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ABSTRACT

This contribution is concerned with the challenges of securing women's rights to land in Africa in the context of contemporary land deals through a discussion of three distinct but interrelated problems in the framing of women's land rights discourses. First, this study discusses the interface between rights and "custom" to highlight the inherent distortions of African customary law. Second, it argues that liberal formulations of the law are limited by a set of assumptions regarding women's position in the political economy. And third, this discussion discursively assesses the debates in the literature regarding the efficacy of law in protecting women's rights to land. The discussion proceeds from a critique of two approaches to promoting gender equity in land tenure systems: the institutional approach, which deals with women's formal land rights; and the political economy approach, which deals with the structural nature of women's traditional relations to land.

KEYWORDS

Women, customary law, commercialization, political economy, justice, land

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INTRODUCTION

In most African states, customary law is acknowledged as part of the national legal system, receiving constitutional recognition and protection. Within the broad framework of land reforms, many African countries have progressively given legal recognition to customary land tenure as well as to the institutions administering it. This important step, however, calls for the harmonization between customary law and the constitutional value of equality, which, as some scholars argue, is valuable in directing debate away from the binary tension of "good" modern law and "bad" tradition. There are, however,

few pointers regarding where land reform processes should focus in order for equity to be achieved. This uncertain legal grounding is also the context within which the contemporary phenomena of land leasing and acquisitions are taking place on the continent. This shift is particularly disadvantageous to African women, a majority of whose claims to land are still heavily embedded within cultural practices that mask their negative relationship to formal processes of land tenure. Feminist legal advocates have taken on a number of cases in which customary, family, and inheritance laws have been challenged, but the legal challenges have not been accompanied by political contestation in the broader political sphere. Thus, although potentially carving out spaces for the interpretation of customary variations of the law in favor of women, a number of studies show that assumptions regarding the contingency, flexibility, and negotiability of customary systems (Pauline E. Peters 2004; Aninka Claassens and Sindiso Mnisi 2009), upon which arguments linking women's greater access to land to customary tenure are built, are exaggerated and belie the often incongruent interests being negotiated within plural legal systems.

This contribution grapples with the question of securing women's rights to land in Africa in the context of contemporary land commercialization through a discussion of three distinct but interrelated problems in the framing of women's land rights discourses. First, by highlighting the inherent distortions of "official" customary law inherited from colonialism,[1] the study recuperates the "living" customary law as a potentially progressive approach toward discussing land deals in relation to gender equality. Second, this study critiques the notion that women could beneficially participate in or gain from land deals as a result of formalization of their land rights, arguing that liberal formulations of the law are limited by a set of assumptions regarding women's position in the political economy. These assumptions, institutionalized and concealed within the liberal framing of women's land rights, are discernible through a structural analysis of the nature of social relations around land. The core of this argument interrogates the possibilities of achieving gender justice within a capitalist system. Third, by discursively assessing the debates in the literature regarding the efficacy of law in protecting women's rights to land, this discussion argues that the factors that delimit formalization also constitute the possibilities for application of customary law. Ultimately, this study makes the argument that customary law offers a more promising path toward recuperating women's rights to land in the context of commercialization.

HISTORICAL IMPORTANCE AND CONTEMPORARY REINTERPRETATIONS OF CUSTOMARY LAW

Martin Chanock (1998) argues that customary law is a colonial construction, an instrument fixed in law by colonizing white men in collaboration

with colonized black men in the interests of patriarchal order. From this perspective, women appear to have little space to assert their own interests. In contrast, Richard Roberts (2005) has argued that customary law courts and the law itself are sites of contestation between litigants and defendants within households. Colonial states were forced to pursue two contradictory objectives of ensuring capital accumulation while also maintaining social control, and their attempt to reconcile these goals manifested in the notion of customary law (Margot Lovett 1989). The colonial state's view of traditional African societies as ahistorical and thus apolitical reveals the contradictions of its attempts to preserve African customs within a static legal system. The idea of customary law thus presupposed both the stasis of preexisting "customs" and the applicability of "law" as a means of social control. Similarly, Terence Ranger argues that in the process of supposedly preserving tradition, colonial authorities actually "set about inventing African traditions for Africans" (1983: 212). Many of these invented traditions were fundamental to the allocation of economic and political privilege within a context of rapid social change and instability engendered by exploitative colonial policies.

For their part, African men purposefully used the colonial state and customary law to enshrine women's subservience in issues such as marriage and land tenure (Ranger 1983). The concept of marriage introduced under colonialism and codified within customary law reduced all married women, regardless of social position, to the same status. Wives were expected to perform domestic duties, which encompassed the entire realm of subsistence agriculture, without the assistance of their husbands. Under customary law in the Gold Coast, for example, though cash crops, such as cocoa, were gender neutral prior to colonialism, they became defined as male crops, while crops used primarily for domestic consumption became coded female. Thus, to enter the market economy, men had to depend on their wives for domestic economic security. In addition to profiting from his wife's increased labor, a husband was given sole ownership of his family's land under customary law. Thus, customary law eliminated women's avenues for accumulation by allocating to men everything produced on their land (Ranger 1983). Studies demonstrate, however, that shifts in relations of production were observed with women's increasing entry into the labor market and with changing patterns of marriage. Like men, women attempted to shape customary law and to escape or redefine the restrictions that it imposed. Studies of cocoa-growing areas in Ghana, for example, have found that while women's participation in cocoa production varied, in general they were less securely established in cocoa farming, operated smaller farms, and were less able to mobilize unpaid labor for their farms than men (Polly Hill 1963; Christine Okali 1983). At the same time, the importance of family labor has been demonstrated by the practice of men transferring portions of farms as gifts to their

