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“CATCH-22”: THE ROLE OF DEVELOPMENT INSTITUTIONS IN PROMOTING GENDER EQUALITY IN LAND LAW – LESSONS LEARNED IN POST-CONFLICT PLURALIST AFRICA

*Amrita Kapur**

This article explores the contours of development policies as they have been applied to pluralistic legal systems, with a specific focus on their effects on women in post-conflict African countries. Drawing on research that firmly establishes the importance of women’s social, economic and political participation in post-conflict development, it identifies the flaws in gender-neutral land titling initiatives introduced and encouraged by development institutions. It then describes the gender-sensitive laws enacted as a response to continuing gender discriminatory practices in Rwanda, Mozambique and Uganda. While taking into account the existence of customary law, these laws explicitly affirm women’s rights with respect to land, property and inheritance.

However, the central government’s reliance on local informal governance structures to apply and enforce these laws creates a “Catch-22” situation, whereby the local elites with the power to enforce the law are precisely the people who continue to apply gender-discriminatory customary norms, particularly with respect to land rights. The experiences of the three progressive societies mentioned above are analyzed to provide insight

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into how statutory and customary systems can develop from divergent conflicting legal orders into a more synthesized union of laws which protects women's land rights and is universally enforced.

INTRODUCTION

A forty-year collage of development policies has reduced poverty for eighty percent of the world's population.¹ However, these policies have also left the remaining bottom billion – seventy percent of whom live in Africa – in development traps characterized by lower life expectancy, higher infant mortality and long-term malnutrition compared to other developing countries.² The current approach to development, epitomized by the United Nations' Millennium Development Goals, is universal in application, generic in focus, and identifies outcomes, but not specific strategies, to overcome the development obstacles that continue to plague the bottom billion.³

This one-size-fits-all approach is exemplified by the wholesale exportation of formal title registration systems into pluralistic African legal systems. The World Bank's support and implementation of titling registration – inspired by de Soto's theory⁴ – failed to stimulate the expected substantial economic development in numerous countries within which it was put into practice. In post-conflict pluralistic African countries, the lack of success is particularly noticeable and regrettable: first, because formal titling was heralded as a comprehensive remedy for stagnant economies,⁵ and second, because of the immense potential for improvement in a predominantly economically underdeveloped region.

There is a wealth of institutional and development wisdom that has yet to be incorporated into development agencies' policies and projects to

¹ PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 7-8 (2007).

² *See id.*

³ *Id.* at 190.

⁴ Hernando de Soto is a Peruvian economist known for his work on the informal economy and the importance of property rights. Broadly, his theory posits that formalizing informal rights to land would allow the poor to use their land as collateral, which would form the basis of entrepreneurship, stimulating the economy; this is critiqued below in Parts III.A and III.B.

⁵ While development is possible without growth, the discussion below is predicated on the absolute lack (not the incorrect type) of growth in the "bottom billion" countries, and an understanding that economic growth is "the core challenge of development" in countries experiencing negative growth rates in both absolute and relative terms. COLLIER, *supra* note 1, at 11.

stimulate economic progress. Specifically, abundant evidence shows that women's economic participation and land rights are crucial to development, and that both are particularly important in post-conflict African societies because of the economy's reliance on land and the more economically-active roles assumed by women.⁶ It is therefore somewhat surprising that the funding and project focus of development institutions, such as the World Bank, does not reflect this understanding.⁷

This article suggests that development policies targeting property rights will more successfully promote economic development by empowering women as property rights-holders. However, this can only be achieved if the gender bias inherent in customary power structures and practices is considered and addressed. For a number of reasons, institutions influential in directing development resources in Africa should see post-conflict societies as particularly critical and receptive sites for development aid and policies. Further, development policies will have optimal impact if they prioritize women's economic participation by promoting and incentivizing the enforcement of stable property rights for women in both customary and formal law.

The heart of the dilemma, the reason de Soto's titling program has failed particularly in pluralist countries, and the challenge in implementing this proposal, lies in the "Catch-22" confronting any formal approach. Any property system must be administered locally because post-conflict central governments inevitably lack the institutional resources and funds to effectively administer a comprehensive property law scheme. Local structures⁸ are invariably dominated by male local elites, who continue to enforce gender-discriminatory customary norms rather than gender-neutral formal property law. The issues to address then are, first, how to ensure that formal law offers sufficiently secure land rights to women, and second, how to persuade or coerce local governance structures to apply formal law.

In answering these questions, this article adopts the following approach. Part I very broadly traces the evolving theories of economic development as shaped by the World Bank, particularly with respect to land rights and the participation of women. Part II examines these issues in the customary law context, as well as the contemporary dynamics of customary practices. Part III explores the theory behind the formal titling regime and

⁶ See *infra* Part III.D.

⁷ *Id.*

⁸ I use the term "local" to indicate the level of governance, and the term "customary law" to indicate traditional cultural norms. Thus, local structures can be used to apply and administer formal law locally, either through existing traditional structures, or through newly created formal structures at the local level.

its consequences in pluralistic contexts. Part IV focuses on Rwanda, Mozambique and Uganda as three post-conflict pluralist African case studies where negotiating the “Catch-22” situation has partially succeeded in protecting women’s rights to land. Part V extrapolates from the theory and case studies to suggest further avenues to overcome the “Catch-22.” Based on an understanding of intersecting systems of rights, the article analyzes how formal law may be better operationalized to enhance women’s land rights, rather than focusing on reform possibilities within local and customary structures.

PART I: CHANGING DEVELOPMENT IDEOLOGY AND IMPLEMENTATION

Part I traces the effects of development policies and discusses the contemporary understanding of essential development criteria, particularly in relation to land rights and the participation of women. The significance of imposing property titling as a development strategy in Africa derives from a number of factors: first, recent development strategies – particularly those of the World Bank – have targeted property titling reform as a prerequisite for development; second, “land is at the heart of social, political and economic life in most African economies[,]”⁹ so the appropriateness of property rights is especially critical to development in Africa; and third, participation of women in the local economy, now recognized as essential in promoting development, hinges on the enforcement of their land rights.¹⁰

A. *A Brief Survey of Development Approaches*

Over and above the legacy of colonialism, Paul Collier recently identified four “development traps” responsible for the total lack of development in the “bottom billion” states: conflict, a lack of natural resources, being landlocked with “bad neighbors,” and bad governance.¹¹ Unquestionably, many of the poorest African nations have also endured the effects of misconceived and badly implemented development strategies promulgated by Western nations and financial institutions, particularly the World Bank.¹² An appreciation of the current effects of these development theories and the “Catch-22” paradigm they have created in the “bottom billion” African

⁹ Camilla Toulmin, *Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions*, 26 LAND USE POL’Y 10 (2008).

¹⁰ BINA AGARWAL, A FIELD OF ONE’S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA xv (1994).

¹¹ COLLIER, *supra* note 1, at 5.

¹² JEFFERY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 189-90 (2005).

countries requires an understanding of the evolution of the development field and its institutions.

Since its inception, the World Bank has played a formative role in articulating, implementing and modifying development ideology, which in effect determines whether countries are worthy recipients of Western aid.¹³ The World Bank's agenda setting has particularly shaped African states' post-colonial "economic recovery" because of Africa's dependence on aid. Shifts in several African government policies are reflections of World Bank policy developments, from the 1950s advocacy of a pro-active state, to a 1970s neo-classical market-oriented paradigm, to the late 1980s focus on liberal governments and improved economic policies in a capitalist market.¹⁴ The result in the "bottom billion" countries¹⁵ is profoundly disheartening: a per capita income decline of 0.4 percent, life expectancy of fifty years, infant mortality of fourteen percent, and a thirty-six percent incidence of malnourished children.¹⁶ In Africa, the number of poor people nearly doubled over the period of globalization – from 200 million in 1981 to 380 million in 2005 – with half the population of sub-Saharan Africa living below the \$1.25 a day poverty line. If the current trend continues, at least a billion people will still live below the poverty line in 2015, with a third of these living in Africa.¹⁷

Fortunately, the significance of these statistics has not been ignored: at its 2004 Annual Meeting, the World Bank announced reducing poverty as its focus,¹⁸ which is now reflected in its stated mission.¹⁹ The institution's approach to reducing poverty was articulated at the 2005 An-

¹³ RICHARD SANDBROOK, *THE POLITICS OF AFRICA'S ECONOMIC RECOVERY* 2 (Robin Cohen et al. eds., 1993).

¹⁴ *Id.*

¹⁵ African countries in this group include: Somalia, Sierra Leone, Ghana, Nigeria, Tanzania, Senegal, Burkina Faso, Zimbabwe, Liberia, Cote D'Ivoire, Togo, The Gambia, Niger, Rwanda, Uganda, Sudan, Kenya, Burundi, Madagascar, Lesotho, Mozambique, Ethiopia, Eritrea, Chad, Central African Republic, Congo, Democratic Republic of Congo, Angola, Equatorial Guinea, Malawi, and Cameroon. See COLLIER, *supra* note 1, at 25, 36, 30, 165, 69, 33, 130, 126, 59, 55, 40, 151, 84, 132, 23, 138, 179, 53, 21, 26, 10, 64, 79, respectively.

¹⁶ See *id.* at 7-8, 9.

¹⁷ SHAOHUA CHEN & MARTIN RAVALLION, *THE DEVELOPING WORLD IS POORER THAN WE THOUGHT, BUT NO LESS SUCCESSFUL IN THE FIGHT AGAINST POVERTY*, World Bank Development Research Group, 25 (2008).

¹⁸ ELIZABETH BECKER, *World Bank Meeting to Focus on Poverty*, N.Y. TIMES, Apr. 24, 2004, available at <http://www.nytimes.com/2004/04/24/business/world-bank-meeting-to-focus-on-poverty.html>.

nual Meeting by Paul Wolfowitz, who stated, “we cannot make headway in the fight against poverty without supporting equality before the law and the legal empowerment of the poor.”²⁰ In 2006, the High Commission for Legal Empowerment of the Poor was launched, and a World Bank Action Agenda was formulated.²¹ The scope of “legal empowerment of the poor” is three-fold: (1) setting a coherent “legal order” through the reform of the judiciary; (2) tackling informality through simplification of business regulations; and (3) formalizing property rights mainly through legal land titling programs.²² It is this last approach, emphatically advanced by Hernando de Soto and unreservedly implemented by the World Bank, which is critiqued here in the context of post-conflict African pluralistic legal systems.

B. *Land Rights and Development*

“The institutional arrangements under which a person gains access to land largely determines, among other things, what crops he can grow, how long he can till a particular piece of land, his rights over the fruits of his labor and his ability to undertake long term improvements on the land.”²³ Land rights, customary or formal, “act both as a form of economic access to key markets and as a form of social access to nonmarket institutions, such as the household and community-level governance structures.”²⁴ In economic terms, an effective system of property rights is a public good as it encourages investment by property-holders and acts as a central element of capital and credit markets. State intervention is typically necessary to establish national systems of land administration to enforce property rights and bear the costs of providing a standardized property system.²⁵ To that extent, establishing and enforcing property rights is linked to social order, and, importantly, also to the perception of social order. Without a

¹⁹ WORLD BANK, BANK INFORMATION CENTRE, Overview, <http://www.bicusa.org/en.Institutioninstitution.5.aspx> (last visited Mar. 2, 2011).

²⁰ ANA PALACIO, LEGAL EMPOWERMENT OF THE POOR: AN ACTION AGENDA FOR THE WORLD BANK 3 (2006).

²¹ *Id.* at 3.

²² *Id.* at 6.

