of laws, and lack of conviction from women reinforce the situation in addition to discriminatory roles and traditional attitudes toward women. Policies and socio-cultural customs that restrict them or deter them from obtaining land rights and prevent them from participating in decisions linked to land use contributes to the feminisation of poverty (Hinton, 2005).

Gender inequalities are particularly severe in the artisanal and small-scale mining (ASM) sector in south-west Madagascar, due to the lack of recognition of ASM as an activity contributing to poverty alleviation. There are significant barriers that cut across other forms of inequality and these are more severe for vulnerable groups (Hinton, 2005), which are oppressed by socio-cultural constraints. As a consequence, women's perspectives, knowledge, needs and proposed solutions have been largely ignored, resulting in policies that criminalise and further marginalise their activities. Lack of land rights in the area, as stated by UNEP, UN Women, PBSO and UNDP (2003), especially for young, divorced, widowed or single women, lead to increased risks of malnutrition, poverty and disease, because land is a common necessity for accessing other resources such as credit and agricultural inputs. Gender barriers deny women and men full access the benefits of ASM, which in turn affects households, communities, and even the national economy. Moreover, women's role in ASM in the region is constrained by socio-economic and cultural barriers, which may impact on their resource rights and on their role in decision-making. Women are typically offered less land and of low value (Lawson, 2018), and their capacity to benefit from ASM remains constrained by de jure and de facto inequity in access to land and property rights (Meinzen-Dick et al. 1997, cited by Lawson, 2018), and they are likely to get lower value for their gemstones. In the mining sites, women are frequently excluded from the more valuable deposits. As a consequence, they are often "found digging on the less valuable units of the lease while men pursue more lucrative seams underground" (Lawson, 2018)¹⁶. Women in sapphire sites around Sakaraha

¹⁶ Lawson, L. (2018). "Rice, sapphire, and cattle in a changing climate: Artisanal and small scale mining of sapphire in Madagascar; the work lives of women miners. In Lahiri-Dutt, K. (Ed), *Between the Plough and the Pick*" Pp.171-192. Canberra: Australian National University Press, ACT.

conduct mining along the rivers where they can dig or sieve sands. In this case, they get smaller pieces of sapphires and some garnets which they throw away (as garnets are not their priority). They spend almost their day stooped over in the dirty water, to the detriment of their health and safety.

In both civil and customary law, discriminatory practices in the ownership, management and inheritance of land exclude women from equal land access. In Sakaraha, customary laws tend to be applied concerning land management. Land customs may vary across ethnic groups and regions, but in general women tend to be only secondary when it comes to rights to land. For that reason, land is often distributed among the male siblings only, or it is given back to families when a woman leaves her settlement to get married. In the event of a divorce or a husband's death, women only receive one third of the common estate, and in some cases a wife may not get anything. Regarding gender equality in ASM, key governance concerns affect the effectiveness of legal instruments and policy to measure progress in remote areas such as Sakaraha. The integration of women into decision-making (formal and informal) is a significant factor in the progress of gender-sensitive policies and the successful realisation of any programme that can change the unequal distribution of resources.

Despite of the legislation, evidence on the ground shows that lack of knowledge at the grassroots level remains a challenge for the implementation and application of laws. Many women lack education, which hinders their ability to enjoy legal access to land (Hentschel et al. 2002). At every village in the region, there is one or more customary elites, called locally *Hazomanga*. These are elders who are respected by the community and are entrusted with problem-solving and decision-making. These customary elites may at times be opposed to women owning or even co-owning land. Even when opportunities legally exist for both men and women, socio-cultural impediments prevent equitable access (Hinton, 2005). It is worth mentioning that in Sakaraha region, people (including women) are nomadic. They follow the mining rushes, moving from site to site for specific amounts of time, and are not keen and "less likely to invest time and resources into more sustainable practices on land they do not own" (Sass (2002) cited by Hinton, 2005). However, they do not intend to go back to the region where they are originally from, especially women who are driven by climate change from the deep south of Madagascar. Furthermore, the allocation of land for extractive

activities can lead to the loss of fertile land for other activities such as agriculture (UNEP, UN Women, PBSO and UNDP, 2003). Around Sakaraha, farmers use slash-and-burn () for agriculture, and bush-fire to burn vegetation to be able to feed livestock by regenerating grasses.

According to Elisabeth et al. (2013), women suffer several consequences due to the violation of their rights that occur in Sakaraha, including:

1. Women with no rights or insecure rights on land have less bargaining power within the household, lower ability to access other resources, less control their lives and destiny, and reduced participation in decision-making. In many communities, having no land means a poorer social status. A lack of land rights reduces women's autonomy and their voice, and affects their self-esteem as well as their well-being. The lack of secure land rights for women impedes their ability to participate in land governance and public life, which inhibits them from full civil and political rights opportunities.
2. Women without land or with land rights insecurity are more likely to suffer from gender-based violence, including isolation, social stigma, rape and killings.
3. As miners, without land or with land rights insecurity, women are more vulnerable to poverty, food shortages, ill-health, and face increased difficulty in developing their business and livelihoods, which mean that their social and economic rights are at risk as well. This is even more the case for women in the mining sites who are separated, divorced, widowed or disabled. Throughout the country there is a huge demand for land by foreign investors, and in the rural areas land has been sold by husbands without the consent of the women. This often leads to children dropping out of school due to income shortage and the inability to support their studies (Elisabeth et al, 2013).

The vulnerability rating for women has risen from medium-risk to high-risk. As an example, it is mentioned that under the civil law, both women and men have equal rights to enter marriage, equal access to participation in all aspects of life.

However, discrimination exists within the family and within the legal framework. Restricted access to productive resources, such as the share of agricultural land-holding, is at 85 per cent (OECD, 2019). This shows that the situation is getting worse for Malagasy women. This may be caused by a variety of factors including the growth of population, poverty and limited (or no) access to a secure income.

Lessons learnt

The country suffers from a low rate of education (Groupe de la BAD, n.d.)¹⁷. In Atsimo Andrefana region, over 50 per cent of the women have never been to school and the level of literacy is considerably below the national average (Centre des Recherches D'Etudes et D'Appui L'Analyse Economique Madagascar 2013, cited by Lawson, 2019). Those living in rural villages are particularly illiterate because there are few opportunities for young people (and young women in particular). In addition, parents have a preference to send boys to school rather than girls because girls will get married and they will then depend on their husband. Furthermore, because of many children in the household, it is preferable for girls to stay home and help their parents take care younger siblings and also to help with domestic work. More than half the women in Atsimo Andrefana region will fall pregnant while they are teenagers, and are likely to have more children than women in other parts of Madagascar (Coastal and Environmental Services 2014; Centre des Recherches D'Etudes et D'Appui L'Analyse Economique Madagascar 2013, cited by Lawson 2019). While the infant mortality rate has gone down significantly in the country, the rate of women who die in childbirth or as a result of complications from self-induced abortions has not dropped. Atsimo Andrefana is also the youngest region in the country. More than 61 percent are under 20 years old, compared to 56.3 percent for all of Madagascar (World Bank Estimation in 2016), with over 50 percent under 15 (Région Sud-Ouest, 2018).

There is therefore a strong need for women's health and education to be prioritised, particularly in rural areas of Atsimo Andrefana. Girls need to go to school in this region as it has the worst literacy rates in Madagascar and the highest level of teenage pregnancy. Investing in women's education will lead to their empowerment through the improvement of understanding of their rights, their involve-

ment in decision-making processes, and their income levels. Providing education for women is significant for the education of future generations throughout the region.

The low status of women in traditional marriages needs to be addressed by sensitising women, traditional leaders and the local community regarding property rights (Groupe de la BAD, n.d.).

There is another group of women miners referred by Lawson (2018) as "ladies in hats", who are quite distinctive. These are women from the south of the country who migrated to Sakaraha for more than five years. They leave their households to look for a new life in a new society, better than before. They conduct local and small trade in sapphires. During an interview the women stated that they "put their money to work", which is the only way to get ahead, so they are spending their money prudently on long-term sapphire trade investments. These women were doing this business to get away from men who "have made them suffer", and they have to manage their sapphire earnings carefully to enable them to live independently of men (Lawson, 2018). As a result, the migrant women opt to permanently stay in the area as they feel safer and experience less discrimination. This group of women has a very critical responsibility within their society and their family, and their participation in ASM deserves to be improved through capacity building, access to credit for their businesses, and better access to the gemstones market.

Conclusion and recommendations

Across the global south, rural women are suffering extensive gender-based discrimination in customs and practices that cause severe inequalities in their ability to access, own, control and even use land, and that limit their participation in decision-making at all stages of land governance. Women are among the most vulnerable and disadvantaged people in Sakaraha. To promote and to protect their rights, land governance is one of the fundamental pillars of decision-making at household, community, and national levels. Land rights are an important determinant of women's empowerment, directly affecting their ability to experience civil, political, and social-economic rights, as well as their ability to fight social exclusion and poverty (Elisabeth, et al. 2013). Sustainable development is heavily linked with women's access to secure land rights.

¹⁷ Groupe de la BAD (no date). « Profil genre pays, Republic de Madagascar, département genre, femmes et société civile (AHGC) ». 26p.

To address the complex challenges and opportunities facing women miners in Madagascar with regards to land rights, the following recommendations are made:

1. It is necessary to place women and their land rights at the core of national development, and to thoroughly assess the impact of gender policies, plans, and programmes. Their integration should be systematic throughout activities related to natural resources worldwide, in collaboration with diverse stakeholders.
2. At the national level, different processes need to continue the ratification of instruments protecting women and advancing women's rights. In addition, useful institutional and statutory frameworks should be set up to include their land rights in public policy, especially so as to prepare and realise a legal framework of "real equality" between women and men in the country.
3. Maintain measures of reform and redistribution of land in order to guarantee real parity between women and men with regard to land titling.
4. Account should be taken of the multi-dimensional nature of discrimination against women and girls in ASM, recognising the centrality of land rights for the realisation of women's human rights and also their livelihoods. The Malagasy government should ensure that women have equality in tenure rights and access to land and other natural resources, regardless of their civil and marital status.
5. Women's participation must be encouraged from the conception until the implementation of land right initiatives. This should include training building capacity for women to be community leaders. At the same time, sensitisation events are needed in partnership with specialised organisations, to include educating traditional leaders (Hazomanga, Olobe, Mpitoka) and local communities on land and property rights. In addition, support is needed for grass-roots approaches like watchdog groups that can monitor women's land rights violations and resolve conflict through reconciliation (Elisabeth, et al., 2013).

6. The importance of women's participation in land governance should be highlighted through awareness campaigns, explaining the rationale for (and advantages of) accomplishing gender equality in land access. Moreover, literacy programmes (legal and functional), formal education, and even the introduction of gender and land rights issues in the school curricula, is necessary, involving men in campaigning. Engaging with media to endorse the visibility of women's land rights can be very important.

7. Representation of women is needed in decision-making processes at all levels; creating an institutional environment that is conducive to their participation is of paramount significance (Hinton, 2005).

Malawi: Overview of Women's land rights and the extractive industries

By Kossam Munthali

Introduction

The Malawi economy has traditionally been more agriculture-based than mineral-based because of the policies that government pursued since attaining independence in 1964. As a result, there has been a lack of mining culture, little technical capacity, and inadequate foreign and local investment, which contributed to the slow development of industry (Government of Malawi, 2014), the benefits of which are unequally distributed. Economic inequality has been rising sharply in recent years. In the seven years between 2004 and 2011, the gap between the richest 10 per cent and poorest 40 per cent increased by almost a third (OXFAM, 2018).

Malawi has a variety of known mineral resources that include uranium, heavy mineral sands, strontianite, rare earth minerals, phosphate, bauxite, gypsum, vermiculite, precious and semi-precious stones, limestone, dimension stone, silica sand, sulphides, and coal (Government of Malawi, 2014).

Despite being christened 'the Warm Heart of Africa', Malawi is one of the poorest countries in the world, with 70 per cent of the population living on less than \$1.90 a day (OXFAM, 2018). Most of the country's population depends on agriculture, with about 85 per cent of the population living in rural areas.

The recent mining boom poses potential socio-cultural, political, economic and environmental risks, including increased gender inequality as well as loss of livelihoods through forced displacement, land conflicts between companies and communities, pollution of waterways and loss of forests (MAWIMA Strategic Plan 2019-2023). Historically, gender roles played by men and women have been quite traditional. Men have entered the public sphere (for example as mine workers) while women have remained in the domestic sphere (in the home). On the mines, women have also provided sexual services to male mine workers. The Mines and

Minerals Policy (2013) recognises that there is inadequate empowerment of local people, gender inequality in the workplace, and low participation of Malawians in mining projects.

The Malawian mining sector's regulatory framework is still in a state of flux. Land and land-related mining laws have not been fully gendered and harmonised, and have so far failed to put women's land rights into the mining culture. At the centre, minerals are free for all and no special reference is made to women's rights. It is difficult to guarantee unity of purpose and direction, including ensuring transparency, accountability, consistency, predictability, and fairness in how to handle women's land rights and related issues. This renders the entire framework and the extractive industries susceptible to capture by vested interests, fraud and corruption which undermine its overall integrity. Although these challenges are widely recognised, efforts to popularise, implement and enforce the available laws proceeds at a snail's pace, suggesting that the sector might as well already be captured by vested interests and is already a hotspot for fraud and corrupt activities. This makes a strong case for an approach that would radically advocate for gendered and harmonised policies together with institutional and legal reform of the extractive industries (EIs), putting women's land rights and EI firmly on the agenda.

This research paper discusses women's land rights in relation to the EI in Malawi and how to foster women's access to, security on, and ownership of land in light of the many extractive industries currently booming in the country. Presented at the beginning is the Malawian EI context, and then how the fluctuating mining-related legislative environment has either contributed to or negatively impacted on land rights for women. Land and land-related laws have been highlighted, with their significance in terms of women's role in land administration. Despite the many laws, this paper suggests why implementation and enforcement of these laws is poor. How men perceive matters related to resettlement and compensation in the context of extractive industries is also discussed. The paper highlights some examples to support the points raised, identifying successes and challenges. The paper has further suggested strategies, tactics, and tools for ensuring that women's land rights can be protected, owned, and sustained at country level. The paper has finally provided recommendations and identified issues that may call for ongoing advocacy.

Literature review

The Republic of Malawi Constitution Sec 30 1994 assures its citizens the right to development, and S13 (a) states that “The State shall promote the welfare and development of the people of Malawi and one of the key goals is Gender Equality (i) through full participation of women in all spheres of Malawian society on the basis of equality with men and (iii) the implementation of policies to address social issues amongst economic exploitation and rights to property.” Women are at the centre of the Constitution¹. S 24 if the supreme law of the land ensures that women have the right to full and equal protection by the same law. This includes women within the mining communities.

The Ministry of Mining is the government entity responsible for the administration of the extractive industry (EI) sector, which includes the granting of exploration and production licenses. The legislation is not comprehensive, but some Acts regulate the general EI sector in Malawi, including the recently enacted Mines and Minerals Act (MMA) 2019, the Environment and Management Act (EMA) 2017, and the Mining Policy of 2013. The MMA, supported by the Natural Resources Justice Network (NRJN) with support from NCA and OXFAM, calls upon law makers to adhere to principles of free, prior and informed consent on land rights. Safeguarding Malawi’s land for farming, housing, business activity and wildlife is deemed vital. However, the MMA 2019 S 222 (2b) allows for mining to take place anywhere at the discretion of the minister on advice from the Minerals Resources Committee, thereby prejudicing provisions in favour of community rights to land as prescribed by the principal Land Law². In communities where women’s land rights remain key, the law should be aligned with the provisions in the Land Law.

While the same law requires lawful occupiers of land to give consent and to be compensated, the Minerals Resources Committee is able to dispense with consent (Section 222(4)) even when they deem it being ‘unreasonably withheld’. This means that someone’s land can be taken away against their will, contradicting the principle of allowing communities and individual landowners and users the right of free, prior and informed consent. By the same MMA 38 (4), any information submitted by the holder shall remain confidential for as long as the licence is valid and for two years after the expiry or termination of the contract. This is retrogressive as it does not spell out what type of information is involved, and

¹ Constitution of Republic of Malawi: Malawi Government
² Mines and Minerals (MMA) Act (2019) Government of Malawi.

it bars Malawians (including women) from access to reports, data and information which may be critical to the business, to human rights, and to women’s land rights. This principle is enshrined in the United Nations Declaration on the Rights of Indigenous People and should have been reflected in the law, which does not uphold and safeguard rights, especially of the most vulnerable in our society who do not have the means to take legal recourse.

General land rights and women’s land rights in Malawi

Land Net – a network of CSOs championing land reforms – states in their 2018 report that Malawi has reached a critical juncture in land reforms. The report further indicates that several laws have recently been enacted which were proposed in the national land policy 2002. The report further states that about ten land and land-related laws were approved by parliament and were assented to by the president. These include: The Physical Planning Act 2016, the Land Survey Act 2016, the Customary Land Act (CLA) 2016, the Registered Land (Amendment) Act 2016, the Public Roads (Amendment) Act 2016, the Forestry Amendment Act 2016, the Land Acquisition Amendment Act 2016, and the Local Government Amendment Act 2016. The Customary Land Administration S 5 (2) stipulates that a land committee shall consist of at least six people, of which at least three shall be women elected within the same community³. The law has not only acknowledged women’s role in land governance, but has provided a basis for institutionalising land committees that are gender-sensitive, but this does not apply directly where mining activities are taking place. In this case, Section 5 (2) of the law describes the land acquisition committee, but what is the practice? Generally, this has faced a lot of resistance; it is still claimed that women do not own land once they get married and a lobola is paid, because then their portion of land is not theirs any more. The government of Malawi have put in place many laws, but the main challenge is the implementation and enforcement of these laws.

How extractive industries impede women’s land rights

Mining operations involve the extraction of minerals from the earth. There is rising pressure on natural resources in developing countries due to an increase in global demand for mineral resources (Anney 2014)⁴. Civil society organisations such as nongovernmental organisations, trade unions, grassroots movements, academia, and churches expect mining organisational leaders to consider both

³ Customary Land Act (CLA) (2016). Government of Malawi

⁴ Anney, V. N. (2014). Ensuring the quality of the findings of qualitative research: Looking at trustworthiness criteria. *Journal of Emerging Trends in Educational Research and Policy Studies*,

the organisational economic benefits and the interests of the community, particularly women and the environment (Yakovleva & Vazquez-Brust, 2012).

