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Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform

by Abby Morrow Richardson

A CONSIDERABLE HURDLE TO THE REALIZATION of women's human rights in Africa is the pervasive denial of a woman's right to inherit land and other property. In many traditional societies in sub-Saharan Africa, land use, housing, and the transfer of land and housing between generations is regulated by customary law, which largely excludes women from property ownership and inheritance. Without secure land and property rights, widows and orphans are often left homeless and destitute after the death of their husband or father. Disinheritance seriously undermines women's economic security and independence as well as their access to adequate food and housing. The denial of land rights to women also contributes to the feminization of poverty and stunted economic development in countries where harmful inheritance practices are common.

Schemes of inheritance and property allocation at death are deeply embedded in notions of culture and tradition in many sub-Saharan African societies. They are closely tied to other important rituals surrounding death, such as burials, funeral celebrations, mourning rites, and the transfer of traditional leadership positions within families and within larger ethnic groupings. These transfers of land, property, and power are nearly always restricted to men.

As language recognizing and respecting women's rights inches its way into the constitutions and laws of many sub-Saharan African countries, there remains a considerable disconnect between official policy and actual practice. Many countries are characterized by a dual system of law that both espouse concepts of equal rights and at the same time legitimize traditional practices steeped in harmful acts of gender bias.

As will be illustrated by the following overview of inheritance laws and practices in Botswana, Zambia, and Ghana, official efforts to remedy discriminatory inheritance laws have typically taken place at the statutory level. These statutory changes generally have no practical effect on the great majority of the population, who are governed, in family and personal matters, by customary law. Short-sighted legislation attempting to change the customary law, while facially progressive, is practically stillborn. Legislators have seemingly ignored the cultural realities of their countries and have passed laws that are largely unpopular and consequently ineffective. To develop systems of inheritance that truly respect women's rights, laws must be written and implemented in ways that recognize and respect the cultural traditions in which these systems are based. Laws that ignore this reality are doomed to be ineffective and ultimately irrelevant.

BACKGROUND

LAND AND HOUSING IN MOST TRADITIONAL AFRICAN cultures is regulated by customary law. Although varying to a certain degree from culture to culture, women are generally prohibited by customary law from owning or inheriting land or other property. Land ownership traditionally is passed through male heirs. A woman's right to access and use land has customarily been defined solely by her relation to men.

While married, a woman enjoys the use of land belonging to her husband; while single, she has access to that of her father or guardian. When a husband or father dies, a woman's right to the land is suddenly placed in jeopardy.

In most ethnic groups, such as the Ewe in Ghana, customary systems traditionally included a social safety net providing for widows and orphans at the death of the male head of household. While women were not able to directly inherit land or property, the men that did inherit were required to care for the wife or wives of the decedent and all of his dependents as the decedent would have. The heir thus not only inherited the property, but he also "inherited" the responsibility to provide for all who depended on the property for their livelihood.



A widow explains the difficulties of losing her land.

This is no longer the common practice today, however. Increasing poverty, widespread war, and the advent of the HIV/AIDS epidemic in the past two decades have eliminated these traditional welfare mechanisms. Whereas widows were once allowed to stay on the land they shared with their deceased husband until their own death or remarriage, they are now often forcefully removed from their homes. In addition, in countries such as Zambia, the phenomenon of "property-grabbing" has recently developed. Property-grabbing is a practice followed by many ethnic groups in the continent, where as soon as the male head of household dies, his relatives come to the home and take everything of value away—from pots and pans to furniture and cars. This often occurs while the woman is performing a traditional mourning ritual, and therefore is not able to defend herself or her property. The woman is often left destitute as a result.