wives and children in their lifetime, thus circumventing matrilineal rules of inheritance that excluded them. These transfers, when formalized through public thanksgiving ceremonies, gave women control over the land and specifically, the power to dispose of such land (Dzodzi Tsikata 2009). In addition, although customary law of establishing the usufruct through land clearing made it difficult for women to own land, they could inherit land, even if the portions were smaller and nontransferable to children in certain communities (Tsikata 2009). Despite their exclusion from the codification and execution of customary law, women attempted to exercise their agency within this legal system that systematically denied their subjectivity.

Recent literature also demonstrates that social embeddedness has played a role in enhancing women's land claims within customary systems. The debate over tenure reform has been stuck in the either/or of whether individual property rights should take precedence over customary tenure or vice versa. However, studies about the way rights function – not primarily to create boundaries around individuals, but to structure the relationships of interdependence that advance or undermine autonomy – help us escape this trap of acknowledging the socially embedded nature of women's land rights (Claassens and Mnisi 2009). Ann Whitehead and Dzodzi Tsikata (2003), too, cite studies from other parts of Africa that suggest women's claims to land are stronger and more diverse than are usually represented. Ironically, for those who link social embeddedness with women's *weaker* claims, the empirically demonstrated strength of women's claims lies precisely in their social embeddedness. These studies contest the idea that women's indigenous land claims are secondary or amount simply to a use right contrasted with a control right. They also suggest that women's claims to land are not justified solely through the recognition of their obligations in food production, but that local-level land management forums make moral and material evaluations of inputs and behavior between male and female household members over a very wide spectrum when adjudicating land claims (Whitehead and Tsikata 2003).

The land policies promoted in Africa during the 1960s and 1970s were based on the premise that customary systems did not provide the necessary "security" to ensure agricultural investment and productive use of land. Because the lack of security was thought to lie in the absence of clearly defined and enforceable property rights, the appropriate policy direction was taken to be the state creation of such rights – most often, individual, private property rights (Peters 2004). However, a number of studies showed that the move toward formalization of customary tenure did not carry the main aim of securing individual rights to land or of aiding transferability of land. Moreover, these rights and functions had not been highly constrained under customary tenure (Peters 2004). Critiques of the conventional view came from research on the actual practices of

African landholding rural economies, which included documentation of widespread cash cropping and "price responsiveness," with the most quoted cases being cocoa production by farmers on customary land in West Africa. Such cases were used to reject premises that customary tenure inhibited investment in agricultural production and agricultural commercialization and to demonstrate the flexibility customary tenure allowed to farmers adapting to changing conditions (Peters 2004).

Another prominent theme was that customary systems did not exclude individual rights, as a simple premise of "communal" systems supposed. Research showed individuals and small familial units who have separable claims, rights, and responsibilities work the vast majority of farms in Africa, even though land in its most general sense is usually vested in collectivities such as chiefdoms or clans. Longitudinal studies have also shown that agricultural intensification and commercial production are not inhibited by customary landholding as much as by broader social and political-economic conditions at local, regional, and international levels (Peters 2004). Pauline E. Peters' (1997) study on Malawi, as well as others, shows that in some places, so-called customary tenure would be more accurately seen as family property because individuals and family units have defined rights to specific areas of land – a situation that also led Paul Francis to state that the actual practice of customary tenure in Ijesha, Nigeria was indistinguishable from "private property in land" (1984: 24). Others have described various types of transfer of land and land rights, such as tenancy in the cocoa areas of West Africa (Hill 1963; Sara S. Berry 1975; Edwin A. Gyasi 1994) and Lesotho (Steven W. Lawry 1993), and other types of transfer, including rentals and sales (Charles M.N. White 1963; Antony N. Allott 1969; John M. Cohen 1980; John. W Bruce 1988; Catherine Besteman 1999), often involving the collusion of traditional leaders with politically powerful elites (Clement Ng'ong'ola 1996; Peters 2004).

Another important body of field research shows how programs of land registration and titling performed from the 1970s to the late 1980s challenged the premise that titling would improve tenure security and lead to increased agricultural investment and productivity. The studies showed that such programs failed to achieve the expected results of improving agricultural investment and productivity. These programs encouraged speculation in land by outsiders, thus displacing the very people – the local users of the land – who were supposed to acquire increased security through titling; and they facilitated practices of bribing, fraudulent titling, and expropriation of land. As a result, the programs frequently exacerbated conflicts and patterns of unequal access to land based on gender, age, ethnicity, and class (H. W. O. Okoth-Ogendo 1976; Simon Coldham 1978; Achola O. Pala 1980; Jean Davison 1988; Parker Shipton 1988, 1994; Angelique Haugerud 1989; David Atwood 1990; Parker Shipton and Mitzi Goheen 1992; Catherine Besteman 1994, 1996).