However, the mining projects involve large-scale operations in which numerous resources are extracted and processed, resulting in a high generation of waste, extensive pollution, and consumption of large quantities of water that cause environmental and social problems for the local communities ((Arimura, et al 2011). Moreover, the mining activities and their associated processing techniques may worsen environmental problems as shown below:



Figure 1: Environment destroyed by Mwabulambo Coal where women used to draw water and farming

Unfair compensation

While land is essential to local livelihoods in Malawi, mining that often takes place in rural areas displaces these livelihoods. Compensating these losses is often difficult and has generally failed to meet local concerns. While the Constitution of Malawi empowers the government to acquire land for public utility, the same law also makes provision for adequate notification, appropriate compensation and the right for the aggrieved party to appeal to a court of law if not satisfied.

In terms on MMA 2019 Section 168 (3), the holder of a mining license shall manage resettlement of a person caused to undergo (a) resettlement process, if acquiring or gaining access to land causes any physical displacement or (b) compensation processes, as provided for in section 225 if acquiring or gaining access to land causes economic displacement but no physical displacement. Section 225 (4) stipulates that where compensation is being assessed or negotiated, women shall be consulted in their individual capacities in order to arrive at a fair compensation for loss of property, land or income which shall be paid directly to them. But this is contrary to the 2016 report by Human Rights Watch findings, which have revealed that mining has massive destruction on the environment (land, forestry, water etc), affecting women and men. Women suffer more because once the environment is destroyed women are unable to produce enough food as echoed by a woman who was victimised by the mining operations as demonstrated below.



Figure 2: "The pipes were right by my house, {with running water} in the kitchen and bathroom, and then they destroyed everything" said Nagomba E. (75) resident of Mwabulambo, a village in Karonga District-Northern Malawi. As an old woman I find it very difficult to walk to the river all the time."

© 2016 Lauren Clifford-Holmes for Human Rights

Whilst the spirit of the law is clear in making sure that women's land rights are being taken care of, corporate (and customary) practices systematically deny wom-

en access to and ownership of land. This paper can testify that additional examples of women's land rights not being adhered to, lack of fair compensation and relocation exist not only in the Mwabulambo coal mining area in Karonga, but also in the cases of Kayelekera Uranium Mining in Karonga, Namizimu illegal Gold mining in Mangochi, Thundulu in Phalombe, Kanyika Niobium Mining in Mzimba, Chitipa and Malingunde Graphite Project in Lilongwe, to just to mention a few. In Malingunde, for instance, it was revealed during interface meetings by the Institute for Community Mobilisation and Empowerment (ICOME) and NRJN that last year villagers were not told that Sovereign Metals (an Australian firm) would be drilling in their fields for exploration and were offered only K700 (US\$0.92755) as disturbance allowance although their crops were destroyed in the process.

Why the government failure despite having so many laws and policies in place? Since the 1970s, studies on policy implementation and enforcement have been plentiful, and have to a large extent tried to explain policy implementation and enforcement gaps. Although the issue of policy failure has been of great interest to social scientists, it has not been so to policymakers, who often equate proposing a policy to its effective implementation (Arghode, 2012)⁵.

Down-top versus up-bottom perspectives on policy and action are at the heart of discourses on policy implementation. Arimura, et al (2011) note that policy implementation challenges, failure or gaps in implementation can occur when policy and any law is imposed from the centre with no thought given to how it might be perceived or received at the local level⁶. They argue that this is not a case of a bottom-up approach to policy, and the action preferred is top-down, while a balance between the two is necessary (Arimura, et al 2011).

The failure of any policy and any law can occur because of bad execution or the policy itself being bad. Ineffective implementation or barriers that make implementation difficult are seen by policy-makers as bad execution. The other reason that is commonly advanced to explain policy implementation failure is when the policy itself is defective in the sense of its based on inadequate information, poor reasoning, or unrealistic assumptions (Arghode, 2012).

⁵ Arghode, V. (2012). Qualitative and quantitative research: Paradigmatic differences.

⁶ Arimura, T. H., Darnall, N., & Katayama, H. (2011). Is ISO 14001 a gateway to more advanced voluntary action? The case of green supply chain management. *Journal of Environmental Economics and Management*

Appiah & Osman, (2014) note that designing good policies is not enough, and that countries need to go beyond good policy design to successful implementation⁷. To effect successful implementation, policy-makers need to build genuine consensus among all stakeholders so that they all work towards a common purpose, as opposed to heading in different directions (Arghode, 2012). To do this, all stakeholders must be brought on board. Making change happen and pursuit of common purpose can cause some upheaval, and hence the need for all to be convinced that the efforts will be worthwhile.

Another weak element is the lack of political commitment to allocate enough resources so that the law can be popularised among women and the entire community, and duty bearers can be held to account. Government has no programmes or funding to make sure that women are aware of what is contained in the law. Lack of meaningful women's participation on land rights and mining issues

Oftentimes women and men who live near the mines are not told that mining operations will be taking place in their area or are given wrong information and as a result they do not have a proper say in what happens more especially on land related matters. Women lack necessary skills to effectively engage and negotiate with mining companies through Free, Prior Informed Consent (FIPC) for fair and just compensation, resettlement and corporate social responsibility remains a real problem within mining communities in Malawi.

Successes

Notable successes that we have registered in Malawi include the following.

1. Setting of the legislative environment

Malawi has recently assented the new Mines and Minerals Act 2019, whose main objective is the development of mineral resources in Malawi. Government has also amended the land and land-related laws that have an impact on women as far as land rights in mining is concerned

2. Legitimate CSO voices

Public accountability can transform natural resources wealth into sustainable development, and revenue transparency into public finance manage-

⁷ Appiah, D. O., & Osman, B. (2014). Environmental impact assessment: Insights from mining communities in Ghana. *Journal of Environmental Assessment Policy and Management*,

ment (Bleischwitz, 2014)⁸. In the context of development and governance, civil society is regarded as the third sector (distinct from the government and business) that functions as “intermediary institutions” in bringing issues of public interest to the public domain through coordinated advocacy. For instance, in Malawi, CSOs raised a variety of concerns as captured by print media about the Kayelekera project, where women’s land rights and mining were on the priority list in the environmental impact assessment (EIA) and Paladin’s proposal, included concerns about mining standards as well as economic and social impacts (Boiral, 2012)⁹. In developing the Malawi Extractive Industries Transparency Initiative (EITI), CSOs have been at the helm of providing legitimacy in engaging, questioning and constructively criticising government and private companies on matters that are of critical importance. CSOs have played crucial roles in identifying and communicating the socio-environment priorities of the local communities related to mining, and helping to jump-start the EITI process and steering EITI, helping to shape the EITI scope, data reporting and reconciliation, communicating and providing feedback on EITI results, identification and agenda setting, public education and enlightenment, serving as agents of change and social mobilisation, monitoring and oversight, whistleblowing and advice. Major focus areas now are to lobby for sectoral reforms. CSOs have managed to advocate for and defend space for engaging in public discourse which is now in place, facilitating increased participation and a democratic voice regarding the sector’s future.

3. Finally, CSOs have managed to engage and sensitise women in mining areas so that they can empower fellow women using the free, prior and informed consent (FPIC) model

Challenges

As a country, Malawi has registered the development of laws which, to a large extent, have not yielded the much-needed results. There are more challenges than successes, and the challenges include:

1. Lack of implementation of policies and laws that protect women’s land rights in the extractive industries. While Malawi has laws and policies that are aimed at protecting the rights of communities, including women potentially affected by mining, implementation and enforcement of these policies and laws remains a major challenge.
2. Displacement laws are not clear, and compensation only benefits men since they are the heads of the households.
3. Women usually don’t engage during consultations because they are not regarded as the land owners, and hence men are prioritised.
4. The central government obtains resource rents derived from extractive activities, but Malawi has failed to translate these resources into women’s empowerment and access to land and to generate employment for citizens. The money realised from such ventures goes directly into government coffers without passing through the hands of citizens
5. Providing opportunities for the government and investors to respect rights and to minimise the risks facing women and natural ecosystems, even as they push for economic development.
6. On the ground, mining in Malawi has been highly politicised by insensitive and greedy government leaders and politicians. There has been pressure to reap quick personal benefits from mining investments at the peril of the nation and therefore issues of women’s land rights are not considered a priority.
7. There are limited resources to roll out FPIC knowledge, which has proved to be an empowerment tool
8. Lack of political transformation due to vested interests. The quality of governance in Malawi continues to undermine the meaningful inclusion of women.

⁸ Bleischwitz, R. (2014). Transparency in the extractive industries: Time to ask for more. *Global Environmental Politics*.

⁹ Boiral, O., Henri, J. (2012). Modelling the impact of ISO 14001 on environmental performance: A comparable approach. *Journal of Environmental Management*,

9. There is no clear model to include women and dialogue meaningfully on women's land rights and the extractive industries, although the Land Law provides room for land legislation and associations which can be used as a platform for engagement and dialogue.

10. Finally, high levels of secrecy and non-disclosure by government officials and mining investors on mining boundaries (mining licensed areas) to women in mining communities starts with exploration and continues throughout the mining life cycle. Investors backed by government don't respect free, prior and informed consent as an international best practice. This makes women vulnerable since they will not even know which land belongs to the mining company and which is available for their farming purposes

Strategies and tactics

To address some of these challenges, the following strategies need to be pursued

1. Further legal audits are needed on the general legal environment, and research into issues related to changing attitudes and mindset on how communities view women's land rights and extractive industries.
2. Facilitate the formulation of a strategic communication plan. The development of this plan to facilitate the findings of the ongoing lessons on women's land rights and extractive industries is central to ensuring that women and other players can contribute to the debate. The plan will spell out the skills needed, including for the local and regional media.
3. Build women's capacity in FPIC and the Citizens Score Card and let them champion these tools. This will help in assessing the quality-of-service satisfaction throughout the lifespan of the mine on land rights and mining operations.
4. Facilitate dialogue interface meetings with governed and governing bodies (duty bearers) and mine owners. Reflective and re-planning meet-

ings should be a continuous exercise until the main goal is achieved.

5. Support women's empowerment and mentorship by linking up with women in leadership positions who can empower fellow women.
6. Facilitate the establishment of a community- and district-based functional multi-stakeholders' group which is fair and independent, with conflicts of interests declared.
7. Decentralise and champion all reforms to make policy-makers and implementers accessible to women in districts. It is difficult now for women to travel over 1200 kms just to seek information instead of accessing the same policy information within their local government councils. This will fit within the government reforms that are being championed now.
8. Identify, support and work with men who can support the cause.
9. Translate and popularise the provisions that protect women's land rights where mining is happening. This will help to empower women and they can use these as tools for advocacy in their day-to-day activities.
10. Introduce community radio debates and phone-in programmes. Community radio remains key to reaching out to communities who can get engaged through their participation and help to influence bad behavior by extractive companies.
11. Forge alliances with institution of governance, including business and human rights resource centres and associations of women lawyers, so that they are able to track investors who have failed to comply with business and human rights principles and access pro bono and litigation services.
12. Document, disseminate and sustain best practices for policy makers and communities in general. The documentaries will be designed to target different classes of people, depending on the nature of the issues and the success being registered. For policy-makers, this will help to influence policy changes.

Conclusions

It is not surprising that, as a nation, Malawi has not recognised women's access to and ownership of land in relation to the extractive industries, let alone ensured the benefit from the land provided by nature to this nation. The nation has overlooked some fundamental basics (dos and don'ts) in the mining industry as far as issues of land rights for women is concerned. Despite being warned and advised by experts not to sign any legal document before a number of issues are sorted out, the government of Malawi went ahead and signed the Deed of Agreement between Paladin and the Malawi government, which was done in a hurry for reasons not explained to communities in Kayelekera and Malawians in general. This involved deliberately keeping women and men in ignorance, allowing foreign investors to exploit valuable resources, destroying everything (as the case of Nagomba), not monitoring and choosing not to give feedback to women and those who matter in communities, taking mining revenues for consumption and not for development, continuing to avoid women's input on land rights, and opting for closed contracting than an open process based on free, prior and informed consent. This has the effect of defending the investors interests at the expense of women and accepting a raw deal, pretending not to see while very clear and visible evils are happening.

These irregularities can and must change if Malawian women are to benefit from their God-given resource (land). This change will include harmonising an effective, up-to-date legal framework that responds to the legal gaps that have led to the loss of the expected livelihoods and benefits, taking into account all the recommendations and demonstrating the political will to do so.

Looking at the depth and vastness of issues that encompass mining, particularly in a country where the industry is in its infancy stage, this study can be considered as preliminary, providing a basis for further research.

Recommendations

To foster women's access to, security on, and ownership of land in light of the many extractive industries in the SADC region (but with a special focus in Malawi), certain things must be done to fill the identified gaps. While the suggestions below are not exhaustive, they are necessary and vital recommendations.

The overriding recommendation is that all land and land-related laws and those governing the extractive sector be repealed or updated to incorporate women's land-related issues. Some of the more specific critical recommendations include:

1. There is a need to amend and harmonise land and land-related laws and the MMA so that the issues of women's land rights in the extractive Industry are given priority.
2. There is a need to analyse power dynamics among all players (companies and the state) before engaging them. A documentation of these dynamics will help as a reference point in terms of further engagement.
3. There is a need to manage vested Interests by different stakeholders such as corporate companies and government, which aim only at maximising profits at the expense of Malawians. Other players with significant and alien interests are the donors, and it is necessary to know and appreciate what interests they have.
4. There is a need for a strong legal, and environmental framework with stiffer penalties if extractive industries don't comply.
5. The Citizens Score Card, which is aimed at inclusive, accountable, and responsive processes, needs to be promoted in all women's land rights movements.
6. Meeting and managing community expectations requires a comprehensive formal packaging in what is known as Community Development Agreements, where shareholding of such mining be on the agenda. These need to be championed by the community themselves with a well-balanced skilful structure through a gendered trust.
7. There is a great need to establish a functional and independent multi-stakeholder group (MSG) at district level where mining activities are taking place. This will help in achieving collective governance on matters related to accountability, business, and human rights.

8. That there is strong need for a call for the transformed Political mindset (Political Transformation) and this must be to everyone.

9. Aggressive citizen-led advocacy is needed, -demanding access to information based on international and regional and local instruments, because hostile interests are also meeting somewhere, designing strategies to continue looting.

10. It comes crystal clear from the above analysis that FPIC must be sought first from women and must be respected by involving all key players through decentralised structures where women are meaningfully represented. This is in line with the current mining best practices, where human rights and business are respected.

11. FPIC to be fully addressed in the Mines and Minerals Act.

12. There is a need for a significant shift in gender roles, relations and responsibilities among both women and men.

13. There is a need to lobby for the development of gender-inclusive guidelines on compensation of land.

14. There is a need to devolve the administration of the extractive industry sector to local councils, to enable women to access timely justice on issues of land rights and the extractive industries.

Mozambique: Overview of Women's land rights and extractive industries

By João Nhampossaz

Introduction

Land in Mozambique is administered under article 110 (1) of the Constitution of the Republic¹: "The State shall determine the conditions under which land may be used and enjoyed." The Constitution does not describe or exemplify such conditions of use and benefit from land, such as for the citizens to use the land as a means of creating wealth and social welfare. Such details are left to ordinary norms and public policies on land, as are the cases of Law No. 19/97 of 1 October (Land Law)², and of Decree No. 66/98 of 8 December³. The main policies on the rights to land are the National Land Policy⁴ and the associated strategy, the government's Five-Year Programme, the Economic and Social Plan, and the corresponding annual state budget.

In terms of gender equality, Article 36 of the Constitution of the Republic enshrines the principle of gender equality in the following terms: "Men and women shall be equal before the law in all spheres of political, economic, social and cultural life."

All ownership of land shall vest in the state. The land legal regime is careful in the way it configures the range of subjects to land rights, including women and local communities (rural or peasant women), in compliance with customary rules, also considering the situation of the simple occupant and user of the land who has not yet definitely acquired the right to use and benefit from the land. It is easy to note that this special attention is due to the importance that the land represents for the lives of women and for the safeguarding of their human dignity.

If it is up to the state to determine the conditions of use and benefit of land, one can understand, in the light of the principle of the democratic state of law and the

¹ Constitution of the Republic of Mozambique

² Law No. 19/97, of 1 October (Land Law);

³ Decree No. 66/98 of 8 December.

⁴ The process of consultation for the National Land Policy reform is currently ongoing and it was officially launched by the president of Mozambique on 16 July 2020.

equality of citizens before the law, that the Mozambican state when determining these conditions must observe and put in place the essential principles of human rights, such as equality, non-discrimination, access to information, transparency, public participation, etc, by creating real conditions for the protection and realisation of women's land rights in the context of the principle of public interest that guides the state's activities.

There is no doubt that land assumes the nature of a fundamental right with special protection due to the particular relevance that the right to use and benefit from the land represents for the satisfaction of certain human rights and fundamental freedoms of citizens, especially women.

The management of natural resources in Mozambique, with emphasis on investments in the extractive industry sector in the Provinces of Cabo Delgado, Tete and Nampula, has been characterised by various positive and negative factors, due to their significant impacts on the land, human rights and living conditions of the populations affected by investments in this sector, and especially women. The resettlement process and the consequent loss of land rights as a result of these investments represents one of the most evident impacts on the living conditions of women affected by extractive industry.

It is clear, on the one hand, that the rights to land of women affected by the extractive sector, including the right to housing and other rights related to land, are violated in the context of the investments and management of natural resources in Mozambique. On the other hand, discrimination against women, violation of the right to information and public participation in the decision-making process (that can interfere in the protection of women's land rights) are also matters of great concern in the context of extractive industry.

Women, especially peasant or rural women, have a leading role in land management because they are the ones who work most with the land for family survival, and the land has a symbolic value for women as the source of life. The value of the land must be assessed taking into account the use made by the woman in order to support and grow their families. However, women are often excluded in the decision-making processes on land management and suffer most from land grabbing in the context of natural resource management, especially by extractive industries.

Peasant women, for whom land is a source for their survival, face several obstacles due to the strong influence of tradition and cultural habits that perpetuate gender-based violence. The law provides for equality, but in practice, this principle of equality is not effective. Men are normally the owners of the land, and are generally the only ones with the right to participate effectively in decision-making processes on land management. Discrimination against women is at the heart of social behaviour in the country.

This paper presents, in an articulated and explanatory way, the facts about the violation of women's land rights in the context of investments in the extractive industry in the Provinces of Tete, Nampula and Cabo Delgado. The quotations of the provisions of laws referred in this article have been unofficially translated from Portuguese by the author.

Women and land rights

Resettlement resulting from economic activities consists of the displacement or transfer from one point to another of the population affected by the implantation of economic enterprises, with the right to restoration or the creation of conditions equal to or above the previous standard of living.⁵

Resettlement, when it takes place under the terms of the law and justice, is therefore one of the legal benefits of the population affected by the investments in question.