Because a woman's right to her home and property depend on many factors, other scenarios are also common. In patrilineal systems (such as the Tswana in Botswana), where bloodlines and ancestry are traced through male relatives, a woman's rights are more secure if she has an older son who is the heir to his father's estate. Upon his father's

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death, the son often allows his mother to stay on the property. If the widow's relationship with her in-laws is friendly, then they may allow her to stay. However, if the land is valued by the family and needed by one of her brothers-in-law or, in matrilineal systems (where ancestry is traced through females, such as the Bemba in Zambia) her nephews, she is less likely to retain control of her home. If she contests the administration of her husband's estate, her inheritance rights depend on the views of the particular traditional leader that will decide her fate. As such, the widow's rights depend on the inclination of the chief or other traditional arbiter, the kindness of her in-laws, or the sex of her children.

COUNTRY OVERVIEWS

BOTSWANA, ZAMBIA, AND GHANA HAVE ACHIEVED varying degrees of success in changing their inheritance laws and, to a lesser degree, their inheritance practices. Ultimately, the inability of the laws to impact cultural practice has drastically limited their effectiveness.

BOTSWANA

The Botswana legal system is derived from five primary sources: the Botswana Constitution, Roman Dutch Law, statutory law passed by the parliament, case law, and customary law. Botswana is also party to regional and international treaties requiring statutory compliance with their anti-discrimination standards, including the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Southern Africa Development Community (SADC) Declaration on Gender and Development, promoting the prevention and eradication of violence against women and children in sub-Saharan Africa. Efforts to bring national laws in conformity with these international obligations have been piecemeal and largely insignificant.

The Constitution, common law, and statutory law all contain provisions prohibiting discrimination generally, although discrimination against women is sometimes excepted. For example, section 15 of the Bill of Rights prohibits the making of any law that is "discriminatory either of itself or in its effect," defining discrimination as affording different treatment to people based on "race, tribe, place of origin, political opinions, colour or creed." Discrimination on the basis of sex is notably absent from this definition, although in one significant case, *Unity Dow v. Attorney General*, Botswana's high court interpreted the provision to include sex discrimination. Section 15 also contains certain express exemptions: laws and practices pertaining to adoption, marriage, burial, devolution of property upon death and other matters related to personal law do not have to comport with the non-discrimination provision. These exemptions encompass practices that most affect the lives and rights of Botswana women, and especially their right to inherit.

Statutory law contains similar provisions depriving women of inheritance rights. The Administration of Estates Act states that every person belonging to an ethnic group, which essentially applies to every native citizen of Botswana, will have their property devolved according to the customs and practices of their particular ethnic group. Unless one affirmatively signs a form excluding customary law from his or her will, a drastic measure which most would not consider, custom will dictate how property is divided. If one foregoes all customary law, there is a statutory scheme of inheritance based on community property, written wills, and intestate succession laws, similar to those found in most western countries, that provides for the inheritance of widows and children. For the great majority of the Botswana people, however, there is no codified law of succession.

Botswana is comprised of numerous ethnic groups, although only eight are officially recognized in the Constitution. Each ethnic group is led by a paramount chief who presides over the entire group, village chiefs, sub-chiefs, and ward headmen. All of these positions were traditionally hereditary, passed from father to son. These traditional leaders are responsible for administering customary law through the customary courts in their respective tribal areas. This administration of customary law is recognized and respected by statutory law and the Constitution, as illustrated by the Administration of Estates Act.

Customary law and practices vary from tribe to tribe, and also within tribes, but are largely based on similar social principles. Throughout Botswana, women are excluded from the great majority of traditional leadership positions. Within a family, the father is the customary head. According to the patrilineal system of marriage that most Botswana follow, a married woman belongs to her husband's ethnic group. Most of the property owned or acquired by the couple in the course of the marriage belongs to the husband and will pass to the eldest son at his father's death. A woman retains, in theory, the right to certain property, such as her plowing fields, which are intended to pass to her daughter upon her death. The male household head, however, determines whether the property will go with the daughter into her marriage. Although this land and all decisions regarding it should technically belong to the woman, the male household head has the power to make all determinations about land transfer in his family. He can divest the woman of her access to the land at will.