²³ GEORGE BENNEH, *Land tenure and agroforestry land use systems in Ghana*, in PROCEEDINGS OF AN INTERNATIONAL WORKSHOP ON TENURE ISSUES IN AGROFORESTRY 163 (1987).

²⁴ Renee Giovarelli *et al.*, *Gender Issues and Best Practices in Land Administration Projects* 3 (2009), available at http://siteresources.worldbank.org/INTARD/Resources/Gender_land_fulltxt.pdf.

²⁵ See KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION 57, 117 (2003).

legitimate and capable government, the allocation and enforcement of rights may cause conflict when different claimants resort to “competing legal, normative and coalitional enforcement mechanisms.”²⁶ Moreover, growing evidence suggests that a more equal distribution of assets, including land, leads to faster growth.²⁷

The World Bank’s approach to land rights can be roughly summarized as follows: action must be taken to create land tenure security because increasing land tenure insecurity in most parts of the world forms an obstacle to investment and growth.²⁸ In the 1980s, the Bank addressed this issue through land titling and registration as part of its structural adjustment agenda, predicting greater security of tenure through the abolition of customary tenure.²⁹ In the 1990s, the Bank shifted its approach, conceding that in a few instances customary tenure did not inevitably adversely affect agricultural production, but nevertheless maintained its previous position that formalization and titling was ultimately the superior scenario.³⁰ The definition of land rights is now regarded as centrally important to economic growth, the effective use of land as a resource, efforts at poverty reduction, and good governance.³¹ As the analysis below illustrates, the relationship between land rights and development is more complex than represented by the Bank’s current ideology.

C. *The Particular Importance of Land Rights in Africa*

A complete understanding of the relationship between property rights and economic development is especially critical in the context of Africa. First, in most African countries, agriculture supports the survival and

²⁶ Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1010 (2006).

²⁷ See Klaus Deininger & Lyn Squire, *Economic Growth and Income Inequality: Re-examining the Links*, FINANCE & DEV. 38, 40-41 (1997) (noting a possible explanation for this phenomenon is that the effects of inequality in asset ownership are transmitted through financial markets).

²⁸ Volker Stamm, *The World Bank on Land Policies: A West African Look at the World Bank Policy Research Report*, AFRICA 2 (2004), http://findarticles.com/p/articles/mi_hb3103/is_4_74/ai_n29150959/pg_2.

²⁹ See Taylor Brown, *Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia*, in COMPETING JURISDICTIONS: SETTLING LAND CLAIMS IN AFRICA 79, 80 (Sandra Evers et al. ed., 2005).

³⁰ Ambreena Manji, *Capital, Labour and Land Relations in Africa: A Gender Analysis of the World Bank’s Policy Research Report on Land Institutions and Land Policy*, 24(1) THIRD WORLD Q. 97, 98 (2003).

³¹ See DEININGER, *supra* note 25, at 11.

well being of up to seventy percent of the population,³² employs some sixty percent of the labor, and accounts for twenty percent of merchandise exports.³³ Agriculture represents thirty-three percent of gross domestic product (GDP) in sub-Saharan countries, and up to seventy-six percent of GDP in some states.³⁴ For the economies of the majority of African nations, the family farm is essential. When conditions are right, the family farm is still regarded as being highly productive and quick to respond to new markets and other opportunities.³⁵ Africa's private sector is largely composed of family farms, and small to medium sized enterprises; in sub-Saharan Africa over ninety-six percent of farmers farm small farms.³⁶ Thus, the effects of any property rights regime are far-reaching and foundational for economic prosperity, or lack thereof.

Second, the importance of land is heightened by the explosive population growth and market development across the continent. Africa's urban population increased nine-fold between 1950 and 2000, while its rural population increased by 265 percent.³⁷ It is the fastest urbanizing continent in the world.³⁸ Moreover, this growth has manifested in the form of informal settlements where land ownership is unclear.³⁹ For example, an estimated seventy-two percent of the African urban population lives in slums without any form of secure tenure.⁴⁰ Consequently, competition over land has in-

³² Rose Gaway, *Investing in Women Farmers to Eliminate Food Insecurity in Southern Africa: Policy-related Research from Mozambique*, 16(1) GENDER & DEV. 147, 147 (2008).

³³ *FAO and the New Partnership for Africa's Development (NEPAD): A Partnership for Africa's Agriculture*, FAO.ORG, <http://www.fao.org/docrep/005/AC735E/AC735E00.HTM> (last visited Feb. 21, 2011).

³⁴ Jacques Diouf, *The Challenge of Agricultural Development in Africa*, Address at the Sir John Crawford Memorial Lecture (Nov. 2, 1989), in *Consultative Group on Int'l Agric. Research Publ'ns*, Nov. 1989, at 3.

³⁵ Toulmin, *supra* note 9, at 11.

³⁶ Dunstan Spencer, *Will They Survive? Prospects for Small Farmers in Sub-Saharan Africa*, Conference Report, Sustainable Food Security for All By 2020, (Sept. 4-6, 2001), available at http://www.ifpri.org/2020conference/PDF/summary_spencer.pdf.

³⁷ Camilla Toulmin, *Securing land and property rights in Africa: The role of local institutions*, in *HOW TO MAKE POVERTY HISTORY* (Tom Bigg & David Satterthwaite eds., 2005).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Anna Kajumulo Tibaijuka, Exec. Dir., UN-HABITAT, Address at the UN-HABITAT Conference on Land in Africa: Market Asset or Secure Livelihood?

creased, fostering conflict between classes and neighbors, and within tightly-knit communities and families.⁴¹ Clarifying and enforcing these rights is therefore critical not only because urban tenure issues are extremely complex and contestable, but also because of the broader implications for social harmony.⁴²

Finally, land rights assume particular importance in countries recovering from conflict, where establishing peaceful relationships between competing groups depends on objective, transparent, and fair distribution of property.⁴³ Paul Collier identifies conflict as a recurring threat for countries with largely stagnant economies: “a typical low-income country faces a risk of civil war of about 14 percent in any five-year period,” with each extra percentage point of growth reducing the risk of civil war by a corresponding percentage point.⁴⁴ A quarter of all African countries are currently enduring the effects of armed conflict, one-fifth of Africans live in countries disrupted by conflict, and the number of African conflict casualties exceeds that of all other regions combined.⁴⁵ Thus, the stakes are highest for post-conflict Africa, where land law that successfully promotes economic growth has the greatest potential to avoid further conflict.

D. Women’s Participation as Critical to Economic Development

“[W]ithout the advancement of women, development itself will be difficult to achieve.”⁴⁶ This symbiotic relationship derives from the gendered discrepancy in poverty rates, the benefits flowing from increased economic participation by women, and, in the seventy-three percent of countries in the “bottom billion” suffering the effects of conflict,⁴⁷ the value of women’s leadership in post-conflict rebuilding.

In the first instance, any strategy that effectively combats poverty in the developing world must focus on women simply because women comprise the majority of those in poverty, suffering not just from an income of

(Jan. 14, 2005), available at <http://www.unhabitat.org/content.asp?cid=1220&catid=14&typeid=8&subMenuId=0#>.

⁴¹ SARA BERRY, NO CONDITION IS PERMANENT: THE SOCIAL DYNAMICS OF AGRARIAN CHANGE IN SUB-SAHARAN AFRICA 116 (1993).

⁴² Tibaijuka, *supra* note 40.

⁴³ Toulmin, *supra* note 9, at 12.

⁴⁴ COLLIER, *supra* note 1, at 20.

⁴⁵ World Bank, *Conflict and Development*, <http://go.worldbank.org/8RCAT8XK00> (last visited Feb. 26, 2011).

⁴⁶ E.S.C. Res. 1990/15, Annex ¶ 8, U.N.Doc. E/RES/1990/90 (May 24, 1990).

⁴⁷ COLLIER, *supra* note 1, at 17.

less than \$1.25⁴⁸ a day, but also inadequate health, nutrition, education and lifestyle.⁴⁹ This “feminization of poverty” is characterized by higher numbers of women in more severe poverty than men, and rising rates of female-headed households.⁵⁰ Causes for this phenomenon have been variously ascribed to limits placed on female labor force participation including gender differences in access to formal employment, lack of access to credit, and wage discrepancies.⁵¹ Several of the identified factors relate back to lack of access to land.⁵²

Even with significantly deficient data,⁵³ it is still clear that the gender discrepancy of the extremely poor has deepened across decades. A study by the International Fund for Agricultural Development across forty-one developing countries accounting for eighty-four percent of the rural developing population found that over approximately twenty years, the gender discrepancy in the increase of the number of people below the poverty line was seventeen percent: there was a forty-seven percent increase in poverty for women compared to thirty percent for men.⁵⁴ In 2004, women still comprised sixty percent of those below the poverty line.⁵⁵ Compounding this

⁴⁸ The World Bank altered the benchmark figure from \$1.00 to \$1.25 to more accurately reflect the cost of living. See Martin Ravallion *et al.*, *Dollar a Day Revisited*, (The World Bank Dev. Research Grp., Working Paper No. 4620, 2008).

⁴⁹ See generally Dir. of the Int’l Research and Training Inst. for the Advancement of Women, Implementation of the programme of work for the period October 2004-May 2005: *Progress report on the International Research and Training Institute for the Advancement of Women*, U.N. Doc. INSTRAW/EB/2005/R.2/Rev.1 (Jun. 2, 2005).

⁵⁰ JAIN DEVAKI, *Development as if Women Mattered, 1986-1995*, in WOMEN, DEVELOPMENT AND THE UN: A SIXTY-YEAR QUEST FOR EQUALITY AND JUSTICE 102, 107 (2005).

⁵¹ *Id.* at 111.

⁵² Carmen Diana Deere & Cheryl R. Ross, *Gender and the Distribution of Wealth in Developing Countries*, (United Nations Univ. World Inst. for Dev. Econ. Research, Research Paper No. 2006/115, 2006), available at http://www.wider.unu.edu/publications/en_GB/index-revised-2010/.

⁵³ See DEININGER, *supra* note 25, at 38 (acknowledging that poverty measured by household systematically ignores individual women and unpaid domestic work, and that poverty statistics are not disaggregated according to sex).

⁵⁴ Mayra Buvinic, *Women in Poverty: A New Global Underclass*, 108 FOR. POL’Y 38, 43 (1997).

⁵⁵ Press Release, Int’l Labour Org., More Women Are Entering the Global Labour Force Than Ever Before, But Job Equality, Poverty Reduction Remain Elusive (Mar. 5, 2004), available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/press-releases/WCMS_005243/lang—en/index.htm.

disproportionate poverty is the disempowerment experienced by the combination of precarious and underpaid work, caring for children, and other unpaid household responsibilities. Women's lack of access to land, credit, and better employment opportunities handicaps their ability to fend off poverty for themselves and their families, or to rise out of it.⁵⁶

Secondly, the logical corollary to the above is that the economic, political and social participation of and leadership by women is essential to development. Indeed, development organizations credit the World Bank's realization of this truth in the World Development Report 2008.⁵⁷ Oxfam notes the critical message emerging from the report is that "gendered inequalities in access to, and participation in, markets, represent a significant constraint on increasing agricultural productivity and growth; and [] improving the terms on which women engage in markets could have significant effects on economic growth and poverty reduction."⁵⁸ As Muhammad Yunus found, this could be attributed to the fact that:

compared to men who spent money more freely, women benefited their families much more. Women wanted to save and invest and create assets, unlike men who wanted to enjoy right away. Women are more self-sacrificing, they want to see their children better fed, better dressed and, as a result, the conditions of the entire community improved.⁵⁹

Further, access to land facilitates women's bargaining power within their household, as well as their representation and participation in decision making processes at the community level.⁶⁰ Agarwal argues that women's ownership of land leads to improvements in women's welfare, productivity,

⁵⁶ United Nations Development Program, *Overview: Human Development to Eradicate Poverty*, HUMAN DEVELOPMENT REPORT 1997, 2, 6, available at http://hdr.undp.org/en/media/hdr_1997_en_overview.pdf.

