Worlds of Human Rights
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The Ambiguities of Rights Claiming in Africa

Edited by

Bill Derman, Anne Hellum, and Kristin Bergtora Sandvik

BRILL

LEIDEN · BOSTON
2013
Cover illustrations: Land restitution process in Limpopo Province, South Africa. Poster used by the Land Claims Commission; citrus packaging plant owned by the Masakona Communal Property Association; the formation of a new company (Muhunguti) owned by the Shigalo Communal Property Association.

Library of Congress Cataloging-in-Publication Data

   pages cm. -- (Afrika-Studiecentrum series ; volume 26)
   Includes index.
   "This book is the result of a long standing collaboration among: Department of Anthropology, the African Studies Center and the Center for Gender in a Global Context at Michigan State University, the Institute of Women's Law at the University of Oslo, VU University Amsterdam, the Center for Poverty, Land and Agrarian Studies at the University of the Western Cape, Bunda College of the University of Malawi, the Peace Research Institute of Oslo, and the Department of International Environment and Development Studies at the Norwegian University of the Life Sciences." -- Acknowledgements.
   Includes bibliographical references and index.

KQC572.W67 2013
323.0967--dc23
201300582

This publication has been typeset in the multilingual "Brill" typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see www.brill.com/brill-typeface.

ISSN 1570-9310

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This book is printed on acid-free paper.
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ACKNOWLEDGEMENTS

This book is the result of a long standing collaboration among several academic institutions: Department of Anthropology, the African Studies Center and the Center for Gender in a Global Context at Michigan State University, the Institute of Women's Law at the University of Oslo, VU University Amsterdam, the Center for Poverty, Land and Agrarian Studies at the University of the Western Cape, Bunda College of the University of Malawi, the Peace Research Institute of Oslo, and the Department of International Environment and Development Studies at the Norwegian University of the Life Sciences. It is also a collaboration between lawyers and anthropologists working in the field of human rights, gender, development and humanitarianism in Africa. It is the outcome of two inter-related panels at the African Studies Association and the American Anthropological Association. The research which is presented has been funded by a number of different organizations. Firstly we would like to thank the Research Council of Norway. They funded the gender, law and development project and a PhD in Refugee Law within the Development Paths in the South Program. Within the Poverty and Peace Program they funded the Land, Water and Poverty Project in South Africa. We wish to thank the Fulbright Program for their support of the fieldwork for the American anthropologists who are part of this volume. Lastly, we wish to thank the South African Netherlands Programme on Alternatives in Development (SANPAD) and the Transboundary Protected Areas Research Initiative (TPARI) for their support of the transboundary park research.

Each of the chapters was carefully reviewed by the three editors. In addition, all the chapters were reviewed by two anonymous reviewers for Brill. We would like to thank all the authors in the book for their constructive suggestions to the general book introduction and to the introductions to each part of the book. Professor Anne Griffiths served as an insightful discussant at the American Anthropological Association panel ‘Remaking Human Rights: Between Western Hegemony and Local Hierarchy’ at the American Anthropological Association Annual Meeting held in Washington D.C.in 2007. We are also grateful to Professor Anne Ferguson for her support and contributions along the way.
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CHAPTER ONE

ETHNOGRAPHIC AND HISTORICAL PERSPECTIVES ON RIGHTS CLAIMING ON THE AFRICAN CONTINENT

Bill Derman, Anne Hellum and Kristin Bergtora Sandvik

1. Introduction

The international human rights framework has assumed prominence as one of the key global discourses on social justice through which the poor, displaced, women, children, landless and indigenous groups (among others) articulate and advocate claims for the rights to livelihood, equality and identity. Social movements, human rights organizations, legal instruments and judicial mechanisms have been mobilized to seek justice from the perpetrators of rape, torture, and murder; to demand fairness in inheritance of land; to claim the right to clean drinking water; and to advance multiple other claims. This mobilization has taken on additional significance with the accelerating rate of adoption of international human rights instruments by most United Nations member states, the growing use of rights-based approaches to socioeconomic development and the increasing number and size of international, national and local non-governmental human rights and humanitarian organizations.

Whether human rights offer real protection when disadvantaged groups invoke them at the local level in an attempt to improve their living conditions is a key concern in recent human rights and development research (De Feyter, Parmentier, Timmerman and Ulrich 2011; Andreassen and Crawford 2013). One of the most highly profiled international initiatives setting out to integrate law, poverty elimination and economic development is the Commission on the Legal Empowerment of the Poor (CLEP) (Commission on Legal Empowerment of the Poor: 2008). Seeing poverty as a result of exclusion, the Commission states that most development initiatives fail because they “tend to focus on the official economy, the formal legal system and the national rather than the local level”.¹ Emphasizing the need for “measures for the legal empowerment of women, minorities,

¹ Commission p. 2.
refugees and internally displaced persons, and indigenous peoples," its ambitious goal is to initiate “a process of systemic change through which the poor and excluded become able to use the law, the legal system and legal services to protect and advance their interests as citizens and economic actors.” The Commission’s simplistic outlook on the transformative capacity of human rights combined with critiques of a human rights based approach (Banik 2011) has prompted the editors of this book to present a collection of ethnographic studies from Sub-Saharan Africa that highlight the complex legal pluralities of claims-making processes from the perspectives of individuals and groups who are using human rights to frame their agendas.

Through ethnographic field work carried out by anthropologists and lawyers, the case studies presented here situate the claiming of human rights in specific geographical, historical and political contexts. The case studies engage with several critical dimensions of contemporary African human rights struggles including land and property, gender equality and legal identity, with a focus on claims-making by groups and individuals that have been subject to injustices and abuses often due to different forms of displacement (Wilson and Mitchell 2006). With the overall focus on claims-making, they describe and analyze situations where the international human rights system has added a new layer to the existing plurality of national, customary and religious norms and institutions that in practice inform social and legal relations. Focusing on local communities’ complexities and divided interests, the cases address the ambiguities and tensions affecting the processes whereby human rights have been incorporated into legislation, social and economic programs, legal advocacy and legal aid initiatives, land reform, development projects, humanitarian assistance or social group mobilization. The overall aim is to come to an understanding of how existing relations of inequality, domination and control are affected by the opportunities offered by emerging law and governance structures as a plurality of non-state actors enter what previously was considered the sole regulatory domain of the nation state.

The book is organized in three thematic parts, each with its own introduction. Concentrating on land and property reform in South Africa, Mozambique and Tanzania, the case studies in Part I and Part II situate rights struggles over access to land or secure tenure in the context of

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2 Commission p. 6.
3 Commission p. 3.
changing property relations, growing land scarcity and the demand for more effective land use. Land struggles and land rights are central to virtually all debates about how to overcome the poverty that characterizes so many rural areas in Africa. While access to land is not an established international human right, it is essential for the exercise of other rights, among others, the right to housing and livelihood, and women's rights to equality. In opposition to market-based policies, intensified privatization and commodification are human rights-based approaches which view land as central to livelihoods, to status in society, to identity and in general to what constitutes a dignified life in the contemporary world (Ikdahl et al. 2005).

Land struggles were at the core of anti-colonial struggles and later in the liberation wars of southern Africa. While much land has been regained from the former colonial powers, much has remained in white hands in the large scale commercial farming sector following independence. However, as Zimbabwe, Namibia and South Africa have attempted land reforms, they have been constrained by international financial institutions and donors to opt for market-led ones rather than rights-based reforms. In addition, African states are aiming at unified legal systems, while rural Africa is primarily governed by a plurality of norms and institutions.

In Part II, case studies from South Africa, Tanzania and Niger address how human rights are conceptualized, articulated and struggled for by different groups of women. African women have increasingly turned to the international human rights arena for better protection of their rights, including access to and ownership of land, equal inheritance rights, full rights of citizenship and social and economic rights. Contestations over equal rights to resources constitutes an arena in which lawmakers, rights-based development agencies, women's organizations and individual women navigate a terrain where universal rights embedded in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) interact with state law and customary or religious norms in different social and political contexts.

Human rights are also central for the victims of humanitarian emergencies, who are affected either by large scale displacements caused by repression, conflict or natural/man-made disasters, or by the more individualized tragedies caused by the HIV/AIDS epidemic. The quest for legal identity and for social and cultural membership rights in a community remains central to the fulfilment of basic rights and lives led in dignity. These rights require gendering since domestic duties often place women at risk of rape and other forms of violence. In Part III, case studies from Uganda, Eritrea
and Malawi untangle the transformation of political agency and rights claiming that occurs when individuals become the object of humanitarian ‘interventions’ and when international humanitarian actors become targets of such claims, in addition to, or to the exclusion of, the African state.

In this general introduction, the case studies are situated in the broader context of changing constellations of law and governance shaped by history, power structures and legal pluralism. In section two, a brief overview is given of how market systems, humanitarian enterprises and state legal systems in recent years have been challenged to incorporate human rights principles to counter growing global inequalities and poverty. Focusing on the processes whereby human rights principles are translated and delivered through legislation, development programs or humanitarian assistance, section three sets the scene for a contextual approach examining how they feed into unequal power relations and varying cultural practices which can reinforce existing inequalities or, alternatively, diminish them.

To understand the ambiguities of contemporary African human rights struggles, section four provides a brief introduction to the continuities and discontinuities in human rights discourses and practices in Africa from the colonial era up to the present time. Section five gives an overview of the slow and uneven process whereby international and regional human rights instruments have been adopted by post-colonial African states. In the light of the long history of Europe’s domination of Africa and the often tense and uneasy fraught relationship with the United States, section six seeks an understanding of the ambivalence and scepticism of many African governments, civic organizations and intellectuals toward the underlying motivations of numerous international actors’ growing human rights initiatives. Towards this end, four sets of African human rights debates are addressed and discussed in the light of the ethnographic case studies. These include the debate about universalism versus relativism and considerations of whose interests are represented in human rights norms and organizations. Related questions are whether the focus on human rights by western governments and NGOs constitutes a way of expanding neo-liberalism, and how the increasing use of human rights in humanitarianism should be understood.

2. The Globalization of Human Rights

While economics-based discourses had dominated international development initiatives since the 1950s, the human rights framework began to
gain purchase in development circles in the late 1980s. This led to a renewed and expanded argument for the importance of human rights in development at the United Nations. Emphasizing the link between development, democracy, good governance and rule of law, the good governance matrix, which formerly gave prominence only to core liberal values embedded in the civil and political human rights, was expanded to include socio-economic rights. As part of these considerations, the United Nations attempted a synthetic Right to Development—an integrated version of social, economic, cultural, civil, and political rights. Seeking to overcome development strategies which didn’t include women, children and other socially marginalized and vulnerable segments of the population, the human rights based approach to development (HRBA) was adopted by the United Nations in 1986. While the right to development itself has been sidelined, the emphases upon the interconnection among the array of civil, political, social and economic human rights has increased (Andreassen and Marks 2006; Musembi and Cornwall 2004). This trend is reflected in a rapidly growing body of human rights literature dealing with the right to a livelihood without discrimination in terms of land, food and water (Ikdahl et al. 2005; Eide and Kracht 2009; Langford and Russell 2013; Hellum and Sinding Aasen 2013).

As HRBA was adopted as a guiding framework for states and international organizations, a new set of possibilities for social action was raised linking non-governmental organizations and development ones. The broadening of human rights into these new arenas and the use of socio-economic rights in addition to civil and political rights produces new contestations (Crawford and Andreassen 2013). State parties in most parts of the world have been reluctant to incorporate social and economic rights into national law although there are important exceptions (Liebenberg 2010; Viljoen and Louw 2007; Andrews 2008). In spite of state resistance there is an increasing body of social rights jurisprudence in most countries which demonstrates how human rights principles are being integrated in

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4 This effort is associated with Dr. Arjun Sengupta (2005) who occupied the position as Special Rapporteur on the Human Right to Development at the United Nations. While the General Assembly adopted the Right to Development, it was a contentious vote and little headway has been made in its adoption or use.

5 In part this was due to most countries ignoring ‘the right to development.’

6 The HRBA has been adopted in Norwegian, Dutch and English development policies. The United States government and the World Bank have resisted using HRBA.
national law as people seeking social justice take legal action (Langford 2009, Hellum and Aasen 2013).

In contrast, the outcomes of rights-based humanitarianism have been much less tangible. In the mid-1990s, the burgeoning humanitarian enterprise found itself in a legitimacy crisis resulting from their inability to protect civilians in Somalia, the former Yugoslavia and Rwanda (Barnett and Finnemore 2004). More general charges of inefficiency, mismanagement and waste were levied against the general practices of humanitarian organizations, at both the UN and the NGO level. As a response, these organizations began to pursue reform through the institutionalization, standardization and professionalization of practice, by expanding humanitarians’ scope to include long-term development-related objectives by emphasizing “humanitarian protection” and engaging much more actively with international human rights. The shift from a needs-based to a rights-based humanitarianism meant that ‘victims’ or ‘beneficiaries’ were re-conceptualized as rights-holders, and humanitarian agencies became their advocates. Inspired by the shift to rights-based development described above, the focus was people-centred, empowering and anti-charity, and saw political engagement not only as legitimate but necessary (Darcy 2004). According to the proponents of rights-based humanitarianism, the coherence between human rights, development and humanitarianism was unproblematic, with rights as the unifying analytical framework for the rapprochement (Sandvik 2010b).

In spite of these ambitious goals of international law and development policy, the globalization of human rights has not led to a significant decrease in poverty in Africa. There is substantial evidence for a growing gap between developed and less developed countries, most significantly in Africa, despite some marked exceptions.

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7 The UN humanitarian system comprises six key actors: United Nations High Commission for Refugees (UNHCR), World Food Program (WFP), The United Nations Children’s Fund (UNICEF), Food and Agriculture Organization (FAO), World Health Organization (WHO) and United Nations Development Programme (UNDP), as well as Office for the Coordination of Humanitarian Affairs (OCHA). The core group of large humanitarian INGOs include, in addition to the Red Cross system, CARE, World Vision, Oxfam and Doctors without Borders (Medecins Sans Frontieres).