In addition, a controversial question in the literature straddles the land–labor nexus: whether there are gender inequalities in land relations or whether women are unable to take full advantage of the land because of other constraints such as capital, credit, technologies, and labor (Dzodzi Tsikata 2010). Sara S. Berry (1989) explores the extent to which the conjunction of socially based differences in access with differences in income and wealth depends on the history of production and accumulation by different groups within a local economy. The examples she uses are how even though both Ewe women in southeastern Ghana and Yoruba women of Nigeria found it difficult to mobilize land, labor, and working capital to plant tree crops on their own account, their economic activities changed in very different ways with the spread of cocoa growing. The rise in cocoa prices meant that women were initially able to exercise a considerable degree of economic and personal autonomy previously denied to them.

Ewe women tended to assume full responsibility for food crop production, which they had formerly shared with men, and often suffered declining levels of welfare as a result. Yoruba women, on the other hand, followed their earlier pattern of specialization in trade, food processing, and other nonfarming activities, and their incomes rose and fell with the fortunes of the cocoa economy as a whole (Berry 1989). Furthermore, Berry argues, since many farmers use part of their income to try to increase (or protect) their access to the means of production in the future, social identity and status become objects as well as instruments of investment. Strategies of production and accumulation are directed toward establishing or strengthening social relations, which in turn affect the terms on which people gain access to resources (Berry 1989).

It is possible, as most studies on the topic suggest, that marginalized groups including women are experiencing negative to adverse effects from large-scale land expropriations taking place in a number of African countries. It is also still widely assumed that the problem lies in customary tenure systems. Yet the preceding discussion shows that this simplistic conclusion lacks a clear understanding of the differentiated ways in which local communities and, in particular, how women embedded in customary systems are negotiating greater access to land. But even more importantly, it demonstrates the importance of asking, as Peters (2004) does, more precise questions about the type of social and political relations in which land is situated, particularly with reference to relations of inequality – of class, ethnicity, gender, and age. Finally, it hints at the difficulties that targeting inequality in land relations through land law reforms could entail without engaging in a broader analysis of this kind.

These observations resonate with the findings of Claassens and Mnisi (2009) in their study of rural women land rights in the former homeland provinces of South Africa. These provinces are the poorest parts of the country where women constitute 59 percent of the 17 million people living

in "communal areas." Claassens and Mnisi (2009: 493) conclude that the current processes of contestation and changes in the provinces

> are not the outcome of the implementation of new laws and are only tangentially related to government policy and land reform initiatives. Instead, they are the product of local processes of struggle and negotiation spear-headed by women and engaging a wide cross-section of people in rural society.

They argue that legal strategies aimed at enhancing women's rights to land need to prioritize engagement with the changes taking place. To do so entails interrogating some of the formalist assumptions underlying orthodox policy approaches to women's land rights in Africa. It requires going beyond legal initiatives that focus on the problems facing women as wives and that posit statute law reform and registered co-ownership rights as the solution. Instead, Claassens and Mnisi (2009) advocate attention to the changes taking place outside the statutory law arena, where women play a key role in negotiating the content of both custom and rights. Their argument calls for an approach to rights that acknowledges their mutable nature and pays attention to processes of contestation around the content and definition of rights – including at the local level – as opposed to approaches that assume a fixed legal content (Claassens and Mnisi 2009).

What we currently observe is that African states are mediating land commercialization through support for market-oriented land legislation. As the argument goes, when there is growing competition for the use of land as a result of population growth and/or increased commercialization of agriculture in the wake of market integration, communal ownership becomes unstable and produces harmful effects in the form of mismanagement and/or over-exploitation of the now valuable resource. Nothing short of a drastic alteration of customary land rights under the aegis of determined public authorities is likely to offer a viable solution to output losses (Jean-Philippe Platteau 1995). But strengthening formal laws to secure women's land rights while states are actively engaged in large-scale land deals exposes the deep contradictions that exist under the current conditions of capitalism. On the one hand, the state is posed as the guarantor of equal rights for its citizens; on the other hand, it is the mediator of capital whose interests may not always be congruent with those of gender equality. The push toward formalization and titling is more manifestly tied to the purpose of releasing land for acquisition with greater ease, or to land commodification – processes from which rural women may not immediately benefit because a number of factors hinder their insertion into land markets. As well as those already outlined above, such factors include laws that govern kinship; women's (non)proximity to centers of political power brokering; local community economic priorities with regard to wealth creation, which

may marginalize women's livelihoods by promoting nonfood agricultural production; and transnational imperatives of trade and investments, which may be more concerned with resource competitiveness and land profitability than with poverty alleviation in general.

In addition, states' valuation or recognition of the informal economy, out of which a majority of African women farm and transact, and states' unaccountability for the taxes derived from the sector are key determinants of the extent to which women's voices or rights will be substantively represented in formal negotiations of land deals: that is, direct taxation is a determinant of citizenship claims. Thus, it may be argued that women's access to land markets is dependent on their ability to convert social capital that accrues to them by virtue of prolonged land use and occupation into economic and political capital that could enhance their claims as key stakeholders in land deals. Yet, this ability is a priori highly dependent on women's integration into the economy, the extent of which is masked by limited interpretations of customary law.[2] I examine this tension between the aims of equality and the profit motive in greater detail below.