⁵⁷ Rebecca Holmes & Rachael Slater, *Measuring Progress on Gender and Agriculture in the 1982 and 2008 World Development Reports*, 16 GENDER & DEV. 27, 37 (2008).

⁵⁸ *Id.*

⁵⁹ Ishaan Tharoor, *Paving the Way out of Poverty*, Interview with Muhammed Yunus, TIME MAGAZINE, Oct. 13 2006, available at <http://www.time.com/time/world/article/0,8599,1546100,00.html>.

⁶⁰ *A Gender Perspective on Land Rights: Equal Footing*, U.N. Food and Agric. Org. 2, <ftp://ftp.fao.org/docrep/fao/007/y3495e/y3495e00.pdf> (last visited Apr. 4, 2011); see also Deere & Ross, *supra* note 52, at 3.

equality, and empowerment.⁶¹ Similarly, a comparative analysis of Honduras and Nicaragua suggests a positive correlation between women's property rights and their overall role in the household economy: greater control over agricultural income, higher shares of business and labor market earnings, and more frequent receipt of credit. In Honduras, women with land rights in male-headed households produced higher incomes through their own "microenterprises" than women without land rights. In Nicaragua, the share of crop and livestock income was higher for women with land rights in male-headed households compared to wives with no land rights.⁶² Given the above conclusions, it is self-evident that the enjoyment of secure property rights by women is essential for development and thus a necessary focus for any well-intentioned government or development agency.

E. The Heightened Importance of Women in Post-Conflict African Contexts

In Africa, the contribution of women's labor to the economy is already obvious: "[i]n sub-Saharan Africa and the Caribbean, women produce up to 80 percent of basic foodstuffs."⁶³ Moreover, women's rights are particularly important in post-conflict African societies in which women become heads of households as widows, single mothers, or orphans. Particularly for widows, control of land may be one of the few vehicles through which elderly women can guarantee their economic security.⁶⁴ If economic growth depends on broad-based participation and if women comprise a majority of post-conflict societies, it follows that articulating well-defined property rights that enhance women's capacity to contribute to the national economy is essential for economic development. Indeed, U.N. Security Council Resolution 1325 from 2000 encourages "gender mainstreaming" so that gender perspectives are addressed in the post-conflict context.⁶⁵ The "gender dividend" that allows women to occupy roles traditionally reserved for men and to acquire new sets of skills and social status as a result

⁶¹ See generally Bina Agarwal, *"Bargaining" and Gender Relations: Within and Beyond the Household*, 3 FEMINIST ECON. (1997) (arguing that when women do not own land they are doubly at risk for poor outcomes, since they have no source of income and no safety net).

⁶² See generally Elizabeth Katz & Juan Chamorro, *Gender, Land Rights and the Household Economy in Rural Nicaragua and Honduras*, Paper presented at the Annual Conference of the Latin American and Caribbean Economics Association, Puebla, Mexico, October 9-11 (2002).

⁶³ FAO Land Tenure Studies, *Gender and Access to Land* No. 4, 11 (2002).

⁶⁴ Giovarelli *et al.*, *supra* note 24, at 3.

⁶⁵ S.C. Res. 1325, ¶ 17, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

is one avenue which offers enormous potential for promoting women's rights.⁶⁶

Decades of incoherent and at times contradictory development policies have left much of Africa economically stagnant, wracked by conflict, and without appropriate strategies for growth. However, recent research helpfully demonstrates that land rights and women's participation in the economy are both essential ingredients for economic prosperity. In the post-conflict African context, the importance of both elements is heightened. Land rights are pivotal because of the largely agricultural African economies, increasing competition over land, and the risk of relapse into conflict that is created by stagnant economies. The undisputed and unexplored potential for women to contribute to the economy is greatest post-conflict when the "gender dividend" allows traditional barriers to employment, leadership, asset ownership and civic participation to be dismantled.

A logical starting premise from which to address the particularly fragile "bottom billion" in post-conflict Africa is that the security of women's land rights will be determinative of economic growth. For this reason, the analysis and following prescriptions focus on the importance of establishing and enforcing women's property rights, particularly in post-conflict pluralistic societies where gender inequality challenges are the most formidable.

PART II: ENCOUNTERING AFRICAN CUSTOMARY LAW

A. *African Legal Plurality*

In the context of African dependence on agriculture, increasing demand for land and post-conflict development, the effective legal enforcement of rights is paramount. This enforcement is especially important because rights to land in Africa stem from several different sources: settlement, long occupation, government allocation, inheritance, gift, and market transactions.⁶⁷ Similarly, property rights can be registered in various ways and at different levels, dependent on different systems of authority for their validation. "Community councils, patrilineal hierarchy, local government, traditional leadership, irrigation authorities, city councils and land agencies" comprise a multiplicity of structures that may give rise to inconsistencies and ambiguity of title.⁶⁸ Consequently, security of property rights

⁶⁶ Naomi R. Chan, *Women in Post-Conflict Reconstruction: Dilemmas and Directions*, 12 WM. & MARY J. WOMEN & L. 335, 337-38 (2006).

⁶⁷ Susana Lastarria-Cornhiel, *Impact of Privatization on Gender and Property Rights in Africa*, 25 WORLD DEV. 1317, 1322 (1997).

⁶⁸ Toulmin, *supra* note 9, at 13.

depends on recognition of validity both by the state and the local community.

Non-state governance mechanisms, commonly in the form of close-knit kinship networks applying customary traditions, predate the creation of many African states. These customary traditions have evolved independently from, and often in contradiction to, state institutions.⁶⁹ Compounding this plurality of authority is the fact that most “[African] central governments have neither the capacity nor the local knowledge to implement a just, large-scale national land registration system,”⁷⁰ resulting in only two to ten percent of land in Africa being covered by formal tenure.⁷¹ Not only does the gap between legality and legitimacy need to be navigated to effectively enforce land rights but the variable ways in which customary laws operate must be completely understood and incorporated for any comprehensive system to be properly applied at the local community level. This application in turn requires an analysis of other societal institutions that exert the most influence on customary tenure systems, including family, marriage, and inheritance structures.

B. Customary Law Structures

The role of customary laws varies across countries and is shaped by cultural interactions, population pressures, socio-economic change, political processes, and manipulation by colonial and post-independence governments.⁷² One universal underlying distinction is between control of land based on some type of recognized possession – customary or formal, temporary or permanent – and access to land, which entails some decision-making power over the production process, products and use of land, but not ownership or possession.⁷³ Another general difference in land distribution trends is that resources – forests, water, and grazing land – are allocated to the community, and agricultural land is allocated to individual households.⁷⁴ Because there is generally no further unclaimed land around inhabited areas, agricultural land is now acquired through inter-household

⁶⁹ Fitzpatrick, *supra* note 26, at 1011.

⁷⁰ Toulmin, *supra* note 9, at 10.

⁷¹ DEININGER, *supra* note 25, at xxi.

⁷² Toulmin, *supra* note 9, at 14.

⁷³ Lastarria-Cornhiel, *supra* note 67, at 1318.

⁷⁴ Camilla Toulmin & Julian Quan, *Evolving Land Rights, Tenure and Policy in Sub-Saharan Africa*, in *EVOLVING LAND RIGHTS, POLICY AND TENURE* 21-22 (2000).

(sale or borrowing) or inter-generational (inheritance or gift) transfers. Inheritance is the most common type of transfer.⁷⁵

Susana Lastarria-Cornhiel notes that control of land is determined largely by gender and class dynamics within the community. Specifically, inheritance transfers generally preclude allocation and transfer of land to women, whether they occur within a matrilineal or patrilineal system. Transfers are to sons in patrilineal communities, and to nephews in matrilineal communities. Women are given access to land through a male relative such as her husband or father in patrilineal societies, or sometimes her husband in matrilineal communities. Women have no inheritance rights in either system, but a daughter who stays in her birth matrilineal community can receive a small piece of family land as a gift from her father, to bequeath to whomever she wishes. Additionally, women in matrilineal societies retain cultivation rights on their birth family's land after marriage, provided the women remain in their community. If a woman marries outside the community, she is able to reclaim her cultivation rights upon return to her birth community. These rights are not granted in patrilineal societies.⁷⁶

A husband is obliged to provide arable land to his wife to farm, which is generally used to grow food crops for the family, whereas the husband's land grows cash crops. Importantly, upon divorce or separation a woman loses cultivation rights to her husband's land, and can only reclaim cultivation rights if she returns to a matrilineal birth community.⁷⁷ Both tenure systems are structured to enable communities to take care of themselves. While women possess only secondary rights, in circumstances of sufficient land supply they nonetheless retain the means and access to land to maintain their family.

C. Current Operation of Customary Law

While formal laws are prone to being ignored or conspicuously unenforced in African communities relying on a parallel customary systems, customary laws are particularly susceptible to contested interpretations in situations of increased land scarcity leading to conflict, discrepancies with formal systems, and weak state enforcement capacity.⁷⁸ As noted above, seventy-three percent of people in the societies of the "bottom billion" have

⁷⁵ Lastarria-Cornhiel, *supra* note 67, at 1319, 1322.

⁷⁶ *Id.* at 1324.

⁷⁷ *Id.* at 1321.

⁷⁸ DEININGER, *supra* note 25, at 35.

recently been through a civil war or are still in one.⁷⁹ Since 1980, twenty-eight sub-Saharan African countries have experienced war.⁸⁰ These countries have faced overpopulation, environmental degradation, and increased migration of refugees, all of which significantly contribute to ethnic and territorial resource conflicts.⁸¹ The commercialization of agriculture and land, restructuring programs, and urbanization have further weakened customary systems, increased individualization of rights, and released the family and community from traditional obligations to certain members, such as women.⁸²

In facing these existential threats to traditional structures, the typical response of customary leaders has been to tighten customary governance mechanisms or enhance exclusionary rights through a process of collective consensus that typically excludes women.⁸³ Indeed, mounting pressures to protect the clan system attributable to increased land scarcity have caused local leaders to further constrain women's access to land through renegotiation of both formal and informal traditional relationships.⁸⁴ Many customary systems have come to entrench discrimination and exclusion along status, age or gender lines. Worse, some have manipulated traditional rules to consolidate legal entitlements and the subsequent economic advantages in the hands of a few customary chiefs.⁸⁵

"If the situation of women regarding land and property rights, whether under customary or statutory law, is precarious in times of peace, it is even more so in situations of conflict."⁸⁶ In many African countries, where communal rights to land conflict with statutory laws that require title deeds to establish rights over land, women's rights to land or other property become even more uncertain after conflict⁸⁷ or in a rapidly changing envi-

⁷⁹ COLLIER, *supra* note 1, at 17.

⁸⁰ Robin Luckman *et al.*, *Poverty v. Conflict: Understanding Africa's Wars*, ELDIS, <http://www.eldis.org/id21ext/s10brl1g2.html> (last visited Apr. 2, 2011).

⁸¹ Fitzpatrick, *supra* note 26, at 1031.

⁸² See Thandabantu Nhlapo, *Law Versus Culture: Ownership of Freehold Land in Swaziland*, in *WOMEN AND LAW IN SOUTHERN AFRICA* 35 (Alice Armstrong ed., 1987).