8 Tracking the Millennium Development Goals (MDGs) has demonstrated that despite some initial success Sub-Saharan Africa lags behind in the overall fulfillment of its goals. See the annual UN assessment of progress in meeting the MDGs.
3. From the Global to the Regional and the Local—History, Context and Power

The ethnographic cases in this book demonstrate how human rights discourses have spread throughout Africa and have become a critical part of social and political discourse involving governments, development agencies, humanitarian organizations, international and national NGOs and individual claimants. Seeing rights struggles as historically, socially, politically and culturally embedded processes, the case studies need to be understood in a historical context where human rights have been invoked by external and internal actors to promote different interests. Human rights principles were initially part of the colonial civilizing mission while later becoming the centrepiece in struggles against slavery, colonialism, racism and the right to self-determination. Today the unfulfilled promises of post-colonial African governments are giving rise to human rights claims coming from actors ranging from women’s organizations, indigenous groups, refugees, displaced peoples, slum dwellers, and landless peoples. By focusing on contestations over material and symbolic resources fashioned in rights language, we seek a situational and contextual understanding of the complex and ambiguous character of contemporary African human rights struggles. Like Seider and McNeish (2012), our approach privileges women and men’s agency and perceptions which emphasizes the role that structure and long-run historical processes play in shaping constellations of legal pluralities and governance, as well as current prospects for positive change.

Human rights claims are being made against national governments, national and international development agencies, multinational corporations, the International Monetary Fund (IMF), the World Trade Organization (WTO), the United Nations and the World Bank. Located in a variety of transnational settings, the case studies in this book interrogate the role of the African nation-state as the primary implementer of international human rights, while also addressing the roles, responsibilities and privileges of a series of non-state actors. Focusing on human rights claims-making that occurs within human rights structures, the development apparatus and the humanitarian enterprise, the authors engage with human rights discourses and practices as multi-sited and multilayered social processes. The ongoing transformation of development and humanitarian policies is taking place in a complex field of legal pluralism where human rights law, national law and local customs and practices already co-exist. The case studies are thus set in a wider global terrain where the
mobility of people, capital, technology, and law has reconfigured the relationship between local, national and transnational domains (Hepner Chapter 13 this volume; Li 2009; Weilmann 2000; Tsing 2004; Ferguson 2006; Nordstrom 2007). Accelerating mobility at all these levels implies that claimants and addressees often operate in multi-sited situations and, as such, have to deal with increasingly complex legal situations (von Benda-Beckmann, von Benda-Beckmann and Griffiths 2005: 1–4). The effect this shift, moving from a state-centred notion of governance exclusively tied to the national state towards a functional notion of governing activities involving a multiplicity of non-state institutions, has on existing inequalities related to gender, race and class is an important issue (F. and K. von Benda-Beckmann and Eckert 2009: 2).

In the linking of human rights, international development and humanitarian practice, new pressures and new struggles are emerging. Along with the question “development for whom?” that has always framed debates concerning development, there is the parallel question, “rights for whom?” Addressing the question of rights for whom, the authors in this book examine processes of exclusion and inclusion with respect to the persons who have the resources and power to obtain the human rights in question. At the same time, the authors examine the ways in which political and cultural symbolism and practices, rather than human rights principles, might achieve greater legitimacy. Through fieldwork we see that delivering or obtaining human rights is not simply a question of translating a right into a vernacular. Instead, we contend that translations of human rights are active, innovative and local, thus providing new meanings to rights. This is, as pointed out by Franz and Keebet von Benda-Beckmann and Anne Griffiths (2009: 3) especially pertinent in plural legal constellations where different state and non-state actors are “engaged in contestations over who has the power to generate law and construct its meaning.” Most importantly, these processes include questions of power, where translation can be dominated by a relatively powerful group who use rights for their own narrow purposes. Local communities, as well as women within them, have often been seen as undifferentiated, having

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9 We do not however, consider corporate and business actors in this volume, nor the World Bank and the IMF. However, there is a growing literature on these, including: Baard Andressen and Stephen Marks (2010); Sigrun Skogly (2001); Darrow, Mac. 2003.

10 Vernacular is the term used by Sally Engle Merry to mean the local translation and interpretation of a human right, see Merry 2006.

11 Harri Englund (2006) does an effective job of demonstrating how elements of the Malawian middle class have turned the language of human rights to their advantage.
similar interests, and therefore little account has been taken of their complexities and divided interests. To come to grips with the complex struggles of power and resources that shape the relationship between international, national and local norms, the notion of common community interests requires unpacking to uncover patterns of gender and social differentiation within local communities (Derman, Hellum and Manenzhe chapter 3 and Hellum and Derman chapter 7). In a situation where the relationship between women’s rights or farm workers’ rights under international and national law is contested, a key question is who, within a local community, has the power to define, interpret, implement and enforce law at the multiple levels it operates?

As human rights principles are translated and conveyed through legislation, legal education programs, development programs or humanitarian assistance, they feed into unequal power relations and varying cultural practices which can reinforce existing inequalities, or alternatively, diminish them. The authors in this book consider structural and relational imbalances of power while at the same time they recognize the importance of subjects’ own understandings and agency. The case studies demonstrate significant differences in power relations which shape the achievement of rights. These include the delegitimization of rights talk among refugees in Uganda (Sandvik chapter 12), the denial of rights claims among National Park inhabitants in Mozambique (Spierenburg chapter 5), the exclusion of non-claimant farm workers in the land restitution process in South Africa (Derman, Hellum and Manenzhe chapter 3), as well as the displacement of the national human rights legislation in Malawi orphan care by way of international charity and private largesse (Freidus chapter 14). The case studies point to deep-seated structural inequalities that often are upheld as a result of governmental neglect, but sometimes also by the benevolent intentions of outsiders (Henquinet chapter 10). They point to ways in which law reform based on a notion of women as a homogenous group may result in discrimination between different categories of women (Ikdahl chapter 8). The twists and turns of the South African land restitution process show how powerful male elites within the claimant communities benefited from a shift from a social justice approach to a market model guided by a narrow equal opportunity approach, where existing gender hierarchies within the community and the household are regarded as private matters (Hellum and Derman chapter 7). In addition, they demonstrate the potential embedded in international, national and local networks that women’s rights lawyers have, as shown by the case of Tanzanian women’s rights lawyers, who acquired an
economic and professional capacity enabling them to mediate between international, national and local norms in a way that changes established gender norms (Bourdon chapter 9).

4. Continuities and Discontinuities in African Human Rights Discourse

To set the stage for the ethnographic cases, we will provide a brief introduction to the continuities and discontinuities in human rights discourses and practices in Africa. A contentious issue in African human rights debates is the question of whether or not human rights instruments and struggles are distinctively African, or whether they are of ‘western’ derivation. The crux of this question centres on the legal, political, social and cultural legitimacy of human rights in African contexts; however, we recognize that human rights struggles are not new to Africa.

To understand the ambivalent relationship between African norms and values and human rights principles, colonialism’s impact on the region’s legal development is central, combined with the history of racism in Europe and the United States. Historical studies combining a political economy approach with an actor perspective view the formation of African customary laws in the light of both external and internal social, economic and legal factors. A series of studies have demonstrated how customary law was shaped in the course of complex struggles involving colonial administrators, elder African men and young women and men. In his classic study of how customary law was created in the early phase of colonialism, Martin Chanock describes how complex struggles in which western colonizers, African tribal authorities and African men and women invoked and manipulated notions of western and African law created a new form of law that was neither customary nor western (Chanock 1985). Studies from South Africa, Zimbabwe, and Zambia show how African women and men from different age and status groups responded variously to the evolving colonial legal system and, despite unequal power relations, manipulated it to serve their own aims and goals (Hay and Wright 1982; Parpart 1988; Hellum 1999). Women who were married, for example, against their will turned to the colonial courts to have local marriage customs declared as repugnant to natural justice and morality. Barth Rwezaura has described the colonial legal development as a process in which:

...the colonial and post-colonial states had contributed considerably to the transformation of the traditional social and economic system. This development enabled the subordinate members of the society such as sons, daughters and wives to claim autonomy from the male elders. Yet simultaneously
some element of state policy and administrative practices tended to con-serve customs and tradition. (Rwezaura 1990: 17).12

When the Universal Declaration of Human Rights was enacted in 1948, only four African states were members of the United Nations: Egypt, Ethiopia, Liberia and apartheid South Africa. The majority of the European powers that passed the declaration were at the same time denying African societies under colonial rule their most basic human rights (An-Na'im 2003: 9) while South Africa was denying blacks citizenship rights. Anti-colonial struggles in the post-World War II era were very much human rights struggles for self-determination, self-rule, the ending of racism and national independence. The anti-colonial movements in virtually all African colonies opted for the state model of governance. In the post-independence era, African states continued to make contributions to the development of the international human rights regime and strengthened the protection of human rights at the level of regional and national law.13

Burke (2010: 128) observes that “The struggle against colonialism and racism in Africa is reflected in international law’s protection of the right to self-determination as well as protection against discrimination on the grounds of sex and race.” A significant contribution to the development of the human rights system is the right to petition, which was pioneered by African and Asian states calling for more effective international legal weapons against apartheid.14 The right to petition embedded in the Convention on the Elimination of Racial Discrimination (CERD) was the forerunner of the right to petition in the International Covenant on Civil and Political Rights (ICCPR). African states were also the driving force behind the preparation of the draft Convention on Consent and Minimum Age for Marriage in 1961. While the female UN representative from Togo argued that the Convention was a means of liberating African women from “the yoke imposed on them by custom,” the Convention was resisted by many western states with the argument that such an instrument would be difficult to implement due to the vast diversity of “cultural and ethno-logical patterns in various countries.”15 In short, the west raised a cultural relativist argument to counter an African women’s rights argument.

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12 Quoted from Rwezaura in Armstrong et al. 1990.
13 The International Convention on the Elimination of All Forms of Racial Discrimination (1969) was directed at apartheid in South Africa, racial discrimination in the U.S.A., continued colonial rule in Africa, and most recently, at discriminatory policies against the Aborigines by the Australian government. See also, Keck and Sikkink (1998).
14 Burke, ibid. pp. 74–75.
15 Burke op cit. p. 128.
The centrepiece of human rights origins in Africa was the struggle against slavery, colonialism, racism and apartheid. The question of freedom and the fundamental rights to self-determination were part of all African independence movements, as were the multiple promises made by African liberation movements about how democracy and freedoms would replace colonialism. The 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples intensified the moral and political pressure on the European colonial powers. The outcome of the initial period of decolonization and restoration of African national sovereignty was, in most instances, the adoption of European-model nation-states and constitutions (An-Na'im, 2003: 9). In the southern part of the continent, the resistance to independence and majority rule led to longer and more violent struggles which we discuss below. This early and promising period of independence was followed by a series of coups, some internally generated and others with western assistance. The violent overthrow of democratically elected Patrice Lumumba in the Congo in 1960, orchestrated by Belgium and the United States, followed by the overthrow of President Kwame Nkrumah’s government in 1966 in Ghana, the first nation to regain its independence after World War II, threatened the re-establishment of colonial or neo-colonial rule. In southern Africa, the Portuguese were holding onto their colonies of Guinea-Bissau, Angola and Mozambique while white minority rule was the order of the day in Southwest Africa (Namibia), Rhodesia (Zimbabwe) and South Africa, supported to varying degrees by the west. Thus, while there was instability and militarization of many newly independent African states, others were subject to western intervention. This provides an important historical context for understanding Africans’ suspicions concerning the West’s nascent interest in human rights.

The immediate outcome of independence in most African nation states, as pointed out by An-Na'im, was the transfer of authoritarian power structures from colonial masters to local elites (2003). The anti-colonial movements that fought for independence often remained authoritarian
and became the location of personal power, rarely transforming into participatory democratic organizations. Military coups or authoritarian governments became characteristic of large parts of the African continent. They also did not lead to substantial economic and social growth. In response to military rule and authoritarianism, democracy movements emerged in many countries, including opposition parties. While these processes were underway in large areas of the continent, the completion of decolonization took place in former Portuguese Africa and southern Africa. Guinea-Bissau, Angola, Mozambique, Zimbabwe, Namibia, Eritrea, apartheid South Africa and, most recently, South Sudan all gained their independence. As they did so, liberation movements were transformed into political parties and formed the new governments of these states. Having benefited from international solidarity movements and human rights support through the United Nations and other international organizations, this made them, at least initially, far more conscious of international human rights than the earlier decolonization struggles. In southern Africa, the recognition of human rights can be found in the SADC Social Charter, for example, which begins with the following:

1. This Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples’ Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments.

2. Member States undertake to observe the basic rights referred to in this Charter.

These are clearly statements of ideals which to varying degrees shape practices. Despite many varied social and economic experiments ranging from socialism in Ghana, Guinea, and Tanzania to Zambian humanism, the 1980s brought a broad disillusionment with African governments, and the western focus turned to markets, formal elections, civil society and political democracy. The 1980s saw the re-establishment of democratic regimes in some nations coupled with structural adjustment programs that attempted to force most African nations into a single economic mould.

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19 Reference is frequently made to Franz Fanon (1969), who warned of the emergence of a new national bourgeoisie which would appropriate the achievement of independence for themselves and ignore the poor and those impoverished by colonialism.

20 From the Charter of Fundamental Social Rights, in SADC, 2003. SADC was formed in 1999, and part of its origins was to promote and protect human rights, democracy and the rule of law.
In this period the West shifted its strategy to promotion of export economies, expansion of the market, and democratization. Good governance was now added to the set of conditionalities that African states had to adopt to meet the strictures of development assistance and structural adjustment programs. The major institutions tasked with formulating and implementing the instruments for economic policies—the World Bank, the World Trade Organization (WTO) and the International Monetary Fund (IMF)—seemed to be exempt from international human rights leading to a critique that the West supported only political and civil human rights and not economic and social ones. The disjuncture between the multinational economic organizations and the rights-based United Nations ones continues to plague a broader adoption of socio-economic human rights as well as civil and political ones (Skogly 2001).

5. Human Rights in Regional and Domestic African Law

Once freed from colonial rule, all African states adopted the Universal Declaration of Human Rights as they entered the United Nations. They also participated in and voted for the broad set of international human rights instruments as they were debated and voted upon in the United Nations. Most African nations signed and ratified international human rights instruments like the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights from 1966 (ICCPR), the International Covenant on Social, Economic and Cultural Rights of 1966 (ICSECR), the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) and the Convention on the Rights of the Child of 1989 (CRC).