It is in these terms that, from the point of view of the Constitution, of Law no. 20/2014 of 18 August (Law of Mines), Law 21/2014, of 18 of August (Law of Oil)⁶, of Decree 31 / 2012 of 8 August (Regulation on the Resettlement Process Resulting from Economic Activities)⁷, the Environment Law and the Land Law and respective Regulations, it is up to the Mozambican state and the concessionaires or proponents of mining or oil activities to create conditions for the effective and fair resettlement of affected families, with respect for fundamental rights and freedoms, especially the security of women's land rights, which constitute the central base of family development through land management and use.

⁵ Article 1(j) of Decree 31/2012 of 8 August, which approves the Regulation of the Resettlement Process Resulting from Economic

⁶ Activities. Law 21/2014, of 18 of August (Law of Oil)

⁷ Decree 31 / 2012, of 8 August (Regulation on the Resettlement Process Resulting from Economic Activities)

The Mine and Petroleum Laws referred to above establish relevant rules for the protection of women's land rights, as demonstrated in the development of this paper.

Legal framework⁸

It is not possible to go into detailed analysis of laws or legal provisions that discriminate against women's land rights and the extractive sector. However, relevant aspects can be highlighted.

In the light of article 5 of Decree no. 31/2012 of 08 August, which approves the Regulation on the Resettlement Process Resulting from Economic Activities, it is stipulated that: "Resettlement aims to boost the country's socio-economic development and ensure that the affected population has a better quality of life, social equity, taking into account the sustainability of physical, environmental, social and economic spaces."

Under Article 10 of the Resettlement Regulation, the main rights are as follows:

1. Effective restoration of income level, equal to or higher than the previous one;
2. Effective restoration of their standard of living equal to or greater than the previous one;
3. Being transported with your goods to the new place of residence;
4. Living in a physical space with sufficient infrastructure and social equipment and services for a life with human dignity;
5. Having space to practice their subsistence activities,
6. Giving an opinion on the entire resettlement process;

The right that women have to benefit directly from the enterprise in the context of the extractive industry and its socio-economic impacts results from the provision contained in Article 4 (e) of the Regulation.

The right to means of subsistence, social services and available resources is set out in paragraph d) of article 4 of the same Regulation and the right to public participation in the entire resettlement process, which fundamentally includes public consultation, results from paragraph f) of Article 4, Articles 13 and 23 of the Regulation.

⁸ Law no. 20/2014, of 18 August (Law of Mines)

The right to information about the contents of the studies referring to the resettlement process, including the right to know the resettlement plan, all relevant documentation for public consultation and to be clarified on resettlement issues is enshrined in article 14 of the Regulation. Access to information is also addressed in the Law of the Right to Information (Law 34/2014 of 31 December) and its respective regulations approved by Decree 35/201 of 31 December.

In this context, it is important to clarify that the creation of living conditions equal to or above the previous standard is not limited to building houses or housing on the basis of bricks. It is essential to create all the elements or rights relevant to decent housing and access to safe land. This means that the government and concessionaires must guarantee adequate housing, with access to drinking water, fertile land for the practice of agricultural production, alternative and sustainable sources of survival, education, health, transportation, access to markets, energy, space for worship, cultural activity and practice of religion.

The investor of the enterprise is responsible for bearing the charges related to the process of preparing and implementing the resettlement plan, under the terms of article 11 (d) of the Regulation on the Resettlement Process in question.⁹

Unfortunately, there is almost no evidence in Mozambique of improvements in living conditions and access to safe land by women as a result of resettlement to which they have been subjected in the context of the extractive industry. On the contrary, it has led to the unfair loss of land rights in their areas of origin.

The Republic of Mozambique is a state of social justice and governed by the rule of law, based on the respect for and guarantee of fundamental human rights and freedoms. However, land conflicts have occupied an important place, with an increasing trend towards land grabbing, including expropriation without due and just compensation and weak effective protection of land rights, particularly by vulnerable groups, especially women.

It is in this context that Mozambique has, in recent years, been the place of transactions for land extensions to large companies, mostly multinationals, whose ac-

⁹ Confirm also the provision of article 42 of the Oil Law in the same sense.

tivity of exploitation of natural resources implies the expropriation of land from local communities living in the target areas of exploitation of resources by these companies. A curious and worrying fact is that this expropriation has not been accompanied by due compensation and fair resettlement, despite the fact that these local communities are themselves the owners of natural resources on the land they are entitled to. Affected communities, especially women, have no support and no opportunity to participate in the negotiation process with extractive industries.

The Constitution establishes in article 109 (2) that the land may not be sold or otherwise disposed of, nor may it be mortgaged or subject to attachment. However, it is well known to society in general that the sale of land in Mozambique is frequent, and is regarded as a highly profitable business in the context of the extractive industry. Women are often the main victims.

Women's land rights in Mozambique are not yet widely seen or treated from a human rights perspective, despite the fact that this is an extremely relevant matter for the safeguarding of human dignity, the illegal limitation or violation of which implies deprivation of other human rights and fundamental freedoms, such as the right to adequate housing provided for under article 91 of the Constitution.

The right to adequate housing and property are clear examples of certain fundamental human rights that are intrinsically linked to land rights. Its illegal limitation also implies the deprivation of women's ability to self-determination and self-realisation, and the possibility of developing their own potential. In fact, the referred limitation often leads countless women and their families into marginalisation, social exclusion, difficulty in accessing housing, and the lack of conditions necessary to enjoy the minimum quality of life with a view to realising the right to development.

Article 1 (2) of the Law of Land defines the right to use and benefit from land as the right that natural or legal persons and local communities acquire over land, with the requirements and limitations established in the same law. The preamble of the Law of Land states that the right belongs to the entire Mozambican people as a universal means of creating wealth and social well-being.

There are many situations in which women, especially rural women, experience land grabbing for the exploitation of natural resources by large companies, a fact that has generated many land conflicts. Resolutions often difficult due to the complexity and the lack of clarity around legal procedures for the protection of land rights of vulnerable groups such as rural women.

Expropriation of land and lack of fair and equitable compensation

Under the terms of article 82 (2) of the Constitution, "Expropriation may take place only for reasons of public necessity, public utility, or interest, as defined in the terms of the law, and subject to payment of fair compensation." In the same sense, the Law of Land states that the termination of the right to use and benefit from land may take place for reasons of public interest, provided that it is preceded by the payment of fair compensation. This means that when expropriation takes place, the people affected must be duly compensated.

The amount of compensation, when it must take place, and the way in which they must be compensated can be agreed upon by the women affected and the competent institution or determined by court order (if the case is brought before the court) However, it is the duty of the state to monitor the process and ensure full and fair payment of compensation.

The most important thing is that the compensation must be fair and equitable, reflecting a fair balance between the alleged public interest and the interests of those affected.

In the decision-making process regarding the amount of compensation to be allocated to those affected, it is necessary to consider all circumstances that include the purpose of expropriation, the value of land rights lost by those affected, the history of those rights, the right to property built on the land, and the loss or abandonment of the affected people's way of life. Unfortunately, there is no clarity in the law as to how the calculation of fair compensation should be made.

The fact is that there is no clarity or guarantees for the citizens affected in the application of the rule that requires the payment of fair and reasonable compensation. That is why we have in Mozambique communities of rural women resettled in places unsuitable for human survival with dignity, and with limited access to

basic social infrastructure and services, such as transportation, drinking water, education and health. Examples of this include the case of about 760 families resettled in Cateme, the so-called Cateme community, in the District of Moatize in Tete Province. Here, communities are still contesting the lack of fair compensation from the resettlement suffered, and the loss of their lands due to exploration for coal mining by the company Vale Mozambique.

As a result of the mining extraction project (heavy sands of Moma), in the Province of Nampula, a conflict of land broke out between the company and the approximately 140 families that had to be removed from their previous housing areas. The affected families are still claiming fair compensation to date.

Extinction of land rights in the context of the extractive industry

An example of poor protection of women's land rights can be seen from article 18 (1-b) of the Law of Land, where it is said that “the right to use and benefit from land is extinguished by revocation for reasons of public interest, preceded by the payment of fair compensation and / or compensation.” This is a form of extinction that must be parallel to the process of expropriation under the terms of article 19 (3) of the Land Law Regulation. However, if this legal desire to pay fair compensation is not respected, it is considered that such an act of extinction of the right to use and benefit from land violates the Land Law and, above all, violates article 82 of the Constitution and should therefore be considered unconstitutional.¹⁰

It is important to note that neither the Constitution nor the Land Law, nor its Regulation, refer to what can be considered as fair compensation, or which entity has a duty to determine what is fair. There are many cases in which citizens and local communities are removed from their land in the name of public interest or the exploitation of natural resources but do not benefit from fair compensation or just resettlement.

From the point of view of the principle of justice, the rule of law and the pursuit of the public interest, fair resettlement or fair compensation means providing citizens affected by the expropriation of their land with equal or better living conditions with regard to access housing, drinking water, fertile land for agricultural

¹⁰ Cambaza, Virgílio, *a Terra no Contexto do Desenvolvimento da Indústria Mineira, Pressões e Conflitos em torno dos DUATs*, in *Desafios para Moçambique 2010*, IESE, p. 221. Since 2018 the Mozambique National Human Rights Commission has been engaged the company to ensure fair compensation to the affected communities, especially women.

production, access to education, access to health, energy and employment and other basic conditions for survival with a minimum of dignity.

However, this practice has generated conflicts of interest on land and it is in this context that some academics argue that investments in the mining sector increase pressure on land tenure and have resulted in the collision of competing interests. On the one hand, there are rural populations with previous land occupation rights, and on the other side there are mining companies¹¹ such as the multinational company Vale.

The community of Cateme and the one of 25 de Setembro arose due to the implementation of the mega project for coal mining by Vale in the district of Moatize, Tete Province, and the women of these communities are still contesting the lack of justice regarding resettlement and compensation to which they are entitled. They claim to lack the minimum living conditions for survival with dignity in the new places where they have been resettled. These families or communities, mostly women, were jointly resettled by the multinational company Vale Mozambique and by the Mozambican government in 2009, and more than 750 small houses were built for these families in new lands. However, with the displacement, resettled families began to face a series of difficulties characterised by inadequate housing conditions and difficulties in accessing land suitable for agriculture. These families were resettled on stony ground, and now have difficulty accessing drinking water, irrigation sources, and other productive and social infrastructure, including adequate food and energy.

If, according to the law, expropriation in these cases should be preceded by fair compensation, who has the duty to check whether the compensation reflects fairness before the right to land of the communities is extinguished? What does the law say in cases of failure to pay fair compensation to the victims? What is the appropriate and urgent procedural means available to victims? For these situations there is no clear solution in the land legislation to protect women victims of land grabbing by extractive industries.

Discrimination against women's land rights

Another barrier to access to land is the practice of discrimination that under-

¹¹ V. Cambaza “a Terra no contexto do desenvolvimento da indústria mineira: pressões e conflitos em torno dos DUATs” in IESE (ed) *Desafios para Moçambique*. p. 220.

mines the achievement of the objectives of the Land Law and affects a significant percentage of the population, particularly the poor, women, local communities and other vulnerable groups who have been the victims of discrimination. Unjustified limitations on access to land for the exercise and enjoyment of land rights in favour of obscure interests of certain privileged companies exploiting natural resources, has led to the outbreak of land disputes between the poor and those privileged companies. Women are the main victims, and they are not given space to intervene in this dispute. Generally, companies have benefited from government support to the detriment of women's land rights, despite the fact that they are the legitimate holders of the land right in dispute.

Women continue to face inequalities in the matter of access to land, often because of their lack of economic power, the arbitrariness of public services, the privileges that are given to people with economic capacity, and because of loopholes in legislation and public policies on land that allow discrimination to take place.

Another example that can be brought to light is the fact that the Land Law does not require title for the recognition of the right to use and benefit from land in certain cases, due to the cultural and customary specificities of our country. This is reasonable and useful. But what happens is that someone who has no title (document) proving the right to use and benefit from the land lives in a legal uncertainty and may easily have her rights violated. Also, the process for acquisition of the document (title of use of the land) is time-consuming and one has to pay fees to the administration services for such documentation. These fees are not harmonised, and each administration service has its own fees.

To eliminate formal discrimination, the Mozambican state must ensure that laws and policies on land do not leave room for the practice of any act of discrimination. Laws must not deny equality as regards the issue of ownership and social protection of women's land rights. Such laws and policies must not create unjustified privileges of land rights for certain companies in the extractive industry without creating clear and secure mechanisms for compensation to former land rights holders so that they are not marginalised.

² Constitution of Republic of Malawi: Malawi Government

³ Mines and Minerals (MMA) Act (2019) Government of Malawi.

Although it is essential to combat formal discrimination, it is almost useless to combat it without, at the same time, also combating substantive discrimination. In fact, eliminating discrimination in practice requires paying enough attention to groups of individuals who have historically and persistently been victims of discrimination, such as women in land management. Many rural women do not have access to land in their own name; they usually have access to land through their husbands.

For this and other reasons the state must take the necessary measures to prevent, diminish and eliminate the attitudes and practices that cause and perpetuate substantive or de facto discrimination. This can be done by guaranteeing, in practice, equal access to land regardless of the area where the land is located and the social and economic position, or political affiliation of the people.

Discrimination against women on the issue of land is widespread, persistent and deeply rooted in social behaviour and organisation, often focused on uncontested or accepted discrimination on the basis of cultural and traditional beliefs.

According to General Comment No. 20 of the United Nations in non-discrimination in economic, social and cultural rights, there is a need for states to teach their agents or public servants about the principles of equality and non-discrimination, and this matter should be integrated into formal, informal and multicultural education in an inclusive manner, with a view to ending superiority or inferiority behaviours¹².

It is necessary to promote dialogue and tolerance between social groups, without any discrimination, and to adopt preventive measures to prevent the emergence of new marginalised groups. There is also a need for human rights education and training programmes for civil servants and judges and other relevant people.

The constitutional norm that obliges the state to determine the conditions for the right to use and benefit from land means undoubtedly that the state must not unjustly interfere in the enjoyment of women's land rights. Also, in the resources that land rights confer on their holder, it must not interfere illegally in the autonomy of land rights holders to claim their rights and freedom of action. Some communities have claimed their land rights in the context of extractive industry,

¹² General Comment No. 20 of the United Nations Non-discrimination in economic, social and cultural rights

and the government responded with police and military force that brutally repressed the members of these communities (as in the case of Cateme Moatize District Tete Province). Members of the Cateme community, including women, have been seriously beaten by the police during the demonstration against the unfair resettlement and land grabbing they have suffered.

The state should not allow companies that exploit natural resources to have benefits on land by discriminating against women. The state has an obligation to create and guarantee the maintenance of a safe environment for the realisation of the right to use and benefit from land and for women to feel secure regarding their inherent rights to land with due legal protection.

Extractive industries and land

The communities affected by the Liquefied Natural Gas (LNG) exploration project in the Cabo Afungi region, Palma District, Cabo Delgado Province, have long complained and denounced land grabbing for the benefit of multinationals, particularly the oil company ANADARKO¹³ which holds a contract for the exclusive use of approximately 7000ha of land. The legitimate owners of the land are rural communities, including women, through customary rules.

The right to use and benefit from the land of the communities affected by the gas project in Palma was assigned to exclusive exploitation by ANADARKO in an obscure and illegal process. In a first phase, the right to use and benefit from land was assigned on a provisional basis to the National Hydrocarbon Company (ENH) in September 2012 and this company, through mechanisms that lack legal basis in relation to the land transmission process (as provided for in Land Law), transferred the same right to use and benefit from land to the company Rovuma Basis LNG Land, Lda (RBLL) in December 2012. RBLL then assigned the same land rights over to the exclusive exploitation by ANADARKO Mozambique Area 1 for industrial purposes.

The entire administrative process of assigning the right to use and benefit from land (DUAT) to exclusive exploitation by ANADARKO, due to irregularities and contradiction with the law that characterises it, represents a violation of the land

¹³ ANADARKO has negotiated its position with the oil company Total that is currently investing in the LNG in Cabo Delgado Province.

rights of the communities affected by this enterprise, particularly the Quitupo community.¹⁴ Furthermore, there is no registration in the public domain of any legality inspection process provided for in the applicable law regarding the land rights process in question, nor any registration of all relevant public consultations carried out under the terms of the law for this purpose, taking into account the trajectory that this process has experienced from ENH to ANADARKO.

The land rights were not extinguished under any legal form in force in the country so that it could be titled in favour of RBLL. This means that, from a legal point of view, the affected families (including the women) are still the legitimate holders of the land rights in question even though they do not have the tenure of the land and are not materially exercising that right.

For the land rights of the affected families to be considered extinct under the terms of the law, it is necessary first of all to ensure the payment of fair and reasonable compensation to the previous holders of the land rights in accordance with the Law of Oil and in conjunction with the article 18 (1-b) of the Law of Land. The extinction of previous land rights does not take place if the legal requirement for payment of fair compensation is not met. In the present case, the communities have not yet received all of their compensation and that is land grabbing. The administrative process for assigning of the land rights is also contrary to the obligation of the public administration to respect human rights and legality as it results from paragraph 7 of article 3 and article 4 of the African Charter on the Values and Principles of the Public Service, ratified by the Mozambican state through Resolution No. 67/2012¹⁵.

Mining and land rights in the Nagonha community in Nampula Province

Nagonha is a rural village, located in the district of Angoche in the province of Nampula, about 180km east of the city of Nampula, whose local communities have been severely and negatively affected by heavy sand exploration that is being carried out by a Chinese mining company (Haiyu Mozambique Mining Co. Lda, a subsidiary of Hainan Haiyu Mining Co. Lda, headquartered in China).

¹⁴ Processo Administrativo de atribuição de DUAT com referência 13945/1067 sobre pedido de ocupação de 25.2413ha na Localidade de Palma disponível na Direcção Nacional de Terras do Ministério da Terra, Ambiente e Desenvolvimento Rural

¹⁵ African Charter on the Values and Principles of the Public Service ratified by the Mozambican State through Resolution No. 67/2012.

This mining company obtained its mining concession (License nº 4776C) in the context of the mining contract signed with the government of Mozambique for the extraction of minerals, heavy sands, which implied the attribution of land rights to this mining company on lands occupied by the affected families, legitimate holders of land rights attributed to Haiyu.

The Government of Mozambique has assigned the DUAT of the Nagonha communities to Haiyu for this mining company to carry out its mining activity. However, this assignment was made by violating the essential legal requirements, namely:

1. Public consultation with affected families who are the legitimate holders of the land rights in that area;
2. Payment of compensation and extinction of the land rights of former holders for reasons of public interest.