⁸³ Fitzpatrick, *supra* note 26, at 1029.

⁸⁴ Aili M. Tripp, *Women's Movements, Customary Law, and Land Rights in Uganda*, AFR. STUD. Q. 2 (2004), <http://www.africa.ufl.edu/asq/v7/v7i4a1.pdf>.

⁸⁵ Toulmin, *supra* note 9, at 14.

⁸⁶ Rasna Warah, *A Conference in Kigali – On Women's Land Property Right During Conflict and Reconstruction*, UN CHRONICLE 1998, available at http://findarticles.com/p/articles/mi_m1309/is_3_35/ai_54259318/pg_1.

⁸⁷ *Id.*

ronment. For example, Tanzanian widows who had previously been allowed to stay on their husbands' land are now being dispossessed of that land as it increases in value.⁸⁸ In Kenya, loss of property after a husband's death is reportedly frequent, and in Uganda, widows often experience harassment and property grabbing attempts by their husband's relatives.⁸⁹ Current rates of land ownership by women reflect these disturbing trends: for example, only five percent of Kenyan women own land in their own names⁹⁰; in Cameroon the figure is less than ten percent⁹¹; in Ghana women hold ten percent⁹²; in Lesotho and Swaziland, women are still considered legal minors.⁹³

Contemporary deprivation of women's land rights results from conflict-driven and socially-transformative challenges facing traditional communities, and from the current land scarcity. The inability of the state to effectively enforce more egalitarian systems of rights allows threatened local elites to continue to manipulate customary law to the detriment of women. This dysfunctional dualist system is the context in which development institutions attempted to simply import a Western-based formal property titling system, independent from and insensitive to local socio-cultural practices, with a predictable lack of success. The "Catch-22" situation that emerges is one whereby local elites are sufficiently empowered to administer the formal titling regime that protects women's land rights, but are reluctant to do so because they perceive it as a system that will erode their land-

⁸⁸ Kaori Izumi, *Liberalisation, Gender and the Land Question in Sub-Saharan Africa*, 7 GENDER & DEV. 9, 13 (Nov. 1999).

⁸⁹ See Winnie Bikaako & John Ssenkumba, *Gender, Land and Rights: Contemporary Contestations in Law, Policy & Practice in Uganda*, in WOMEN & LAND IN AFRICA 233-277 (L. Muthoni Wanyeki ed. 2003); see also *Double Standards: Women's Property Violations in Kenya*, HUMAN RIGHTS WATCH (Mar. 2003), available at <http://www.hrw.org/en/news/2003/04/29/womens-property-rights-violations-kenya>.

⁹⁰ Republic of Kenya, Combined Fifth and Sixth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women (39th Sess., 2007), para. 134, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under Kenya).

⁹¹ Ernest Harsch, *Combating Inequality in Africa*, 20 AFRICA RENEWAL 16 (Jul. 2006).

⁹² Carmen Diane Deere and Cheryl R. Doss, *Gender and the Distribution of Wealth in Developing Countries*, UNITED NATIONS UNIV. – WORLD INST. FOR ECONOMICS RESEARCH, Research Paper No. 2006-115, available at <http://www.wider.unu.edu/stc/repec/pdfs/rp2006/rp2006-115.pdf>.

⁹³ Joyce Mulama, *Women Hold the Key to Food Security*, DEV. AFR., Apr. 3, 2004, available at <http://ipsnews.net/africa/interna.asp?idnews=23170>.

oriented power base. As discussed below, the chasm between the two systems is significant, and has yet to be successfully navigated.

PART III: THE IMPOSITION OF A FORMAL PROPERTY TITLING SYSTEM

Law can fail for one or more of several reasons: if it is poorly constructed, if it is inherently discriminatory, if it fails to reflect the needs or capacities of certain groups, or if it contravenes custom and practice to which society assigns a higher priority than formal law, in which case it will be ignored by those applying it. Several of these reasons are relevant in the following discussion about the effects of de Soto's titling program in pluralistic African societies. Part III discusses first the details of de Soto's regime, its mixed results, its interaction with customary law, and ends with a discussion on the gender discriminatory impact a gender-neutral system has on land rights.

A. *Hernando de Soto's Titling Program*

Hernando de Soto's restrictive definition of property rights as "rights, both personal and real, which confer on their holders inalienable and exclusive entitlement to them" crucially determined the inferences he drew about informal systems, and the benefits he proposed mere titling would have on economic growth.⁹⁴ He equated informality – any rights falling outside the definition above – with insecurity, the inability for easy transfer and use of property as collateral, and substantial costs.⁹⁵ His solution: "turn property into collateral, collateral into credit, and credit into increased income."⁹⁶ Broadly, the perceived benefits of land registration were identified as: (1) stimulation of efficient land use by increasing tenure security and providing investment incentives; (2) reduction of transaction costs and the creation of a land market to increase supply and reduce prices; (3) the creation of a title that could be used as collateral for banks to improve access to credit and safeguard investments; and (4) the provision of land-holder and land distribution information to governments, allowing the creation of a property tax system.⁹⁷

De Soto's status as a leading expert on development secured the enthusiastic and widespread implementation of his property-rights program,

⁹⁴ HERNANDO DE SOTO, *THE ECONOMIC ANSWER TO TERRORISM* 159 (2002).

⁹⁵ HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 161-62 (1996).

⁹⁶ Christopher Woodruff, *Review of de Soto's THE MYSTERY OF CAPITAL*, 39:4 J. OF ECON. LIT. 1215, 1219 (2001).

⁹⁷ Toulmin, *supra* note 9, at 15.

including in Tanzania, Egypt and Peru.⁹⁸ However, the results of his policy have proved to be more equivocal.

B. Results of de Soto's Method

Title deeds have produced positive effects in some countries: Cameroon experienced increased tenure security and less inconsistency between formal and customary institutions.⁹⁹ Ethiopian female heads of households have been able to register land title in the Amhara region,¹⁰⁰ and in Brazil, titles were perceived to “increase the potential circle of trade.”¹⁰¹ However, the introduction of formal titling in Brazil and Indonesia also produced a thirty to eighty percent increase in land values, while the link between titling, investment, and access to credit remained equivocal.¹⁰² In Egypt, legalization increased the value of land by a factor of at least ten, and capital was transformed into sources of rent, rather than into sources of activity;¹⁰³ in Paraguay the gains flowed primarily to wealthy producers;¹⁰⁴ and in Peru it failed to stimulate investment.¹⁰⁵ For example, out of the 200,313 Lima households awarded land titles in 1998 and 1999, only about twenty-four percent had received any kind of financing by 2002, which came from the state rather than the private sector.¹⁰⁶

⁹⁸ Herald Tagama, *Title Deeds Could Unlock Trapped Wealth*, AFR. BUS. (Dec. 2004), http://findarticles.com/p/articles/mi_qa5327/is_304/ai_n29142223/.

⁹⁹ See Kathryn Fermin Sellers & Patrick Sellers, *Expected Failures and Unexpected Successes of Land Titling in Africa*, 27 WORLD DEV. 1115, 1118 (1999).

¹⁰⁰ S.F. Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law*, 36 WORLD DEV. 1233, 1241 (2007) (noting that Ethiopia does not have a pluralistic legal structure because it was not colonized).

¹⁰¹ Espen Sjaastad & Ben Cousins, *Formalisation of Land Rights in the South: An Overview*, 26 LAND USE POL'Y 1, 2 (2008).

¹⁰² Gershon Feder and Akihiko Nishio, *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, 15 LAND USE POL'Y 25, 40 (1999).

¹⁰³ TIMOTHY MITCHELL, *The Properties of Markets*, in DO ECONOMISTS MAKE MARKETS? ON THE PERFORMATIVITY OF ECONOMICS 37 (Donald MacKenzie, Fabian Muniesa, & Lucia Siu eds. 2007).

¹⁰⁴ Michael Carter & Pedro Olinto, *Getting Institutions Right for Whom? Credit Constraints and the Impact of Property Rights on the Quantity and Composition of Investment*, 85 AM. J. AGRIC. ECON. 173, 173 (2003).

¹⁰⁵ MITCHELL, *supra* note 103, at 31.

¹⁰⁶ John Gravois, *The de Soto Delusion*, SLATE, Jan. 29, 2005, <http://www.slate.com/id/2112792>.

De Soto's simple three-step solution described above conceived of formal titling as the "missing ingredient" for poor markets to work.¹⁰⁷ The mixed results – and in some cases, the distinct failure to solve poverty¹⁰⁸ – have been attributed to multiple factors, two of which are discussed here. The first factor is the complete reliance on formality, ignoring the fact that property rights are less authoritative entitlements, and more practically socially embedded processes and products of constant negotiation, contestation and compromise.¹⁰⁹ De Soto conceives the poor as being rich in possessions but not in legal protections,¹¹⁰ entirely ignoring the extreme pre-existing discrepancies between individuals and groups in their ability to exercise their rights. Irrespective of the existing norms, laws, and cultural institutions, this parachuted approach has proven unsuccessful in several target states, specifically by increasing land values to the disadvantage of the already economically disenfranchised. Post-titling land price increases allow benefits to accrue to those who are already powerful and to wealthy landowners and landlords, but preclude poor tenants and disadvantaged individuals, such as women, from accessing these benefits because the titles are conferred on male household heads.

Secondly, characterizing informal property systems as a defective form of capital ignores its proven advantages, such as increased land accessibility for lower-income groups, the possibility for incremental building developments, and the general lack of a requirement to purchase land.¹¹¹ The conclusion accordingly drawn by some is that formal titling "often [has] disastrous consequences for the poor because individuals with good political connections can often bypass the land rights of indigenous people, women, or other vulnerable groups."¹¹²

In the alternative, even if formal title was proven manifestly superior to informal title in its effect on investment and development, there are inherent structural issues that are not easily overcome. The first of these issues is the scope of the reforms, as limited by other social arrangements. A formal land registration system, characterized by a written record and centralized information, necessarily recognizes only those rights and entitlements granted by other formal institutions. Where pre-existing informal rules continue to regulate other legal relations, such as marriage and inheri-

¹⁰⁷ Hernando de Soto, *The Missing Ingredient*, THE ECONOMIST, Sept. 11-17, 1993.

¹⁰⁸ See MITCHELL, *supra* note 103, at 10.

¹⁰⁹ Fitzpatrick, *supra* note 26, at 1008.

¹¹⁰ See HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 6-7 (2000).

¹¹¹ MITCHELL, *supra* note 103, at 23.

¹¹² *Id.* at 31.

tance, the scope of formal land rights is necessarily reduced. For example, the Rwandan 1999 Inheritance Law grants equal inheritance rights to sons and daughters, and provides for the protection of property rights within registered marriage. Registered marriages, however, are still relatively uncommon in Rwanda in comparison to traditional or church marriages and “consensual union” relationships, so the pool of rights-holders entitled to equal protection comprises only a minority of the total population.¹¹³

Secondly, conventional land registration systems are notoriously expensive, complex, and slow to be implemented.¹¹⁴ Following implementation, continuous funding is required for register maintenance and updating to ensure record accuracy and reliability. If the cost is borne by the prospective title-holder, then the poorer land owners are doubly disadvantaged: first, by being prevented from securing their rights formally, and secondly, because they are exposed to the possibility of a wealthy individual registering title, which will then trump pre-existing customary rights. In Uganda, privatization and formalization “overextended government capacity, became an unacceptable drain of public funds, and reduced the collateral value of land due to new uncertainties.”¹¹⁵ Funding from outside donors such as development institutions may address the expense issue, but not the complexity or implementation challenges. Thailand was regarded as a titling “success story” by the World Bank, having issued 8.5 million titles in the course of a twenty-year titling project.¹¹⁶ Collier’s research suggests that countries emerging from conflict cannot afford this time for the effects of titling implementation to be felt.¹¹⁷

A third structural concern is that of credit requirements to obtain loans for land purchase through the formal system. Literacy and collateral are class- and wealth-dependent prerequisites for loans from financial institutions. Both of these dimensions, while facially gender-neutral, disadvantage women disproportionately. First, literacy is lower among women than

¹¹³ CONSTITUTION OF THE REPUBLIC OF RWANDA, May 26, 2003, tit. I, ch. 1. art. 26; see JENNIFER BROWN & JUSTINE UVUZA, WOMEN’S LAND RIGHTS IN RWANDA, RURAL DEV. INST., No. 123, 1 (2006).