Africa is one of the three regions in the world today that has its own supranational system for the protection of human rights. The African Charter on Human and Peoples’ Rights adopted by the Organization of African Unity in 1981 came into force in 1986 but with minimal enforcement mechanisms. It included civil, political, social, cultural and economic rights and recognized the right to environment and the right to development. Protecting both group rights and individual rights, it contributed to longstanding debates concerning what the relationship should

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21 We are aware of the large differences between nations. The U.S. ignored CEDAW while Norway re-oriented its development assistance to expand its programs for women with a focus on expanding the sphere of women’s rights. By the west, we mean essentially the former colonial powers joined by the United States.
be between the state's obligation to protect women against sex discrimination on the one hand, and to protect the family as the custodian of custom and culture on the other. It was written at the dawn of Zimbabwe's independence; just a few years after Mozambique, Angola and Guinea-Bissau gained independence in 1975, while Namibia and South Africa were still under minority racist regimes. To the disappointment of African women in independent Africa, the liberation movements that were so keen to portray women as fighters and as equal participants in the liberation struggles often relegated them to positions of inequality after national independence had been achieved (Nhongo-Simbanegavi, 2000).

These reversals led to strong women's rights movements linked to international feminist movements for equality before the law, access to land and rights to property. It was CEDAW, with its application in both the private and public spheres, along with the globalization of women's rights organizations, which precipitated a major shift in the priorities of governments and human rights organizations in Africa as elsewhere in the world. The World Conference on Human Rights in Vienna (1993) and the Fourth World Conference on Women in Beijing (1995) constituted a major breakthrough for claiming “women's rights are human rights.” The Vienna Declaration of Human Rights (1993) and the Beijing Plan of Action (1995) stated that:

> The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms.

Facilitating global discussions about which elements of women's rights were western, which were not and which transcended national and continental histories, these World Conferences brought about new forms of cooperation and understandings. For African Women's Rights NGOs,

22 By this we mean the National Front for the Liberation of Mozambique (FRELIMO), the Popular Movement for the Liberation of Angola (MPLA), Party for the Independence of Guinea Bissau and Cape Verde (PAIGC), South West Africa Peoples' Organization (SWAPO), African National Congress (ANC), Zimbabwe African National Union (ZANU) and Eritrean Peoples' Liberation Front (EPLF). There were many other liberation movements and parties, but these are the victorious ones.

23 The Vienna conference was only the second global conference to focus exclusively on human rights, with the first having been the International Conference on Human Rights held in Teheran, Iran, 1968 to mark the twentieth anniversary of the Universal Declaration of Human Rights.

these global events became stepping stones for basic claims such as equal property rights. All Sub-Saharan African states, with the exception of Mauritania, accepted without reservation to:

Undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies.\textsuperscript{25}

In response to the new wave of struggles for equality and human rights in 21st-century Africa, the African Charter was followed up by the African Charter of Rights and Welfare of the Child of 1999. Where the African Charter was weak on women’s rights, these rights were formulated and included in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2005 (the AfPRW). The Protocol to the African Charter on the Rights of Women was prompted by the growing body of women’s rights NGOs’ emphasizing that norms, expectations and resources deriving from membership in a family, a clan, an ethnic, religious or political group often comes into conflict with women’s rights and freedoms as individual citizens. The Protocol, as the first amended human rights instrument, states that women have the right to a positive culture and places an obligation on states to change gender stereotypes embedded in cultural and religious beliefs (Banda 2005).\textsuperscript{26}

These international and regional human rights instruments have clearly made their mark on the development of most African legal systems. Yet there is considerable variation in the degree of protection offered by the constitutions and laws of those African states that have ratified existing international and regional human rights treaties. Among the African countries that are examined in this book, the most extensive human rights protection is offered by the South African Constitution, which encompasses the whole catalogue of civil, political, social and economic rights and recognizes customary law only in as far as it is compatible with the principle of gender equality. While rendering protection of civil and political rights, the Tanzanian, Mozambican, Malawian, and Zimbabwean constitutions do not provide any significant protection of social and economic rights. Whereas the principle of gender equality is protected in the

\textsuperscript{25} The Beijing Declaration and Platform for Action, which was the result of the Fourth World Conference on Women in 1995.

\textsuperscript{26} Article 17. Right to Positive Cultural Context. 1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
Mozambican and Tanzanian constitutions the equality principle’s status in relation to customary law remains contested. The Zimbabwean constitution has a clawback clause stipulating that customary law in the field of family and inheritance law takes precedence in the event of conflict with customary law. In another variation, the Eritrean constitution protects the whole range of civil and political freedoms as well as social, economic, and gender equality but has remained unimplemented since its initial drafting in 1997.

Pointing to the disjuncture between theory and practice in African human rights protection, African human rights scholars emphasize the need for both formal and informal institutions to have the capacity to make power holders accountable to their duty to respect, protect and promote the rights of citizens (An-Na’im 2003, 27; Daniel R. Mekonnen 2009). In a socio-economic context where recourse to courts and professional lawyers is costly, the existence of an independent judiciary and a legal profession is clearly not enough to make law accessible to the poor and marginalized majorities. The past two decades have seen a growth in numbers and activity of non-governmental human rights organizations in Sub-Saharan Africa (Zeleza and McConnaughay 2004), but not without controversy. The growth in African human rights NGOs reflects the emphasis on human rights in international development policy, with many NGOs dependent on foreign sources of funding and technical assistance. The degree to which the agendas and strategies of these organizations are externally dictated or internally generated will be discussed in the chapters in this book.27 In light of the complex history through which African nations became independent and the new western emphasis upon human rights as part and parcel of development cooperation, the nature of human rights is still a highly contested subject in Africa. We now turn to these debates.

6. African Human Rights Debates

Despite the widespread state acceptance expressed through ratification and domestication of international and regional instruments, human

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27 The rise of U.S.-based human rights organizations which became critically important in Africa in the 1980s were Freedom House, which assessed the state of freedom of all independent states, Amnesty International, Human Rights Watch, and then Africa Watch. All of these focused for most of their existence on political and civil rights and not on the other rights.
rights claims are often rejected by African states with reference to principles of non interference, national sovereignty and the incommensurability between human rights instruments and African cultural practices. This form of human rights resistance stands in contrast to earlier appeals for international boycotts and international solidarity that were key for the liberation movements in Angola, Eritrea, Guinea-Bissau, Mozambique, Namibia, Angola, South Africa and Zimbabwe. Given the long history of domination of Africa by Europe and the fraught relationship with the United States stemming from slavery and exacerbated by highly selective engagement in African conflicts, it is not surprising that many African governments, civic organizations and intellectuals express ambivalence and scepticism toward the underlying motivations of numerous international actors’ growing human rights initiatives.

The first set of African human rights debates addressed in this introduction focus on the issue of universalism versus relativism. Are human rights simply the articulation of the laws and perspectives of one part of the world? The second set of debates centre on the political, legal and social legitimacy and relevance of human rights as they are currently formulated. Are their current expressions and organizational forms simply western templates and transplants requiring substantial change in African contexts? The third set of debates is linked to the second concern—whose interests are represented in human rights norms and organizations? In particular, is the focus upon human rights by western governments and NGOs a sophisticated way of expanding neoliberalism? Are human rights discourses and organizations being used to further the aims of the growth and development models designed by northern nations, and particularly the United States? The fourth set of debates revolves around the appropriate understanding and use of human rights-based humanitarianism in African contexts especially given the number and severity of African humanitarian crises.

The First Debate: From Cultural Relativism Versus Universalism to Human Rights in Context

The universalist versus relativist debate has its origin in the initial anthropological critique of the UDHR. In 1947, the American Anthropological

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28 And of course these complex relationships have already been altered by the rise of Asian powers including China, India and now Indonesia. The BRICS (Brazil, Russia, India, China and sometimes including South Africa) have substantial economic and political power if and when they act together.
Association (AAA) wrote a “Statement on Human Rights” in response to the UDHR. The UDHR is based on the premise, according to the AAA, that there is something basic and universal across time, geography, language, and culture that connects all human beings. In the context of western domination, the statement questioned how the proposed declaration of human rights can be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in countries of Western Europe and America? The classical question stemming from this statement is: Are there any sets of values which transcend individual cultures? Since all cultures know the world through their own historically shaped values, it is not possible, from a cultural relativist perspective in this framework, for one culture to objectively assess or judge the values of another.\(^{29}\) Gustavo Esteva and Madhu Suri Prakash (1998) take anthropological relativism to an extreme asserting that:

> Each culture has its own common background, its own horizon of intelligibility. Each culture is a world, a universe. It cannot be reduced to any other culture’s ways of seeing and living reality. It is another reality. (1998: 128)

And from this perspective, human rights interventions appear as a radical imposition upon a pluriverse. On the other hand, many human rights scholars construe human rights as innate, universal principles, as basic rights of the species that “one has simply because one is a human being” (Donnelley 2003: 10). From this perspective, human rights are seen as something revealed rather than something constructed and built over time by human actors.

Between these conflicting anthropological and legal positions is a process-oriented approach that views human rights as a social construction; one which is formulated, negotiated and cast by differently positioned actors seeking justice and freedom in a context of legal globalization. Recognizing that human rights can never be an abstract, neutral position, African human rights scholars like Abdullahi An-Na‘im and Sylvia Tamale, set out a middle ground position, emphasizing the need to develop a united set of principles without losing focus on difference, through a sustained intracultural and cross-cultural dialogue (An-Na‘im 1992; 2000).

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\(^{29}\) The anthropological critique focused, for example, on the existence of slavery along with ‘the rights of man’ or continued colonization and the loss of political autonomy. Thus, unless the UDHR was extended to all peoples and cultures in their own traditions, it was too biased in favor of the U.S. and Europe.
Oloka-Onyango and Tamale 1995; Tamale 1999). Showing how the relationship between international human rights, national constitutional law and African customs is the object of constant reinterpretation, Fareda Banda, in her (2005) influential book *Women, Law and Human Rights. An African Perspective*, emphasizes the flexible character of African culture and custom. To bring human rights from the plane of abstract principles to concrete contestations, African women’s law scholarship has pioneered a grounded approach that situates African human rights struggles in the gendered and classed realities in which co-existing local, national and international norms are mobilized and negotiated (Hellum 1999; Musembi 2002; Hellum, Stewart, Ali and Tsanga 2007). In a similar vein, newer anthropological scholarship on strong legal pluralism transcends the universalist/relativist dichotomy by showing how the relationship between culture and rights is constantly reconceptualized through a process characterized by fluidity and contestation (Cowan, Dembour and Wilson, 2001: 14). Focusing on ways in which women’s human rights travel between the international and the local, Sally Engle Merry’s uses the concept of “vernacularization” and “indigenization” to analyze the process whereby human rights are adopted or resisted in different local contexts (Merry 2006).

The ethnographic studies in this volume reflect and deepen these intermediary and agency-oriented positions in anthropology and law. They show how defence of ‘a culture’ against challenges represented by human rights claims often stems from contestations over what constitutes ‘culture’ in a changing world. Moreover, they demonstrate how new norms and institutions create new contexts in which dominant cultural paradigms related to access and control of resources and power are questioned. As the governments of Sub-Saharan African countries gradually domesticate international and regional human rights instruments, the increasingly unified state laws enter into a complex interplay with co-existing formal and informal norms and institutions producing new struggles in which old privileges related to marriage, divorce, inheritance, child custody, land ownership and refugee status are challenged. In a situation where African societies do not constitute isolated local units, but are characterized by a multiplicity of interacting cultures, values and norms, polar oppositions like rights versus culture or traditional versus modern do not produce any realistic understanding of what is at stake.

In chapter 4, Knut Nustad’s ethnographic field research illustrates the importance of problematising (and not romanticizing) ‘the local’ or ‘the
indigenous' since these too are fields of contestation with varied interests. Nustad’s examination of land rights and conflicts related to the racially motivated dispossession of land and the subsequent rights claims for restitution to the dispossessed in the Dukuduku forest of KwaZulu Natal, South Africa, bears witness to the vigorous contestations surrounding who is indigenous, who is the chief and who has rights to the land. Derman, Hellum and Manenzhe’s chapter 3 attests to how the incorporation of human rights into local struggles may lead to the reproduction of old imaginations. The South African Land Restitution Act gives a broad definition of property rights including registered or unregistered rights, use by labor tenants, sharecroppers or occupants and customary law to compensate for the multiple forms of dispossession that took place in the apartheid years after 1913. Yet in the course of the social and legal process whereby claims have been shaped and decided, this broad and inclusive notion of property rights has been reconfigured in order to privilege those groups who mediate their claims under a chief. This resurgence of chiefly power speaks to law’s character as a ‘semi-autonomous social field’ (Moore 1978). State law is not the single regulatory force as it impinges on the claimant communities which have the power to generate and enforce their own rules.

Bourdon’s chapter 9, on the other hand, shows how human rights can be invoked to change existing perceptions of gender. She describes how Tanzanian women NGO lawyers take advantage of the open-ended and flexible alternative dispute resolution (ADR) process to reach agreements that favour women by sidestepping the letter of statutory law which is out of tune with Tanzania’s human rights obligations. The often moralistic rhetorical devices including such notions as a ‘good wife’ and a ‘good husband’ are informed by the way in which gender is constructed in the CEDAW and the African Protocol. Central to this process, where state law is overruled by new imaginaries and standards are the identity and power of the mediator in guiding the case away from moralizing women’s positions to framing the discourse in terms of African feminist and human rights gender values.

The Second Debate: The Political Economy of the African Human Rights Sector

A related critique focuses upon the regional and cultural differences between the West and Africa. One prominent proponent of an
African-based or a national-based human rights focus is Makau Mutua who has produced a series of writings including *Human Rights: A Political and Cultural Critique* (2002) and a second, more recent volume, *Human Rights NGOs in East Africa: Political and Normative Tensions* (2009). In the first, the basic underpinnings of human rights are criticized from a cultural relativist perspective—rather than universal, human rights are seen as specific to time, place, culture, ethnicity and religion. In the later edited volume, he contends that the ways in which western non-governmental organizations (without naming them) brought their organizations and concerns into East Africa are at odds with the real needs and possibilities of human rights in the region. The essence of his argument is the following: The biggest threat to human rights NGOs in East Africa (Kenya, Tanzania and Uganda) is their dependency on international donor funding. He goes on to suggest that almost all donor-donee relationships are pathological, that they confuse priorities, lack social, cultural and political legitimacy and as such undermine the creation of viable human rights movements (2009: 31). According to Mutua, human rights NGOs not based in Africa exist to vindicate their own agendas, many of which are incongruent with the burning issues in the region. He leaves little place for African agency, negotiation, mediation or partnerships in the light of powerful human rights NGOs, and several authors in his volume do not agree with his perspective. Unlike Mukua Mutua, Boaventura de Souza Santos and Caesar A. Rodriguez-Garavito, in their book *Law and Globalization from Below* (2006), present case studies from Eastern Africa and other parts of the world showing how organized grassroots resistance to neo-liberal globalization can translate into emerging counter-hegemonic socio-legal discourses.