Affected families in Nagonha complain that they have not been consulted regarding the process of giving the land rights to Haiyu. There is no record in the public domain of any public consultations in accordance with the law. The acquisition of land rights by Haiyu was made without respecting the mechanisms laid down in the land legislation for this purpose. This culminated in land grabbing from several families, including women who are the main victims of this mining activity.

Land rights of communities affected by coal mining by Vale Mozambique in the District of Moatize, Tete Province

On 26 June 2007 the mining company Vale Mozambique signed a mining contract with the government of Mozambique for the exploitation of mineral coal, under which a mining concession was granted to Vale of a vast area of land in the District de Moatize, in Tete Province, which covers the lands that were occupied by more than a thousand families affected by this project.

An action plan for the resettlement of the population affected by this mining project was approved. As a result, between 2009 and 2011, 1365 families were resettled, 760 of whom are part of the so-called Cateme community and the others were resettled in Unit 6 of Bairro 25 de Setembro in Moatize District. The relocation of the Cateme community ended in August 2010.

The mining company Vale has not yet carried out a fair resettlement, nor has it paid a fair compensation to the communities affected by its activities, especially the Cateme community. Most of the members of this community are women.

Under the law applicable to the case, it is the obligation of Vale to carry out the fair resettlement of the affected families and to pay fair compensation in full respect of their fundamental rights and freedoms. However, that is has not happened. The resettlement of the families affected by the project has not been completed within the reasonable period for this purpose, nor is it being carried out fairly. For about nine years these families have been living in precarious conditions as a result of the poor conditions of the resettlement of which they are victims. The families affected by the coal mining project in question have lost their land rights in their areas of origin, and the compensation to which they are entitled has not been paid in full.

Since this mining company has not carried out a fair resettlement, it was ordered by the Administrative Court of the Province of Tete, through Judgment No. 09 / TAPT / 19 of 12 April, to rebuild all houses within 120 days, following the standards provided in the model house presented to the affected families¹⁶. Even with a judicial decision and unequivocal evidence of the violation of the land and housing rights of the families concerned, Vale has not yet rebuilt the houses in question.

In the resettlement process, it was agreed that each family of the Cateme community should receive two hectares of land for agricultural purposes, but only one hectare of land was allocated, the second hectare having been replaced by a payment of a monetary amount of 119 000M (about two thousand dollars). The reasons for this decision remain unclear, as well as the criteria for setting the assigned value. These families have an uncertain future, with difficulty in accessing drinking water. They are obliged to use their own funds to access electricity in a context where they have no sources of income.

Families affected by the project are granted the right to use and benefit from the land and the right to adequate housing under the terms of the provisions of article 111 and 91 of the Constitution.

¹⁶ Judgment No. 09 / TAPT / 19, of 12 April (Mozambique Bar Association vs. Vale Mozambique and Government of Mozambique)

“When the concession area covers, wholly or partially, spaces occupied by families or communities, which implies their resettlement, the company is obliged to compensate those covered in a fair and transparent manner”, and the fair compensation “must be signed in a memorandum of understanding between the Government, the company and the communities”, it being “the Government's responsibility to ensure better terms and conditions of the agreement for the benefit of the community, including the payment of fair compensation”. This is what Article 30 of the Mining Law provides. However, Vale Mozambique, as the concessionaire company, has been violating this provision on an ongoing basis.

Article 12 (2) of Law no. 20/2014, of 18 August (Law of Mining, provides that: “Pre-existing rights to use and benefit from land are considered extinct after payment of a fair compensation to land users and their revocation, under the terms of the applicable legislation.” This legal requirement has not yet been fulfilled by Vale.

By not fulfilling its obligations to carry out the fair resettlement of the affected families, Vale Mozambique has already caused (and continues to cause) incalculable damage in terms of the right to decent housing, human dignity, the right to productive land and the well-being of these families. These families are affected by hunger resulting from the lack of resettlement and fair compensation, and there is no doubt that these losses or damages in the families concerned resulted from the violation of their land rights in the context of mining activity by Vale Mozambique. The gravity of the situation created by this resettlement is such that it is always mentioned as an example of what should not be done in resettlement processes.

Recommendations

1. Rural women and civil society must be given access to information and participation in the decision-making process regarding issues that affect their land rights and the activities of extractive industries that affect their livelihoods.
2. There is excessive secrecy in the extractive industry, and government must ensure that affected communities (particularly women) benefit from the exploitation of land and natural resources by extractive industries.

3. The inspection and control of the illegal land sale business needs better strategies and better accountability on the part of the offenders, especially in the context of the extractive industry.

4. There is a need for legal reform that clarifies the responsibilities of companies and the state with regard to protecting and respecting women's land rights so that they are safe from land grabbing.

5. The justice system must initiate a process of reflection and construction of a specific, simple and rapid procedural regime to address any violations of land rights, especially for women who are the main victims of discrimination.

6. It is important to adopt the necessary measures so that the state's obligations regarding women's land rights are applied to the progressive and integrated realisation of these rights and to avoid situations of unacceptable and unjustifiable setbacks in this process. To this end, the principle of progressivity and the prohibition of backsliding need to be considered. After advancing the protection of women's land rights, the state must not be able to decrease the level reached, except in certain justifiable circumstances.

7. There is a need for coordinated efforts to consolidate a culture of respect for women's land rights from a human rights perspective, which implies training the population and institutions.

8. The supervision and control of the illegal business of buying and selling land requires better strategies and ensuring that offenders are held accountable.

9. There is a need for greater and more effective involvement of women in the decision-making process regarding land and natural resource management in the context of the extractive industry that affects their lives.

10. Access to information on the decision-making process on issues of land and natural resources management must be effective to as to empower rural women with the knowledge they need to protect their land rights.

11. Legal reform of land laws and laws governing the extractive industries must be realistic and efficiently protect women's land rights.

Conclusion

The Law of Land, despite having seen important successes, suffers from inconsistencies regarding its harmonisation and application in the light of the fundamental principles of human rights, especially regarding the principles of non-discrimination and justice. The Law of Land incorporates rules that prohibit the practice of acts that jeopardise the rights of landowners, but the protection mechanisms are not clear – they are ineffective and offer space for delaying manoeuvres that facilitate systematic violations of women's land rights especially by extractive industries.

The public services provided for the satisfaction of the right to land are performed as if this were a favour. Local communities and other vulnerable groups, including rural women, remain exposed to evictions, land grabbing and other abuses of their land rights.

It is, therefore, necessary for the public administration to identify vulnerable groups that need priority or special attention in the protection of land rights, based on the approval of norms that protect them from discrimination and incorporate them into their policies, strategies, operational plans and the state budget with a view to protecting them, compensating them, and strengthening their access to safe land.

At the same time, there is a need to undertake coordinated efforts to consolidate a culture of respect for land rights from a human rights perspective. This implies sensitising the population and institutions in the area of extractive industry on land and human rights through campaigns and other dissemination activities, and the promotion of a culture of enforceable rights by citizens and public servants. The activity of the extractive industries has brought extremely negative consequences for women with regard to their rights over land. It has removed them from their ancestral lands and imposed new ways of survival without any type of preparation or effective support. In addition, it has excluded them from the decision-making processes, has reduced women's autonomy in land management as

their source of survival, destroyed the cultural way of life of women affected by the extractive industries, and has left them in severe poverty and hunger. The activity of the extractive industry in Mozambique constitutes a denial of the right to development of women as they have lost their land rights mostly through land grabbing.

Namibia: Overview analysis of women's land rights and extractive industries in Kunene Region

By Chanda Fidelia Mutale

Introduction

Recognising that women's participation is necessary for the achievement of sustainable development, extractive industry companies are increasingly committed to integrating women's economic empowerment into aspects of their operations. Investors and private individuals are acquiring large areas of land, particularly in developing countries, to extract profitable resources including diamond and uranium, at the expense of livelihoods, human rights and the environment. Communal resources, particularly those of indigenous peoples, such as land, rivers and forests are under threat from polluting industries, deforestation and hydro-electric projects. Women, who have less secure rights to land, are particularly vulnerable to land grabs, displacement and dispossession to make way for large-scale development projects, such as mining. The purpose of this paper is to examine why women have less secure land rights concerning extractive industries in Kunene region of Namibia.

Mining in Namibia is done mainly by the private sector. The mining sector contributes to 25 per cent of the country's income. It is the largest contributor to the national economy (Walvis Bay, 2011)¹. Namibia has various mineral resources apart from diamonds. These include uranium, copper, gold, lead, tin, lithium, cadmium, zinc, salt and vanadium. Less than 1 per cent of women are involved in mining, mostly trading in semi-precious stones in Erongo and Kunene regions. Women represent 43 per cent of the agricultural labour force, yet they rarely own the land they are working on. They have tenure security or control over the land. Women often have limited decision-making power over land.

Promoting women's participation in the extractive industries sector is a valuable contribution to exploring solutions for putting women at the heart of economic activities in Namibia. The sector cannot afford to lose momentum. It has seized the opportunity to invest in genuine solutions which put social, economic and

¹ Windhoek, Walvis Bay and Ongwediva. BDO is a member of BDO International Limited.

political empowerment for women in the extractive industries at the centre of overcoming the gender barriers and issues that women have faced in the effort to accelerate economic development and create expanded opportunities for women's economic empowerment (DFID and GIZ, 2013)².

This paper focuses on women's land rights and the extractive industries in Kunene region of North-Western Namibia. For over 50, years mining has gained momentum with the enactment of the Minerals Act of 1992 and the 1996 Act that granted usufruct rights to local communities (Republic of Namibia, 1992)³. This legislation makes negotiations easy between the mines and the people in authority. A gendered approach to land rights can enable shifts in gender power relations, and assure that all people, regardless of sex, benefit from and are empowered by development policies and practices to improve people's rights to land (FAO, 2005)⁴.

Objectives of study

1. To examine the effectiveness of government policy regulations on women's land rights in relation to extractive industries in Kunene region.
2. To assess the opportunities for women's land rights and extractive industries.
3. To establish the strategies that can protect the women's land rights.

Motivation of study

Namibia prides itself on adherence to diverse cultural affinity and traditional belief systems which define the place of women in respect to land access and ownership. Inasmuch as land rights have been improved because of societal perceptions and the difference in educational levels, there is still inequality in land ownership especially in the extractive industry (mining). This has an impact on the social and economic status of women and their families in Kunene region.

Literature review

The desk review identified a number of studies that concentrate on women's land rights and the extractive industries. These studies are drawn from the SADC region and finally focus on Namibia, and the Kunene region in particular. According to Macionis (2010), borrowing from Engels, capitalism increased male dominance

² Processo Administrativo de atribuição de DUAT com referência 13945/1067 sobre pedido de ocupação de 25.2413ha na

³ DFID and GIZ. (2013). 'Promoting women's financial inclusion: A toolkit'.

⁴ Republic of Namibia, (1992). The minerals (prospecting and mining) act 33 of 1992. Windhoek: Government Printer.

and authority, and it feeds on the community's resources, creating more male power and disempowering women⁵.

Land rights in sub-Saharan Africa, as in other regions, are governed by institutions that are culturally and socially determined. Many sub-Saharan African countries, for example, practice a custom called "levirate" marriage. When a husband dies, the wife will marry one of the brothers or another relative of the deceased person. On the one hand, this can be seen as a form of social protection: the widow will not be left on her own, but will continue to be part of the clan and will have access to its resources. But on the other hand, this does not allow women the right to choose their partners, and can be seen as an institution that protects male rights to land (MPWPC, 2007)⁶. Women only have access to land through marriage, and if the marriage breaks up (for whatever reason) the women lose their access to the clan's resources, and specifically to land. It is therefore important to promote women's independent property rights, as access rights may be temporary.

The population lives on communal land owned by the state and customarily allocated to members of the community by traditional leaders. Under pre-independence customary law, women's access to land was primarily through their husbands, fathers or some other male relative. Under the Communal Land Reform Act of 2002, there are no bars to gender equality in the allocation of communal land, but there is also no direct articulation of the principle of non-discrimination, nor any affirmative action for women⁷. Land continues to be allocated by traditional leaders, with the allocations being ratified by community land boards, about one third of whose members should be women. A study of 10 villages under the jurisdiction of a single community land board found that 40 per cent of the applications for land rights originated from single, widowed or divorced women, with the average age of the female applicants being about 60. The study noted that both the community land board and the local traditional authorities in this particular location were actively encouraging women to apply for land rights. Despite being rich in mineral resources, it is ironic that southern countries still have a high prevalence of poverty and inequality, even in Namibia, which the United Nations classify in the Medium Human Development (MHD) category of

⁵ FAO, (2005) *Gender and land compendium of country studies*.

⁶ Ministry for the Promotion of Women and the Protection of Children, October 2007: *Draft national gender policy*.

⁷ Republic of Namibia (2002). *"Draft National Land Tenure Policy"*. Windhoek: Ministry of Lands and Resettlement.

countries. With regard to women, the mining sector is characterised by injustice in Kunene region. Based on the evidence which was reviewed. The majority of women in the region are largely excluded from participating in or benefiting from the vast mineral wealth of the region due to the communal laws put in place that affect them greatly.

Current state of Namibia

Namibia is ranked 108 out of 159 countries on the UN's 2015 Gender Inequality Index (UNDP, 2016). The country's index value, 0.474, is better than the averages for both sub-Saharan Africa and for the group of countries categorised as having medium human development. The state of gender equality in Namibia is reflected in a number of key indicators. Namibian women live longer than their male counterparts (an average of 67.5 years, versus 62.5 years), and they spend more time in school (an average of 6.9 years, versus 6.5 years) (UNDP, 2016). This educational advantage has not yet translated into higher earnings, which remain unequal. Gross national income (GNI) per capita for women is just US\$7 971, compared to US\$11 667 for men. Men's participation in the labour force is similarly higher, at 63.3 per cent for men aged 15 and older, compared to 55.7 per cent for women. In government, women are well represented, although parity has not yet been fully achieved: 41 per cent of Namibian parliamentarians are women, which is well above the global average of 23 per cent (World Bank, 2017)⁸.

The National Land Policy and the Communal Land Reform Act 5 of 2002 aim to improve gender equality in land rights and tenure security. Regrettably, no mechanisms are in place to monitor the impact of gender policies and laws on gender equality. Circumstantial evidence suggests that progress has been made in improving gender equality in access to land and tenure security, but discrepancies between the provisions of the Communal Land Reform Act and practices on the ground continue to exist. The question thus arises whether the provisions of the Act pertaining to women generally and widows in particular are being implemented effectively.

Today the Himba people manage to maintain their pastoral livelihoods along the Kunene River despite limited development in their region because they are not

⁸ Scott, J., Dakin, R., Heller, K. and Eftimie, A. (2013) *Extracting Lessons on Gender in the Oil and Gas Sector. A Survey and analysis of the gender impact of onshore oil and gas production in three developing countries*. World Bank Extractive Industries Working Paper, nr. 28. The World Bank. Washington D.C.

participating in government issues. The droughts which affect their lands are because of the mining taking place and the construction of the hydro power dam which caused floods and displacement and which is contributing to climate change.

Government policy

The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights recognises the principle of gender equality and women's equal rights to property and land. Among other provisions, these principles state that the African states are obliged to "ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women". This includes the obligation to take measures to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land.

Seeking to sustainably allocate, develop and manage natural resources in communal areas, the government of Namibia passed the Communal Land Reform Act (CLRA) in 2002. The law establishes state ownership of all communal lands, which are administered by traditional authorities who can allocate (and revoke) land rights to individuals, private companies or families according to customary laws. The Act also established Communal Land Boards (CLBs) that are tasked with ensuring the procedures of land registration are followed in accordance with the Act. Any citizen of Namibia can apply to have a communal land right registered in his or her name. Improved legal rights and secured access to land are particularly important for women and marginalised population groups (Thiem, 2014)⁹.

The Draft National Land Tenure Policy (RoN 2002: 17-18) has gone through several stages of consultation and amendment. It states that customary rights for arable, residential and grazing land will be held by the head of the family in trust for the rest of the family. Heads of households may not dispose of such rights without the consent of their spouses and dependent children. The Draft Policy refers to the Constitution and the Married Persons Equality Act in respect of

⁹ Thiem, M. (2014). A Decade of Communal Land Reform in Namibia: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration. Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

the protection of the rights of women, particularly with regard to inheritance practices. In addition, traditional authorities and regional CLBs are called upon to ensure that gender discrimination does not occur in inheritance cases involving communal land. The possibility of appealing to a Land Board against a decision of a traditional authority is also provided for.

The government of Namibia recognises that the exploration and development of its mineral wealth through mining could best be undertaken by the private sector. Government therefore focuses on creating an enabling environment for the promotion of private sector investment in the mining sector. This will include competitive policy and regulatory frameworks, security of tenure, and the provision of national geo-scientific data to further stimulate exploration and mining (Government Gazette 5638)¹⁰. The Namibian Constitution authorises affirmative action, noting that "it shall be permissible to have regard to the fact that women in Kunene have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation" (Art 23(3)).

The participation of women in the Namibian mining sector is low, a fact recognised by the government and actively addressed in the Minerals Policy (2003). In the policy, the ministry states its intention to specifically develop more opportunities for women to participate in large-scale mining, particularly through targeted skills development. There have been initiatives in the past to promote women's participation in the sector, including by the Ministry of Gender Equality and Child Welfare and the Ministry of Labour. Article 23 of Namibia's constitution acknowledges gender and the discrimination that women have historically faced in Namibia, and companies operating in the country are required to comply with the National Gender Policy. In addition, Namibia's Affirmative Action Act (1998) requires that companies submit an affirmative action plan to address both racial and gender discrimination.

¹⁰ Government Notice 258 of 2014 (Government Gazette 5638), as amended by Government Notice 53 of 2016 (Government Gazette 5978).

Key findings

Women's land rights, in law and in practice, are an essential step towards the empowerment of women. These rights are also critical in determining the economic wellbeing and social status of women. Laws alone are not enough to secure women's access to and ownership of land. The effectiveness of laws depends on awareness about them, the abilities to invoke them, the general governance environment, and to what extent cultural norms and traditions are practiced and followed instead of formal laws.