¹¹⁴ DEININGER, *supra* note 25, at 190; Toulmin, *supra* note 9, at 16.

¹¹⁵ See Diana Hunt, *Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land Act*, 22 DEV. POL’Y REV. (2004).

¹¹⁶ WARRICK SMITH, WORLD BANK, WORLD DEVELOPMENT REPORT: A BETTER INVESTMENT CLIMATE FOR EVERYONE 83 (2005).

¹¹⁷ See Collier, *supra*, note 1, at 20.

men,¹¹⁸ and secondly, women-headed households and single women have little access to credit and other resources, often because of lack of collateral or the assumption that they will be unable to meet financial obligations in the absence of a male partner.¹¹⁹ In various countries, married women still need the consent of their husband before taking a loan, a requirement that violates international human rights law because of its gender discriminatory effect.¹²⁰

C. *Titling in the African Context*

All of the above obstacles demonstrate that simply imposing Western institutions in developing countries is disconnected from the local context, and necessarily sidelines the underlying power structures and interests of the society.¹²¹ While aid providers are now starting to pay closer attention to the vested interests at play – including threats posed to communal informal power bases – there is still the additional assumption that local actors will embrace the change proposed in preference over deeply ingrained cultural traditions. However, in the case of pluralist systems, many non-state systems are kinship-based, resistant to replacement by formal state property regimes, and efficient in their own terms.¹²² The World Bank now recognizes that, in Africa particularly, the expected benefits from formal land titles did not manifest because of the comprehensive coverage of customary law.¹²³

The value of a formal system lies in its uniformity, which provides consistency, certainty, and incentive for trust. However, straightforward titling programs founded on an exclusionary principle are fundamentally incompatible with the complex, layered relationships that characterize customary land systems. Simply vesting all rights in one entity – in this

¹¹⁸ Two-thirds of the world's illiterate are women. U.N. DEP'T OF PUB. INFO., WOMEN AT A GLANCE (1997), <http://www.un.org/ecosocdev/geninfo/women/women96.htm>.

¹¹⁹ U.N. Econ. & Soc. Council, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination, *Women and Adequate Housing*, ¶ 29, U.N. Doc E/CN.4/2003/55 (Mar. 26, 2003), available at <http://www.unhchr.ch/housing>.

¹²⁰ MARJOLEIN BENSCHOP, UN HABITAT, WOMEN'S RIGHTS TO LAND AND PROPERTY 2 (2004), available at http://www.unhabitat.org/downloads/docs/1556_72513_CSDWomen.pdf.

¹²¹ THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 104, 108 (1999).

¹²² DEININGER, *supra* note 25, at 52-53.

¹²³ See PALACIO, *supra* note 20, at 8.

context, a male household head – ignores underlying issues of power and legitimacy, while simultaneously depriving certain groups of any land security.

While in theory, pluralism need not necessarily prevent the evolution of more precise property rights, in practice, post-conflict developing states “lack[] the money, moral authority, or coercive capacity to override local institutions,” resulting in legal and normative pluralistic uncertainty and conflict.¹²⁴ Moreover, the collective cost-minimizing and welfare-maximizing community norms are inevitably preferred over formal law,¹²⁵ and acting in defiance of communal ideals can lead to sanctions such as ostracism and moderate acts of violence.¹²⁶ In Kenya, the continued adherence to customary norms in contradiction to the introduced titling system rendered formal registers inaccurate and irrelevant, and the economic benefits attributable to titling unsustainable.¹²⁷ In Niger, in land inheritance conflicts between a man and his female relatives, the contradictions between customary and statutory law are construed in the man’s favor.¹²⁸ Thus, the abolitionist approach to substitute local custom with legislation is doomed to failure when the local community views it as “decontextualized, hegemonic, and counterproductive for gender equality in practice.”¹²⁹

Since customary law is perceived as maintaining social order, when legislation is passed without reference to or integration with customary law, weak states in post-conflict African societies are unable to enforce the new laws. Rural communities have neither the understanding nor the appreciation of the improvements to their land system, and instead choose well-established familiarity over a “remote, predatory, understaffed, underfunded, or otherwise deficient state” system.¹³⁰ For example, although the Namibian government passed legislation allowing widows to remain in their houses and on their land after their husband’s death, in the absence of

¹²⁴ Fitzpatrick, *supra* note 26, at 1040.

¹²⁵ *Id.* at 1030; *see also* Angelique Haugerud, *Land Tenure and Agrarian Change in Kenya*, 59 AFRICA 61, 61 (1989).

¹²⁶ Fitzpatrick, *supra* note 26, at 1030.

¹²⁷ *Id.* at 1015-16.

¹²⁸ Tidiane Ngaido, *Redefining the Boundaries of Control: Post-Colonial Tenure Policies and Dynamics of Social and Tenure Change in Western Niger*, (Dec. 6, 1995) (unpublished Ph.D. dissertation, University of Wisconsin-Madison), *noted in* Lastarria-Cornhiel *supra* note 67, at 1321.

¹²⁹ Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimation of Gender Hierarchy in Developing Countries*, 41 HARV. INT’L L.J. 381, 394 (2000).

¹³⁰ Sjaastad & Cousins, *supra* note 101, at 3.

civic education and a commitment to enforcement, customary law continues to cause the dispossession of widows' matrimonial property.¹³¹

The challenges are multiplied because simply imposing a formal titling regime exacerbates previously existing inaccessibility caused by African bureaucracy, corruption, and slow property procedures.¹³² In Ghana, registering a land purchase involves multiple visits to five different government offices, so that even those with excellent contacts in government and the judiciary can wait for more than eighteen months to obtain formal title.¹³³ It is not unusual for bureaucrats and strategically placed persons, such as local chiefs and wealthy urban residents, to claim and title land that previously belonged to poor and uneducated rural families in their name, as occurred in both Cameroon and Somalia.¹³⁴

D. Effects of a "Gender Neutral" Property System

Generally across Africa, all of the wealth and class related concerns that are detailed above are disproportionately experienced by women.¹³⁵ Compounding these concerns is the fact that titling gathers and deposits "different rights or bundles of rights" in one "owner."¹³⁶ Through this process, women typically lose access or cultivation rights to male household heads who acquire exclusionary control. *Prima facie*, women have the same individual formal land rights as males, but women who separate from husbands or become widows often lose both their customary and statutory access and cultivation rights.¹³⁷ Moreover, because they enter the system "with no property, little cash income, minimal political power and a family to maintain,"¹³⁸ women are systematically disempowered in obtaining land rights. As highlighted above, purchasing land requires access to credit, and commercial banks often predicate any loans on clients' literacy or provision

¹³¹ Joireman, *supra* note 100, at 1241.

¹³² See Robert Buckley & Jerry Kalarickal, *Shelter Strategies for the Urban Poor: Idiosyncratic and Successful, but Hardly Mysterious* 25 (World Bank Pol'y Research, Working Paper No. 3427, 2004).

¹³³ Toulmin, *supra* note 9, at 15.

¹³⁴ Lastarria-Cornhiel, *supra* note 67, at 1320.

¹³⁵ *Women, Legal Reform and Development in Sub-Saharan Africa*, WORLD BANK, <http://siteresources.worldbank.org/INTFINDINGS/685507-1161268713892/21097507/find20.htm> (last visited Mar. 9, 2011).

¹³⁶ Lastarria-Cornhiel, *supra* note 67, at 1326.

¹³⁷ *Id.* at 1325.

¹³⁸ *Id.* at 1326.

of collateral. Particularly in post-conflict developing societies, women as a group have been precluded from opportunities to acquire either.¹³⁹

Indeed, the World Bank has conceded “formal law that requires gender equity in property rights is mostly ineffective in the face of customary law that does not recognize equitable property rights for men and women” and that “land legislation may conflict with family or personal law.”¹⁴⁰ For example, although the Deed Registry in Swaziland permits married women, even under customary law, to purchase and register land in their name, town councils have required husbands to accompany married women at the time of registration and the husband’s name is recorded as the buyer of the property. Widows and divorcees are even further disempowered because in the absence of a husband, a male “guardian” must accompany the woman.¹⁴¹

The most critical group in a post-conflict context for economic development is women. Yet, the most vulnerable women – divorcees, widows, and single women who do not have male counterparts – are precisely the women most frequently excluded. As the Executive Director of Habitat notes:

[W]omen are still excluded from many of the formal and legal structures of society and from full participation in economic life. In conflict and post-conflict situations, numbers of women-headed households often increase sharply as many men have either been killed or are absent. This has grave results: having no formal rights to land and property and little voice in governance, women are left without the means to create stable and sustainable livelihoods. This contributes to poverty and perpetuates social and political inequality that can lead to more conflict. Thus, ensuring equal rights for women is important for peace as well as the economic well being of all of society.¹⁴²

¹³⁹ Elaine Zuckerman & Marcia Greenberg, *The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers*, 12 GENDER & DEV. 70, 74 (2004).

¹⁴⁰ WORLD BANK, *supra* note 19, at xi.

¹⁴¹ Nhlapo, *supra* note 82, at 48-50.

¹⁴² Anna Tibaijuka, *Foreword* to UNIFEM, WOMEN’S LAND AND PROPERTY RIGHTS IN SITUATIONS OF CONFLICT AND RECONSTRUCTION 8 (Alfred Buregeya, et al. eds., 2001) available at <http://www.unifem.org/attachments/products/WomensLandAndPropertyRights.pdf>.

The World Bank's 2001 *Engendering Development* report contained several key gender acknowledgments: that gender inequalities impede development, that effective action requires also that policymakers take account of local realities, and that gender issues must be an integral part of policy analysis, design, and implementation.¹⁴³ Seven years later, the World Bank's 2008 World Development Report conceded that affirmative action may be required to equalize chances to secure women's property rights, which in turn would improve the effectiveness of natural resources management.¹⁴⁴ It also suggests that "agricultural development actions must be decentralized to tailor them to local conditions," including in the form of community-driven approaches led by women.¹⁴⁵ Yet the conclusion, after decades of various land rights policies to improve growth, is that "[d]esigning property rights that support efficient land use and recognize the multiplicity of rights, particularly for women and indigenous groups, is a highly complex issue that requires further exploration."¹⁴⁶

Almost thirty years after U.N. recognition of the symbiotic relationship between women's advancement and development, the importance of their economic participation is still not reflected in international financial institution (IFI) policies, including those of the World Bank. The tendency has been to impose formal gender-neutral frameworks, which, despite containing language consistent with gender equality, exist independently from and parallel to gender-discriminatory applied customary law. There is a conspicuous absence of cohesive strategies prioritizing projects and loans that target women's rights as critical for stimulating economic development, particularly in numerous post-conflict African countries.