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30 Makau Mutua is Dean, SUNY Distinguished Professor and the Floyd H. & Hilda L. Hurst Faculty Scholar at Buffalo Law School, The State University of New York.

31 He did not explicitly consider why and how so many African states adopted the African Charter or how and why this is ‘not African.’ In short, he tends to avoid any discussion and analysis of African-produced human rights instruments.


33 For example Tamale’s chapter in Mutua’s book argues the reverse for women’s rights than he argues more generally. For her, the withdrawal of donor funding from women’s rights organizations has been damaging to them. These organizations, in her analysis, should ideally be confronting the underlying power relations and structures that create imbalances and inequities between Ugandan men and women (p. 68). Situating her analysis in the deep patriarchal structures of Ugandan society, she argues precisely for breaking with the ways in which women’s bodies are controlled. These controls are such that it may take transnational as well as local efforts to undermine and change.
Adopting an actor oriented perspective on women's struggles for land and inheritance rights in Tanzania, Bourdon's chapter (9) considers the complex interplay among international human rights agencies, Tanzanian women lawyers and individual rights holders, in order to explore how women use human rights to protect their access to land and housing. How human rights ideas and practices travel in various settings and become socially and economically important is what engages Bourdon. Her anthropological analysis of the social life of the law contextualizes and grounds the practice of human rights and draws attention to the channels of communication and institutional structures that mediate between global human rights ideals and local situations. Freidus’ chapter 14, in analyzing lay humanitarian attempts to assist orphans in Malawi, finds that these organizations dismiss human rights concerns while universalizing the conditions of orphans. The main church organizations assisting orphans view them as victims, their families as helpless, and represent echoes from the past, namely, Africans in desperate need of western assistance. The concept of children having rights, despite the existence of the Child Rights Convention, seems beyond these organizations for the present.

Henquinet’s chapter 10 explores how women’s equal rights, as embedded in the CEDAW and the CRC, are translated by the international development organizations CARE and United Nations Children’s Fund (UNICEF) in the Maradi Region of Niger. In the complex negotiations among equal rights, custom and religion, and as these organizations seek to gain public credibility and negotiate Muslim and aid worker identities, patriarchal norms and perceptions are often accommodated and reinforced rather than challenged and changed. Human rights, in Sally Engle Merry’s terms, are ‘indigenized’ rather than ‘vernacularized’, which means that the content of the human rights are fundamentally altered from their international human rights content (Merry 2006b: 49). Vernacularization refers to the pragmatic use of human rights by reshaping rights to respond to national, regional or local norms and practices (Levitt and Merry 2008). Henquinet's work shows how development institutions such as CARE and UNICEF, in their negotiations with local and national power holders, in many instances put the credibility and legitimacy of their own institution above women's equal rights. This in turn can undermine their credibility and legitimacy in the eyes of the women they are committed to assist.

34 Niger is a secular state although it is predominantly Muslim.
The Third Debate: Between Social Justice and Neo-Liberalism

A third critique suggests that human rights discourses in practice are used to promote the interests of those already privileged to maintain their societal position, including the continued hegemony of Europe and the United States. In this optic, the human rights agenda has been said to be part of a neo-liberal strategy to continue opening up Sub-Saharan Africa to capitalism. Ambreena Manji’s *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (2006) examines the pressure exerted on African governments by the World Bank and international donors to replace customary land tenure with Western-type legal registration processes. She argues that liberalization of African land law will have serious consequences for the way in which people perceive land and their fellow landholders. Harri Englund (2006) argues that human rights discourses have been appropriated by relatively wealthy and well-educated Malawians to further support their societal positions rather than to empower the poor and address poverty. He makes a strong case, and careful attention must always be paid to who is making human rights claims, how they are doing it, who is included and who is excluded. Englund’s careful field-based analysis fits well with the case studies in this book in their attention to context, organizational goals and strategies and outcomes by the full panoply of actors including governments, multilateral agencies, non-governmental organizations and local actors. Manji’s analysis on the other hand, severely limits African agency and its resistance to efforts to formalize land tenure to benefit either the wealthy or ‘the west.’

By examining ethnographic case studies, the authors in this book deepen debate about whether and how human rights organizations and struggles benefit, or do not benefit, elites, and whether or not they promote neo-liberal economic agendas. In chapter 5, Marja Spierenburg explores the complexities of creating transfrontier conservation areas where populations are living or using these environments. Spierenburg documents the protracted process of environmental NGOs attempting to protect their reputations as they engage with local ‘communities’ who are increasingly being restricted in their use of, and access to, a national park. Rather than using the framework for involuntary resettlement, the government of Mozambique adopted a framework for voluntary resettlement in an attempt to show that local land rights are respected and that the processes of resettlement are fair and genuinely acceptable. The human rights of those relocated are placed in jeopardy. These rights include the rights of participation, housing, livelihoods and in the local context, land.
In land restitution in South Africa Derman, Hellum and Manenzhe describe in chapter 3 how a rights-based South African state nonetheless seeks neo-liberal or market solutions marrying land restitution to business models. The gendered outcome of the South African land restitution process, addressed by Hellum and Derman in chapter 7, describes how the South African government’s attempt to tightly link a social justice and business model in the post-settlement phase has resulted in a land restitution model governed by a narrow equal opportunity approach, where existing gender hierarchies within the community and the household are regarded as private matters. By disregarding the basic institutional architecture envisaged by the drafters of legislation and policy aiming at substantive gender equality, the government has created a profound disconnect between what Cousins and Hall (2012) term the realm of “equal rights” and the local realities lived by “women rights holders”.

Ikdahl (chapter 8) analyzes how the neo-liberal strategy of land titling that was adopted by the Tanzanian government and supported by the World Bank runs against land tenure security and property rights for some groups of Tanzanian women. Her study, based on field work in Hanna Nasif in Dar es Salaam, shows how state law’s attempts to protect women’s equal right to a home by focusing exclusively on the husband-wife relationship are often to the detriment of entitlements that derive from other extended family relationships. In line with research findings from South Africa, Ikdahl’s study points to the fact that the wife not is the sole claimant with a stake in the family property (Claassens 2005). In a situation where the right to a home is nested in a bundle of rights and obligations between family members from past, present and future generations it is important to consider how different groups of women are positioned in complex chains of relationships between people and property.

Hepner (chapter 13) describes how the Eritrean state turned into a highly militarized and repressive regime. As Hepner observes, the rejection of broadly defined foreign influences and concerns about maintaining sovereignty in a world dominated by neo-liberal globalization underpins the current crisis of human rights in Eritrea. To illuminate responses to this crisis, she examines how three different organizations have responded to the repression. The three organizations addressed here by Hepner include the Eritrean Anti-Militarism Initiative (EAI) based in Frankfurt, Germany; the Eritrean Movement for Democracy and Human Rights (EMDHR) based in Pretoria, South Africa; and the Eritrean Human Rights Advocacy Group (EHRAG) based in California, USA. What had
been one of Africa’s most insulated regimes now faces an international mobilization by some of its refugees, asylees and emigrants.

In response, Eritreans who had organized and supported a transnational mobilization to support Eritrean independence from Ethiopia are now using emergent rights-based initiatives among refugees, asylees and exiles in the United States, Germany, and South Africa with a view to ending the Eritrean regime. Ongoing research has turned up evidence that asylum seekers are advised by compatriots, lawyers, refugee counsellors and others that becoming involved in opposition organizations can help build a stronger asylum case. This raises serious questions about the motivations for political activism operative among some asylum seekers and suggests that no direct link can be assumed between political activism and critical consciousness of political issues. Real motivations underlying actions are difficult to discern.

The Fourth Debate: Human Rights and Humanitarianism

A fourth critique argues that rights-based humanitarianism is fundamentally compromised by the ambiguous relationship between international humanitarian actors, African states and the premises and prescriptions of the human rights framework. Two fundamental problems are perceived to be at work.

Since the mid-1990s, little has changed in the relationship between transnational humanitarian practitioners and the people designated as the beneficiaries of humanitarian assistance in local contexts. Commentators point to a structural deficiency, namely the lack of substantive engagement between humanitarian protection and the processes of injustice: Classical humanitarianism was palliative (relieving immediate suffering), remedial (restoring health, dignity, and the ability to cope) and preventive (of blocking exposure to certain threats, usually within short timeframes). Humanitarian action did not engage with root causes: the humanitarian law framework focused on imposing constraints on the conduct of warring parties. The human rights agenda, on the other hand, was centrally concerned with root causes, structural injustices and power imbalances (Darcy 2004).

As a result, rights-based humanitarianism sits uneasily together not only with traditional charities, but also with the humanitarian governance of UN agencies (Sandvik 2010a), the new global philanthropy and a sprawling landscape of faith-based initiatives. Furthermore, in the context of humanitarian emergencies, national governments as the main human
rights duty bearers are frequently debilitated, rendered incompetent, or unwilling to offer legal and material protection to its population or to other groups of people that may have landed on its territory. As observed more generally by Klasing, Moses and Satterthwaite (2011:13), the conflicting understanding of rights-based approaches between agencies and NGOs with respect to the definitions of rights-holders and duty-bearers and their interrelationship may actually undermine the ability of affected populations to effectively demand their rights from the host state.

The contributions to this volume illuminate how the various agendas of different humanitarian and human rights actors intersect or collide, and how victims/beneficiaries attempt to make sense of these frameworks in their struggle for resources. In the case of Uganda (chapter 12), Kristin B. Sandvik investigates the tension between the formal conceptualization of rights-based humanitarianism and the practice of rights, as it plays out in the everyday context of the international refugee regime. Sandvik describes how UNHCR legal protection officers resist rights claiming by urban refugees in Kampala by redefining refugees as gossips and rumormongers. In her case study (chapter 13), Tricia R. Hepner considers the ambiguity of rights-talk as it works as a framework for political organizing and individual asylum claims in Eritrea and in the Eritrean diaspora. This case shows us the complex considerations underlying how Eritrean refugees in exile endeavour to use human rights frameworks in their social movement activities on the local, national, transnational and international levels. They also use human rights to mobilize narratives of individual humanitarian suffering. Finally, Andreas Freidus (chapter 14) points to the marginalization of rights as a consequence of the rising influx on the African continent of groups of lay humanitarians inspired by a mixture of celebrity and faith-based humanitarianism. This case unpacks the disquieting encounter between international children’s rights and the charitable discourses deployed in the “humanitarian” appropriation of orphan care by Western NGOs in Malawi.

References


PART I

LAND, PROPERTY AND HUMAN RIGHTS
CHAPTER TWO

INTRODUCTION TO LAND, PROPERTY AND HUMAN RIGHTS

Bill Derman

Most of Africa is in a transitional period moving from a land abundant area to a land scarce one. With population increase, commodification of production, increased integration into a world economy, and growing large-scale land acquisitions, there are intense debates as to the appropriate forms of land tenure for this period of change. In addition there are wide-ranging discussions about the most appropriate and effective ways to improve agricultural production while protecting village and community land. These discussions are reflected in continent-wide concerns around the following issues: whether or not to title or register landholdings, how to protect pastoral grazing lands, how to reduce conflicts between long term and recent residents or migrants, how to balance conservation, national parks, and local needs and concerns about land use, how much land should be set aside for biofuels taking land out of food crops, and how women should receive land rights and land ownership. There appear to be two general competing models of what the appropriate governance models should be for land tenure, and the appropriate agricultural paths for increased food production. One path relies on the market and global processes and the other upon protecting the livelihoods and rights of a diverse range of peoples. The first path advanced in general by the World Bank, the International Monetary Fund, regional development banks and many donors means to promote international investment in land, agriculture, biofuels and minerals, to create or sustain national land markets, to increase exports and in general to increase openness to globalization. An alternative model is to give policy priority to the majority of land holders which include small-scale agriculturalists, farm workers, rural migrants, women, minorities, pastoralists, etc. From a human rights perspective protecting the livelihoods and assets of the poor and the most vulnerable in order to protect these groups from expropriation either by the state or by international investors is a basic
concern. These broadly defined development paths have multiple implications for rights to land and property, the subject of the chapters in this book.

In this volume four case studies from South Africa, Mozambique and Tanzania focus upon property reform to explore whether and to what extent claims are based, in whole or in part, upon human rights. As noted in the introductory chapter land is not a recognized human right but nonetheless in multiple African contexts human rights language and concepts are employed. Land restitution in South Africa, for example, underscores the deep linkages among human rights issues, processes of land reform and the social, political and religious connections among African peoples and their land. Protection of land and property rights are critical in charting and accomplishing the variety of visions for rural and agrarian change. Thus, multiple powerful actors ranging from government departments and ministries, businesses and farming companies, chiefs and customary authorities, international institutions like the World Bank, and NGOs vie for securing their preferred paths and visions. All three chapters (2, 3 and 5) on South Africa reveal the tensions at play in trying to realize the rights provided for in the South African Constitution and the Land Restitution Act. The Mozambican case draws attention to the transnational decision-making processes which in the name of ‘development’ alienate land and resources from those who currently use it in the name of conservation. The chapters on women in the South African and Tanzanian land reform demonstrate the importance of a human rights approach to a gender analysis of land reform. This approach is discussed in greater detail in the introduction to Part II.

The Significance of Land

In rural Africa there are deep and enduring connections to the land through birth, kinship, ancestors and burial grounds. One outcome of colonization especially in southern Africa has been extreme racial differentiation in terms of access and ownership of land. In other regions of Africa, there has been significant postcolonial land concentration by power

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1 The United Nations Special Rapporteur on the Right to Food, Mr. Olivier De Schutter has been formulating guidelines for foreign investors in agriculture—Principles for Responsible Agricultural Investment (RAI) that Respects Rights, Livelihoods and Resources. http://www.responsibleagroinvestment.org/rai/node/256. Also International Declaration Of Peasants’ Rights approved by the Advisory Committee on Human Rights of
holders with one extreme example being Kenya (Shipton 1988). Thus, land reform, access to land, land resettlement and the inheritance of land delineate critical arenas in which to view competing claims to land and justice through a human rights lens.

In international human rights law there is no ‘right to land’ equivalent to the right to food, the right to health, the right to water and sanitation, etc. However, there are a range of human rights instruments which either directly or indirectly entails access to land for livelihoods, for equitable resource allocation, for return of land to people who have been dispossessed of land by colonial projects, for racial reasons or those displaced by development projects like large dams. In the case of South Africa there is the national legal right to have land or its value returned if the person or his or her descendants have been removed from the land for racial reasons after 1913.