Just as important as laws, but often overlooked, are the regulations for implementing the laws. Beyond a normative declaration of women's and men's equal rights to land (like those often contained in a general land law), rules, regulations, and procedures can have the biggest impact on women's land rights in practice. Statutory law, if enforced, has supported women's secure rights to land, but enforcing the law can be difficult because the justice system is often inaccessible and costly, and high land values provide an incentive for illegal land grabbing. Beyond general proclamations of equal rights to access and own land, certain legislation must have specific positive action provisions which bring about opportunities for women to be able to develop the land and preserve it for their children. A 2017 study which investigated women's land rights in Kunene, Ohangwena, Omusati, Oshana and Oshikoto regions found that, even though women may legally acquire land in their own right for small-scale mining or agriculture, historical gender inequalities remain. (Namibian Broadcasting Corporation, 2017) For example, the study (which interviewed 402 respondents in the regions in question, with no gender disaggregation provided) found that about 15 per cent of women interviewed did not receive the land they applied for from traditional authorities; for a majority (66 per cent) of them, the reason was that the village headman believed the land to be too large for a woman¹¹.

In 2007, four years after the new land law came into force, some traditional leaders interviewed by the Legal Assistance Centre reported a rising trend in applications for land from single women, mainly women over the age of 50. While these women were applying for and receiving land, younger women were unaware of their rights and faced particular challenges. Some traditional leaders interviewed

for the study expressed reluctance to allocate communal land to young, single women. Young women do not traditionally have their own households, usually remaining in their parents' homesteads until they marry. Traditional leaders cited worries that allowing young, single women to establish their own homesteads might encourage violence or prostitution as lots of single men would be likely to visit them, and that this would contradict parental responsibilities to care for such women. Some traditional leaders apparently refused to allocate land to single women on these grounds, despite the law's gender-neutral provisions. Ironically, the study found that the overriding reason cited for the increased ability of single women to obtain land was not the new law, but the fact that women increasingly have the financial means to "persuade" village sub-headmen to allocate land to them.

The wider gender gap within the country's mining sector can be attributed to various factors such as dominant culture, family roles, nature of the job, hard labour and gender stereotypes. Many of the problems women face when pursuing mining careers arise due to women's traditional roles as the primary caregiver. It can be very difficult for females to achieve a good work/life balance because of the industry's constraints in terms of flexibility, remote site work, and juggling childcare with often unsociable hours and expectations of overtime (UN Women Policy Brief, 2014)¹².

A recent study of 10 villages under the jurisdiction of a single community land board found that 40 per cent of the applications for land rights originated from single, widowed or divorced women, with the average age of the female applicants being about 60. Younger women in the study area were aware of their right to register for independent communal land rights, but were discouraged from doing so by cultural and socio-economic barriers. The study noted that both the community land board and the local traditional authority in this particular location were actively encouraging women to apply for land rights.

Successes

The government of Namibia has made various efforts to strengthen women's rights, first of all by according gender equality the status of a constitutionally guaranteed fundamental right, and by subsequently passing progressive gen-

¹¹ Namibian Broadcasting Corporation, "Lands ministry prepares for September Land Conference", 19 April 2017, NBC website: <www.nbc.na/land-conference-2017>.

¹² UN Women Policy Brief (2014). Gender equality in the extractive industry in Africa.

der-based laws in order to ensure the empowerment of women, men and children, and the equality between men and women as prerequisites for full participation in political, legal, social, cultural and economic development. The data shows that considerable progress has been made in Namibia to include women in management. Namibia succeeded in achieving 33 per cent women in the public service management cadre, thereby reaching the 30 per cent target by 2005, with 48 per cent of offices, ministries and state agencies having more than 30 per cent women in management positions. It is important to note that the current situation represents a marked improvement in the public service.

The legal framework provides for the prohibition of discriminatory practices. For example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, generally protects women against discrimination. Section 8 of the Act sets out a list of possible cases of unfair discrimination, each of which would need to be proved in terms of the Act. This section includes female genital mutilation (FGM), gender-based violence, and “any practice, including any traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl-child.”

Challenges

Corruption in the land sector (and land administration in particular) hinders women's access to land ownership, and affects their use of and control over the land. This prevents women from benefiting from the economic opportunities brought by the security of tenure. Corrupt practices in the context of large-scale land-based investments contribute to the unauthorised conversion of customary land to commercial land. This usually happens to the detriment of rural women's access and land use rights because commercialisation concentrates land in the hands of those with the resources to assert ownership, usually community leaders, male household heads, and political elites (Theodor Muduva, 2014)¹³.

Gender challenges in environmental management include the low involvement of women in decision-making related to environmental management, environmental hazards, cultural practices, and attitudes to ownership and control of land. There is inadequate information and education on sustainable environmen-

¹³ Theodor Muduva, (2014) is an adviser for academic cooperation - *land governance in Southern Africa* (GIZ-AU Office).

tal management, and the need for gender-responsive environmental policies and programmes.

In the context of HIV, women's rights to inheritance and property are a crucial factor in reducing women's vulnerability to violence and HIV, as well as empowering women to cope with the social and economic impact of epidemics at the household level.

Mining is an industry of extraction that intensively uses resources, both human and environmental, at the expense of communities. In addition to causing pollution of resources, mining uses large quantities of water and destroys land that might have been otherwise used for other purposes such as agriculture or housing.

Strategies to ensure the protection of women's land rights

The Women in Mining Association of Namibia (WiMAN) was launched in November 2017. WiMAN's main objectives include creating an empowering network that will inspire, support and develop the advancement of women working in the mining industry at large scale through providing access to education, skills development, mentorship and representation, and by ensuring conducive work environments for women. It remains to be seen to what extent the association will involve women in the small-scale mining sector.

In 2003, the Ministry of Gender Equality and Child Welfare (MGECW) developed the National Gender Mainstreaming Programme (NGMP) to guide gender mainstreaming strategy at national and regional levels among all stakeholders. The NGMP recommended a Gender Management System (GMS) in order to operationalise the gender mainstreaming strategy in a systematic way in policies, programmes and structures of line ministries and among other stakeholder institutions. The GMS seeks to establish a comprehensive network of structures, mechanisms and processes for bringing a gender perspective to all government policies, programmes and projects (NGMP, 2003)¹⁴. Key components of GMS include an enabling environment, GMS structures, GMS mechanisms, and GMS processes. The structures suggested within the institutional framework will focus on coordination, research, monitoring and evaluation as well as capacity building

¹⁴ Ministry of Women Affairs & Child Welfare, National Gender Mainstreaming Programme, 2003.

as the main mechanisms for implementing the gender policy.

Additional strategies are to:

1. Ensure women's participation on an equal basis with men in decision-making regarding sustainable environmental management, and ensure gender balance in management structures by legislation where appropriate.
2. Evaluate all policies and programmes in terms of their environmental impact and their effect on women's equal access to and use of natural resources. Educate and increase women's access to information and education, especially in the areas of science, technology and economics, thus enhancing their knowledge, skills and opportunities for participation in environmental decisions.
3. Promote and protect the use of knowledge, innovations and practices of women of indigenous and local communities and safeguard their existing intellectual property rights.
4. Put measures in place to reduce risks to women from identified environmental hazards at home, at work and in other environments, including appropriate application of clean technologies in line with the international Rio Declaration on Environment and Development.
5. Increase the proportion of women, particularly at grass-roots levels, involved as decision-makers, planners, managers, scientists and technical advisers and in the design, development and implementation of policies and programmes for natural resource management and environmental protection and conservation.
6. Ensure adequate research to assess how and to what extent women are particularly susceptible to, exposed to or affected by environmental degradation and hazards, including (as necessary) research and data collection on specific groups of women, particularly women living in poverty (NPC, 2004).

Recommendations

1. Promote statutory laws which address land issues, specifically those related to the interaction between gender and land systems, in order to have more equality in the distribution of resources, information and communication initiatives involving all of the local stakeholders, including community leaders, religious leaders, traditional healers,
2. Encourage research to provide data that allows better understanding of the situation in women Kunene and to inform and communicate through advocacy campaigns. Effective communication strategies which are context-dependent in order to be effective and to address the specific needs of different groups, like communication strategies, have to be very clearly grounded in the local context and in cultural norms, institutions, attitudes and values.
3. Recognise that women have an equal and independent right to acquire, administer, control, use and transfer property, irrespective of their marital and family status. Ensure that international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women, are incorporated into national law as applicable and that reservations are removed.

Advocacy plan

As Namibia continues to pursue the vision 2030 for sustainable development, there is a need for diversification and equality to be considered. This must include both urban and rural the women. Women should have a platform so that they are able to articulate their concerns, especially regarding government policies and human rights. The Kunene region is mostly taken up by the communal law which is done by negotiations, and not all women can stand and negotiate about land which may lead to displacement, poverty and health issues. A women's association should be formed that will tackle the issue of land and policy formulation, and that can advocate for the voiceless and those who are not educated.

The example of listeners' clubs can be very powerful in addressing specific issues. Improved public policy is needed so that services and support can more effectively reach the most vulnerable. Promoting the empowerment of women with specific strategies, based on information and communication, should constantly be monitored.

Conclusion

The struggle for gender equality in Namibia is far from over. Since independence, various legal reforms and policies were put in place in pursuit of gender equality in terms of economic and social justice for all. Discriminatory cultural practices, patriarchal ideologies, and historical imbalances have affected the proper implementation of these policies despite legal reforms.

Progressive policy and legislation has yet to translate into equal treatment of all people in terms of the mining industry and the land that is being used.

South Africa : Overview of women's land rights and extractive industries:

By Khethokuhle Khuzwayo

Introduction

For centuries industries in the global South have profited greatly off the labour of black and indigenous workers. This labour was first forced under conditions of slavery, then unfairly extracted by colonial authorities who instituted tithes and taxes to force colonised populations into cheap labour pools. In more recent years, the privatisation and commercialisation of land, agriculture and natural resources has left dispossessed peasants with little choice but to continue yielding their labour on unfair terms. Gender has typically been downplayed or ignored in structural (race and class) analyses of the mining industry and its history in the global South (Chauncey, 1981).

Hayley and Cloete (2019)¹ note that despite the South African government's 1911 Mining Act, which barred women from underground work, women have played a significant role in the South African mining industry, particularly in asbestos mining: "until the industry's twilight in the 1980s, females comprised up to half of the asbestos mineworkers in South Africa" (McCulloch, 2003: 414)². The lack of official records on women's contribution to asbestos mining in South Africa has sustained this invisibility. In 2002, the Minerals and Petroleum Resources Development Act (MPRDA) made the broad commitment to expand opportunities for women. This was later incorporated into the Mining Charter, which put in place a 10 per cent quota for women's participation in mining employment to be achieved by 2014. The quota system has led to more women miners being recruited, but poor working conditions have led to problems with retention (Hayley and Cloete, 2019).

Evidence from affected communities suggests that, due to patriarchal social structures and the traditional gendered division of labour, women often bear a greater proportion of the stress associated with extractive sector induced social

¹ Hayes, E & Cloete, J. (2019) 'The Mining Law Review - Edition 8 South Africa', The Law Reviews, pp. 1-6.

² McCulloch, J. (2003) 'Women mining asbestos in South Africa 1893-1980', Journal of South African Studies, vol. 29 pp. 2.

and environmental changes than do men. Women are typically responsible for the health and well-being of the family, often including food production, sourcing fuel, cooking, domestic duties, and care of children, the sick, and the elderly. This work is largely “unseen” and unpaid.

As resource development leads to a more complex economy, women report experiencing a loss of status as their economic contribution is devalued. Economic, social, and environmental changes related to project development combine to heighten the burden on women. Common dimensions of this burden include pollution, land loss, rising prostitution, and alcohol consumption, and the de facto exclusion of women from consultations, decision-making, and access to new income streams entering the household.

Sweetman and Ezpeleta (2017) state that it is critical to recognise that terrains of control, violence and extractivism are many, and interlinked³. These terrains are extending as industrialised countries and transnational corporations are looking beyond tapping the last drops of oil, gas, water and minerals from existing sources; they are now also prospecting for new resources in the oceans and the polar regions in particular, threatening food supplies, biodiversity, and ultimately the global ecological balance as never before. Land and natural resources are fundamental to the economy, and to the livelihoods of local communities in Southern Africa. The abundance of diverse natural resources in the form of minerals, gas, oil and forestry has seen the extractive industries being a key driver of economic growth in most Southern African countries in recent years. The rush for these resources has paved the way for large-scale extractive and agricultural projects in the region. These projects have often frequently resulted in adverse impacts on the land rights of adjacent marginalised communities, and more importantly on women (South African Resource Watch Concept Note, 2020).

Research shows that for most developing countries land is the most fundamental resource affecting women's living conditions, economic empowerment and, to some extent, their struggle for equity and equality. Despite the importance of land rights to women in the SADC region, they are still widely discriminated against. This has been attributed to both statutory and customary laws favouring male ownership of property, which exclude women's rights to own land. With-

³ Ezpeleta, M & Sweetman, C. (2017) 'Introduction: Natural Resource Justice', *Gender & Development Journal*, vol. 25, no. 3 Available at: <<https://doi.org/10.1080/13552074.2017.1395138>> (Accessed 23 September 2020)

out rights to land, rural women's economic and physical security is compromised (South African Resource Watch Concept, 2020).

Women and land rights

When women in rural Africa speak about land, its value and importance to livelihoods, culture, and humanity as a whole, they assert that land is very valuable as it is a source of income. According to a Research by Kachika (2009) women in the Eastern Cape speaking of land stated, “For us, land is very valuable. It is a source of income because we grow crops or farm livestock⁴. We can use the land... to educate our children and to build houses. Land is our gold mine. Land is our nature – sometimes we have no jobs, but there is always land on which to do something. Even without a fixed salary, we can put food on our families’ tables’ (Kachika, 2009)

The FAO (n.d.) states that the rights to land – are especially women's rights to land – are determined by a complex interaction between the institutions and the underlying power relations of a society⁵. The South African land scene is characterised by complex realities and stark contrasts between a well-developed and flourishing core and the mostly poor, underdeveloped countryside where many South Africans live (Claseens, 2015). These complexities result both from the racially unequal distribution of land, wealth and other resources, and also from the ‘unexplored’ gendered distribution, particularly in communal areas.

Under customary law, women are at the greatest disadvantage, yet a majority of them live in communal areas which are governed by traditional institutions under customary law. What constitutes customary law is different for different communities. Customary rules are negotiated at a local level and are influenced by changing norms and values. In one area for example, land rights are mediated through a patrilineal system, where land will be allocated to a household under the authority of a male ‘household head’ and all other members’ rights are dependent on the ‘household head’ (Cousins, 2010). IANRA (2019) notes that under communal tenure systems, portions of land are held by individual families, while other portions are held and managed in common by the community/ tribe/ group. These ‘common resources’ include grazing lands, forests or woodlots,

⁴ Kachika, T. (2009) ‘Women’s Land Rights in Southern Africa: Consolidated Baseline Findings from Malawi, Mozambique, South Africa, Zambia and Zimbabwe. South Africa & Netherlands Action Aid International & NIZA.

⁵ FAO (n.d.) ‘Focus on women and food security’ Available at: <<http://www.fao.org/focus/women/sustin-e.htm>> (Accessed 23 September 2020)

communal food gardens, and shared water resources. Many of these resources are typically used and managed by peasant women to fulfil their familial and community reproduction responsibilities. Under communal land systems, people do not hold a title deed and rarely have documentary evidence of their land rights, such as permits or certificates of occupation.

The South African legal system is inherited from Roman Dutch law, which is administered by formal courts alongside the customary law system, which is recognised by the South African Constitution and is administered by traditional authorities. The two parts of this dual system are in conflict with each other in practice. For example, land rights are held differently under the two systems. As a result, there are multiple tenure arrangements under the customary systems which are not formally recognised under 'law' (Hornby et al, 2017). There is also a disjuncture between law and practice resulting in gender disparity in land ownership, as unmarried women are often not allocated land in their own right, particularly in communal areas, and married women are allocated land only under the authority of their husbands. This is happening when marriage rates are declining, and the number of women-headed households continues to increase. Cousins (2010) found that in Msinga (a communal area in KwaZulu-Natal province) the Mchunu traditional authority, in response to the declining marriage and in recognition of the role of land in sustaining livelihoods, started to allocate land (on request) to unmarried women with children⁶.

The FAO Gender Policy Brief (2019) notes that the land reform programme has three elements:⁷ 1) restitution, 2) redistribution and 3) tenure reform. Looking at the overall policy, it appears that although there are gender considerations for redistribution and tenure reform, there is no specific gender focus in policy on restitution (Weideman, 2003). The restitution policy appears to be generic, failing to take into account the different experiences of injustice between men and women and their different needs. According to the FAO Gender Policy Brief (2019) the South African government has, to an extent, advanced policies that give more power to the traditional patriarchal system, leaving women more vulnerable than before to gender discrimination in terms of access to land and other resources. Reviewing land policy, it becomes apparent that some of the policies address

gender equality while others do not. Even where gender has been considered in policy, there is no strategy on how the 'gender goals' can be realised. Most of the land legislation encompasses the principles of equality, especially gender equality as enshrined in the constitution, but there is a gap in implementation, so gender equality in land ownership remains an elusive goal. Below is an overview of relevant land legislation in so far as it pertains to women's land rights.

The White Paper on Land Policy of 1997

The White Paper sets out a commitment to redistribute land back to those who were dispossessed after 1913. It acknowledges discrimination against women under customary law and in terms of family law. Furthermore, it puts significant emphasis on gender equity in accessing land, committing government to removing barriers in order to enable women to acquire land and to prioritise women in redistribution projects. In this respect, the policy advocates for addressing customary and social practices that discriminate against women. It also commits the government to including women in land-use planning processes and to putting in place mechanisms to facilitate women's access to resources in order to achieve gender equality in land reform.

Some reviews of the White Paper highlight the fact that it raises the gender issues only as part of the vision and fails to address implementation. The document should include an implementation strategy, setting targets for gender equality and targeted allocations to meet some of the basic needs that impact directly on women, such as access to water as part of agricultural development.

Interim Protection of Informal Land Rights Act (IPILRA), 1996

This Act was aimed at protecting the informal land rights of many people living in former Bantustans and on Trust land, who do not have documentation that secures their rights to land as a result of the broken land administration system. It stipulates that people with informal rights on land are not to be deprived of land use and access rights without their consent and compensation. The Act recognises these informal tenure rights as legitimate rights in accordance with the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT). However, up to now, there are no processes and procedures developed by the department to guide its implementation. There are proposals to strengthen the Act and to

⁶ Cousins, B. (2010) *The Living Customary Law of Land in Msinga*. University of Natal Press. Pietermaritzburg.

⁷ FAO Women's Land Rights Policy Brief (2019) 'Women's role in small-scale agriculture', November 2019, South Africa.

make it permanent, although it is not clear at the moment which direction the government will take.