Abby Richardson

Widows tell their stories of disinheritance.

There is a provision in the Customary Courts Act, which codifies the customary court system, mandating courts to apply "the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity, or natural justice." This provision in the law presents an opening through which many harmful traditional practices, especially those disinheriting women, could be effectively challenged in the statutory courts. There is a general agreement among women's rights organizations that many of the statutory courts would likely rule in favor of women on inheritance and other customary practices if given the chance. Pursuing such a case, however, is not desirable for most women.

In Botswana and many other southern and west African countries, disinherited women have an aversion to the formal court system. Although a woman may take her relatives to court to challenge

the way in which they divided her husband's property, this action would be seen as a declaration of war against the husband's family, resulting in a traumatic severance of the widow's and her children's family ties.

Widows face other institutional disincentives to court action. Courts are often located in central hubs that are difficult for poor rural women to reach. Judges are sometimes perceived as biased, unfair, and responsive to bribery and coercion by the other party. The woman is often ostracized or ridiculed by the community and threatened or harassed by the in-laws. Finally, the decisions made at the court level, if they favor the woman, are often not enforced.

As long as the Constitution and statutory laws legally exempt traditional practices that discriminate against women, the gendered system of inheritance that presently exists will persist. As the government representative in the *Unity Dow* case noted, "it is not unfair to say that if gender discrimination were outlawed in customary law, very little of customary law would be left at all." Women's rights advocates should attempt to change this understanding of women's rights as offensive to traditional culture, and try to redefine patriarchal notions of custom into those that respect both women's rights and tradition.

ZAMBIA

Zambia, like Botswana, has a dual legal system: statutory, constitutional, and common law coexist with a parallel yet sometimes contradictory customary law system. The Zambian Constitution also has a Bill of Rights that guarantees equal protection under the law to all citizens. Zambia has ratified CEDAW and other international human rights treaties, but it has not incorporated them into its domestic legal system. Like Botswana, the Zambian Constitution excludes from its equal protection and anti-discrimination provisions practices pertaining to marriage, divorce, devolution of property, and other personal and family matters. In these areas of critical concern for women, the law legitimizes a discriminatory customary system.

In 1989, Zambia enacted the Intestate Succession Act (Act), which significantly affected a woman's legal rights to inherit. The Act, which governs the administration of an estate when there is no will, establishes the spouse (male or female) as the primary inheritor of the decedent's estate. It guarantees a life interest in the marital home for the surviving spouse. Although beneficial to women because it secures their right to remain in their home, the law falls short of granting equal inheritance rights to women. The widow does not inherit the title to the home; instead, she may only stay until her own death or remarriage. She gains only the usufruct right of use, not absolute ownership. Additionally, enforcement of the Intestate Succession Act requires a widow to take her case before a statutory court, which, for the reasons mentioned above for Botswana women, is not a realistic option for most Zambian women.

In Zambia, most customary law is administered by local courts and traditional courts. The Zambian government, through the Local Courts Act, officially recognizes local courts as the administrators of customary law and some statutory law. Decisions from these courts can be appealed to higher courts which, similar to the Botswana courts, will enforce customary law as long as it is not "repugnant to natural justice, equity, and good conscience." In addition to the official local courts, there are also traditional courts over which traditional leaders preside who resolve conflict at a local level in accordance with the specific customs and practices of the locality. These courts, which operate primarily in rural areas, are not officially recognized by the Zambian government, and there is no link between these courts and the local courts or other official Zambian courts. Because chiefs

recommend the appointees who sit on the local courts, the local court justices, like the chiefs themselves, are primarily male.

Customary law in Zambia varies among the country's seventy-three ethnic groups. Of these groups, sixty-nine are matrilineal, meaning that lineages and families are traced to a female ancestor, and the blood line is traced through the female members of the family. Despite the centrality of matrilineal women to the definition of family and ancestry, men in matrilineal societies, like their patrilineal counterparts, wield the actual power. Men are the traditional leaders who sit as chiefs and headmen and preside over traditional courts.