In a varied and rich literature, anthropology has demonstrated that land is embedded in social relationships and contains multiple economic, social and spiritual values (Peters 2009; Berry 1993; Cousins 2008; McCabe 2004 among many others). These include, but are not limited to, long-term security for some or all family members, provisioning of crucial foods, monetary income, social worth, speculation, rituals, and cultural or ethnic identity. In the case of chiefs or others who are regarded as land owners, it can often be used to gather followers, to earn income through either gifts or fees or sold to investors. Land’s economic value can be increased by location (near a highway, near a market, in or near a city, in or near a national park), valuable minerals (gold, coal, etc.), and good water resources. In general, land prices have been rising over most of Sub-Saharan Africa (even though in rural areas little land is privately owned) which has increased competition over land. And, as national and international investors seek new lands for forests, conservation areas, biofuel plantations, food plantations and mines, land rights have gained increased importance. In addition, land rights and land contestations are invariably in the shadow of development. In this time of market dominance,
development is almost synonymous with globalization. However, simply opening African land to global markets has and will continue to place multiple human rights in jeopardy. The case studies from South Africa and Mozambique reflect the tensions between development (including agriculture and tourism), and viewing development as dependent upon international markets. Land and property rights contestations have significant human rights implications as have been identified by the UN Special Rapporteur on the Right to Food.

*Land Ownership and Property*

‘Property’ is notoriously hard to define as demonstrated in chapters 2, 3, and 5. Anthropologists view property and the social relations that accompany property as rights that people have over things and access to things and resources. The von Benda-Beckmann’s and Wiber define property as follows: “Property concerns the ways in which the relations between society’s members with respect to valuables are given form and significance.” (2006: 15). These relations are made up of three elements: 1. The social units that can hold property rights and obligations; 2. The construction of valuables as property objects; and 3. The different sets of rights and obligations social units can have with respect to such objects (op cit.: 16). The chapters on land reform and resettlement demonstrate the complexity of property relations and how property is accessed or denied across the continent. Rather than debating whether or not private property is the ‘best’ form of property, the authors in this book engage with recent rethinking of ideas about property to establish that social and economic realities cannot be encapsulated into a rigid historical trajectory in which private property becomes triumphant and universal.³ The case studies show that market forces do not explain how land is taken from some owners and given to others. Land ownership⁴ in the sense of rights to exclude others are increasingly contested with the new claims for land access and use being advanced by agribusiness, tourist and mining interests. In addition are the internal claims about control, use and access to land. The African land literature describes competition between people on the basis of

³ Nustad in Chapter 5 takes up the thorny question of the relationship between rights and property using a slightly different concept of property.

⁴ Hall, Hirsch and Li 2011 make the point that exclusion is an inherent part of virtually all land tenure systems including common property systems.
gender, age, wealth, history, and lineage which usually resides on claims based on past ownership or past use.

In international human rights treaties and covenants, there is no human right to property. The UDHR declares that “Everyone has the right to own property alone as well as in association with others.” However, in regional human rights treaties individuals have the right to enjoy and use property subject to public interest and state conditions. Article 14 of the African Charter of Human and Peoples Rights states:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The emergent literature on large scale land acquisitions in Africa and the worries of the UN Special Rapporteur on the Right to Food highlights the continued importance of land as a human rights issue even if it is not always framed in this way. International Land Coalition publishes a regular summary of publications and resources documenting large scale land acquisitions and resistance to them. http://www.landcoalition.org/.

In our view, because there is no human right to property private property per se it is therefore not privileged over other forms of property which in Africa include family property (of various scales), common pasture land, common waters, chiefly domains, sacred groves and this list is not all encompassing. In a somewhat different slant, Mary Robinson the former Commissioner of Human Rights contends that property rights are human rights focusing on the fact that “more than half the world’s population lives outside recognized and enforceable laws, without effective legal

5 Part of the many reasons has been political disagreements between the U.S., the former East Bloc and many southern nations on how to define property and the limits of state appropriation.

6 Van Banning concludes his work with the recommendation that the right to property deserves to be a human right (2002: 366).

7 This does not specify the kind of property involved but does clearly underline the importance of law. Public need and community general interest are subject to broad interpretations.

8 The emergent literature on large scale land acquisitions in Africa and the worries of the UN Special Rapporteur on the Right to Food highlights the continued importance of land as a human rights issue even if it is not always framed in this way. International Land Coalition publishes a regular summary of publications and resources documenting large scale land acquisitions and resistance to them. http://www.landcoalition.org/.

9 For a full discussion and analysis of the human right to property see Theo R.G. van Banning 2002.
means to protect their families, homes or other possessions.”¹⁰ In short she suggests that it is the poor who suffer most from the lack of property rights, broadly conceptualized. The importance of property rights (in whatever form) are central in discussions of women’s rights in the Women’s Protocol to the African Charter on Human and People’s Rights and less so in the original Charter where the emphasis is upon the nation and the collective.¹¹ The loss of property rights (especially land) was key to anticolonial and antiracial struggles in eastern and southern Africa. How to undo these colonial and racial legacies and restore property rights has been of central importance. In this context the chapters will examine the kind of property that is envisioned and the difficulty in finding the appropriate forms of land tenure.

Such conflicts over the best forms of land tenure for economic growth and investment has had a highly ideological element based upon assumptions that farmers don’t invest in their land if they don’t ‘own’ it; and that without an active land market more efficient producers cannot increase their production. From this perspective the market is seen as inclusive rather than considering it as excluding some while including others. The World Bank and many other actors including the Hernando de Soto led Alliance for Progress¹² have sought to have private property or freehold tenure replace other forms of land tenure. Part of such a process is described by Ikdahl’s chapter on Tanzanian land registration. The study draws attention to the situational and ambiguous character of women’s relationship to both state and family law in attempting to secure urban land and homes.

Land reform and land resettlement holds a central place in our analysis of property and human rights since it constitutes an effort to undo injustices from the past or to bring ‘development’ to populations who require it. And the question that flows from undoing past injustices will be what systems are envisioned to be more just? What has happened to land in South Africa since 1994 takes on significance that transcends land and

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¹⁰ Property rights are Human Rights by Mary Robinson. El Pais, June 1, 2007.
¹¹ For a comprehensive discussion of women’s rights to property and land see Ingunn Ikdahl 2010.
¹² Hernando de Soto through his two books The Other Path (1989) and The Mystery of Capital (2000), his Alliance for Progress, and consistent networking including the Norwegian Mapping authority and the UN Commission on The Legal Empowerment of the Poor (CLEP) which was approved by the UN General Assembly in 2009. This new organization shone for a few years but there have been no additions to their website since 2009 and it is not being supported by the United Nations.
agriculture itself. Having framed the injustice in primarily racial terms, the South African governments set out an arbitrary target that 1/3 of South Africa’s agricultural land would be transferred from ‘white’ hands to ‘black’ ones. This target strongly tends to be used as the indicator of success or failure of land reform. If the target is missed then land reform is failing. As readers of this volume know, success and failure turn out to be very complicated and not easy to follow on a straight line. In particular we devote a fair amount of attention to what has been identified as an important weakness in the process—the new institutional structures that are to receive the restituted land. We analyze the kinds of organizations and institutions that are the new owners and managers of the restituted land and farms. It can be very difficult to forge an agreement on who actually ‘owns’ the land as Nustad points out in chapter 5. National governments don’t do well with complexity of contradictory demands from local communities and challenges to their authority. And when challenges emerge to the Tanzanian, Mozambican and South African government’s interpretation of the peoples’ best interest; they can become quite forceful in crushing or attempting to crush opposition to their policies.

The Multilayered Character of Land Rights

Many current international efforts center on formalizing land rights. Such debates tend to focus upon individual versus common or group tenure over land. As described in Ikdahl’s chapter about the Tanzanian land debates, it features a Hernando de Soto inspired effort to title poor people’s property on an individual basis ignoring how property is actually held and deployed. In urging the poor to enter the formal arena he ignores the range of ways by which people acknowledge property in its different social and historical dimensions. Caroline Rose notes that de Soto is indifferent to the impact of formal property on traditional communities (those with their own layered property systems) and by implication indifferent to those who will lose their property or property rights in a complex transition to formalized rights. Moreover formalization can easily result in ‘land invaders’ or others who have illegitimately acquired property to get permanent title.

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13 Unlocking the wealth of poor people through vesting them title or legal ownership of their assets including land.
15 Caroline Rose 2010.
Those who have supported de Soto’s views contend that law will protect those who enter the formal arena. However, those familiar with what it takes to access the legal systems, have observed that the poor are the least likely to benefit from legal systems which are difficult, expensive to access and tend to be biased in favor of the wealthy. Formalization then needs to be accompanied by programs to permit the poor to access legal empowerment. The broader process supported by the World Bank and other powerful institutions to privatize and individualize property has ignored how many poor people can become poorer through this process. In addition, sustained titling and privatization entails the continued closing of the common pool resources whereby groups that depend upon common resources including grazing lands, forests, water, and different land forms find themselves excluded. They are often excluded on the basis of lack of power rather than for other reasons. Lastly, those who design systems for poor people to escape poverty without proper and full consultation and participation in these changes, deny them the right of participation. Farm workers, women, the landless, homeless, indigenous groups, and other marginalized groups all have the right under the ICESCR and CEDAW to participate in planning and programs to improve or change their life conditions but are most often excluded from such processes. In the context of land, these four chapters all reflect how the state, or specific ministries or agencies within the state have neither the interest nor perhaps the capacity to permit their citizens to meaningfully participate (especially agricultural workers, poor women, and the poor more generally) in the critical arenas of policy formation and implementation.

In the African context, it has been argued that African culture prescribes groups or households as the appropriate social units rather than individuals as in the west. In terms of urban land rights for women Ikdahl in chapter 8 delineates the complex chain of relationships women are embedded in, the land and houses at stake, and why for women regulations that privilege marriage may, under many circumstances work against the interest of many women. In short, how to balance group rights and individual rights calls for a holistic analysis of the complex chain of relationships different categories of women rely on for access to land. In the same vein struggles for tenants rights, who are the majority of urban residents, can become even more difficult than home owners. This is because tenants’ rights are poorly developed in most African countries and because tenure security relies on a range of networks and laws which are often unavailable to single or divorced women.
The chapters in this book more generally demonstrate that the dichotomy between group and individual rights loses sway when addressing women’s property rights. Women’s groups have challenged long-standing group rights that exclude women from a whole array of rights including inheritance, secure access to land, education, and employment. These biased group rights have tended to be in patrilineal societies where access to land is through husbands and male authorities. These rights are frequently lost upon divorce or the death of the husband. In addition, marital goods become the property of male kin and are lost to spouses and children. And, as we already noted above, property rights of farm workers and other marginalized workers also falls neither into group or individual rights and how best to protect them is very difficult.

_African Land Reform_

The general economic and political importance of land reform diminished in the 1980s and 1990s only to regain heightened political significance in the 1990s and early twenty-first century. This is due to the implementation of fast track land reform and the seizure of almost all white owned farms in Zimbabwe and the emergence of land reform in post-apartheid South Africa. At a small scale but of great import have been the efforts to modernize Mozambican agriculture by its government.\(^\text{16}\) Attempts at undoing the spatial dimensions of apartheid in South Africa and Namibia are critical to their nations’ future while Tanzania struggles to balance protecting rural peoples’ land access and rights while carrying out formalization and titling.

Many human rights claims, if enacted, require changes to property or property relations. Property as a bundle of rights, as described earlier, serves multiple functions including shelter, income, food production, family life, and access to resources. Because of the complexity of property and its multiple functions, the effort to impose a single property regime in Africa by the World Bank, World Trade Organization, some bilateral donors and many NGOs, will continue to meet with resistance and opposition. If countering inequality within and between nations, and

\(^{16}\) Hanlon 2002.
overcoming poverty remain national goals of African states, then property rules and tenure, especially of key resources, are central.

Debates around appropriate forms of land tenure and land rights have dramatically increased. This is due to the purchase or leasing of African lands for the purposes of biofuel production, agricultural production (food and nonfood crops), mining, logging, conservation and game-farming. Our emphasis in this chapter and the ones to follow has been upon the local consequences of rural development strategies. We have emphasized throughout the book the importance of the right to participation in decision-making around livelihoods and other human rights. The United Nations Special Rapporteur on the Right to Food has sought to introduce a human-rights based framework on how the process of land acquisition ought to work.\footnote{http://www.srfood.org/index.php/en/component/content/article/984-access-to-land-and-the-right-to-food http://www.srfood.org/images/stories/pdf/officialreports/20101021_access-to-land-report_en.pdf} While we do not have the space here to enter into a detailed analysis of what is at stake we wish to point out how a human rights based approach is being deployed to include new threats to African peoples’ livelihoods and access to the key resources of land, grazing lands and water. The Special Rapporteur argues that security of tenure is crucial for realizing the right to food and he suggests that, individual titling and the creation of a market for land rights may not be the best path in many instances. Rather he suggests the strengthening of customary land tenure systems and the reinforcement of tenancy laws could significantly improve the protection of land users. Drawing on the lessons learned from decades of agrarian reform, the report emphasizes the importance of land redistribution for the realization of the right to food. It also argues that development models that do not lead to evictions, disruptive shifts in land rights and increased land concentration should be prioritized over ones that do. In our view rights to land will be increasingly linked to other human rights and will grow, rather than diminish, in importance.

Chapters 3, 4 and 7 explore the processes of restituting land to rural communities who have lost land due to racial dispossession. In chapter 5, Spierenburg examines a less visible but important dimension of dispossession of local communities from their land caused by the expansion or creation of national parks and conservation areas. In this case the state is the land owner and therefore contends that the property rights of those living there are insignificant in comparison to state needs. Unlike in South Africa, the vast dispossession of Tanzanian land was carried out by the
The full text on women and sustainable development reads: “Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to: a) introduce the gender perspective in the national development planning procedures; b) ensure participation of women at all levels in the conceptualization, decision-making, implementation and evaluation of development policies and programmes; promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women; take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.” There are no such clauses about men and land.