Communal Property Association Act (CPA) of 1996 and (its amendment, the Communal Property Association Amendment Bill of 2017

The Act makes provisions for communities to form legal entities (Communal Property Associations or CPAs) in order to be able to make claims under the land reform programme to land that they can own as a collective. The Act also stipulates that these associations should be formed and run in ways that are non-discriminatory on the basis of race and gender. It also ensures the protection of the members against abuse of power by others. It specifically promotes the equal rights of all members to use land and other resources belonging to the association. A 'member' is defined in different ways; Hornby et al, (2010) found that sometimes it means the recipient of the land reform grant, while at other times it refers to the household head, and at yet other times it refers to all adults who are beneficiaries of the land reform⁸. These definitions are important since they impact on women's rights and access to CPA resources. The amendment increases the government's responsibility to 'manage' and 'monitor' (through the proposed office of the registrar in DRDLR) compliance of the CPAs with democratic principles.

The Land Reform (Labour Tenants) Act of 1996 and the Extension of the Security of Tenure Act (ESTA) of 1997

The legislation makes provision for security of tenure for labour tenants and those who use or occupy land because of their association with labour tenants. According to the definitions, 'the applicant', 'the associate', 'the labour tenant' or 'the family member' may be either male or female, but the Act does not consider special conditions or circumstances that are different for men and women as labour tenants, and therefore does not offer special considerations in such cases. The Act does however recognise spouses, even under unregistered customary union.

⁸ Hornby, D.; Kingwill, R.; Royston, L. and Cousins, B. (2010) Untitled: Securing Tenure in Urban and Rural South Africa. University of Natal Press. Pietermaritzburg.

Traditional Leadership and Governance Framework Act, 2003 and its amendment of 2009

The Act was passed as an attempt to 'regulate' the traditional authorities, which had governed communal land under the colonial and apartheid systems. The legislation stipulates the conditions under which a traditional authority would be recognised. It calls for the establishment of traditional councils, with conditions that 40 per cent of the members be democratically elected, and that a third of the members be women. To date, some areas have still not established the traditional councils required by the Act. Furthermore, some of the established traditional councils do not have the quota of women stipulated by the Act. Critics of the Act argue that it does not provide security for people living in communal areas. The high-level panel report (2017) critique reveal that the government's understanding of customary law as centred on traditional authority instead of on 'living custom' exacerbates insecurity. It renders people living in communal areas 'second class citizens' who do not enjoy the same citizenship rights as the rest of the country.

The Green Paper on Land Reform, 2011

The Green Paper re-configured the elements of land reform, to include a four-tier system that includes: Leasehold for state owned land; Freehold (with limited extent) for privately owned land; Freehold, but precarious tenure with obligations on land owned by foreigners; and Communal Tenure with institutional rights on communally owned land. The policy emphasises 'democratic and equitable allocation of land across race, gender and class' (DLRRD, 2011)⁹. The policy is completely silent on the issue of how women's land rights are to be achieved under this policy. The communal tenure proposed for communal areas does not answer the questions of access and control of land for women, many who live in these communal areas. It does however acknowledge that communal tenure is complex and recognises the need to ensure constitutional compliance.

The Land Redistribution for Agricultural Development Act

The main objective of this Act is to stimulate commercial farming activity among African farmers. It specifically commits to prioritise women and young people who live in rural areas. To this effect it commits to targeting projects that are led

⁹ Department of Rural Development and Land Reform. 2011. The Green Paper on Land Reform. https://www.gov.za/sites/default/files/gcis_document/201409/landreformgreenpaper.pdf (Accessed on 21 October 2019)

by women and to ensuring that women benefit from the resources by allocating a third of the resources for women. However, the policy does not create specific interventions to advance the interests of women in this context.

Recapitalisation and Development Programme

This policy is subsequent to the Green Paper of 2011. It focuses on making 'productive' entities of all land reform farms transferred since the inception of policy in 1994. It also includes smallholder farms which were privately procured. It does not address equitable gender distribution. The recapitalisation aspect of the policy, which requires the claimants to have a business plan and have a strategic external partner to validate the claim, is open to abuse by those who have power and money at the expense of the marginalised majority (Claassens, 2015)¹⁰. It has so far been used to advance the agenda of large-scale agriculture.

Comprehensive Agricultural Support Programme (CASP), 2004 and the Policy on Comprehensive Producer Development Support, 2018

This programme seeks to expand support to enhance agricultural productivity among farmers as one step in an attempt to bridge the gap between land reform and agricultural reform. CASP does commit to prioritising subsistence and household farmers, but it does not have a specific focus on gender. Failure to set specific targets often leads to resources being grabbed by those who have the information and the means (physical and otherwise) to access the support offered, at the expense of those who do not.

The Communal Land Tenure Policy (CLTP) of 2014

The CLTP has been proposed in place of the Communal Land Rights Act (CLRA) of 2004, which was heavily contested and finally thrown out by the Constitutional Court. The Act has similar intentions to the CLRA as it seeks to transfer 'outer boundary' land in communal areas to traditional councils. It stipulates that CPAs will not be formed in areas where traditional councils exist, thus handing over ownership and control of land to the hands of traditional councils. The policy does not address any gender considerations.

¹⁰ Claassens, A. (2015) 'Law, Land and Custom, 1913 – 2014: What is at stake today', in Cousins, B. and Walker, C. Land Divided, Land Restored: Land Reform in South Africa for the 21st Century. Jacana Media (Pty)Ltd. Auckland Park.

Overview of South African land legislation

It is clear that South Africa has a series of legislative measures governed by the principles of democracy. The South African Constitution guarantees equality, eliminates all forms of discrimination, and ensures that all legislation is subject to the principles set in the constitution. Although a lot of policy is progressive, implementation is lagging far behind. The South African government has been criticised for being slow in distributing land equitably through land reform and for its failure to align land reform and agricultural reform. According to the Advisory Panel Review, only 23 per cent of women have benefitted from land reform. Some of the non-democratic elements, for example in traditional institutions, have not been eliminated; patriarchy persists and hinders women from enjoying full rights to land and other resources.

Legal framework for the extractive sector

In South Africa the national government has made a deliberate effort to recruit women into the mining sector, passing legislation that encourages (and sometimes enforces) mining corporations' employment of women miners. However, women's legal inclusion in the mining sector has generally not been a liberating experience for women as they have stepped into extremely masculine and already deeply exploitative work cultures and environments (in class, race and ethnic terms). There has been little or no adaptation of facilities, work clothing, policies and work practices to address the physical and social differences between women and men (Centre for Human Rights, 2019)¹¹. The very institutions that should fight to defend worker rights – the trade unions – are places in which women feel embattled and unsupported (IANRA, 2019).

In seeking to attain transformation and empowerment objectives, South Africa's mining legislation is based on a system of state 'custodianship' of mineral resources, in which the state, acting through the Minister of Mineral Resources and Energy, issues different types of licences and rights to applicants on a 'first come, first served' basis and upon satisfactory demonstration of the applicant's ability to comply with the financial, technical, environmental, health and safety and socio-economic development requirements set out in the legislation. The most important legislation concerned is the Mineral and Petroleum Resources

¹¹ Centre for Human Rights (2019) 'Background Study on the Operations of the Extractive Industries Sector in Africa and its Impacts on the Realisation of Human and Peoples' Rights under the African Charter on Human and Peoples' Rights'. Available at: <https://www.achpr.org/public/Document/file/English/Background%20Study%20on%20the%20Operations%20of%20the%20Extractive%20Industries%20in%20Africa_ENG.pdf> Accessed 30 September 2020

Development Act (MPRDA), which came into force on 1 May 2004 and the Mining Charter. Other important legislation includes the Mine Health and Safety Act 1996, the Mining Titles Registration Act 1967, the Mineral and Petroleum Resources Royalty Act 2008, the Precious Metals Act 2005, the Diamonds Act 1986, the National Environmental Management Act, 1998 and the National Water Act 1998.

For the purposes of this paper we will focus on mining-specific legislation that speaks to women's land rights in South Africa with reference to regional and international Law. Below is an overview of relevant legislation.

Minerals and Petroleum Resources Development Act (MPRDA)

According to Hayley and Cloete (2019) in 2002, the MPRDA made the broad commitment to expand opportunities for women, later translated into the Mining Charter, which put in place a 10 per cent quota for women's participation in mining employment to be achieved by 2014. The quota system has led to more women miners being recruited, but poor working conditions have led to problems with retention. The commencement of the MPRDA signified a radical and important departure from the preceding regulatory environment, which existed for more than 100 years prior to the MPRDA, where the right to mine was based on a system of private ownership of 'mineral rights' (being essentially limited real rights and servitudes in respect of land), which could be freely traded. To accommodate the transition, the MPRDA contains detailed provisions allowing for the conversion of 'old order rights' into prospecting rights and mining rights regulated by the MPRDA. This process seems to be largely completed, with old order rights and conversion playing a less important role in the mining industry and, indeed, legal practice. However, a small number of old order mining rights are yet to be converted into new mining rights.

South African Mining Charter

The South African Mining Charter requires that all single-sex housing compounds be transformed into family housing by 2014, and that mines facilitate home ownership options for all mineworkers (also by 2014). According to the International Alliance on Natural Resources in Africa (IANRA no date) the mines have been able to substantially avoid their responsibility for housing and servicing workers

⁸ Hornby, D.; Kingwill, R.; Royston, L. and Cousins, B. (2010) *Untitled: Securing Tenure in Urban and Rural South Africa*. University of Natal Press. Pietermaritzburg.

by agreeing to a 'living out allowance' of R1 800 (US\$180), negotiated with the agreement of the major mining unions, which effectively places responsibility for the daily reproduction of workers in the hands of individual miners and their wives, girlfriends and other family members. With this allowance, workers are expected to provide for themselves housing and basic services such as water, energy, roads and sanitation without corporate support and in a context in which the state is substantially absent. The burden of responsibility to manage the reproduction of labour and life, with minimal services (or none at all), principally falls on women in the dense informal peri-urban settlements that surround the industrial mines in South Africa.

Mining legislation in South Africa is administered and enforced by the Department of Mineral Resources and Energy (DMRE), previously the Department of Mineral Resources. The DMRE is divided into five main branches: mineral policy and promotion; mineral regulation; mine health and safety; corporate services; and the chief financial officer. The mineral regulation branch is primarily responsible for the processing of applications, awarding of licences and rights, and enforcement of the MPRDA. The mine health and safety branch is primarily responsible for the administration and enforcement of the Mine Health and Safety Act (MHSA) 1996, including investigations into safety incidents, injuries and fatalities occurring at mines in South Africa. In both cases, there are regional offices of the DMRE in each of the nine provinces of South Africa, which are primarily responsible for the administration of the MPRDA and the MHSA. However, especially in the case of mineral regulation, the ultimate decisions (including the granting of licences and rights, consideration of internal appeals, and decisions to suspend or revoke licences and rights owing to non-compliance) are taken at national level by officials in the DMRE head office in Pretoria.

The most noteworthy licences, rights and permits relating to mining and prospecting include:

1. prospecting rights (which authorise invasive prospecting and exploration work, on an exclusive basis for the prospecting area and the mineral concerned, but do not entitle the holder thereof to mine for that mineral);

⁹ Department of Rural Development and Land Reform. 2011. *The Green Paper on Land Reform*. https://www.gov.za/sites/default/files/gcis_document/201409/landreformgreenpaper.pdf (Accessed on 21 October 2019)

2. mining rights (which authorise mining and exploration on a large scale and for an extended period, on an exclusive basis for the mining area and mineral concerned); and
3. mining permits (which authorise small-scale mining on areas less than five hectares and for short periods, on an exclusive basis).

SADC Gender Protocol

Under the SADC Gender Protocol, there is a specific obligation on states parties to review, by 2015, all policies and laws that determine access to, control of, and benefit from productive resources like land (Article 18(a)). Such reviews should address all factors that lead to the land rights of peasant women being undermined, thus making them more susceptible to related land grabs by extractive industries. When extractive industries interfere with peasant women's agriculture, as they do in many parts of the continent, it makes visible African governments' low prioritisation of women's rights to food and land.

Gender land rights, extractive industries and African Union policy

The Centre for Human Rights (2019) notes that the promotion of women's rights to food and land in relation to extractive industries has not been spelt out by AU mining-related documents such as the African Mining Vision (AMV) and the Plan of Action for the implementation of the AMV. However, some leeway is found under the African Commission's 2012 Resolution on a Human Rights-Based Approach to Natural Resources Governance of the African Commission on Human and Peoples' Rights (ACHPR), which finds that natural resource governance in Africa is gravely hampered by, for example, the misappropriation of land; and that rural communities in Africa continue to struggle to assert their customary rights of access and control over various resources, including land, vis-à-vis natural resource extraction (ACHPR, 2012b)¹².

Land and women's role in extractive industries

Women miners endure many challenges. Women's land rights are often very tenuous in rural areas because they often live under communal tenure systems. Over centuries, from colonisation through to post-colonisation, there has been a failure to reform and strengthen these systems. According to IANRA (2019), residents of Ga Pila village in Sterkwater (SA) were relocated to make way for a

mining dump. Residents are fighting the Amplats mining company for services that have not been rendered, for the balance of compensation due, and because their farming fields are located at a great distance away from the settlement.

Large-scale land dispossessions, or 'land grabs', have involved the forced acquisition of thousands of hectares of land without due respect for local land users' entitlements to the land, either through proper consultation, informed consent, or adequate compensation for the loss of land-based livelihoods (Kachingwe, 2012)¹³. Research in the past decade has shown that large-scale land-grabbing in Africa has generally been driven by the food and energy (mainly biofuel) needs of other countries (Cotula et al, 2009;¹⁴ Kachika, 2010), with the African Union (AU) noting that "most of this activity is driven by foreign investors and is geared towards the export rather than local markets" (AU et al, 2009). Case studies and anecdotal stories confirm that mining leases or concessions have been granted on communal lands already claimed, occupied and used by local peoples (Cotula et al, 2009; Sulle, 2010) and that peasant communities have been pushed off their lands to make way for mines (Cotula et al, 2009; Sulle, 2010). Women are likely to be affected differently to men by large-scale land deals, and are disproportionately more likely to be negatively affected because of the systemic discrimination they face in relation to their access to, ownership of, and control over land (as discussed above).

When whole tracts of land are seized by mining companies, peasant women's loss of land for farming and for the harvesting of natural resources impacts negatively on their food rights and that of their families, as is well illustrated in the example of the Anglo Platinum Mine in Mokopane, Limpopo in South Africa. For generations, local communities have collectively cultivated this land and grown diverse crops sufficient for subsistence, including pumpkin, tomatoes, carrots, spinach, maize, sorghum, beans, sunflower, peanuts, and watermelon. Since 2001, the local Setswana and Sepedi speaking people have become impoverished, malnourished, and sick, dispossessed of their farmlands, and without access to clean local water sources. The consequences of the loss of food sovereignty and access to water have been indisputably negative for thousands of villagers, leaving many wondering how they will survive. As the people responsible for cooking, cleaning,

¹² ACHPR (2012b) "224: Resolution on a human rights-based approach to natural resources governance" <<http://www.achpr.org/sessions/51st/resolutions/224/>> (Accessed 4 April 2012)

¹³ Kachingwe, N. (2012) 'From Under their Feet: A Think Piece of the Gender-Dimensions of Land Grabs in Africa, South Africa', Action Aid International.

¹⁴ Courtula L et. al (2009) 'Land Grab or Development Opportunities in Agricultural, Investment, International Deals in Africa', Available at: http://ifad.org/pub/land/land_grab/pdf > (Accessed 9 February 2013)

nourishing children, and tending to garden plots, women are experiencing particular distress. (IWMN/RIMM, 2010)¹⁵.

The Danish Human Rights Institute (2019) notes that women's rights and participation are frequently marginalised in land acquisition and resettlement processes. For example, indigenous land use agreements (ILUAs) and impact and benefit agreements (IBAs) are two common forms of negotiated arrangements. Land use agreements set out how potential adverse effects of the project will be mitigated and managed, as well as what and how community benefits from the project are to be attributed. Women are not engaged in such agreement negotiations, and how their rights and interests are reflected is a critical consideration for gender-responsive due diligence. Women often do not have a voice in these communities because they are not seen as rights holders. The land is generally vested in a man (whether it is a husband, brother, or father) and as a result women's rights of access to land in communal tenure systems is mediated through a man.

Farouk (2013) further notes that when there are decisions about whether to proceed with extractive projects, women's voices are generally quite silent in those communities. The challenge more generally for communities that are confronting extractive industries is that often they will have a traditional leader or a traditional council that will act for the community, and they will make decisions to proceed with the extractive project without consulting all stakeholders, in particular women (Farouk, 2013)¹⁶. Across the Global South, almost half of smallholder farmers are female. However, women often have little control over their income and lack secure land tenure. Even if legislation theoretically grants women equal land rights, as in the case with South Africa, these rights are not always implemented in practice.

Moreover, where women's rights are not upheld by national and local law, it may be difficult to bring gender considerations to the fore. For instance, where agreement negotiations are based on land ownership or where voting rights are tied to land, women – who often lack land titles – have limited abilities to engage in decision-making processes. The World Bank (n.d.) states that with only 30 per

¹⁵ International Women and Mining Network/Red Internacional Mujeres Minerial (IWMN/RIMM (2010) Women from Mining Affected Communities Speak Out: Defending Land, Life & Dignity, Samata India: RIMM International Secretariat Available at: <<http://landportal.info/sites/default/files/2010rimmwomenspeakout.pdf>> (Accessed 15 February 2010)

¹⁶ Farouk, F (2013) South African Civil Society Information Service, Available at: <<https://sacsis.org.za/site/article/1818>> (Accessed 17th October 2013)

cent of land rights formally registered worldwide, many communities continue to use customary practices to govern land use and ownership rights. DevEx (2013) makes the case that these customs sometimes allow men to sell land without their wives' consent, or even forbid women from owning land. In addition, women often face discrimination during decision-making processes at the family, community and political levels¹⁷.

In association with physical resettlement, women may lose their homes and sources of income without receiving suitable alternative means of generating livelihoods and incomes. This may also occur in the case of economic displacement. Human Rights Watch (2011) notes that women are often reliant on subsistence livelihoods and income generation through informal work and services, such as tending land, gathering food, fuel and medicines, and maintenance and selling of cultivated produce. These activities are often dependent on resources being available in or around the area of the home. As such, relocation can strip women of their livelihoods, making them dependent on others for livelihood-sustaining activities and incomes. Additionally, Human Rights Watch (2013) makes the case that resettlement often disproportionately impacts on the livelihoods of female-headed households, as proximity to family members or healthcare providers may take precedence over access to agricultural land and resources when choosing where to relocate¹⁸. As a consequence of women's legal and economic positioning in many societies, resettlement arrangements may exclude women from receiving proper compensation. The Asian Development Bank (2003) notes that patriarchal legal and customary structures which bestow land rights exclusively to men may keep women from the negotiating table altogether¹⁹.