Customary law relating to inheritance in matrilineal societies provides that when a man dies, his primary heirs are his nephews (his sisters' children). This matrilineal system of inheritance stands in direct contrast to the Intestate Succession Act, which devises an inheritance scheme that is patrilineal. The Act establishes certain inheritance rights for the spouse, dependents, and the decedent's parents. The direct conflict of this Act with the practice of land distribution among the large majority of Zambian families has severely limited its applicability and effectiveness.

Another hurdle to the implementation of women's inheritance rights in Zambia is the phenomenon of property-grabbing. Although the practice is often defended as the traditional right of the relatives to inherit the property of the deceased, many women's rights organizations operating within the country recognize that in the face of increasing poverty, traditional property schemes have been manipulated to justify the disinheritance of women. In Zambia and elsewhere, where an extended family support system exists, relatives are often overburdened to take on the extra responsibility of caring for other relatives. The family will often come and claim the property but not uphold the accompanying responsibility of caring for the decedent's family. What is claimed as cultural practice is in truth a manipulated version of the traditional inheritance scheme's original form and intent.

In addition to organizing community widows' support groups that attempt to fend off property grabbers, many NGOs are working to correct the misinformation and misunderstanding about cultural practices that currently stand as a barrier to implementing gender-fair inheritance laws. A group of NGOs in Zambia is working with a coalition of traditional experts, historians, and human rights activists to reach a common understanding of the development of inheritance practices and how allowing women to inherit comports with the purpose of traditional inheritance schemes. These groups hope to promulgate an accurate representation of traditional cultural practice that is both true to its origins and in compliance with international human rights standards. These groups believe that cultural norms support a woman's right to inherit, and a proper understanding of the way in which the cultural practice developed will lead to greater acceptance of women's inheritance rights. They believe traditional culture and international human rights standards are not at odds, but complementary if properly understood.

In Zambia, as in Botswana, the dual system of law simultaneously promotes concepts of equality and anti-discrimination and allows a discriminatory system of customary law to govern the majority of matters affecting an ordinary citizen's life. Although the provisions of the Intestate Succession Act are available to all Zambians, it is largely ignored and disfavored by local courts since its terms are foreign to the family systems in which the majority of Zambians live. As human rights organizations seek to change cultural understandings about women's inheritance rights, the statutory law should also be sensitive to the context in which it will be applied. It should not seek to

usurp the entire familial system on which much of Zambian society is based, but it should rather create ways to protect women's rights that are more familiar, less threatening, and that can be better integrated into traditional cultural structures.

GHANA

Ghana is widely seen as a leader in the struggle for inheritance rights in Africa. In addition to having ratified numerous international human rights treaties, including CEDAW and the African Charter on Human and Peoples' Rights, Ghana passed, in 1985, the Intestate Succession Law (the Provisional National Defense Council, or PNDC, Law 111). PNDC Law 111 significantly altered the system of land and property distribution legally recognized by the Ghanaian government. According to its accompanying memorandum, the law seeks to "provide a uniform intestate succession law that will be applicable throughout the country irrespective of the class of the intestate and the type of marriage [statutory or customary] contracted by him or her." The law, "aimed at giving a larger portion of the estate of the deceased to his spouse than is normally the case at present," grants concrete rights to spouses to the property acquired by the decedent during his or her lifetime. This notably does not include family and lineage property. Despite this omission, the Act states that wives and children may remain in the home as tenants in common until the widow's death or remarriage.

PNDC Law 111 was enshrined in the 1992 Constitution with clauses addressing the property rights of spouses. The Constitution states in article 22 that "[s]pouses shall have equal access to property jointly acquired during marriage" and that "[a] spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will." With these provisions explicitly providing for women's inheritance, Ghanaian constitutional law goes well beyond that of Botswana and Zambia in legally preserving women's rights. No exceptions exist for the application of customary law in Ghana.