The newly independent state forced rural residents into consolidated villages (ujamaa) during its early socialist period. In this period private property of land was seen as harmful to the lives and livelihoods of rural Tanzanians. Since then Tanzania has struggled to formulate appropriate land tenure policies including ones which equally include women. Land rights, land tenure and land access are central to how rights are understood and contested in specific contexts. The Protocol to the African Charter on the Rights of Women in Africa (the AfPRW) pays considerable attention to the importance of land. “Access to land is deemed an element of the right to food security (Article 15) and African states are to promote women's access to and control over productive resources such as land and guarantee their right to property.” This is not to imply that most African states are using the charter to address the profound inequalities that exist but to point out that is has been clearly recognized and can be used to promote women's land and property rights.

Land reform, access to land, land resettlement and the inheritance of land, mark important arenas in which to view competing claims to land and justice and how human rights enter the processes. In South Africa, a rights based approach is used including a constitutional mandate to carry out land reform along with national laws which set out procedures for carrying out land restitution. Mozambique and Tanzania have also laid out land reform and land tenure processes but these have not been nearly as systematic as the processes in South Africa. And, as is so often the case, the state, which is supposed to protect the rights of its citizens can be the cause of loss of land and land rights as is the case in Mozambique or housing developments in Dar es Salaam. The tensions surrounding 'the state' form an important center for all the chapters. However, the degree to which the state has a single agenda must be demonstrated rather than
asserted. Since the state can be a malleable institution, subject to multiple pressures, it can be used to carry out, for example, a patriarchal agenda in South Africa despite the promotion of gender equality by other elements within the state. These trends continue to provide urgency and importance to land debates. South Africa has been particularly interesting and a bit different since the struggles over return of land are not centered on food production but viewing agriculture as a business and focusing on the strength or weaknesses of business plans while emphasizing a rights-based approach to the return of land.

In the chapters on South African land rights black South Africans have the right to restitution under the Land Restitution Act and the Constitution if they were dispossessed of their land for racial reasons after 1913. In these chapters, the property in question is mainly private land with some government-owned land to be returned to those or their descendants. A major problem that requires solving is who should receive the land and under what conditions? In this case of restitution the South African government was not satisfied to simply return the land but to see it used in accordance with government wishes. Thus South Africa’s land restitution program attempts to merge human rights, customary rights, property rights and development. To explore these issues Derman, Hellum and Manenzhe examine the processes of land restitution and farming in the Levubu valley in northern Limpopo Province. Rather than offer financial compensation to claimant communities, the South African government has gone ahead and purchased more than fifty large-scale highly developed farms for transfer to claimant communities. In order for the transfers to take place the land claiming communities had to organize themselves into Communal Property Associations or trusts. These are formal legal entities designed by law and required of these communities. Some efforts were made to assist communities in the transition but when the national government opted to make communities form strategic partnerships this lapsed as the leadership had to learn how to function in joint venture companies. How these new arrangements have worked is the subject of the chapter in which the authors assess how the balance between state, market and rights are working out. The chapter on gender in the restitution process will be discussed in the introduction to Part III.

In chapter 3 Knut Nustad discusses notions of ‘property’ and ‘rights’ in the light of his research in the Dukuduku forest in South Africa. In addition he problematizes the idea of community as it has been formulated and understood in the restitution process. In 1998, a group of forest dwellers contacted the Association for Rural Advancement (AFRA), a land
rights NGO based in Pietermaritzburg, and asked it to help them file a claim for the land. A claim that covered the whole of Dukuduku, many surrounding farms and a substantial part of the park, was subsequently filed with the Regional Land Claims Commissioner just before the cut-off date of 31 December 1998. After years of not attending to the issue, the Land Claims Court which handles land restitution cases rejected the claim only to have it reinstated by a higher court. The delays have continued with the main issue being trying to secure different peoples' rights through the formation of a particular legal group known as a Communal Property Association. Nustad demonstrates that the restitution of land in the Isimanagliso wetland park is seriously out of touch with the complex historicities of dispossession which the land reform was meant to address. As shown by the case discussed in the chapter, these problems have become exacerbated when the area in question is part of a conservation area.

In chapter 5 Spierenburg explores the complexities of creating trans-frontier conservation areas where populations are currently living or using these environments. While there are guidelines for what governmental authorities should do when forcing or coercing people to move, there has not been much attention to how to protect the human rights of those displaced. And does a rights approach work better than, for example resistance (Lustig and Kingsbury 2006)? How does one use a human rights approach and strategy in a nation that is formally democratic but many of its policies are not? Under international and South African pressure but with its own internal interests the government of Mozambique declared a new park, the Limpopo National Park (LNP), as an important contribution to the creation of the Great Limpopo Transfrontier Park (GLTP) in 2001. This transfrontier park (see map 2, page 102) encompasses Kruger National Park in South Africa and Gonarezhou National Park in Zimbabwe, rendering it one of the largest transfrontier parks in the world—about 45 000 km². Also in the new park, however, were eight villages living along the river which is deemed to offer the best possibilities for sustaining viable wildlife populations as well as tourism development. Thus the people are to be relocated to outside of the park based upon the assumption that tourists do not want to see villagers utilizing the environment. On the other hand, residents' views are diverse and they depend upon what options are on offer for resettlement. Spierenburg documents the protracted process as environmental NGOs attempt to protect their reputations as they engage with local 'communities' who are increasingly being restricted in their use and access to a national park and as the World Bank
framework for voluntary resettlement is adopted in an attempt to show that local land rights are respected and that the processes of resettlement are fair and genuinely acceptable. This case is a subtle account of ‘green grabbing’ or appropriate villagers’ lands for conservation purposes.

References


CHAPTER THREE

LAND RIGHTS, HUMAN RIGHTS AND DEVELOPMENT:
CONTESTATIONS IN LAND RESTITUTION, LIMPOPO PROVINCE,
SOUTH AFRICA*

Bill Derman, Anne Hellum and Tshililo Manenzhe

1. Introduction

Land reform in South Africa has carried a series of heavy burdens including the realization of human rights, improving social justice and equity, and raising the standard of living of the poor. In addition, it was to improve, not diminish, agricultural production. Despite the pace of land reform proceeding at a far slower pace than envisioned or targeted, major changes are taking place in rural South Africa and in Limpopo Province in particular.\(^1\) In this chapter we explore one leg of land reform—land restitution—as an effort to restore land rights and land ownership, and to remake property and social relations through the complicated processes of land restitution.

Having researched a series of land restitution projects in Limpopo Province we explore how the process has unfolded over time, whose rights have been reconstituted, and how property relations have been altered through the introduction of new institutions. In addition we examine the mismatches and misfits in the discourses and practices established. In particular we pay attention to the location of these projects in and adjacent to the former Bantustans (Homelands) since under apartheid rule they were governed differently from the laws, policies and practices of ‘white’ South Africa. In this chapter we explore how and in what ways have these restitution processes been affected by this deep racial history and

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* The research would not have been possible without the assistance of Themba Maluleke, Shirhimi Shirinda, and Dr. Edward Lahiff. The latter introduced Derman to the area and generously shared his knowledge.

\(^1\) This is exemplified by the newsletter *Umhlaba Wethu* from the Institute of Poverty, Land and Agrarian Studies which shows how far government is from meeting its ‘targets’ without specifying that the target was set arbitrarily and without considering what government could and could not do. Against its own advice, it was the World Bank that suggested at the Options’ Conference (in 1993) that 30 percent of agricultural land could be transferred from white to black hands in the first five years of a market-led programme that was adopted in ANC policy in 1994 (Hall 2010: 169).
the assumptions made about the nature of the African rural communities? What kind of property has land become and what are the property implications of land restitution? Chapter 7 will address women's right to equality under international and South African law and if these rights are addressed or not addressed in the process of restoring rights to land in the context of a highly commercialized agriculture and with many owners residing in the communal areas.

Limpopo Province, the most rural of South Africa’s provinces has seen a variety of important changes which include: new owners on many farms, shifts in the relationship between farm owners and managers and farm workers, adjustments to global markets, new institutions including large municipalities tasked with the provision of services, communal property associations charged to be the new land owning bodies, and tens of thousands of Zimbabwean farm workers and immigrants in general. At the same time, there are profound continuities with the rural landscapes created by apartheid and by an economy dependent upon black labor. The former homelands of Venda, Lebowa and Gazankulu, now called communal areas remain as reservoirs for labor. Their demography is dominated by children, the elderly and women with its young and middle-aged men (but women as well) seeking work and opportunities in the urban and industrial areas.

**The Complexities of Undoing Apartheid**

South Africa is known for the multi-pronged struggle to end apartheid and establish a new rights-based system of governance. Since 1994 it has struggled to restructure its race-based economy and to end the poverty of its black majority. The systematic destruction of the economic base of South Africa’s rural populations by its government made land a central issue in the struggle to achieve a democratic and nonracial nation (Beinart and Bundy 1987; Mbeki 1983; Marks 1970; Delius (1984, 1996); Krikler 1993 among others). At the same time, the role of land as a significant means of livelihood for many diminished due to apartheid policies (Platzky and Walker 1985). The passage of the Restitution of Land Rights Act in 1994 prior to the constitution demonstrated the real and symbolic importance of land issues and the centrality of a rights-based approach. To overcome the division of South Africa’s lands between white and black South Africans, new policies and new laws were formulated in the mid-nineties. These included broad workshops and discussions although often without the participation of rural peoples especially in the former homelands.
White papers and laws were quickly produced in the 1997–1998 period. As Cousins notes (2005: 250) the emphasis shifted from discussion, analysis and workshops to implementation. However the directions that were initially chosen were altered dramatically with a major shift in direction within the Ministry of Land Affairs and Agriculture in 1999 with the resignation of Derek Hannekom and his replacement by Thoko Didza. This change in leadership supported by President Mbeki brought to agriculture many of the same policies now in place in other ministries; namely an emphasis upon the market with a corresponding reduction on social justice and poverty. This shift can also be viewed as bringing the perspective of the market-friendly Growth, Employment and Redistribution (GEAR) strategy to replace the poverty and redistribution oriented Reconstruction and Development Programme (RDP) in the agricultural sector.

Despite the gradual shift from a poverty focus to black empowerment, land restitution was sustained but it appears the government did not know the full extent of rural land claims. And while there were multiple debates surrounding agricultural strategies the land claims described below proceeded. The claims process began with the expectation of the return of lost lands, lost homes, lost pastures and lost fields. However as Cherryl Walker points out:

Because restitution is a right that is measured in terms of a specific piece of land, it pits the present and the past against each other in difficult, revealing (and discontinuous) ways. The land has not gone away but its usage, its public and private meanings, its current value are likely to have changed (2008: 232).

In the case of Levubu, the landscape based upon herding, maize cultivation, forest use, fishing, etc had been transformed as had employment opportunities. To protect these and to prevent the failure of land reform in general, the government opted for strategic partnerships to safeguard production and to manage a transition to black ownership. Thus the right to land under restitution was not straightforward and subject to multiple contestations, understandings and misunderstandings. Current processes

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2 There is a substantial and growing literature on the twists and turns in South Africa’s land and agricultural policy. Ruth Hall authoritatively traces the debates and decision-making within the land sector. She also provides a comprehensive bibliography.

3 None of the recommendations of the time proposed communal property associations to own the restored land in perpetuity. See below.
in Limpopo mark a dramatic historical shift from Mark Wegerif’s 2004 findings that almost all land reform projects were on state owned land which had been bought by the apartheid government for incorporation into the former Bantustans. Now, former privately owned farm land is in community hands purchased by government on behalf of claimant communities.

Overlapping Social Justice and Market Approaches to Land Restitution

Land restitution based upon a legal and constitutional right continued despite the shift to market-based economic policies with strong social welfare elements. The government continued its laws and policies on how to recognize and restore lost land rights for individuals and communities while then needing to adjust its strategies and policies to fit with the broader agricultural national agendas. Thus in Limpopo Province, a rights-based land restitution strategy with its vision of historical social justice was married to a business one.

Those who were dispossessed of their land have had access to government services and to the courts. The basic principles of legal empowerment suggested by UN Commission on the Legal Empowerment of the poor (CLEP) are being used in Levubu including access to the Land Claims Court as the final legal arbiter of contested claims. Suggesting that poverty and marginalisation is caused by the insecure and unprotected assets of the poor, the CLEP calls for a development strategy that changes the relationship between state, society and market. Integrating human rights principles with a liberal market approach CLEP has given new life to old debates about the role of law in development. South Africa's land reform attempting to merge human rights, customary rights and property rights makes it a well suited case to examine the contested relationship between human rights and economic development.

In this chapter we proceed as follows: In Section 2 we provide a brief background to the study and then examine the actions of the South African state in assuming so much of the responsibility for the process of land restitution. We do so in light of how government leaders have analyzed the challenges of deep poverty in the former homelands. In the third section we focus on the process of land restitution through which land is

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purchased from its previous owner and returned to its former ‘owners.’ Returning land to its original owners (or the owners since 1913) turns out to be a highly complex and sensitive task. The fourth section examines the new institutions that form the land-owning entities, the Communal Property Associations (CPAs). CPAs are the legislatively designated entity (along with trusts) that can legally receive land. In the fifth section we explore the question of whether the farming enterprises and the market can sustain the hopes and expectations of claimant communities. In the concluding section we address the complex intersections of customary laws, property and rights.

2. **Background and the Burdens of the South African State to Implement Land Reform**

In an ambitious effort to genuinely transfer prime farm land, the South African government purchased sixty-three farms for approximately 220 million rand for seven claimant communities in the Levubu Valley in northern Limpopo Province.

These are: Tshakuma, Tshitwani, Ravele, Masakona, Ratombo, and Shigalo. Since 2006 several more farms have been purchased or are in the process of being purchased although the precise numbers are not known. And throughout the province there are land claims by multiple claimant groups. Levubu as it is locally known is located in the upper catchment of the Luvuvhu River east of the town of Makhado (also known as Louis Trichardt). The site of export-oriented, high value farms in an ecologically rich area with good rainfall and highly developed irrigation systems; it has been an important experiment in land restitution. To keep production and profit levels up, a strategic partner model was initiated and implemented by the South African government to assure continued production in what appears to be consistent with a neoliberal or business oriented solution.

We have utilized several methods and approaches in our research. It has involved extensive interviews from 2005 to 2010 (but with greatest effort from 2006–2008) with all the parties, including local and regional

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5 We are excluding Tshivazauhlu in any detail from this chapter because they have just received one farm.