Women generally earn less for paid work and are often sidelined in compensation payments for land acquisition. This income disparity undermines their bargaining power. Furthermore, limited education may prevent women from engaging in land-related negotiation processes. Jenkins (2014) makes the case that a lack of literacy among participating women has been shown to informally exclude women from negotiations, as they are unable to understand or counteract written measures. Moreover, lack of education can exclude women from economic ben-

¹⁷ DevEx (2013), Why women should own their land: Available At: <<https://www.devex.com/news/why-womenshould-own-their-land-81754>> (Accessed 23 September 2020)

¹⁸ Human Rights Watch (2013) 'What is a house without food?' Mozambique's coal mining boom and resettlements.

¹⁹ Asian Development Bank (2003) Gender Checklist: Resettlement.

efits and solutions during negotiations, as alternative livelihood and occupation options may be limited (Asian Development Bank, 2003).

Symons (2018) makes a case for people living in communities affected by mining activities across South Africa to advocate for the government and companies to respect and protect community members' rights from the potentially serious environmental, social, and health-related harms of mining. In many cases such activism has been met with harassment, intimidation, or violence. A case in point is the intimidation and violent killing of the members of the Amadiba Crisis Committee in Xolobeni. Mining areas in South Africa such as Limpopo, KwaZulu-Natal and Northwest have experienced other similar incidents. When men (who are often breadwinners) are murdered, women's burden of care increases (as experienced by the widows of the massacred Marikana Miners).

According to the Centre for Human Rights (2019), research undertaken on women in South African mines reveals that women are often accused of bringing bad luck, of being incapable of doing mine work, and often blamed when a team fails to meet its production targets. Management and male peers similarly construct women workers as "discontinuous labour", contending that they are not committed to their jobs and hence less likely to be promoted. Sexual harassment is prevalent in South Africa, and women have been raped and killed underground. Little is done to address women's specific challenges. For example, research indicates that while men can stay in hostels at mining sites, women miners remain responsible for childcare and household duties and therefore find themselves having to commute to work daily using public transport (Centre for Human Rights, 2019). To qualify for recruitment, they must pass several physical tests, many of which cannot be conducted when women are menstruating, pregnant or breastfeeding. Work clothing is not suitable, with one-piece overalls hampering women's ability to use the toilet (particularly in confined spaces underground). Women workers also complain of a lack of separate ablution facilities for women. Black women complain that they earn less than their male and their white counterparts. And male miners treat women with suspicion, seeing them as "trophies, lazy and slowing down the work process" (Benya, 2009, pp. 127)²⁰.

²⁰ Benya, AP (2009) 'Women in Mining: A challenge to Occupational Culture in Mines', MA Dissertation, University of Witwatersrand, Johannesburg, South Africa.

Recommendations

The recommendations outlined below intend to change power relations at the individual, group and societal level.

Activism and advocacy

Peasant women are using their power, assuming agency, and struggling to defend the basis for life and dignity that is threatened by extractivism (IWMN/RIMM, 2010). In South Africa's Limpopo province, women have asserted "naga ke ya rona!" ("the land is ours!") and emerged as leaders in confronting the Anglo Platinum mining company, which since 2001 has forcibly relocated many thousands of Mapela residents to compensatory lands of inferior quality and incomparable extent, usually located many kilometres from their place of residence.

Faced by government officials aligned with the mining industry and a company that has refused to consult – let alone to negotiate – with communities, Mapela residents in the northern Limpopo province felt they had no choice but to launch a public campaign to defend their rights and demand compensation for their losses. Despite death threats, mass arrests, police shootings and heavy surveillance, women have come forward as leaders of these community campaigns against the mine. Many perceive this struggle as a fight for life, a stance for the rights of future generations. Principled statements of resistance emanate from sites where families continue to live on their original homesteads, after refusing the company's removal orders. While some have organised road blockades, others have attempted to return to ploughing by reclaiming their ancestral lands and disregarding Anglo Platinum's fences. Coordinated actions have taken place to stop Anglo's bulldozers from entering gravesites. Girls as young as 11 years old have been arrested on trumped up charges of 'malicious damage to property', while women of all ages have been wounded by rubber bullets shot by police during non-violent marches and vigils. (IWMN/RIMM, 2010)

The fearlessness of the Mapela peasant women facing the mining company, its threats to their community, and the actual violence and repression meted out by mine security and state police, is inspiring. This courage is repeated in the struggles

of women, their men, and their families across the region and the globe. Women are motivated to play a central role in these protests because large-scale and widespread land grabs and land devastation threaten women and the well-being of their entire households. In this story, the women farmers affirm, through their struggles, that agriculture is the primary means of livelihood for peasant women, and a strategy they fall back on for survival even when capital is scarce. This case powerfully demonstrates that with access to information and awareness, and support from an allied civil society organisation (CSOs), women can collectively become powerful advocates against harmful mining activities. When women and their communities are organised, empowered to monitor mining activities, and expose the negative impacts of mining activities in their own localities, it is more likely that offending mining companies can be held accountable.

Inclusive laws, policy, procedures, and practices

The Danish Institute for Human Rights (2019) and the World Bank Report (2013) note several good practices that may enhance women's land rights²¹. These include ensuring the inclusion of policies and procedures to ensure women's participation and agency in community relations engagement and ensuring a gender balance in on-site community relations teams. Stakeholder engagement strategies may be strengthened by working directly with women and men in local communities to ensure that the voices of women are adequately reflected in site-specific stakeholder engagement plans and activities. Addressing language and literacy considerations is essential, as is targeting locations that women tend to visit (e.g., markets or churches) for information dissemination.

The World Bank Report (2013) takes the position that in resettlement:

whether or not a woman's name is on land titles, including her in decision-making is good practice. In some cases, a woman who is not yet co-titled would be legally entitled to an ownership right; in other instances, the woman does not have that right, and the man may choose to overrule the woman's wishes. Hence, clear knowledge of a woman's rights to be consulted and co-titled are important to ensure that women secure their legal rights in this process.

Grievance mechanisms for raising allegations of human rights violations should

be developed by mining communities working in collaboration with NGOs and government and take all necessary steps to ensure the safety of anyone who files a grievance. Companies and the Minerals Council should thoroughly investigate and address all alleged incidents reported under the grievance mechanism, and if necessary, take immediate action to remedy human rights violations.

Research and incentivising

Identifying, understanding, and analysing pre-existing barriers, gender roles, and power relationships is vital. Since women-specific barriers may not be easily visible to outsiders, it can be helpful to gather information from reliable informants and third-party sources. For example, engaging NGOs or other organisations trusted by women as intermediaries or facilitators may be effective.

Community gatekeepers may also present barriers. Religious leaders, for instance, may either block or facilitate engagement. The World Bank suggests that conducting community mapping, with input from diverse local stakeholders, may encourage women's participation in community forums. This mapping should include consultation to determine the most appropriate times and locations to hold meetings in order to ensure that women will be able to participate, given their childcare and other home and work responsibilities. Childcare, meals, etc., may need to be provided. 'Gendering' the budget for engagement should be ensured; for example, budget lines should include activities or other arrangements for transport, feeding and entertaining of children. Oxfam America describes how organisations in Brazil conducting a human rights impact assessment (HRIA) established women 'focal points' in each community as a way to improve female participation in community consultations.

Setting up a 'vouching system' to increase female participation in community consultations is a great incentive. International Alert gives an example of a women's organisation in Myanmar which has institutionalised a vouching system for cases where women are reluctant to join community consultations or are prevented from doing so. This involves identifying an initial group of women who have participated in consultations and tasking them with reaching out to other women by 'vouching' for the process. In this manner, women who feel that they cannot trust a particular process, or who are scared to join, can gradually join the

²¹ World Bank (2013), Extracting lessons on gender in the oil and gas sector. Available at: <www.worldbank.org/ogmc> (Accessed 23 September 2020)

process by having someone who they trust vouch for it. Clearly, such a system requires careful planning and implementation and may not be appropriate in all circumstances.

Inclusion of males

Addressing the concerns of men in community consultation is critical. According to the World Bank (2013), by addressing the male concerns of the community, men they may feel more comfortable enabling women to take advantage of opportunities. Dialogue will need to take place about sensitive family issues to mitigate negative impacts that can occur. For example, women earning more money may sometimes result in increased family violence. In these instances, it may be helpful to analyse family workloads, discuss household decision-making, and have NGOs present at community consultations to work with men on issues of self-esteem. This is also important in processes such as resettlement, where many companies are reluctant to include wives in the process because they are uncertain whether women should be included when matters of money are discussed, should know the amounts, or should be present when the funds are handed over, for fear that doing so may lead to domestic and gender-based violence. Companies need to undertake careful analysis to determine where this is a real risk, and where it may instead be hiding behind a 'convenient excuse' that perpetuates the exclusion of women and the very real negative impact that resettlement can have on women's lives.

Addressing gender roles and cultural norms

Addressing gender roles to encourage women's participation is key. While community consultations may incorporate women, the influence of cultural and traditional gender roles can still marginalise women during engagement processes. To reduce the challenges cultural gender norms may present, strategies to address these should be implemented. For instance, this may include ensuring that women's representatives are fully involved in community decision-making during engagement and resettlement. This 'involvement' must go well beyond simply having women representatives on a committee, to ensuring that their views are proactively sought, genuinely considered and responded to.

Proactively addressing issues of representation

In many contexts, men (and women) may suggest that women are 'represented' by male community leaders or heads of households. Identifying male and female community members who champion women's rights and interests and engaging them to determine how representation is structured, as well as how women's voices may be best included, can be decisive. For example, local church leaders, women elders, teachers and healthcare workers may have useful insights. Another option may be to introduce a section in each negotiation meeting that is designated to listening to women's views, possibly led by a skilled independent facilitator.

This may also involve finding 'spaces where women participate, reaching out to women's networks, empowering women leaders and building a critical mass of women representatives', rather than simply adding women to masculinised public spaces and assuming that they will express their views. Potential barriers to women's participation in public discussions can be identified through a gender impact assessment. These barriers could include inability to attend meetings due to childcare commitments, and difficulty understanding customs that discourage women from speaking publicly. Promoting broad-based community discussions, rather than top-down information sessions which rely on male representatives to convey information to local communities, can also be beneficial.

In any formal negotiations – such as for a land use agreement, impact benefit agreement, community development agreement, or resettlement planning – it is essential to ensure women's representation in the negotiations. Instigating a 'no women, no meeting' policy for negotiations may assist in ensuring women's presence during negotiations. Provided that such strategies are backed up with any necessary capacity building and culturally relevant strategies to facilitate active participation, they can contribute to women's representation in negotiations. Identifying 'male champions' in local communities who will represent women's interests can also be effective.

A holistic approach to resettlement planning

Schedules between resettlement and the development of an extractive industries project be carefully coordinated to prevent displacement, especially of vulnera-

ble persons such as women and children. Early planning and proper resourcing that enable an emphasis on identification of design option alternatives that avoid resettlement are therefore key good practice strategies. This is particularly important for ‘fast track’ projects, where important time and space for proper due diligence is particularly at risk.

A resettlement process and action plan should take account of the particular situation of women and girls. For example, it is important that women are involved in the selection of resettlement locations, as they may pay more attention than male community representatives to vital factors such as water accessibility and the proximity of social services such as schools and healthcare. Women should also participate in the design of resettlement housing to meet their practical and cultural requirements.

Compensation

The issue of compensation for resettlement should be planned carefully from a gender perspective. All too frequently, resettlement processes involve large cash payments to male leaders and heads of households, which never reach women or contribute to family well-being. Strategies such as paying women directly, using joint accounts and promoting in-kind compensation can be effective, as can making the payments in tracts (i.e., spacing them out over time). However, these strategies may not always be appropriate and each and every community context will need to be individually assessed in order to gain insights as to what may be appropriate and effective in the specific context. Menzies and Harley, in their study on women’s engagement in mining deals in Papua New Guinea, highlight the positive outcomes of introducing family bank accounts for distributing cash compensation payments.

Monitoring and evaluation

Monitoring and evaluation mechanisms are imperative to promote the long-term success of resettlement. Monitoring and evaluation should be considered early and integrated into project planning to foster the selection and application of effective indicators. The United Nations suggests that women specifically work alongside men when determining project indicators, ensuring that gender-sensitive indicators are present and that formal grievance mechanisms are accessi-

ble to both women and men. Information and justice channels should likewise be equally available to both women and men. Regular monitoring is needed of threats and abuses against community rights defenders in mining-affected communities. National, provincial and municipal governments need to protect communities and civil society members who are exercising their domestic and international rights to freedom of opinion, expression, assembly and association.

Working with government and local NGOs

Cooperating with relevant government actors (national and local) and NGOs can help to ensure that land laws are effectively implemented and that women’s land rights are respected and implemented. This may include addressing gender discrimination in the context of a specific project, as well as using leverage to address systemic discrimination – such as by working with other operators and other actors to promote equality in land rights. In South Africa, for example, NGO’s such as Natural Justice, The Land Network and Engagement Strategy (LANDNESS), and Women in Mining are working to advocate for the socio-economic rights of vulnerable communities and people-centred land governance to achieve social justice in terms of resource management.

On 6 April 2020, The Minister of Agriculture, Land Reform and Rural Development, Ms Thoko Didiza announced the department’s interventions to mitigate the impact of Covid-19. The department has ring-fenced R1.2 billion for assistance to mainly target financially distressed small-scale farmers. Of the R1.2 billion, R400 million has been allocated for farmers within the Proactive Land Acquisition Strategy (PLAS) programme and the remainder will be channelled towards farmers who are mainly within the poultry, livestock, vegetables and other commodity sectors. Further on 1 October the minister announced the release of state land for agricultural purposes and stated that this adjudication will prioritise women, youth and people living with disabilities. NGOs can play a huge role in assisting women-led community-based organisations in submitting these applications. NGOs collaborating with the state can work with local mining communities, in particular women-led organisations, to identify women’s organisations that can tap into this opportunity to address land rights, socio-economic challenges, and unequal power relations.

Economic empowerment

While direct employment creation within the industry workforce is often limited, the provision of other inputs such as start-up capital, training, and sensitively designed infrastructure (electrification, roads, internet access) can help to foster and support female entrepreneurs in previously isolated areas and along resource corridors where new contracting and business opportunities arise. Greater connectivity to the outside world can help to increase the leverage of women, and of communities more broadly, mitigating risk

by enabling the company and the state to be held accountable, and allowing local people to forge alliances that strengthen their voices. The positive spillover effects of these investments for women are optimised if they are accompanied by a regulatory framework and enforcement mechanisms that guarantee non-negotiable asset security for both men and women, and safeguard their environmental and social integrity in the face of rapid change. Many large international oil companies have extensive programmes for investment in local communities, and strive to uphold international best practices in terms of mitigating social and environmental impacts. Sometimes company standards, especially around environmentally responsible behaviours, are more rigorous than those required by the regulatory regime in which they operate.

South African law enforcement and compliance

A call is made by human rights activists on South African law enforcement and prosecuting authorities to investigate and prosecute those responsible for threats and abuses. A call is also made for the revision of the Regulations of Gatherings Act in accordance with the 2018 decision of the Constitutional Court on the constitutional right to protest (i.e. prohibiting the criminal prosecution of conveners for failing to notify municipalities of a planned protest). Municipalities cannot impose extra-legal requirements on applicants for protests in mining-affected communities, but need to guarantee their rights to freedom of opinion, expression, peaceful assembly, and protest.

Conclusion

Activism on natural resource justice and women's rights starts from recognising women's actions to challenge the issues they face. Research clearly shows the need for development policymakers and practitioners, politicians and business leaders to recognise women as agents, not victims, and support them in their struggles to achieve natural resource justice. It requires supporting women in communities affected by natural resource extraction, to have their voices heard, valued, and acted on. It also involves valuing and supporting bottom-up, participatory and inclusive decision-making, furthering the common good of all citizens, not just political and business elites.

Zambia: Overview analysis of women's land rights and extractive industries

By Dyles Mbewe

Introduction

Land in Zambia remains a key factor of production and provides a basis for sustainable livelihoods for many Zambians. Zambia as a country is covered by 752 614 square kilometers of land. This land is utilised for infrastructure development, human settlements, mining, tourism, industries, agriculture, and other uses. Land is administered through a dual land tenure system, consisting of state leasehold tenure and customary tenure. Rural people settled on customary land predominantly depend on land for agricultural purposes. They also depend on other natural resources that rely on land for fuel, fiber, fruits, shelter, and fuel. Land is a natural resource with variety of benefits at both social and economic levels.

In recent years, Zambia has experienced vast tracts of land being allocated to local and international investors under the agriculture, extractive, and tourism sectors. The country has abundant natural resources, including land which puts it as a key destination for large-scale land-based investments (LSLBI). These investments vary from agriculture to mining and infrastructure development such as roads, shopping malls and multi-facility economic zones. Some investments have been situated in areas where communities have owned land and farmed for several years. Despite the increase in land investments, the growing wealth is unequally distributed. Investors acquire large parcels of land at the expense of poor local communities who have limited knowledge of land rights. The country has weak land administration systems, weak legal and policy frameworks, and inadequate strategies to monitor land transactions.

While it is generally envisaged that LSLBIs generate economic opportunities (such as jobs and taxes), it is also true that sometimes these acquisitions violate the land rights of poor and vulnerable communities and threaten their livelihoods. LSLBIs have in some cases resulted in displacement of local communities without adequate compensation or proper resettlement packages. Affected communities are then unable to continue with their normal livelihoods due to loss of arable

land. Women living in host communities experience the negative impacts of extractive industries because they are predominantly small-scale farmers whose livelihoods depend on agriculture. Loss of land therefore entails a drop in food production, which results in food insecurity at household level.

The government is not only party to international laws and instruments, but has formulated and enacted laws and policies that seek to protect women's land rights. However, there is a gap in terms of the enforcement of the laws and having a workable monitoring mechanism that highlights the performance of these laws.

Current status of Land in Zambia

Land tenure systems

Zambia has a dual land tenure system, involving state leasehold tenure and customary tenure. Leasehold tenure refers to a system where land belonging to the state is leased to another entity for a fixed period through a contractual agreement. State land is administered using legislation, and designated government entities oversee the administration of land. On the other hand, customary land is held by the chiefs on behalf of their subjects, and is administered using unwritten law or customs and traditions that exist in a particular area. According to Kalinda et al (2008), 61 per cent of Zambia's land is under customary tenure¹. Customary land is a valuable source of identity, pride and social cohesion in Zambia. Even though it is guided by customs and traditions, it is a legally recognised system of landholding in Zambia through the Lands Act, which provides that a person who uses or occupies land in a customary area, may convert it into leasehold tenure. In the current land management regime, customary rights to land cease to exist when land has become the subject of leasehold documentation.