Customary law, however, persists despite these laws. Ghana contains both matrilineal (in the Upper East, Upper West, and South western regions) and patrilineal (in the Northern, Volta, Greater Accra, and Southern regions) ethnic groups. In addition, nearly half of all marriages in Ghana are officially polygamous, while a much greater number consist of a husband with one official wife and one or more concubines.

Under customary law, when a man dies, all of his self-acquired property (which often includes property acquired with the assistance and labor of his wife) returns to his lineage and is distributed accordingly. In patrilineal societies, as in most of Botswana, the land will thus go to a son or brother. In matrilineal societies, as in most of Zambia, the property will devolve to nephews. In both systems, the widow is usually entirely dispossessed.

With the advent of PNDC Law 111, entire systems of property inheritance and distribution were legally uprooted, particularly those in matrilineal lineages. The legal revolution, however, has not fully translated into cultural transformation. In many ways, the law is impractical in matrilineal communities whose entire social and familial system would be completely debased if the law were to be implemented. The law also fails to mention or recognize polygamous marriages, which constitute the majority of marriages in Ghana. When applied to these unions, the law fails to adequately address the multitude of complexities arising when a man dies leaving multiple wives and multiple sets of children.

An even greater obstacle to the law's implementation is the lack of public education about the law. Today, 19 years after PNDC Law 111 was passed, many people who do not belong to the educated, urban classes are not aware of the law's existence. There is no public education program designed to inform the Ghanaian citizenry of this significant aspect of their legal system. Customary inheritance systems persist and customary courts continue to resolve conflicts.

The Ghanaian inheritance situation in many ways is a step beyond Botswana and Zambia. Nonetheless, the full implementation of women's inheritance rights is still far from complete. Ghanaians should be informed about the law and know how to access it. Future laws should not ignore the reality of the cultural situation in which they are to be applied; otherwise, they will risk being ignored and ineffective.

CONCLUSION

LEGAL AND CULTURAL BARRIERS to ensuring women's inheritance rights are commonplace in west and southern Africa. Legally, legislators have passed laws that have little hope of implementation within the cultural context in which they are applied. In Botswana, constitutional and statutory reform is necessary in order to seal the loophole that allows customary law to discriminate against women. In Zambia, where patrilineal systems of inheritance are codified even though much of the country is matrilineal, the law could be reformed to recognize matrilineal systems of inheritance in ways that respect women's rights. As the Ghanaian illustration shows, however, even with a relatively strong law, true reform will only be secured when the law is known, understood, and enforced throughout the country.

If cultural revolution is what the leaders of these countries desire, then the forces required to catalyze that revolution need to be put into place. Massive education campaigns need to be undertaken to ensure that people understand the law and the reasons for its passage. Customary court judges should be trained on how to administer the new law, and local statutory courts need to be more accessible to the common person.

Where national governments have failed to follow the passage of laws with implementation, many non-governmental organizations are working to fill the gap between law and practice. Legal literacy trainings organized by NGOs seek to inform women, local court judges, and the rest of the community about inheritance laws and generally why women's inheritance rights deserve to be respected. Because of the numerous problems with the formal court system on inheritance matters, many organizations in Ghana and other countries are working to create avenues for solving inheritance disputes in less confrontational ways, such as through church leaders, community alternative dispute resolution centers, and mediation training of local lawyers and legal service providers. These avenues of implementation provide a viable alternative to inaccessible and daunting formal court processes and as such deserve government support.

Changes in long-held traditional practices can never be achieved solely by passing a law. Laws are only effective if enforced; enforcement is possible only with understanding and acceptance; and respect for the law is secured only when the people believe in its necessity. Ultimately, women's right to inherit will be secured only when cultural understanding encompasses a respect for women's rights and when statutory legal systems respect and adapt to the cultures in which they will be applied. *HRB*