LAND ACQUISITIONS AS GENDERED, DISPLACING, AND MARGINALIZING

The dramatic rise in land acquisitions across Africa is symptomatic of changes taking place in the global political economy, changes that are reflected within reforms of domestic land laws that favor the market economy. In Africa and elsewhere, a number of factors drive land acquisitions, mainly: short- and long-term food security concerns; increasing global demand for alternative energy through production of liquid biofuels; production pressures related to nonfood agricultural commodities; private sector involvement mainly driven by long-term expectations of competitive returns from agriculture or land; emerging carbon markets fostering land acquisitions in the expectation of long-term increases in land values; and host country incentives – for example policies easing or removing restrictions on foreigners' acquisition of strategic assets, including land (Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard, and James Keeley 2009). Further, a number of arguments have been put forward to explain the concentration in Africa of this new trend – one being that Africa's land is empty and available, much of it being underutilized and ripe for commercialization.[3] This line is especially being promoted by the World Bank (2009), which argues that because of low population densities and limited mobility, much commercialization will need to be based on large-scale commercial agriculture.[4]

Opportunities do exist for rural communities to benefit from land acquisition and commercialization, including through increased investment in agriculture, farm and off-farm jobs, development of rural infrastructure,

school and health posts, resources for new agricultural technologies, future global price stability due to increased production, and possible increased food availability in host countries. However, these outcomes are highly gendered, and their realization is determined by: (1) the existence of an even playing field in negotiations; (2) the ability to enforce agreed compensation; (3) the extent of eviction or loss of land; (4) the environmental problems of large-scale agriculture; (5) the questionable productivity gains; and (6) the lack of transparency that could create broad insecurity (Ruth Meinzen-Dick 2009). The survival of communities is at the core of these land contestations.

In addition, because the new deals involve leases or concessions on communal land that is already occupied and used by local people, these deals potentially threaten the livelihoods of farming households and the prospects for the continent's 80 million smallholder farms, which contribute 30 percent to Africa's gross domestic product and 40 percent to its exports. The deals are also controversial because they precipitate new, and sometimes aggravate existing, contestations over land (and related natural resources, especially water) when private investors, sanctioned by national governments and other authorities, aim to use these natural resources in poor rural areas for their own commercial agricultural enterprises.

The other question that preoccupies researchers of land commercialization is that of sustainability. Factoring the land question into prospects of sustainable development and livelihood sustainability is subject to political interpretation, since there is no single objective method of balancing the economic, social, and environmental issues that come into play (Fidelis Kanyongolo 2008). Even where states seek to legislate in favor of sustainability, this is still a weak safety net. For land law is an expression of particular subjective political choices and does not govern the interplay between land and sustainable development in any objective manner. It is used as a tool to achieve specific goals. There is, therefore, no reason for expecting that the law will facilitate equality of access to land, increased security of tenure, or any other goal that will promote sustainable development. The law may actually perpetuate or aggravate various problems (Kanyongolo 2008). The political policy frameworks within which laws are implemented crucially determine their impact, and these differ from country to country.

For instance, an examination of the general nature of current Malawian land law is illustrative of its limitations as a tool for optimizing the contribution of land to sustainable development. The overarching policy goal of the government is economic growth (Malawi Government 2006), which means that within the framework of sustainable development, social and environmental goals are likely to be subordinated to economic ones. In practice, therefore, any role that land law plays in mediating the balance among the various dimensions of sustainable development is conditioned

by the prioritization of economic development and is not predicated on equilibrium among them (Malawi Government 2006).

The reason is that Malawian land law is predicated on notions of neoliberal legalism, which is why it will not affect the balance between economic and other objectives in any way other than those defined by policy. Fundamentally, these notions posit law as an apolitical and ahistorical phenomenon that does not look beyond individuals as bearers of rights. As such, the law generally takes no account of the racial, gender, class, or other identity of people whose interests it seeks to regulate, since, in theory, all people are equal before the law. This approach does not facilitate social transformation because it ignores the inherent collectivity of economic and social claims such as those based on gender and class (Malawi Government 2006). Consequently, the law does not promote the interests of groups that have been historically disadvantaged in terms of access to land and security of tenure. On the contrary, the policy imperatives of economic growth, which prioritize individual property ownership and liberalization of land markets, are likely to militate against the use of the law to reverse the balance between individual economic rights and collective social and environmental rights (Kanyongolo 2008).

Case studies from Mozambique show that community members are mere observers of the large-scale projects that are created in their communities, where partnerships between investors and communities do not exist. Deficient community consultations result in the unintended loss of land rights in some communities, and some community members incur financial loss by producing crops plants like *jatropha* that are never eventually bought by their promoters. There are persistent tensions between investments and communities, in part because communities do not understand the projects. Conflicts are also a constant feature, especially when community members realize that they are beginning to lose their land. Reinforced by poverty, the bait for the acquisition of these lands is the guarantee of employment for community members; yet with formal employment in rural Mozambican families being for men, women are at once excluded from this process; women work the land, while men are at the center of the negotiation process. The projected benefits from these large-scale project areas are expected in the long term, yet communities have immediate livelihood needs that women – the most affected producers and consumers – must procure from distant fields. These long-term projects fence off communities from agricultural lands and other natural resources, such as water and firewood, and stringent property laws alienate local populations and undermine user rights protected under collective tenure systems and customary laws (Lourenço Duvane 2010).