6 How and when these will proceed is unknown.
representatives of the then Department of Land Affairs (DLA),\(^7\) the Provincial Department of Agriculture (PDOA), the Regional Land Claim Commissioner’s office (RLCC), municipal officials, senior managers within the three companies designated as strategic partners, leaders and members of claimant communities and the lawyers who represent them, commercial farmers and their legal representatives, farm workers, women, members of the Boards of Directors of the new joint venture companies (JVCs), and employees of NGOs active in land reform in Levubu. During this time we also observed numerous community workshops and meetings between various parties, and analyzed the negotiations’ documentation. Finally, we carried out a survey of four claimant communities to explore the kinds of benefits they hoped for and preferred, the history of their involvement with the land committees and communal property associations, and their current livelihood activities.

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\(^7\) Now part of the Department of Rural Development and Land Reform in the Ministry by the same name. This has been separated from the Ministry of Agriculture, Forestry and Fisheries.
Limpopo Province

Apartheid created two economies built upon a powerful state that privileged the white minority while oppressing and exploiting the black majority. This is most graphically represented in the division of land between white South Africans owning 87% of the nation’s land and black South Africans 13%. In Limpopo Province those figures were 65% for whites and 35% for blacks which has been reduced further through land reform. Approximately 7% of the lands have changed hands (Aliber et al 2011) which mean that 42% of the lands are in black hands, still a relatively small percentage given the numerical dominance of black South Africans in the province. The post-apartheid state has formulated and implemented major laws and policies to undo the racial practices of the past including land reform. In principle South Africa represents the success of a revolutionary party dedicated to a just, nonracial society which required the transformation of the apartheid state. However, the programs developed by government since 1994 have been anything but straightforward or unproblematic. Despite the governments’ claims most economists and analysts see only an increase in the numbers of South Africa’s poor with an increasing number of black South Africans gaining entry into the worlds of power and wealth (May and Hunter 2005, Seekings and Nattrass 2005, Marais 2011 among many others). In the context of increasing, or at best, stable levels of poverty, the rural areas have the highest percentage of poor people. Poverty is also highly gendered. Female headed households which are numerous in rural areas are poorer than male ones, female unemployment is higher, and the wage differential between men and women is quite high. In addition, more men are able to migrate to cities for employment than rural women.

These trends are found with force in Limpopo Province. It remains the most rural province in South Africa with 89% of its population living in these areas as residents of communal areas or on commercial farms. It is also the poorest or second poorest province. Its total population is estimated in 2007 to be 5.4-million (11.3% of South Africa’s total population). There is a large disparity between men and women with women constituting 54% of the population. This disparity can be largely explained by labor

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8 The three pillars are land redistribution, land restitution and tenure reform which has now been enacted as the Communal Land Rights Act (CLARA) passed in 2003 but declared unconstitutional in 2010 leaving secure tenure for the communal areas unachieved.
migration. In the province the two largest employers are government and agriculture. It has been estimated that there are approximately 303,000 smallholder farmers in Limpopo Province in 2000 (Statistics South Africa: 2002). Women constitute 80% of these smallholder farmers. The great majority of people in Limpopo—82.4% - live in the former Homelands or Bantustans—Venda, Gazankulu and Lebowa - which tend to be located far from the urban areas and characterized by low rainfall, poor soils, less water, poorer infrastructure and in general were designed to force men to work in the mines, industries and cities by having inadequate lands for agriculture. The claimant communities while based in the communal areas have many members living in cities and mining towns. By claimant communities we don't mean groups of people living together in one place but those people who make up a land claim based upon the criteria set out in the Land Restitution Act (LRA). Land claimants can come from the same village or they can come from many places after having been dispersed by apartheid government policies or by the search for economic and social opportunities.

Government has taken on the major responsibilities for development in the former homelands by claiming to provide electricity, water, housing, temporary employment, and offers grants for children and for the elderly. These programs, however, have been in the context of a broad strategy to increase foreign direct investment, to withdraw all subsidies from South African agriculture, and to make South African industries globally competitive. Adam Habib (2005) points to the central contradiction at the heart of the ANC government; the tension between neoliberal industrial, trade, monetary and fiscal policies versus social expenditures including children's educational grants, old age grants, and disability payments. Social expenditures, in his view, will not and cannot lift the poor out of their poverty. Nonetheless, these social expenditures are essential for those in the communal areas and are often the most important source of income for many families. Simultaneously, land reform and land restitution in particular has meant that government has sought to purchase land to shift a major means of production from white hands to black ones. It does this while insisting that the land be owned by the Communal Property Association thereby maintaining communal land ownership and supporting traditional authorities.

While the basis for land restitution was and is historical justice, the vast use of public monies, the depth of rural poverty, and the importance of agriculture has meant that land restitution has been refashioned to be a vehicle for development. The economy of these former homelands rests on businesses, small scale agriculture, herding of livestock, urban
migration, and social grants. These have been categorized by the ANC as the second economy which term hides the connections between the first or formal economy and the second, informal and poor one. Pushing the analogy a bit, the first economy resides in the commercial farms, mainly white owned, often located adjacent to communal areas. Keeping the commercial farms intact became the implicit model for land reform. In general, the Limpopo Department of Agriculture and the Regional Land Claims Commissioner required and requires business plans to be drawn up and submitted to the departments for approval before land can be transferred, but this is getting a bit ahead of our story. The point here is that business and the market are to be the drivers of land reform in general and land restitution in particular while the land itself is to be withdrawn from the market. We are not arguing that the market does not have a central place in land restitution but rather that exclusive reliance upon the market may defeat the complex purposes of land reform.

Of central interest to us is the question of what kinds of land rights or rights to land are enshrined in land restitution and whether the land and agrarian policies at work in land restitution have been designed to reflect the interests of the rural poor or whether they more broadly represent rural elites and business interests? We agree with Thomas Pogge (2007) that extreme poverty is a violation of international human rights since it limits or denies the enjoyment of other human rights, especially in the context of extreme income inequalities as in South Africa. This has taken on increased significance with the rise rather than the diminishment of inequality. Can and will the rights embedded in land laws and policies address rural poverty in the case of land restitution in Limpopo? How have the restitution policies developed for Levubu taken poverty into account? Or, like other South African economic policies, is the assumption that the market, left more or less alone, will take care of poverty? What has been the more or less official government analysis of the causes of poverty in the former homelands or communal areas? What measures have been take to ensure the rights of the different beneficiaries involved in the restitution process such as women, farm workers and members of the claimant communities? These are the questions we touch upon the remainder of the chapter while describing the ups and downs of a complex and experimental process.

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9. See Lahiff et al. (2008) for an analysis of the difference that land reform has made in four land reform projects in Limpopo. In general the positive changes were much less than the planners had hoped or expected.
3. **Claiming Land under the Land Restitution Act: Using the Law to Gain Land**

A significant burden and opportunity for the state has been land restitution and the process of returning land to those dispossessed of land on racial grounds since 1913.\(^{10}\) As Deborah James (2007, 2009) and Cherryl Walker (2008) have documented, getting the land back is indeed a complex and tangled process. The formal institution tasked with the return of the land has been the Land Claims Commissioner (LCC) acting on the basis of the LRA. To demonstrate the process and its complexities we provide an account of the steps involved in actually getting land back.

The process itself becomes important because it illustrates the difficulties in moving from the idea of historical justice to implementation which left an untold number of ‘communities’ unable to make land claims in the legislatively determined time frame. According to the act, land claims could be made either as an individual or as a group. In the area where we have been carrying out our research it has been exclusively group claims. The claims had to be lodged on the prescribed form from the Regional Land Claims Commissioner (RLCC) and to be submitted to the Office of the Claims Commissioner in Pretoria by the 31st December 1998. Many groups, usually chiefdoms or subchiefdoms, formed land claims committees. It was not easy for them to proceed. For example, the official forms were initially only obtainable from offices of Department of Land Affairs, the Land Claims Commissioner and some Tribal Authority offices where they were deposited by the Congress of Traditional Leaders of South Africa (CONTRALSA). This posed difficulties for more remote or not well-informed communities and many never did successfully register their claims. It was only after the establishment of Nkuzi Development Association, a nongovernmental organization established to assist farm workers and claimant communities that there was an NGO in all of Limpopo Province dedicated to assist communities.\(^{11}\) Nkuzi began a national land campaign entitled “Stake your Claim” to inform residents of Limpopo Province and nationally of their land rights to insure that as

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\(^{10}\) The date September 13, 1913 was the passage of the Native Land Act which divided South Africa's lands on the basis of race. It was the arbitrary date chosen by the new government to serve as the cut-off time. If groups or individuals lost their land prior to that date they cannot use the Land Restitution Act to make claims.

\(^{11}\) Nkuzi Development Association was formed in December 1996. There were originally two staff members but it expanded rapidly. At its peak it had 5 offices and 30 staff.
many claims as possible were made in South Africa’s rural areas. In response to the cutoff date of 31st December 1998, Nkuzi started operating long hours, worked over weekends, conducted radio talk shows, wrote pamphlets, provided press briefings all as part of the restitution information campaigns. They recruited many volunteers who became expert in how to assist communities lodge the forms and information required at the offices of the RLCC. The government lagged behind the land demands of claimant communities. They were pressured by NGOs and communities to act faster, to be more accessible and to communicate in a timely fashion. The Northern Province (what is now Limpopo) Land Claims Commission offices were based in Pretoria, and lacked capacity to attend to much of the province. It was not until 2001 that the RLCC opened an office in Polokwane (the provincial capital of Limpopo Province) to facilitate the land claims process. The RLCC conducted preliminary investigations in order to unpack the whole claim and detailed property description, confirmation of information contained in the land claim form and often request additional documentary evidence. Nkuzi directly assisted government in processing the land claims in Levubu. They collaborated on detailing the history of the claimants, proper and complete property description, resolving boundary disputes where possible, gathering and documentation of oral histories, confirmation of other evidence such as graves and housing ruins, conducting archival and deeds research for the properties in question, compilation of lists of victims of dispossession and claimant verification lists. The claimant lists were to include everyone above the age of 18 years, who was a victim of dispossession or a direct descendant of the person dispossessed. On the basis of reports from these investigations, in 2000 (three years after cut-off date), the RLCC published a gazette notice for the 11 communities claiming Levubu.12 Land owners had thirty days to contest and most did not do so. In Levubu, there were three groups of land owners: those who rejected the validity of the claims and unwilling to sell,13 those who were eager to sell and move out, and those who would prefer to sell but remain managing the farms in some form of joint venture.14

12 Gazetting in those years was regarded as major progress in the claims settlement because the majority of the claims were still in a registration phase.
13 These tended to be members of the Transvaal Agricultural Union known now by its acronym TAU SA. This organization represents the interests of farm owners primarily in northern South Africa.
14 These were initially called the Group of 23 mainly associated with the other union of farm owners, Agri SA. They ultimately became Mavu Management Services (generally
From Land to Chieftainships

In the case of Levubu, and it is not exceptional, the claims are all in tribal or chiefly names. The boundaries asserted for the land claims are those remembered by chiefs, royal families and elders, at often some indefinite time in the past. Most documents regarding boundaries are to be found in the official archives which were biased toward chiefs and lines on a map drawn those implementing apartheid policies. Actual land use by diverse groups was typically not recorded. In this study all the communities have taken the names of their chiefs or headmen. These are the seven communities receiving land through purchases by the RLCC from farmers on their behalf after having received, investigated and then to large measure accepted their land claims. To date, there have been five phases\(^\text{15}\) of purchases with the major turnover having taken place in Phase I.\(^\text{16}\)

According to the Restitution of Land Act as noted above, land claims could be individual or community. A ‘community’ was defined in relation to the land as any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group. It was the decision of those groups that filed land claims in the three year period from 1995–1998 to opt for community claims. They usually did so in the name of the chief, or as a Land Claims Committee in the name of the chief. Following the submission of the claims all land claimants had to form a Communal Property Association or a Trust. Six of the seven communities formed Communal Property Associations and one a Trust. As part of the process of formation the entire membership of the CPA was entitled to vote for the CPA’s leadership. However, claims by black communities against white farm owners are not the only land claims. Because of the disruptions produced by forced or coercive resettlement into the ethnically based homelands, many claims (and unknown number due to reluctance of the RLCC to make them available assuming they themselves know) were filed by one group against another over loss of fields, loss of grazing lands or loss of space for homes. In addition and adding to the

\(^{15}\)* A phase means a purchase on behalf of a CPA by the RLCC.

\(^{16}\)* It was in preparation for Phase I that the Claimant Communities selected a strategic partner to manage their farms. In the next two purchases the farms were managed by the SP. Subsequently claimant communities are choosing their own farm managers.
complexity of the land restitution process has been boundary disputes between claimant communities.\textsuperscript{17}

The land restitution process has been used by some groups to reclaim not just land but also chieftainship.\textsuperscript{18} It has become part of a broader struggle for chiefly recognition where according to the narratives of three groups in our research, they lost the official recognition of their chiefs and were dispersed to different communities in the homelands. The position of king, chief, and headmen are governmentally recognized positions with salaries and official duties. In broader terms, land restitution has become part of a highly contested landscape including who are the officially recognized kings, chiefs and headmen as well as interethnic relations between Shangaan and Venda communities.\textsuperscript{19} And, only some rural communities actually formulated land claims and thus they are the potential beneficiaries of significant resources while other equally poor communities are not.

In Levubu, the claims were clustered or grouped together and Nkuzi attempted to solve boundary disputes within each cluster. They were only partly successful (see below). Some communities agreed on compromises in order to speed up the process while others continue to reject the boundaries that have been gazetted and therefore lands will not be returned until the disputes are settled. Simultaneously, claimant communities had to provide membership lists of all those who were dispossessed or were direct descendants of those dispossessed. These are the people who become members of CPAs and as such are collectively the owners of the land. These lists can be contentious since these specify the land owners in perpetuity.\textsuperscript{20} The gender dimensions of CPA lists and CPAs more generally are discussed in the next chapter. How CPAs function in general is discussed below in Section 4.

\textsuperscript{17} In a series of interviews (2009–2010) with the leadership of CPAs, the deputy to the Land Claims Commissioner and a local lawyer we learned of multiple claims made by communities against each other. Usually, however, they were for compensation and not for the land itself.

\textsuperscript{18} Ratombo, Shigalo, and Tshitwani ‘royal’ families felt that they had lost their earlier chiefly status and were demoted to headmen or lost all status. They were seeking to regain what they claimed were their former positions.

\textsuperscript{19} The common narrative among Venda is that the Shangaan came with the Portuguese colonialists and therefore they do not have legitimacy. A version which is only a partial truth at best.