For instance, lending statistics from IFIs, the World Bank, and state donors demonstrate consistent underfunding. UNIFEM reports that from 2002 to 2007, gender was a sub-theme in less than five percent of World Bank lending projects, so that while gender may be incorporated in projects, "gender equality objectives are not indicated amongst the main thematic focus areas of these programmes."¹⁴⁷ A 2005 report by two non-governmental organizations, Eurostep and Social Watch, found that only 0.1 percent of

¹⁴³ James D. Wolfensohn, *Foreword* to WORLD BANK, *ENGENDERING DEVELOPMENT* xi-xii (2001).

¹⁴⁴ WORLD BANK, *AGRICULTURE FOR DEVELOPMENT* 9, 16 (2008), available at http://siteresources.worldbank.org/INTWDR2008/Resources/WDR_00_book.pdf.

¹⁴⁵ *Id.* at 20. This is explored further in Part V below.

¹⁴⁶ *Id.* at 139.

¹⁴⁷ U.N. Development Fund for Women [UNIFEM], *Who Answers to Women? Gender and Accountability* (Sept. 2008), http://www.unifem.org/progress/2008/media/POWW08_Report_Full_Text.pdf.

Official Development Assistance (ODA) is actually spent on gender equality.¹⁴⁸ More specifically, among World Bank Post Conflict Fund grants, only \$3,127,383 (4.67 percent) out of the total of \$66,961,254 allocated by the World Bank to date targeted women, and of 301 Post Conflict Reconstruction projects, only ten of them targeted women as a specific group.¹⁴⁹ The significance of these figures is increased by the fact that public sector aid has dropped from ninety to twenty to twenty-five percent in the last twenty years; the remaining seventy-five to eighty percent of developing aid comes from the private sector.¹⁵⁰

The failure of development institutions to translate research recommendations into a funding and policy focus on women is problematic because ignoring women as key participants dramatically reduces the efficacy of any development projects. Moreover, it represents a lost opportunity to contribute to post-conflict rebuilding in a manner that is most likely to facilitate social acceptance of progressive laws. Since development interventions often occur in transitioning societies when the market system is dysfunctional,¹⁵¹ and post-conflict Africa is particularly dependent on aid in this regard, IFI funding is crucial to the success of resource-dependent measures for social change: enforcement mechanisms, community education and training, and the fostering of an active and organized civil society. Rather than merely “incorporating” gender, if the World Bank and other IFI projects specifically target women as under-utilized economic participants, the scope, sustainability, and magnitude of economic growth would be substantially enhanced. Allocating a greater proportion of the significant funds commanded by IFIs would assist with state capacity in oversight and enforcement of fairer legal systems, provide additional resources for community education, and enable structured collaboration between local communities and governments as called for by local female leaders.¹⁵²

The potential impact of aid is greatest in post-conflict African economies because of the ability to build transformed gender-sensitive legal, economic, and social structures consistent with progressive legislation. The complexities inherent in encouraging changes to custom have proved diffi-

¹⁴⁸ Thalif Deen, *Development Financing Still Gender-Blind*, IPS NEWS, Apr. 4, 2008, available at <http://ipsnews.net/news.asp?idnews=42035>.

¹⁴⁹ Adriana Quinones, *Gender and Post-Conflict Reconstruction: The World Bank Track Record* (2004).

¹⁵⁰ Noeleen Heyzer, *Executive Director, UNIFEM, Speech at the Women’s Funding Network Conference* (Apr. 27, 2007), available at http://www.unifem.org/news_events/story_detail.php?StoryID=632.

¹⁵¹ Lastarria-Cornhiel, *supra* note 67, at 1329.

¹⁵² See Mulama, *supra* note 93.

cult to overcome in the absence of a coherent research-informed framework backed by the substantial resources commanded by IFIs. The current challenge is to facilitate local acceptance of new norms; this acceptance will ultimately be achieved with a mixture of enforcement and community initiatives, all of which require technical expertise and resources. A focus on these avenues by development institutions could provide the necessary momentum to overcome the “Catch-22” encapsulated in the local-universal dialogue. As demonstrated below, there is internal pressure to change, and women have made some progress, mainly through formal institutions that are already more receptive to notions of gender equality than customary law.

PART IV: LEGAL REFORM POSSIBILITIES AND PRACTICE

Post-conflict African countries dominate the “bottom billion” club: economic growth is non-existent and the stabilizing social structures have been intentionally or incidentally destroyed, with the state apparatus dismembered and the traditional male decision-making population decimated. Entrenched gender discriminatory customary practices may still be present, and yet “[t]he post-war reconstruction phase can be an opportune time to reform or improve land tenure systems that lead to war and conflict in the first place . . . [s]ince women are often forced into nontraditional roles during conflict, these new roles can be consolidated to create a new place for women in society as decision makers, developers and peacemakers.”¹⁵³ Thus, the best prospects for development institutions to promote sustainable development and post-conflict reconstruction lie in developing an integrated legal system that protects women’s rights. Part IV explores the lessons learned from three post-conflict societies that have attempted to reconcile the differences between customary and formal property rights.

A. *The Rwanda Context*

With the highest population density in Africa, a rural population comprising ninety-five percent of the total population, and a customary law-based system that is undergoing almost total reconstruction after conflict, Rwanda offers a powerful case study for the analysis of women’s land rights. As a former French colony, the Rwandan legal system is characterized by co-existing systems of (unwritten) customary and (written) statutory law.¹⁵⁴ This uneasy balance frequently gives rise to contradictions and in-

¹⁵³ Warah, *supra* note 86.

¹⁵⁴ *Rwanda*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html> (last visited Aug. 16, 2011).

consistencies. Judges do not always know localized customary law, and local authorities are not always willing to implement judges' decisions that are based on a formal law that theoretically supersedes customary law.¹⁵⁵

In the area of land law, most land continues to be acquired through localized customary rules of occupation. Although individual property rights under customary tenure have shifted from user rights to ownership rights, most land is obtained through inheritance, a land grant, loan, or community sale.¹⁵⁶ Generally, only a minority of landholders have sufficient resources to apply for and pay for a land title.¹⁵⁷ This shift to ownership rights precipitated land fragmentation because males increasingly inherited land as a right and not just for sustenance. That land was incessantly subdivided for inheritance by male heirs.¹⁵⁸

Rwanda's customary patrilineal system precludes women from inheriting, owning or controlling land, and consequently, from applying for agricultural credit. Accordingly, women's land rights were contingent upon the good will of in-laws or consanguinal family members. Importantly, marriages are legal only if they are contracted at a district office, a bureaucratic and expensive process, and are deemed "illegal" or "non-legal" even if the marriage is performed at a church or according to tradition.

In the wake of the 1994 conflict, in some areas of the country between one-third and half of the women became widows, and thirty-four percent of households became female-headed (an increase of fifty percent since 1991). Of these female-headed household heads, widows comprised more than sixty percent.¹⁵⁹ In the turmoil of the reconstruction period, customary norms were often inadequate to accommodate re-forming communities in which an unprecedented number of women were required to assume leadership roles:

[P]ostwar transition in Rwanda . . . created an open space in which, by urgent necessity, these [customary] rules and [cultural] practices had to be radically reinvented. Importantly, this space provided women, who had endured some disadvantages under prewar customary land law, with many

¹⁵⁵ Laurel Rose, *Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation*, 13 TEX. J. WOMEN & L. 197, 203, 208 (2004).

¹⁵⁶ *What is Land Tenure?*, FAO.ORG, <http://www.fao.org/DOCREP/005/Y4307E/y4307e05.htm> (last visited May 6, 2011).

¹⁵⁷ *Id.* at 205.

¹⁵⁸ *Id.* at 208.

¹⁵⁹ *Id.* at 219.

new opportunities, but also with some constraints, for addressing their limitations within Rwanda's land control hierarchy and for reinventing customary land law on a case-by-case basis.¹⁶⁰

Reflective of this gender inversion, female Rwandan parliamentarians now comprise the highest proportion in the world;¹⁶¹ in 2008, women secured fifty-six percent of the seats – the first female majority in the world.¹⁶² Statutory law now provides for widows to assume their husband's land rights, unmarried women to inherit land (if the sole surviving descendent of the patrilineal group), and married women who are only children to inherit their parents' land.¹⁶³ On the other hand, considerable discretionary powers were extended to the Council of Succession to deny, limit, or rescind such inheritance rights.¹⁶⁴

In recognition of women's postwar land needs, the government also introduced the *imidugudu* land policy, which provided housing to female-headed households without discrimination, and in some cases in preference to male-headed households. Again, discretionary powers to grant or deny land rights to prospective or current residents were granted to local authorities.¹⁶⁵ A similar mixed result is observable in the Organic Land Law, adopted in 2005, which states that men and women have equal rights to land, but contains no corresponding enforcement mechanism.¹⁶⁶

There are other challenges to true equality. As mentioned above, formal inheritance laws only apply to those who are married under civil law, which excludes the majority of the adult female population as well as those practicing polygamy, which is relatively common in some parts of Rwanda.¹⁶⁷ In addition, Rwanda's legal system is not adequately equipped

¹⁶⁰ *Id.* at 211.

¹⁶¹ Elizabeth Powley, United Nations Children's Fund [UNICEF], *Rwanda: The Impact of Women Legislators on Policy Outcomes Affecting Children and Families* (Dec. 2006), <http://www.unicef.org/sowc07/docs/powley.pdf> (last visited Aug. 16, 2011).

¹⁶² UNIFEM, *Rwandan Women Secure 56% of Parliamentary Seats in Historic Election Result* (Sept. 22, 2008), http://www.unifem.org/news_events/story_detail.php?StoryID=736 (last visited Aug. 16, 2011).

¹⁶³ *See Law on Matrimonial Regimes, Liberalities and Successions*, 2000, C. Civ. No. 22/99 (Rwanda), arts. 9, 50.

¹⁶⁴ *Id.*, art. 75.

¹⁶⁵ *See* Rose, *supra* note 155, at 214-15.

¹⁶⁶ BROWN & UVUZA, *supra* note 113, at 2-3.

¹⁶⁷ *Id.* at 15.

to deal with the volume and complexity of land cases, and local authorities are often reluctant to enforce controversial decisions.¹⁶⁸

Nevertheless, most women who have assumed control of households and communities after war have asserted greater land rights than are specified under either customary or formal law.¹⁶⁹ Many women took advantage of uncertain postwar legal conditions to access their birth home land, or their deceased or ex-husband's land, reinventing customary land law or applying new standards in anticipation of more equitable legislation on a case-by-case basis.¹⁷⁰

Land reform in the Rwandan context highlights both the potential for progress and the limits of change dictated by pre-existing cultural norms. Local power structures are typically resistant to change, which has tempered the scope and unconditionality of more equitable provisions. However, the proven capacity of women to use transitional uncertainty to consolidate their access to land suggests that the heightened social malleability and acceptance of women's rights in post-conflict rebuilding is a context within which further progress is possible.

B. The Mozambique Context

Customary law in Mozambique exists in both matrilineal (in the north) and patrilineal (in the south) forms. Across both systems, women are prevented from owning their own land because control rights are vested with her husband or maternal uncles or nephews.¹⁷¹ Despite the 1975 government denunciation of customary law as "backward and superstitious," customary norms are still adhered to, particularly in relation to inheritance rights, the division of labor, and gender power dynamics.¹⁷²

After emerging in 1992 from sixteen years of internal conflict, Mozambique began reconstructing its institutions and distributing land among small-scale farmers, who generate ninety-nine percent of agriculture and are the mainstay of the economy.¹⁷³ The war had forced hundreds of

¹⁶⁸ See *id.* at 17.