Moreover, poverty and lack of critical information renders local communities vulnerable to manipulation and dispossession, as land deals are justified on the basis of the people's immediate needs. We witness

this in the "villagization" program in the South Omo valley of Ethiopia, a federal government project with the single objective of "improving people's livelihood within the framework of the national Growth and Development Plan." Nominal targets for this project are stated as:

> provision of efficient and effective economic and social services, including safe drinking water, optimum health care, increased education, and improving agronomy practice and market access, creating access to infrastructural development of roads, power and telecommunication links, and ensuring people's full engagement in good governance and democracy. (Government of Ethiopia 2012)

Under the Ethiopian project, the Ministry of Agriculture, through the Investment Supporting Directorate, had until 2012 allocated a total of 342,099 hectares of land to local and foreign investment companies. The Directorate took 3.6 million hectares of land in Oromia, Benishangul-Gumuz, Gambella, and the Southern Region and allocated large land grants of 100,000–500,000 hectares of land (Anyuak Media 2012). The fertile river valleys in Gambella and SNNPR (Southern Nations, Nationalities and Peoples Regional State) are prime land investment areas because of ample water supplies and good soil fertility. However, many of these areas face ongoing food security problems. The United Nations World Food Program (Oakland Institute 2011) estimates that approximately 84,000 individuals out of an estimated population of 310,000 received food aid in Gambella in 2010. There are also indications that the Afar region, on the most food insecure regions in Ethiopia, will be another area of increasing commercialization of agriculture, as reportedly 409,000 hectares of land is available (all along the Awash River) for land investment through the federal land bank (Oakland Institute 2011).[5]

The long-run impact of this trend is likely to bear negatively upon the survival and security of whole communities, as amassing these large tracts of land means commandeering water as well. As competition for limited resources intensifies, peasant communities are likely to seek to further diversify investment in tangible resources, time, effort, and technical or social skills. Peters (2004) makes this argument with regard to social relations around land, that diversification and cultivation of networks and patron–client relations done with the aim of improving the relative security of those involved in them is likely to be achieved at substantial costs. These costs include limits on specialization and technical efficiency (by diverting resources to investments in social relations), and a potential reduction in predictability and security when groups are set in political competition with one another for access to resources. It is hard to miss the face of women in

her conclusion that the heaviest price is paid by those excluded from such networks (Peters 2004).

The above narratives demonstrate the difficulties associated with achieving social justice in the current political and economic contexts of land commercialization, despite the existence of formal legal frameworks that ought to safeguard women's individual property rights. Even where collective ownership is envisioned as a safeguard for women's claims, the problems associated with state interests and lack of autonomy persist. Cotula et al. (2009) have recommended that government investment decision making be backed by efforts to secure local land rights to help avoid the arbitrary dispossession of local people's land and to obtain better deals from incoming investors – for instance, through providing land as in-kind contribution to a joint venture in which both investor and community have a stake. While collective land registration may be a valuable policy option, the new land acquisition trend may require revisiting the long-standing debate about land titling in Africa. Local (customary) land rights systems can work well at the local level, but they are irrelevant to investors. As such collective registration of community lands can be a powerful tool for protecting local land rights vis-à-vis incoming investors. However, several major legal issues exist with regards to collectivization of land, some of which might require further legislation depending on the existing legal framework in different countries.

The inalienability of collective land is focused on the preservation of the land within village communities. No village community member – not even the village chief – may sell the lands. However, a village is not the only group that is eligible for collective title. It may be possible in some cases for a company to gain access to land utilization rights through collective title; for-profit companies may be able to qualify for collective land title (Rights Link – Lao Project n.d.). Economic liberalization can potentially overpower community interests in land in favor of big business, with law reforms likely skewed in favor of business. In Tanzania, for example, where land is owned by the state but assigned on the basis of long-term leases (usually lasting ninety-nine years), businesses argued that collective ownership would make it hard to use land as collateral for bank loans or as a source of income. Rwanda's 2005 Organic Land Law precludes transfer of final land rights without the prior consent of all family members including legally married spouses and adult children. Businesses argued that seeking prior consent from family or community members before land could be sold or utilized in a certain way did not facilitate the land market (Mary Kimani 2008).

Another collective land gray area appears in issues of compensations, should the state requisition collective land. While collective title is designed to protect villages and villagers from inequitable land transactions with companies, it may be unclear what sort of protection the collective title provides against state requisition. If the state requisitions collective land,

does the collective organization receive compensation? As was the case in Tanzania, the government may argue that there is no need to compensate for the state's requisitioning of collective land because collective land is actually owned by the state, and the state would have no reason to compensate itself for land it is requisitioning. The law might stipulate the exception to this argument as being that when a cooperative or collective organization does not use land for the zoned use, then the state may take back the land without compensation. This implies that any other compulsory acquisition of collective property by the state would require compensation. It also indicates that there is an underlying assumption that the state must compensate for the requisition of land (Rights Link – Lao Project n.d.).