Large-scale land-based investments and development

In Zambia, the opening of land investments for local and international investors was facilitated by measures that the country took to liberalise the economy in 1991 (GRZ, 2001)². Then followed the enactment of the Lands Act of 1995 which allowed the conversion of customary land into state land³. The intention of this

¹ Kalinda T., Bwalya S., Mulowa A., and Haantuba H., (2008) Use of Integrated Land Use Assessment (ILUA) Data for Environmental and Agricultural Policy Review and Analysis in Zambia. Forestry Department, Food and Agriculture Organisation, Ministry of Tourism, Environment and Natural Resources. Lusaka, Zambia.

² Government of Zambia (2001). Third United Nations Conference on the Least Developed Countries. Last accessed on 26.07.20 <https://unctad.org/en/Docs/aconf191cp9zam.en.pdf>

³ Government of Zambia (1995) Lands Act. Accessed on 25.07.20 <http://41.77.4.165:6510/www.parliament.gov.zm/sites/default/files/documents/acts/Lands%20Act.pdf>

conversion was to empower and register small-scale land investments to allow for the low and middle class to produce enough food. However, the provision for conversion of land presented an opportunity for big national and international investors. Over time, Zambia has been experiencing a rise in large scale land-based investments by both local and foreign investors who have entered into long-term lease agreements and concessions on statutory and customary land. The country's pristine land has made it a favourable investment destination.

Zambia is endowed with abundant natural resources such as copper. According to Jamasmie (2019), the country is Africa's second largest copper producer, and mining continues to form the backbone of the economy. For this reason Zambia continues to enter mining land deals on a regular basis. Such investments tend to threaten the land rights of host communities⁴.

Women's access to land

According to the 2010 census of population and housing, 65 per cent of Zambia's population resides in rural areas where subsistence farming is the main source of livelihood⁵. Two thirds of Zambians are employed in the agricultural sector, of whom about 72 per cent are women. The dependency on agriculture is notably high in rural areas where 87 per cent of women and 85 per cent of the men find livelihoods in agriculture, forestry and fisheries. Most farmland is under customary tenure, but it is this same land that has now been opened up to large-scale land investments for both Zambians and non-Zambians alike.

Most analysis of large-scale land acquisition in agriculture concludes that land deals produce negative overall outcomes for women. Researchers have called attention to women losing access to communal resources, for instance, because their land rights are more insecure. A study conducted by the World Bank (Deininger et al. 2011) highlighted that when it comes to accessing common resources such as water and firewood, women were disadvantaged after losing their land to investors⁶. Women on customary land have limited control over land, and lose their negotiation power with investors once evicted from their land

⁴ Jamasmie C. (2019) Zambia's Chamber of Mines deepened worries of sinking global copper output. Accessed on 24.07.2020 <https://www.mining.com/zambias-just-deepened-worries-sinking-global-copper-output/>

⁵ Government of Zambia (2012) 2010 Census of Population and Housing. Central Statistical Office. Lusaka, Zambia. Accessed on 20.07.20 https://www.zamstats.gov.zm/phocadownload/2010_Census/2010%20Census%20of%20Population%20National%20Analytical%20Report.pdf

⁶ Deininger, K., D. Byerlee, J. Lindsay, A. Norton, H. Selod and M. Stickler. 2011a. Rising global interest in farmland: Can it yield sustainable and equitable benefits? Washington, D.C.: World Bank.

(Deininger et al. 2011)⁷. Their level of access to and control of land determines their level of involvement in decision-making processes over their land.

Women's role in society and how land is an enabler

Women play a critical role in sustaining a productive and viable agricultural sector through the provision of 60.6 per cent of the labour when they participate in both cash and food crop production (Labour Force Survey, 2012)⁸. In many cases women carry the primary responsibility for household food security, health, and nutrition of their families. According to the Farmer Input Support Programme (FISP) Report of 2013, the number of women who benefitted during the 2005-09 farming seasons was 241 700 compared to 437 600 male beneficiaries⁹. This limits their ability to move beyond subsistence agriculture due to limited access to inputs and benefits accruing from their labour input during production.

According to the Living Conditions Monitoring Survey (2010), overall poverty is higher among female populations (79.8 per cent compared to 77.5 per cent for men). Although these figures had declined from the 2006 figures (84.5 per cent for women and 79.4 per cent for men), extreme poverty levels were more pronounced in female-headed households than male-headed households. Poverty continues to remain more of a rural phenomenon than an urban one, with more women (especially in female-headed households) being the majority.

Women take a leading role in providing food for the family, clean water, firewood, and care giving. They are also responsible for strengthening the social capital that exist in their communities. The impact of the extractive industries not only displaces women from their land but it also destabilises their social capital as well as making it difficult for their gender roles to be fulfilled.

Laws and policies relevant to women's land rights

Under customary law, there are discriminatory practices that hinder women's access to, control over, and ownership of land. In many cases, women have access to land only through their husbands, fathers or brothers.

⁷ Deininger, K., H. Selod and A. Burns. 2011b. The Land Governance Assessment Framework: Identifying and monitoring good practice in the land sector. Washington, D.C.: World Bank.

⁸ Government of Zambia (2012) Labour Force Survey. Central Statistical Office. Lusaka, Zambia. Accessed on 20.07.20 https://www.mlss.gov.zm/?wpfb_dl=50

⁹ Ministry of Agriculture and Livestock (2013). Farmer Input Support Programme Report. Lusaka, Zambia.

However, it is important to note that the Zambian Constitution, does not discriminate against women. The constitution calls for equitable access to land and other natural resources as a guiding principle for the management and use of land. This puts women in a position to demand their right to equitable access to land.

The Gender Equity and Equality Act of 2015 addressed the gender imbalance that exist between men and women, including an imbalance in land access¹⁰. The act guides the elimination of discrimination against women, especially in the access to and control of resources to ensure the full development and advancement of women on an equal basis with men. The act further stipulates that responsible ministries should ensure that women have the same rights as men, including in the allocation and acquisition of land and other property. The National Gender Policy of 2015 sets out as one of the measures under the objective of the economic empowerment of women the need to ensure that women own at least 50 per cent of land allocated¹¹. The policy has identified tracking of all gender-related land issues as one of the areas of action.

Besides the constitution and government policies and laws, there are international human rights laws that Zambia is a signatory to. Although these laws have not been domesticated in Zambia, they provide guiding principles with respect to the rights of women to land. These include:

1. The 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and its optional protocol in 2000;
2. The 2003 Protocol to the African Charter on Human and People's Rights;
3. The 2004 Solemn Declaration on Gender Equality in Africa;
4. The 2008 SADC Protocol on Gender.

How the laws and policies promote or impede women's land rights in the context of extractive industries

Successes of the laws and policies

The constitution does not discriminate against women, but endeavours to create a gender balance for both men and women in access to and ownership of productive resources, including land. The acts and policies that have been enacted

from this premise have upheld the provision by further affirming the need to ensure women have equitable access to land. This is outlined in the Gender Equity and Equality Act as well as in the national gender policy. The policy charges the responsible ministries (such as the Ministry of Gender and Ministry of Land) to ensure that affirmative action is implemented.

Challenges faced in protecting women's land rights

Lack of community participation.

The poor in Zambia are faced with land loss, as their land is allocated to investors for development projects and activities such as mining. The allocation of land for investment takes place in most cases without consulting communities living on the land or who were utilising the land before it was allocated. Communities are only informed that the land in question has been allocated without their consent, and in most cases without understanding their way of living, culture, needs and priorities.

Limited protection of property rights for landholders on customary tenure. The dual land tenure system has resulted in a situation where some landholders on state tenure enjoy the full protection of their property rights, while landholders under customary tenure are essentially occupants or users of land and their property and land rights are not protected. There is also non-protection of rights of the poor and disadvantaged community members, including women; it is difficult for them to protect their rights to land (both state and customary) and to access the judiciary system when their rights are infringed upon.

Lack of documentation of customary tenure: Lack of documentation of customary tenure exists because there is an absence of commonly agreed documentation to secure tenure of customary land at family, village and chiefdom level. Another significant challenge which should be highlighted is weak land management. The current land tenure systems are inadequate as there are ambiguities in the management of land especially, under customary tenure where land is administered according to unwritten laws, customs and traditions that exist in a particular area.

¹⁰ Ministry of Gender (2015) Gender Equity and Equality Act. Accessed on 10.07.20 <http://www.parliament.gov.zm/sites/default/files/documents/acts/The%20Gender%20Equity%20and%20Equality%20Bill%2C%202015.pdf>

¹¹ Ministry of Gender (2014) National Gender Policy. Accessed on 25.06.20 https://www.gender.gov.zm/?wpfb_dl=51

Displacement of local people and inadequate compensation. Investments and development activities without the involvement of communities mean that women are threatened with displacement from their land, and in this process displaced people are not adequately assisted to begin a new way of life and to continue with their agricultural way of life. These ventures often involve large areas of land, and disadvantage local and medium investment in agricultural productivity. This vulnerability derives from a history of inadequate land policies that have resulted in insecurity of tenure. Women in host communities in most cases have no opportunities to negotiate for better deals when they are displaced from land and are unable to meaningfully engage stakeholders involved in the land transactions, and do not receive adequate compensation for land they give up.

Inadequate enforcement of statutory laws and regulations. While Zambia has several laws that should regulate land investments, there is inadequate enforcement due to limited engagement of regulatory agencies like the Zambia Environmental Management Agency (ZEMA). As a result, not all significant land investments are subject to environmental impact assessment (EIA), as the law requires. Ordinarily, a well conducted EIA would include a social impact assessment. Impacts such as displacement and subsequent resettlement of communities would be well catered for according to a resettlement action plan (RAP). However, the government does not appear to provide guidelines on what constitutes an acceptable RAP.

Lack of adherence to international guidelines: It is also clear that most large-scale land-based investments (LSLBIs) do not conform to the UN Guiding Principles on Business and Human Rights, which provide for the three pillars: respect, protect, and remedy. There are concerns that the manner in which these large-scale land investments are negotiated and implemented has inevitable impacts on human rights of mainly rural communities who are denied the rights to land and other resources such as water and forests, right to food, right to self-determination and right to development.

Opportunities

In order for the sector to benefit everyone, there is a need to address each of the challenges identified by way of legislative and administrative measures. These include:

1. Simplify and speed up the decentralisation process of acquiring both artisanal and small-scale mining (ASM) and land rights. This will enable women to participate in mining so as to increase their beneficiation and access to productive resources where mining is taking place. This, should have a provision for due diligence so that only committed women are given licenses.
2. Facilitate ASM to graduate from subsistence to commercial business entities through support and capacity building by entities such as the Zambia Development Agency, the Coalition of Energy Efficient Comminution (CEEC), and other institutions that provide technical support in business development.
3. Guarantee a legal framework that provides rights holders adequate land, defining the duration of rights and security of tenure.
4. Support for collaboration and organisation among women miners through training in organisational management, establishment of mining co-operatives through the process of legal registration.
5. All associations dealing with ASM should mainstream gender in their structures and provide for women-specific interventions.

Proposed strategies to protect women's land rights

Informed by the foregoing, this paper proposes the following as ways to improve women's access to and right to land within the extractive sector:

1. Engage and consult stakeholders (including spouses, brothers, uncles, and traditional leaders) before investments in extractives are concluded.
2. Promote functional adult literacy classes for women miners or women landowners so that they are able to read and understand the provisions of contracts that are signed between mining investors and the government.
3. Train host communities, including women, in negotiation and advocacy skills so that they can demand their land rights in the face of displacements.
4. Encourage women to form or join (mining) cooperatives for peer support, information dissemination, coordination, etc and to improve information sharing.
5. Form interest groups and identify community women's land rights champions who support the protection of women's land rights.

Tools for ensuring the protection of women's land rights

1. Issuance of traditional land-holding certificates: these can be used to document land rights. Women can then use the certificates as the basis for negotiation and to demand their land rights.
2. Use education as a tool for empowerment. Form groups that will push for adult education to improve their literacy levels.
3. Empower women with knowledge on land rights. Women should be trained in land rights so that they appreciate and demand their rights.
4. Strengthen the informal platforms that exist in host communities. Informal structures can be used to advocate for the protection of women's land rights.
5. Use women traditional leaders as women's land rights champions to influence the protection of women's land rights.

Key recommendations

1. To improve women's participation in the mining sector, there is a need for the mines operating in Zambia to be mechanised to modern standards so that women and youth can be employed as machine operators. Women should be offered better jobs because they are the ones most impacted by the operations of the mine.
2. The contracts between mining companies and government should be made public for transparency. This will enable community members to make informed decisions about their land, especially in cases where they are threatened with displacement.
3. To avoid displacement, women should be involved in negotiation processes at every stage. Investors and the government must hear from the communities, and allow for free, prior, and informed consent.
4. The government and investors should ensure that the provisions of the national resettlement policy are followed to cushion the shock that host communities go through, especially women when they are faced with land displacements.
5. The concept (and enforcement) of free, prior and informed consent should be made law so that host communities participate in making decisions about their land when it comes to hosting investments.
6. Use traditional court systems to influence the protection of women's land rights and the resolution of land-related disputes that concern women's access to and ownership of land.

Policy Recommendations

Following the different research reports presented and the accompanying challenges, gaps and opportunities, the following policy measures are recommended;

1. **Institutional frameworks:** To address women's rights within extant institutional frameworks for management of customary land, this report recommends that empirical studies be carried out across Southern African countries, focusing on different renewable and non-renewable resources.
2. **Women Participation:** National governments and institutions which allocate land rights must be representative of women, and dispute resolution mechanisms (including civil and customary courts) should be accessible to women.
3. **Discrimination Against Women:** There is need to consider developing regional law, member states to review all policies and laws to end the discrimination against women in access to property.
4. **Land Redistribution:** Scaling up and maintaining measures of reform and redistribution of land to guarantee real parity between women and men about land titling.
5. **Awareness and information Dissemination:** The importance of women's participation in land governance should be highlighted through awareness campaigns, explaining the rationale for (and advantages of) accomplishing gender equality in land access. Moreover, literacy programmes (legal and functional), formal education, and even the introduction of gender and land rights issues in the school curricula, is necessary, involving men in campaigning. Engaging with media to endorse the visibility of women's land rights can be very important.
6. **Artisanal and Small-Scale Mining:** Account should be taken of the multi-dimensional nature of discrimination against women and girls in ASM, recognising the centrality of land rights for the realisation of women's human rights and their livelihoods. The governments should ensure that women have equality in tenure rights and access to land and other natural resources, regardless of their civil and marital status.
7. **Economic Diversification:** Governments should be able to put up diversification methods and tools that will be beneficial to everyone, including youth and women.

Conclusion

The research papers have identified various opportunities and threats that face women in land matters. The problem is not the absence of laws; even in countries where the rights are clearly articulated in law, women's rights to land are still lagging. Lack of awareness of their legal protections, discriminatory customary practices, and lack of resources to fight for their legal rights have led to many women being denied their customary land rights. The failure to unpack land rights to excavate different levels of entitlements for different community members is also problematic because it does not align entitlements to functions. Women's role on land as labourers should entitle them to a larger share of rights, but this is not the case. The reports have gone further to relate and link the situation to the infiltration of western norms into African ways of viewing and managing land, which has informed many countries' legislation on community land.

The research papers have advanced different arguments and assertions which are mainly aimed at addressing women's rights within extant institutional frameworks for management of customary land. Emphasis has been placed on the need for empirical studies across Southern Africa, focusing on different renewable and non-renewable resources. Such studies will guide targeted interventions informed by the lived realities of women living in communities and their experiences with extractive industries for livelihood and commercial purposes.

The reports acknowledge the presence of some promising legal reforms to improve women's rights. Constitutional and statutory provisions on customary tenure rights are favourable, but do not go far enough to secure the rights of communities whose land is sought by developers. There should be adequate space for consultation and free and informed prior consent to such developments. Compensation should also be differently construed to consider the communities' loss not only of their land, but also their livelihoods, natural resources, food security, and cultural practices.

Ultimately, the requirements of regional law have not been met. Few SADC countries have reviewed all their policies and laws to end the discrimination against women in access to property. Developments in providing women with equal rights in civil marriages and formal registration of properties have been positive, but women's rights in customary marriages and women's customary land rights require far more attention.

SARW Objectives

Monitor corporate and state conduct in the extraction and beneficiation of natural resources in Southern Africa, and assess to what extent these activities uplift the economic conditions of the region's communities.

- Generate and consolidate research and advocacy on natural resource extraction in Southern Africa.
- Create informed awareness of the specific dynamics of natural resources in Southern Africa, building a distinctive understanding of the regional geo-political dynamics of resource economics.
- Provide a platform of action, coordination and organisation for communities, activists, researchers, policy-makers, corporations, regional and global governing bodies in the watching and strengthening of corporate and state accountability in extractive industries.
- Engage with and support government on building accountable and transparent management of extractive resources.
- Build capacity for communities, civil society, parliaments, and media to hold governments and corporations to account, and to participate in decisions about resource management.
- Advocate and promote human rights and environmental protection in resource extraction activities.
- Support efforts to legislate mandatory public disclosure of and access to financial, social, environmental and regulatory compliance information in the extractives industry.
- Promote extractive industries that create wealth for local communities.

Southern Africa Resource Watch

1st Floor, President Place
1 Hood Avenue / 148 Jan Smuts Avenue (Corner Bolton Road)
Rosebank, Johannesburg 2001
South Africa

+27 (0) 11 587 5026
info.sarwatch@sarwatch.org
www.sarwatch.org



Advancing Rights in Southern Africa (ARISA) Objectives

The Advancing Rights in Southern Africa program at Freedom House (ARISA) is a 5-year program that seeks to improve the recognition, awareness and enforcement of human rights in the region, including the protection of the region's most vulnerable and marginalized groups. The program led by Freedom House in collaboration with partners—the American Bar Association Rule of Law Initiative (ABA/ROLI), Internews, and Pact—works at a regional level in select countries to:

- Improve the enabling environment for the promotion and protection of human rights;
- Strengthen the capacity of regional and local civil society actors to seek redress of rights violations;
- Increase public demand for improved rule of law and human rights protection; and
- Foster South-South communities of practice for knowledge and resource sharing to advance efforts to address human rights violations.