¹⁶⁹ ROSE, *supra* note 155, at 219.

¹⁷⁰ See *id.* at 237.

¹⁷¹ Rachel Waterhouse, *Women's Land Rights in Post-War Mozambique*, in *WOMEN'S LAND AND PROPERTY RIGHTS IN SITUATIONS OF CONFLICT AND RECONSTRUCTION* 45, 47 (Alfred Buregeya et al. eds., 2001), available at <http://www.unhcr.org/refworld/docid/46cad90.html>.

¹⁷² *Id.* (citing interview with Ismael Ossemane, Vice-President of the Nat'l Peasants' Union of Mozam. (1996)).

¹⁷³ *Mozambique: Women Still Struggle for Land Rights Despite New Law*, IRIN NEWS, (July 1, 2003), <http://www.irinnews.org/InDepthMain.aspx?InDepthId=26&>

thousands of rural people to abandon their homes, often taking refuge near towns or in peri-urban slums and leaving villages deserted for years at a time. The government's post-conflict policy of encouraging people to "return to the land"¹⁷⁴ meant many single, divorced, and widowed women returned to farm the land, but without any legal protections. Three processes facilitated direct control over land by some women: first, the government redistributed lands abandoned during the conflict to local families, including those headed solely by women; second, widowed or abandoned wives were able to return unchallenged to the land of their former husbands; and third, returning males migrating to different areas married local women, a reversal of the previous custom whereby women left their local community upon marriage.¹⁷⁵

Prior to 1997, land disputes, which arose frequently in the years immediately after the conflict, required written evidence to substantiate claims of land use. Most rural farmers, especially women, did not have access to written contracts since over seventy percent of women in Mozambique cannot read or write. Moreover, bureaucratic processes and a scarcity of courts and legal advice in the rural areas made access to the justice system difficult and complicated.¹⁷⁶

The 1997 Land Law was a major breakthrough because it combined formal and customary law. In addition to the traditional recognition of written documents in land usage cases, it recognized customary tenure systems and the rights of people who had occupied land for over ten years in good faith.¹⁷⁷ It also established procedures for delimitation and registration of community land rights to be implemented through a village lands registration regime with minimal funding. The procedures built on existing village-

ReportId=69845&Country=Yes. An estimated 68% or about 12.5 million people live in rural areas. Rural households are predominantly smallholders who provide about 95% of agricultural GDP with the balance from a small number of medium and large commercial farms. WORLD BANK, MOZAMBIQUE AGRICULTURAL DEVELOPMENT STRATEGY 3 (2006).

¹⁷⁴ See Anna Wardman, *The Co-Operative Movement in Chokwe, Mozambique*, 11 J.S. AFR. STUD. 295, 299 (1985).

¹⁷⁵ Waterhouse, *supra* note 171, at 48-49.

¹⁷⁶ Leonard Maveneke, *Mozambique's Family Law Passes!*, OXFAM INT'L, http://www.oxfam.org/en/programs/development/safrica/moz_law.htm (last visited Jun. 12, 2011).

¹⁷⁷ That is, occupation in the belief that no one else had rights to the occupied land could be regarded as legally belonging to the occupier; however, women struggle in practice to enforce this right. See Mozam. law no. 19/97 ch. 3 art. 2, available at http://www.mozambiquecalanga.co.za/mozambique_land_law_legislation.pdf.

level structures and relied on a large number of volunteers who were trained as paralegal guides.¹⁷⁸

However, inadequate educational initiatives have undermined rural communities' awareness and exercise of their improved rights, as well as the effectiveness of the institutional processes.¹⁷⁹ Local justice is usually delivered through male elders in forums to which women have no access. Efforts to reconcile the two systems produced provisions permitting, but not requiring, co-titling and women's recognition as members of rural communities. These provisions perpetuated land security problems faced by widows upon their husband deaths.¹⁸⁰ In dealing with inheritance and marriage, the introduced legislation applies only to common-law (formal) marriages since it does not recognize customary law. Since the majority of women were married under customary law, they cannot benefit from the new provisions.¹⁸¹

Another major breakthrough subsequently occurred in December 2003 when the new Family Law was passed, protecting informal unions between men and women. Under the new law, women who have lived with their partners for more than a year are entitled to inherit the property of their husbands.¹⁸² The remaining challenge, as always, is the meaningful enforcement of these laudable laws. To date, as explored in other publications based on primary research,¹⁸³ civil society organizations have been bridging the gap between formal equality in law and access to justice in practice with varying levels of success. For example, while court verdicts are invariably in favor of women's land rights, enforceability of these decisions remains a challenge for both divorcees and widows.¹⁸⁴

C. *The Uganda Context*

Uganda's patrilineal customary inheritance law provides for a widow to receive fifteen percent of her deceased husband's estate, although

¹⁷⁸ Toulmin & Quan, *supra* note 74, at 15.

¹⁷⁹ Sjaastad & Cousins, *supra* note 101, at 7.

¹⁸⁰ Joireman, *supra* note 100, at 1240.

¹⁸¹ Lastarria-Cornhiel, *supra* note 67, at 1321.

¹⁸² Mavenka, *supra* note 176.

¹⁸³ See generally Amrita Kapur, *Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems* (IDLO Customary Justice Working Papers Series, Paper No. 2, 2010), available at <http://www.idlo.int/Download.aspx?Id=222&LinkUrl=Publications/WP2Mozambique.pdf&FileName=WP2Mozambique.pdf> (noting that NGOs are working in some African legal systems to bring together customary and formal law).

¹⁸⁴ *Id.* at 19.

this percentage is often withheld in practice.¹⁸⁵ “Under customary law a widow may be ‘inherited’ by her in-laws and forced to marry a male relative,” or ejected along with her children from her home.¹⁸⁶ As in other patrilineal societies, women are unable to otherwise control land.¹⁸⁷

In 1986, after years of human rights abuses, conflict, and a guerilla war that brought Yoweri Museveni into power, a new era embracing female civic participation began. Broad legal reforms ensuring female representation in decision-making bodies¹⁸⁸ culminated in the 1995 Ugandan Constitution, which prohibits “laws, . . . customs or traditions which are against the dignity, welfare or interest of women”¹⁸⁹ – a landmark in legal protection of women’s rights.

In terms of property law, the 1998 Uganda Land Act includes a number of progressive provisions, which include the following: (1) requiring the prior written consent of both spouses in transactions involving family holdings; (2) prohibiting decisions pertaining to customary land that deny women access to, ownership of, or occupation of land; and (3) requiring the Uganda Land Commission to have out of its five members at least one female member, one-third of each District Land Board to be women, one-quarter of each parish land committee to be female, and one-third of the Communal Land Management Association to be female. Each of these bodies deals with communal land ownership and management.¹⁹⁰

The structure of the tenure system is among the most extensive and decentralized in the entire continent, involving district land boards supported by a network of 4,500 local land committees.¹⁹¹ However, women’s activist groups have been unsuccessful on two occasions in their campaign for the Land Act to include a co-ownership clause.¹⁹²

None of the three countries discussed above have enacted mandatory co-ownership laws to protect divorcees and widows.¹⁹³ However, it is nonetheless clear that formal systems provide the initial critical

¹⁸⁵ EQUALITY NOW, *Uganda: Exclusion of Women from Land Ownership – The “Lost Clause[”]* (Aug. 2000), http://www.equalitynow.org/english/actions/action_1701_en.html (last visited Jun. 12, 2011).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Tripp, *supra* note 84, at 5.

¹⁸⁹ THE CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995, art. 33(6), available at http://www.ugandaembassy.com/constitution_of_Uganda.pdf.

¹⁹⁰ Tripp, *supra* note 84, at 5.

¹⁹¹ *Id.* at 2.

¹⁹² *Id.* at 8.

¹⁹³ *Id.* at 6. This is in contrast to South Africa and Tanzania. *Id.*

legal framework for women to claim rights when customary law leaves them landless; the more challenging issue is how to enhance social receptivity to these formal changes. While there are variations across cultures and countries, commonalities in post-conflict African societies – such as uncertain social structures, land scarcity, and entrenched power dynamics that systemically disadvantage women – make it particularly important that rights are not dependent on familial or community relations. Instead, these rights should be based on objective criteria that protect the most vulnerable.

PART V: FUSING THE SYSTEMS – TOWARDS A CONCEPTUAL FRAMEWORK

Development institutions, and particularly the World Bank, conceded years ago that the gulf between different systems of rights and between law and practice must be bridged if women are to enjoy secure land rights.¹⁹⁴ Moreover, research consistently affirms the critical role women must play in the economy for growth and development to occur. In pluralist African societies, customary law must be considered by any effective developmental strategy: either to better pursue eventual titling, registration and privatization of individual land ownership, as favored by the World Bank, or as a way to strengthen and democratize local communities, as proposed by Oxfam.¹⁹⁵

I have characterized this pluralist context as a “Catch-22” because development policies in the last four decades have targeted both local structures and central governments without achieving a coherent property rights system that promotes economic growth or development in the “bottom billion” countries. This dilemma is more pronounced in the context of promoting and protecting women’s land rights, which runs counter to contemporary interpretations of custom. Although custom has historically provided communally acceptable land rights for women, experiences with land scarcity, population growth, and increased commercialization suggest that malleable power in the hands of the local elite will continue to prevent tenure and economic security for women under customary law. I do not pretend to have a solution – achieving any degree of development in this context has proven elusive even for international development experts – but by extracting some lessons from the case studies discussed, there may be additional and alternative methods to solve this “insoluble” problem. I structure my suggestions around three main challenges.

The first of these challenges is the reluctance of local authorities to implement gender-equal formal law that contradicts custom. This reluctance

¹⁹⁴ See *supra* Part I.C.

¹⁹⁵ Tripp, *supra* note 84, at 1-2.

could be alleviated if the central state competently oversaw and enforced legislation. The second obstacle is the lack of state capacity to perform oversight and enforcement functions; given the existence of gender-sensitive formal law in several post-conflict African states,¹⁹⁶ however, the ability to guarantee rights could be addressed by financial resources, and training and monitoring enforcement regimes. The proposals below are predicated on the assumption that less institutional capacity is required to oversee local distribution of justice than would be needed to administer the law, hear cases, provide staff, and dispense justice centrally. The third challenge is the failure to date by IFIs and development agencies to direct substantial resources into policies that prioritize the improvement of rights protection for women without secure land ownership. Accordingly, the prescriptions explored below focus specifically on areas in which IFI conditional funding could promote gender equality in the structure and content of both customary and formal land, marriage, and inheritance law. The scope of the integrated system must encompass and be accessible to all women – single, divorced, and widowed – and must be recognized and enforced both by formal institutions and at the local and state levels.

A. *Content of the Protections*

Women require the certainty and predictability of a modern, national system of land legislation that “specifies and guarantees their land rights as a class of citizens and as individuals with different interests.”¹⁹⁷ An effective system must redress institutional discrepancies between customary and formal law, in addition to historical, social, and economic gender disparities such as literacy and access to credit. While development institutions cannot guarantee legal reform, conditioning financial and strategic support of government initiatives on implementing the recommendations below could be a powerful incentive for central governments to focus on women’s rights as a mechanism promoting greater economic prosperity.¹⁹⁸

Entitlements: Formal rights should universally and independently guarantee access to individual land titles for women so the foundational capacity to own property is legally recognized. Emulating the positive Tanzanian and South African experiences, married couples should be required by the state to jointly register title as co-owners to ensure that wo-

¹⁹⁶ In countries where the state does not have the will to provide gender equality, the approaches to promote gender equality are necessarily far more complicated, and beyond the scope of this paper.