This is an important consideration within the framework of land leasing and acquisitions taking place in Africa, particularly given that existing gender ideologies and biases are likely to permeate any negotiations between communities and the state. Given the perception of the state as being "both an inefficient administrator as well as a predator on land that in law, and/or in fact, belongs to ordinary land users" (H.W.O. Okoth-Ogendo 2000: 129), can the law still be expected to provide an avenue through which women can be inserted into and gain substantive voice and stake in land deals? This question is especially relevant if property (land) is seen "as a bundle not of rights... but rather of *powers*" (Katherine Verdery 1998: 161; emphasis in original). Claassens and Mnisi similarly argue for an approach to rights that focuses on the relationships and power relations that rights mediate, rather than solely on rights as "boundaries of autonomy" (2009: 491). As such, the negative effects of titling or other tenure reforms may not be due to their legal specifications, but instead an outcome of the way in which they are administered and adjudicated, which in turn reflects the distribution of power (Robert E. Smith 2003). The case studies presented in the preceding discussion suggest the need to look beyond formalization of land rights as a means for guaranteeing women's autonomy. Or rather, the need to move beyond an understanding of rights as having fixed boundaries and instead to pay attention to the processes of negotiation about underlying values that shift the content of rights over time (Claassens and Mnisi 2009). The case studies discussed are a clear demonstration of the limits of formalization as a means for protecting communities, and women within them, in instances where they face large-scale land dispossession.

FORMALIZATION OF LAND RIGHTS AND ITS LIMITS

At the micro level, customary law – which is still more prevalent than statutory laws in many African countries – tends to discriminate against women when it comes to access, ownership, and control of lands, as often women only have usufruct rights (Kwanele Jirira and Charles Halimana 2008). Even if women are guaranteed control over land under statutory

law and the constitution, their land rights may not be guaranteed under customary law and cultural practices. Patriarchal norms currently dominate the interpretation of customary laws and practices so that in the name of "usage and custom" gender concerns may not be considered or may not be based on the notion of gender equality (Ritu Verma 2007: 13). Despite the predominance of male biases, there are nevertheless some opportunities for women to benefit from the application of customary law (Phides Mazhawidza and Jeanette Manjengwa 2011).

Customary law is able to provide relative security to community members at lower cost than state-run structures. Many arrangements exist within customary systems, which provide flexibility and movement of land between different users, allowing varying forms of access (Camilla Toulmin and Julian Quan 2000). However, as already cited above, this notion of the flexibility afforded by customary systems is contested. Peters (2004) has argued that the pervasive competition and conflict over land call into serious question the image of relatively open, negotiable, and adaptive customary systems of landholding and land use and support Kojo S. Amanor's (2001) argument that such conflicts reveal processes of exclusion, deepening social divisions, and class formation.

Yet at the same time, Peters' (2004) contention that land commodification be understood as more than the capitalist negotiations that enable it, is crucial for understanding the place of the law, which also derives from similar negotiations. She insists that rather than a process of class formation, as with all important socioeconomic processes, commodification shapes, reshapes, and transforms preexisting social and cultural ideas, practices, and relations, even as it is shaped by these. Thus, while accepting that an "understanding of processes of (land) commodification allows the focus of analysis to extend beyond that of individual livelihoods to detect the dynamics and trajectories of social change" (Henry Bernstein and Philippe Woodhouse 2001: 319), so too, Peters argues, does an understanding of social and cultural definitions, relations, and practices. Insisting on these does not entail falling into a "nativist" or "primordialist" trap. To engage in a sociocultural analysis of economic relations, including commodity production, is not to make "culture" the sole determinant but to show *how* people engage in markets, state, or development, for example. To gloss a range of distinct social modes of organization and cultural modes of understanding as fully capitalist, irrespective of whether these are in Malawi or Malaysia, Angola or Albania, Botswana or Britain, is to lose precisely the dynamics of social transformation (Peters 2004). These arguments recall this study's earlier concern: with the ability of formal law, in its multiple generalizations, to accurately target the varied forms of inequality and marginalization that arise out of land commercialization.

Basing land reform on customary law also fits in with new global thinking about the need for local people to participate in the management of natural

resources and with renewed interest in decentralization. Toulmin and Quan (2000) argue that in circumstances where land registration is needed, it should proceed with more respect for customary law; it could be simpler, cheaper, and more equitable to register collective rights as opposed to individual rights (Whitehead and Tsikata 2003). However, customary law is only efficiently used as a common resource under conditions of communal tenure, close kinship ties, and more subsistence agriculture.

Some analysts argue that the creation of mechanisms for the recognition of customary systems and the harmonization of customary and formal tenure will allow the customary sector to be regulated and facilitate the expansion of land markets. They insist that the creation of new, local-level institutions that mediate formal titling and customary systems will ensure legal accountability and create pressures for customary systems to conform with international and national economic regulation. The argument is that as land becomes scarcer, customary land tenures will evolve toward individual ownership and more closely defined conceptions of individual property. They support the tendencies within customary systems that ultimately evolve into private property ownership (Kojo S. Amanor 2008).

Amanor (2008) argues, however, that the recognition afforded to customary systems ultimately undermines them and transforms them into the opposite, by facilitating market transactions. He further observes that in many African countries, the actual areas under customary tenure have rapidly declined as individual property rights are recognized. Large numbers of people continue to exist on very small, fragmented holdings. Conversion to individual property rights is not usually the result of peasants registering their land, but of increasing appropriation of customary land for commercial sectors. This results in the conversion of large areas of customary land into freehold and leasehold sectors, estate farms, mineral concessions, and conservation areas. Increasingly, a shrinking area of customary land comes to serve a large population that is forced to eke out a living from diminishing customary holdings (Amanor 2008).

Citing research from Kenya, Celestine Nyamu Musembi (2007) argues that a low incidence of joint registration, coupled with the established practice of registering land in the name of the head of household has meant that formalization weakens women's claims to family property. This insecurity, she argues, needs to be understood within the general context of the systemic narrowing of existing social criteria for recognizing entitlement, finding that the narrow and limited understanding of registrable interests employed in the titling programs inevitably results in exclusion (Musembi 2007). This exclusion has gender-differentiated consequences that translate into particular expressions of insecurity for women. For the vast majority of married women, interests in family land are held on account of the marriage relationship, which for most women is based on customary law. The precariousness of customary

land rights in the eyes of a legal system that pretends to be blind to the reality of plural and overlapping rights to land is obvious. Unmarried daughters living on land registered in their fathers' or brothers' names are in a similarly precarious position. In the absence of legal recognition of customary interests in registered land, the entitlements of women in these situations have no independent existence. They derive from the title-holder's interests, and their security depends primarily on the stability of their relationship with the title-holder (Musembi 2007).

As such, arguments that favor formalization of customary land rights expose motives that are less in the interest of women's tenure security and more inclined toward supporting commercial interests in land. Liz Alden Wily's (2011a) analysis of countries whose land laws support common property rights supports this conclusion. Land laws in Senegal (1964, 1996), Niger (1993, 2000), Côte d'Ivoire (1998), Angola (2004), Benin (2007), Burkina Faso (2009), and Lesotho (2010) acknowledge customary interests as worthy of protection. However, none of these laws endow customary rights with the same legal force as statutory entitlements, and all of them prescribe variously cumbersome procedures for acknowledgment of customary occupancy. For example, Angola's new land law recognizes "customarily useful domains" inclusive of commons, the boundaries of which are to be delimited (Republic of Angola 2004). However, this does not carry the same force as registration of individually granted rights, concessions, or leases. The law also makes it clear that "valuable resources" may be excluded from customarily useful domains. Making registration compulsory by fixed dates in Angola and Côte d'Ivoire (and Namibia) has also failed, leaving vast swathes of unregistered customary land in uncertain territory (Wily 2011a). The situation in Senegal is deceptive in that while land laws of 1964, 1976, and 1996 provide for 60 percent of the land area to be administered locally as community territories (*zones de terroir)*, the reality of ultimate state ownership has become increasingly synonymous with landlordism, with desirable areas now fairly routinely redesignated as state lands and reallocated to private persons or investors. Rangelands and forests have been at the frontline of losses (Gerti Hesseling 2009).

Benin's 2007 legislation is notable because it came about through a lengthy process of village-level consultation and piloting. The law acknowledges customary landholding as interests of real property and fishing and pastoral interests as unalienable access rights (Philippe Lavigne-Delville 2010). Delimitation of village boundaries is followed by identification of every land right within the domain, from individual and family rights to those held collectively and seasonal or other derivative interests. Certificates may be issued on request and are deemed legally acceptable collateral for securing credit. The law falls down, however, in that such entitlements once again do not represent a full title in land. This requires formal

registration under procedures relatively unchanged since colonial times, in the process extinguishing customary incidence from entitlement (Wily 2011a). Nonetheless, research is documenting what some call "informal formalization," a trend toward developing "informal" documents and other means of recording land transfers that depart from the oral methods prevalent among customary systems (Tor A. Benjaminsen and Christian Lund 2003).[6]

These arguments, while pointing to the necessity of moving the discussion around land leasing and acquisitions away from rigid legal frameworks, also raise legitimate concerns about the extent to which unregulated customary systems can preserve use and occupation rights of communities. As Peters (2004) concludes from her analysis of inequality and social conflict over land in Africa, there are advantages in the socially embedded nature of relations around land: the pervasive pattern of most rural land lying under various types of customary, communal, or collective holding – whether of chiefdom, village, clan, or lineage – does mean that many people have some access to land for cultivation, wood, and other uses. The lauded flexibility of customary tenure, in practice often resembling extended family tenure, remains an important asset to small-scale producers across the continent. Yet at the same time, increasing competition and social conflict around land and landed resources across Africa belies the assumption that socially embedded systems of landholding and land use guarantee access, let alone equal access. Nor do the examples of social negotiation around land and of fuzzy or ambiguous claims and counter-claims to the same lands gainsay other examples of fierce conflict and exclusionary processes (Peters 2004).

Customary laws have the potential to narrow down a number of the gaps identified in formal laws, such as limiting women's access to and participation in land deals. In seeking to build this bridge, feminist legal advocates challenge customary laws and family laws thought to disenfranchise women, although increasingly discourses suggest that these challenges have not had a huge impact since they have not been accompanied by political contestation in the broader political sphere. This is a crucial dynamic for, as Amanor (2008) argues, the construction of the customary is inherently political. Thus, he contends, reforms of customary land tenure need to be placed within the context of politics and political economy, rather than in an institutional context of building civil society representation,[7] community participation, decentralized administration, or institutional reform to promote security in land ownership. Ultimately, the criteria for establishing equity in land cannot be based on institutional reform, decentralized management, or the formal recognition of customary relations by the state. The criteria must relate to the actual distribution of land and the need to redistribute land to the landless and the rural poor, among whom women are highly represented (Kanyongolo 2008).