¹⁹⁷ Rose, *supra* note 155, at 241.

¹⁹⁸ As noted in Part I above, this approach by development institutions has almost completely determined aid-dependent government development policies in the past.

men's interests in property cannot be forfeited. As has worked in Mozambique, women who return to abandoned land previously occupied by their husband's family or their own family after conflict should be entitled to claim title to that land without challenge. This system limits the need to redistribute land among the mostly female post-conflict community, and dispenses with the requirement for evidence, which is likely to be inaccessible or non-existent. Divorced women should be entitled to half the matrimonial property upon separation so they can continue to occupy their homes and support themselves and their family.¹⁹⁹ Building on the provisions in the 1998 Uganda Land Act, sales of family land by husbands should require written consent of the wife and two government land officials (one male and one female). Women should be able to unconditionally inherit land through a standardized procedure. If group rights continue to be awarded, they should articulate the obligations of individuals within the group as well as the mechanisms by which these are specified or can be changed.²⁰⁰ Government policies could ensure housing is provided so that it does not discriminate against female-headed households, and, as in Rwanda, prefer them in certain circumstances.²⁰¹ Similarly, the redistribution of unclaimed abandoned land could prefer female-headed households, as recommended in Mozambique.²⁰²

Finances: Development institutions could adopt the Grameen Bank template and as a policy provide credit to women on analogous financial terms, prioritizing females who are most vulnerable – single women, divorcees and widows – as recipients without requiring collateral and literacy. Microfinance institutions have already proven successful in empowering women who otherwise would be excluded from borrowing capital to develop small enterprises generating regular income.²⁰³ Similarly, pre-existing credit projects could be modified to target women. The World Bank's post-conflict reconstruction credit programs, such as the World Bank Sierra Leone Economic Rehabilitation and Recovery Credit Project (III), should be modified so the infrastructure, knowledge, and processing capacity can be applied almost immediately to schemes that specifically target women. Prioritizing women in titling programs and land reform in Latin American programs has stimulated substantive change. For example, Chile, Colombia,

¹⁹⁹ See HUMAN RIGHTS WATCH, *supra* note 89, at 25.

²⁰⁰ See DEININGER, *supra* note 25, at 51-52.

²⁰¹ See Rose, *supra* note 155, at 214.

²⁰² See Waterhouse, *supra* note 171, at 48.

²⁰³ See Grameen Bank at a Glance (Mar. 2011), http://www.grameen-info.org/index.php?option=com_content&task=view&id=26&Itemid=175 (last visited Jun. 12, 2011).

and Nicaragua give priority and charge lower fees to female household heads in land-related interventions.²⁰⁴

Further, institutional funding could be tied to achieving quotas in the proportion of titles issued to males and females within prescribed time frames. This linkage would guarantee the preferencing of women even if the titling process is slow. Single, divorced, and widowed women would be further protected through their prioritized status in the process. Institutional funding would also counteract the reluctance of local banks to lend under reformed laws that promote gender equality.²⁰⁵

B. Scope of the Protections

The scope must be as expansive as possible, and framed in mandatory terms. Joint registration of title establishing co-ownership for couples is essential to protect wives within marriages from possible future dispossession. While in common law this is recognized as joint tenancy, in civil law systems – including Rwanda – the legal relationship is called *ton-tine*.²⁰⁶ The introduced system should resonate with the existing legal structure. Formal law must recognize customary marriages if the protections are to be available to women most in need. These protections are in place in both Tanzania (after two years of co-habitation) and Uganda (after ten years of monogamous co-habitation).²⁰⁷ Unoccupied, unused state-owned land could be made available for purchase and titling; public land occupied in good faith for a substantial period of time, as in Mozambique, should be recognized and formalized.

C. Recognition and Enforcement

The importance of creating and maintaining institutions for enforcement cannot be overstated. African governments have struggled to implement a large-scale national land registration system successfully.²⁰⁸ The current low levels of documentation, underdeveloped institutional capacity, and vulnerability to wealth and gender bias suggest that fair and effective

²⁰⁴ See DEININGER, *supra* note 25, at 60.

²⁰⁵ Ann Varley, *Gender and Property Formalization: Conventional and Alternative Approaches*, 35 WORLD DEV. 1739, 1747-48 (2007).

²⁰⁶ See, e.g., James Brooke, *Informal Capitalism Grows in Cameroon*, N.Y. TIMES, Nov. 3, 1987, available at <http://www.nytimes.com/1987/11/30/business/informal-capitalism-grows-in-cameroon.html>.

²⁰⁷ This ten-year period of time is overly demanding and further progress is needed to reflect greater gender equality. See BROWN & UVUZA, *supra* note 113.

²⁰⁸ See Toulmin, *supra* note 9, at 10.

centralized land systems are a distant goal for many post-conflict African countries. In contrast, local structures are cheap, flexible, perceived as legitimate,²⁰⁹ and are effective centers for rights administration and dispute resolution. While a unified system may be the ultimate goal, establishing locally tailored procedures that can be upgraded over time offers a more immediate remedy to women entering the land market during the critical post-conflict reconstruction period. Supporting local institutional intermediate land titling has proven effective in both Nigeria and Ethiopia,²¹⁰ but the risk of the “politics of exclusion” of the least powerful – typically women, migrants, tenants, and pastoralists – is one that still requires adequate legal safeguarding against.

Certain factors consistently emerge as critical for an effective system: establishing a process after thorough local community consultations, using decentralized and local management, building on existing local institutions, using the local language, granting minimum discretionary powers to local elites in their administrative responsibilities, ensuring substantive downward accountability, protecting low fees to users, providing for periodic updating, and providing for easy detection and penalization for abuse of power and discrimination.²¹¹ These measures focus on implementation at the local level, but allow for central oversight and enforcement of laws protecting women’s rights if required.

Implementing complementary measures ensuring transparency and downward accountability (democratization) to protect against abuse by local elites requires vesting rights in individuals, with central government oversight of local bodies. This can be partly achieved through female representation in local institutions such as land committees and local governments. For instance, the locally devolved Tanzanian system ensures that women are represented in land administration and adjudication bodies, as does the Ugandan structure described above.²¹²

Similarly, primary research in Tanzania suggests that when women are in leadership positions within the community, such as being the community leader, vulnerable women such as divorcees and widows are highly likely to have their land rights respected.²¹³ The central government can then re-direct resources that would otherwise be engaged in a burdensome registration system into appropriate and responsive enforcement mecha-

²⁰⁹ See Jean-Phillipe Platteau, *Does Africa Need Land Reform?*, in *EVOLVING LAND RIGHTS, POLICY AND TENURE* 72 (2000); Toulmin, *supra* note 9, at 17.

²¹⁰ Toulmin, *supra* note 9, at 10-11.

²¹¹ See *id.* at 17.

²¹² Tripp, *supra* note 84, at 4.

²¹³ See Kapur, *supra* note 183, at 19.

nisms. This oversight may thus reduce corruption, exclusion, and subversion of the law by local elites. Further, extensive management at the local level builds on existing structures, relationships, and cultural practices. The initial focus could be on “introducing simple written contracts with agreed basic terms,”²¹⁴ which would require verbal confirmation of the terms by a government official in order to accommodate issues of illiteracy.

Well-funded, expansive educational campaigns that reach women in rural areas are critical to local adoption. For example, the limits to progress in Mozambique and Namibia stem from “insufficient investment by the state in informing rural community members of their rights and supporting local procedures”²¹⁵ Development institutions would increase the efficacy of their entire investment by ensuring that the local communities and decision-making bodies – both formal and customary – are aware of the rights granted, how they affect customary law, and which enforcement mechanisms apply.

The final and most intransigent avenue for progress is promoting local willingness to effectively use formal institutions. One goal should be gender inclusion at all state levels, from land committees to local government staff to state-level political representation. In addition to this inclusion, strategic and financial support of non-state actors by IFIs could be instrumental in empowering local groups to maintain the pressure for change. In the past, “[w]omen have successfully formed informal groups, associations, or cooperatives to secure their rights, protect or acquire more land”²¹⁶ For example, “[i]n Burkina Faso, Ghana, Uganda, and Tanzania, women, lawyers’ associations and civil society groups have . . . agitat[ed] for women’s property rights, educating the populace, bringing test cases . . . to court and promoting the enforcement of laws that protect women’s property.”²¹⁷ Gender specialists advocate for the use of paralegals at the local level to promote women’s rights with support from the NGO community.²¹⁸

The above considerations are by no means exhaustive; the specific cultural, political, and social context will in each case facilitate some initiatives and hinder others. However, there is a growing body of evidence from which to extract successful policies and highlight possible obstacles. The correct formula of substantive protections and procedural reforms required

²¹⁴ Toulmin, *supra* note 9, at 17.

²¹⁵ Sjaastad & Cousins, *supra* note 101, at 7; *see also* Joireman, *supra* note 100, at 1241.

²¹⁶ Lastarria-Cornhiel, *supra* note 67, at 1327.

²¹⁷ Joireman, *supra* note 100, at 1241.

²¹⁸ *See* Varley, *supra* note 205, at 1749 and Kapur, *supra* note 183, at 20.

may vary. Nevertheless, addressing the content of protections, financially enabling women, broadening the scope, and paying particular attention to enforcement at the local level are universally critical for any effective property-focused development policy.

CONCLUSION

The remarkable diversity between regions and countries in the African continent precludes the successful importation of a one-size-fits-all approach to addressing gender equality in land rights. Development institutions, heavily influenced by World Bank research, ideology, and policies, have been slow to appreciate the importance of customary laws and the risks of ignoring local power structures. Unsurprisingly, legislation explicitly enshrining gender equality has proven insufficient to guarantee women equal access to property rights. This insufficiency is partly due to the failure of development policies to translate research and rhetoric into funding and interventions supporting women's economic participation.

Today, there is enough evidence in various African post-conflict pluralist societies to constructively inform development strategies and funding. The reliance of post-conflict states on private funding guarantees the enormous capacity of development institutions to shape laws, institutions and policies. It is disappointing that development funding has not capitalized on the potential of women to be a driving force for economic growth, nor developed a comprehensive understanding of how to empower women as economic participants. This potential is amplified in post-conflict societies where women are central actors in rebuilding communities in desperate need of effective development policies and financial resources to avoid relapses into violence. The characteristic uncertainty in transitional societies provides the greatest opportunity to re-shape custom and social norms that promote gender equality and economic growth.

This paper has explored the different structures and experiences of post-conflict African countries and extracted strategies that could inform a coherent World Bank approach to land law that ensures women's rights. It suggests that gender equality needs to be specifically targeted in land administration development projects in a culturally sensitive manner in order to minimize local resistance to formal legal systems. Where customary law does not recognize gender equitable property rights, and land legislation conflicts with personal or family law, implementation must provide meaningful protection of women's land rights. Utilizing local structures to administer policies is pragmatically and socially imperative, but the power to determine the content of and enforce property rights must necessarily shift from local elites to central institutions.

The “Catch-22” situation that this current system creates is demonstrated across pluralist Africa today: how will local structures be persuaded to apply principles of gender equality in land law, contradictory to the custom already entrenched, validated, and enforced? The answer is multi-faceted, long-term, and involves a diversity of actors. In post-conflict communities, the central government is often willing to embrace gender equality, highly mobilized and capable women and organizations can be found, and traditional culture is being re-negotiated. These circumstances are precisely those in which development aid is needed the most, capable of the most, and politically able to target the most important and underutilized resource – the female population. Unfortunately, there are all too many contexts where conflict has wreaked havoc on economic prosperity; let us hope that development aid starts targeting those who matter most to both peace and development.