CONCLUSION

There is still no conclusive evidence of the viability of customary law's efficacy in securing women's rights to land. Rather, contemporary land deals take place in the context of a legal, political, and economic terrain that requires constant negotiation and reinterpretation in line with the lived realities of communities and women within them. This study demonstrates that customary law is not yet exhausted as an avenue for redress. It exposes the colonial fallacies upon which the customary was based, the attempts to put it aside, and the assumptions that underlay these attempts. It also examines the problematic nature of formalization in the contexts of land acquisitions, which in essence pits the state against itself. The literature illustrates that local communities historically develop highly differentiated relations to land, a fact that makes it difficult to reduce dispossession brought on by land grabs to a narrow analysis of primitive accumulation. For, as Liz Alden Wily (2011b) notes, the sheer scale of areas pledged to lease – thousands of hectares, in most cases – suggests that smallholdings are not being targeted, although they may be casualties in the process. This fact suggests that much more than having the effect of disenfranchising whole communities, large-scale land appropriations must be placed in the context of the situations and processes, including commodification, structural adjustment, market liberalization, and globalization, which limit or end negotiation and flexibility for certain groups or categories. What is revealed are complex dynamics of gender relations that call for the need to understand the inclusion or exclusion of women from land and landed resources within the broader context of historical and cultural class formation that involves a determined move away from notions of undifferentiated local communities and social networks (Peters 2004). Arriving at a clearer picture of the extent of the losses, or gains, which women are accumulating in the face of intensified land acquisitions is, in short, a process of magnifying the stories of differentiation, displacement, and exclusion. The perils associated with the customary law discourse should not blind us to the democratic and transformative possibilities inherent in the contestations taking place in these arenas (Claassens and Mnisi 2009). Understanding the customary systems that mediate women's relationship with the state, capital, and community is critical for shaping the nature of interventions by feminist activists in promoting gender equality in land tenure.

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NOTES

[1] In South Africa, for instance, recent constitutional court judgments have addressed the tension between customary law and the bill of rights by interpreting customary law to be not the distorted and codified version inherited from colonialism and apartheid and contained in old statutes and judgments, but the constantly changing "living law" that develops as society changes. The judgments state that customary law derives its authority from the constitution and must be interpreted in terms of the Bill of Rights (Community Agency for Social Enquiry 2011).

[2] The false dichotomies between formal/informal, urban/rural, individual/communal, which underlie the rights versus custom dichotomy, have aided women's exclusion from the economy. These binaries are deeply entrenched and resonant at many levels of society and in the political discourse that frames the legislative process. They obscure the crosscutting reality of the lived experience of people in communal areas and their ongoing efforts to reconcile custom and tradition with the broader values and changes taking place in society. Another problem with such binaries is that they reinforce the idea of separate spheres of modern and traditional life and thereby bolster claims to zones of customary authority outside the operating legal regime (Claassens and Mnisi 2009).

[3] As Liz Alden Wily (2011b) notes, neither foreign-driven nor more locally driven land acquisition at scale is new. Millions of hectares of customary domains around the world have already been involuntarily lost to large-scale commercial land pressures, such as through: (1) allocation to settler communities during colonial times; (2) the creation of 1.7 billion hectares of forest and wildlife reserves, as described earlier; (3) the issue of concessions amounting to millions of hectares for oil, mining, and timber extraction; and (4) establishment of large-scale farming schemes involving limited numbers of local farmers – such as seen most typically in recent years in Brazil, in the mechanized

farming schemes of Central Sudan of the 1970s and 1980s, in the groundnut scheme in Tanzania in the 1950s, in the rubber plantation developments by Firestone in Liberia since the 1920s, or indeed, going much further back, in the initial oil palm plantation developments, especially along the western coast of Africa, in the late nineteenth century (Wily 2011b: 27).

[4] The World Bank also argues that African's Guinea Savannah, stretching across most of inland West Africa across to the Horn, through much of Central Africa and down the east coast of Mozambique, constitutes "one of the largest underused agricultural land reserves in the world" (2009: 1).

[5] Recent reports indicate that the Ministry of Agriculture has suspended land allocations for investment purposes in order to "take time for assessment," based on reports that "investors have not been utilizing land allocated for investment appropriately" (Anyuak Media 2012).

[6] Most of those so far described in published sources come from francophone countries, mostly in West Africa. Philippe Lavigne-Delville (2003) cites cases from several countries (Ivory Coast, Burkina Faso, Benin, Rwanda, and the Comoros) where farmers are using signed documents or "contracts" to record land transactions, particularly those considered "unusual and illegitimate" in that they involve the transfer of lineage or communally held land for money.

[7] Kanyongolo's (2008) argument that civil society is not inherently democratic and itself embodies various class and gender interests is instructive here. It is neither an autonomous entity nor capable of being a neutral force in various struggles over land. The more powerful and influential actors within civil society are likely to encourage the state to implement policies that advance their parochial interests at the expense of those of the poor.

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