\textsuperscript{20} For an analysis of the formation of CPAs and the use of membership lists see Sjaastad, Derman and Manenzhe 2011.
State Purchases and Dilemmas

The actual purchase of farms under the general principle of willing seller and willing buyer is accomplished by the RLCC subject to the signatures of the Minister and the head of finance. Until 2008 only the land and immovable property were surveyed and purchased. For example, tractors were excluded but fruit and nut trees were included in the farm's value and therefore purchase price. Professional surveyors are used to determine the value and the seller (the farmer) and the buyer (government) had to agree on the price. After 2009 the government purchased the functioning farm which has involved far fewer farms in Levubu. This first phase of government purchases on behalf of the claimant communities has involved the transfer (in freehold title) of approximately 5,382 hectares of private land, in 63 parcels,21 purchased at a total price of R219 million. An additional twenty-five percent of the farms' value has been allocated for the rehabilitation of the farms because there were many delays in the actual take-over of the farms from the time of purchase until farming resumed. There have been four additional purchases of farms but these have been limited in number although the process has been smoother with no delays between purchases and take over.

The claiming of land has meant a major commitment of financial and human resources by government to regain the land. The government continues to underestimate the resources and work necessary to make the process work. In trying to control the process government has revealed itself to be non-responsive, non-communicative and heavy-handed. In 2009, eleven years after claims were filed most rural claims in Limpopo have not been resolved leading to suspicions and accusations against government. And, with the firing of two land claims commissioners for corruption, this has added fuel to discontent. Moreover, as we discuss below, settling a claim means the beginning of new issues and problems which require even greater government commitment and resources which, for the most part, have been lacking. What has been termed post-settlement support has suffered from underfunding and lack of skilled personnel. This has led to new unanticipated problems magnified by the difficulties faced by the strategic partners discussed in detail below.

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21 We could term these parcels individual farms. The farms were then grouped together as part of one land claim. When the strategic partners came in (see below) they attempted to run multiple farms as one.
Land versus Farms: The State and the Market

Has the restoration of land, the purpose of restorative justice, lost its meaning in the transformed landscape of the Levubu valley? Here almost all land has been put into high intensity commercial agriculture including avocados, macadamias, bananas, litchis, pecans, citrus and eucalyptus and pine tree plantations. Prior to August 2009, government was not purchasing functioning commercial farms so assuring a smooth transition from the previous owner to new owners was critical. The Government having taken full responsibility for the purchase of land did not however, address the difficult issues of coordination, planning, sequencing and in general anticipate the scale of issues that needed to be addressed to keep the farms productive and to prevent the owners from degrading it. Up until 2004/5, there was no clear communication or coordination between the RLCC (mainly responsible with the turning over land) and the Provincial Department of Agriculture as well as the Provincial Land Reform Office. While municipalities were growing in importance and held responsible for service provision, they were not linked to land reform in general and land restitution in particular. In looking at the nature of farms to be purchased, government opted to utilize the private sector to maintain the farms and operate them on behalf of the claimant communities. And when the strategic partners grouped all the farms into new mega-enterprises government was silent as to the management and productive issues that would emerge in breaking up the former units of production to replace them with giant farms.

4. From Land Holding into Share Holding: The Strategic Partner Model

According to the initial model, successful claimant communities, organized in CPAs or Trusts, formed a joint venture or operating company with a private entrepreneur (often with a small share reserved for farm workers) in which the entrepreneur the so-called ‘strategic partner’ invests working capital and takes control of farm management decisions for a period of ten to fifteen years, with the option of renewal for a further period. The potential benefits to the claimant communities include rent for use of the land, rent from the houses on the farm, a share of the profits, preferential employment, training opportunities and the promise that they will receive profitable and functioning farms at the termination of the contracts and lease agreements. All the contracts provide clauses whereby community members are not free to move back
onto their land for residential purposes. And, no funds are set aside for the improvement of farm worker and farm dweller living conditions on the farms nor to ensure that gender equity will be realized at all levels.

In our research we have observed two strategic partners go bankrupt and one pull-out leaving all communities without a strategic partner. In short, the road to land restoration has been anything but smooth. We have observed over-stretched government ministries and departments lacking skilled personnel moving from crisis to crisis while trying to meet their own targets of how many claims settled and how many hectares transferred. They prematurely declared success without examining what the consequences and impacts were. Multiple business plans have been written for restitution projects often unrealistic, unachievable and finalized without thorough consultation with communities about their needs, wishes and consideration. Government seems to have convinced itself that good business plans (no matter how fanciful or unattainable) will, with the market, achieve the goals of land restitution.

4 The Claimant Communities and Communal Property Associations: Levubu Complexities

Levubu is an important test for restitution in part because of its highly developed agricultural economy integrated into national and international markets, and the unprecedented scale of land restoration envisaged. It is also important because it lays bare how difficult it is to transfer profitable and more or less successful farms to claimant communities who have diverse needs and requirements in addition to an initial lack of skills to run the farms. While we do employ the concept of community because they are recognized legal entities we suggest that within them there are competing interests and differing needs. For example, all communities have struggled with the strategic partners and government to ensure that they will be able to take over the farms in as short as time as possible from basically white management. Simultaneously they are struggling to find candidates to take up agriculture at university and to commit themselves to running the farms on behalf of their communities. Levubu

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22 Although in at least one instance a ‘chief’ was provided with a CPA owned farmhouse rent free.
offers potential lessons for other land and rural development policies based on transfer of enterprises to large community groups.  

There are many members who do not live in the local area but who nonetheless expect to benefit. There are no clear guidelines for the moment on how to handle this difficult issue.

The new institution created for managing restituted land was the Communal Property Association Act 28 of 1996. According to Tom Bennett, a leading specialist in customary law, the CPA Act introduced a new method for structuring tenure to accommodate the widespread practice of groups of people holding land under what were deemed informal systems of communal tenure. (2008: 148–149). Under this Act groups could set up a juristic person through whom members would be able to acquire, hold and manage property in common, under a written constitution. While each CPA could in principle devise rules that would serve its particular needs but the rules were always subject to the constitutional principles of equality and non-discrimination. In practice the Levubu CPAs adopted ones suggested by the DLA and work-shopped by Nkuzi to the communities. That is to say, Nkuzi would discuss the boiler plate draft constitution with communities, explain it to them and then urge them to vote on its acceptance at a general meeting with the community which they did. According to the advocate Shirhami Shirinda this meant that communities did not own their constitutions, did not adopt them to their own needs and indeed they do not follow them.

In addition to the difficulties with constitutions, Tom Bennett observes that communal ownership does not capture the essence of ‘customary law.’ In his view (traditional rulers were not the owners of land but the trustees of land. While they have powers of control they also have broad responsibilities to care for their subjects (2008: 149). However, in the case of land restitution, other customary property relationships remain the same and it is only the restituted farms and properties or businesses

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23 This is an important arena where the Communal Land Rights Act (CLARA) would have intersected with land restitution. Under CLARA it might have been possible to replace the CPAs traditional authorities under CLARA. This question is briefly discussed below.

24 In referring to how one CPA adopted its constitution, Chief Masakona referred to being workshopped meaning that the NGO held meetings with them to explain what a constitution is, what it is supposed to do, and why they needed to adopt one. Workshopping was a method adopted by both NGOs and government.


26 Ben Cousins (2008) also elaborates this perspective.
created by the fruits of the farms that are owned by the CPA. In the expectation of substantial benefits from restituted farms but without knowing when or how they might appear, CPAs created what we could call executive committees which were generally made up of older men with either business or professional work experience (education or governmental) or tribal elders who had served on the original land claims committees. Chiefs (or headmen) and royal families almost always took an active role in the land claims committee and were usually represented on the committee. In the case of the one trust in Levubu, Tshakuma, the chief served as head of the trust which administered the restituted farms. In general, CPAs were designed to serve as democratic entities during the broad processes of land reform including restitution. Aliber et al (2011), Greenberg (2011), and Lahiff et al (2010) have found substantial difficulties in the operations of CPAs in their extended case studies also in Limpopo Province. In part this was due to the difference between being a member of a CPA, and actually living or residing in a single locale (see below). But it’s also about the mismatch between communal nested ownership of land, chiefly prerogatives, and the vague nature of tenure over newly restituted farms. In the expectation of substantial benefits nonresident CPA members expected to receive benefits or to gain political control over the CPA to be able to obtain them.

Further Internal Complexities in CPAs

There are significant links between how these six communities outlined above fared under apartheid and how they are functioning now. One important dimension was whether or not they had a recognized chief (or headman) and how the chiefdom’s members were accommodated in the homelands. For example, Tshakuma did not lose most of its land during apartheid but rather they were incorporated into the Venda homeland. However, one subgroup among them lost their lands but the chiefdom has made the claim on behalf of the whole. This has produced a longstanding conflict between the two including sitting apart at land meetings and arguing with each other publicly. On the other hand, the Masakona, with a recognized chief and royal family while subject to forced removal stayed more or less intact and were allocated land together. In

27 For a detailed examination of how CPAs function see Lahiff et al. (2008). One general conclusion which we also found is how distant and unsupportive government has been in the democratic and business functioning of CPAs.
contrast the Ravele were more dispersed with members opting for different places to resettle. They were, however, a recognized tribe and their chief and some family members were high officials in the Venda government. Thus they have had a strong, coherent and committed leadership over time. The Shigalo, a Tsonga speaking group were moved twice, the second time into an already existing chiefdom of Khomanyani (the area is currently known as Oliphantshoek in former Gazankulu). The three other groups, Ratombo, Tshitwani and Tshivazauhlu were dispersed and according to their narratives, lost their chief and downgraded to headmen.28 Thus land restitution has become part of a broader struggle for chiefly recognition.

In the long transition from land committees to CPAs and the actual receipt of claimed land, it was difficult to maintain popular and broad interest in the process. Typically it was only the leadership that remained engaged and even they had little to meet about between 1998 and 2005. Proximity and having a good, accessible meeting place was important. In Ravele and Masakona the chief’s involvement along with the tribal council provided a meeting place, a structure and some resources to keep a CPA functioning. Shigalo utilized the tribal council offices whereas Ratombo, Tshitwani and Tshivazauhlu struggled with no place to meet and with dispersed memberships. All communities had difficulties in maintaining communication with a membership that could just as well be working in Johannesburg, Pretoria, as in the communal areas. Interviews with members of the leadership suggest that most considered the restoration of tribal land as key to the reinvigoration of tribal identity and the power and status of tribal leaders. It is therefore not surprising that tribal chiefs are at the forefront of most claims, including holding key positions within the CPAs and Trusts.29 In one community, Shigalo, the CPA leadership was clear for several years that the land restituted belonged to the community, not to the chief. This has now been reversed with the accession of a new Headman (although he is considered a legitimate chief by the Shigalo). This had been the only community where we had found such a clear distinction.

28 But it is not clear that they were recognized as headmen either.
29 See Ntsebeza (2006) and Oomen (2005) for detailed discussions on traditional leaders, and Hellum & Derman (2009) for a more detailed account of chiefs and CPAs in Levubu. For a broad consideration of indirect rule and the use of chiefs in South Africa see Myers (2008).
Issues of Participation in CPAs

While CPAs were intended to be democratic and to represent the interests of its members they have become far more problematic. The claimant communities are far more than chiefs, land claims committees, and CPAs. As with the former homelands, women form a majority of the residents with many men working in Johannesburg or Pretoria. In addition, it has been difficult for women to find full or part time employment outside of the farming sector and often due to the distance to the farms, packing houses and agro-processing facilities; they have difficulty in balancing work and family. The degree to which there are jobs they are in government employ, agriculture, and business. The rates of unemployment are extremely high, among the highest in South Africa.

In general then, the rural communities including CPAs are faced with multiple development issues including employment, access to good farming land, to good roads, to adequate water for drinking and farming, etc. We attempted in the early phases of our research to capture some socio-economic dimensions of the different communities through interviewing 72 households in Masakona, Ravle, Ratombo and Shigalo. We found that the majority are dependent upon government assistance in terms of children’s grants, grants for the elderly with some retired older members receiving full pensions. Of the 72 households in 2008, 48 were receiving child grants, 42 old age grants and 27 were receiving both. In the same 72 households 60 had garden plots around their homes and 31 had fields although many had not cultivated in 2007 due to drought. Only 7 sold agricultural produce. In short, these communities continued to engage in some agricultural production but of a fairly limited variety.

In the communities we have been following, we have found only one where there appears to be frequent and open communication about the affairs of the CPA and the farms with the wider CPA. In two interviews, leadership of the CPAs expressed the deep fear that they would be seen to be acting only in their own personal interest and not that of the broader CPA because so little by way of benefits have gone to the broader membership. But even so, they took no steps to share information. We found in our survey that large numbers of men and women had little or no idea what to expect from the transfer of farms. And little attention was paid to communicating the operations of the new joint venture companies whose Boards were to be comprised of elected representatives from the CPAs and members of the strategic partner. At the same time we found that women’s participation in CPAs was lacking, they were not included in
leadership positions and there were no special provisions made for women in the multiple processes which led to strategic partnerships. The issue of women's participation is taken up in greater detail in Chapter 7.

5. CPAs and Strategic Partners

In the long process of first choosing a strategic partner, and then writing and signing the appropriate contracts between the CPA and the strategic partner, most community members were not informed of this process. In general, there had been the expectation the lands would be returned. This is what Nkuzi advocated as well as leading to the possibility for addressing poverty and disempowerment. The RLCC and the DLA ‘work-shopped’ the communities intensively to have them accept the idea that they wouldn't be receiving the land directly for farms or residences. They argued that everyone would benefit more from strategic partnerships. This was also the time that government pushed Nkuzi out of the picture since the latter had been arguing for land to be returned with the communities holding decision-making powers over the restituted lands. When we did our surveys in 2008, 30 respondents of the 72 still wanted to go back to the land they had lived on and several whom we marked not wanting to return indicated that they were simply too old to move even though they would like to. The intervention by government to protect the current farms operations while understandable was not communicated in a broad manner.

To add another layer of complexity, the original contracts between the SPs and the CPAs were written by the companies with the agreement of government. The law firm of Deneys Reitz had entered on a pro bono basis on the initiative of Nkuzi to represent the claimant communities in their contract negotiations with the agribusiness companies. At first government resisted the idea and then welcomed their participation. While Nkuzi gained the support of commercial lawyers to assist in drawing up contracts more favorable to the claimant communities and while Lahiff, Derman and Manenzhe explained the contents of these contracts to the leadership of the CPAs, we realized the lack of understanding on the part of the CPA leadership of the contracts' contents. Government took no role in explaining these to the broad membership. At the same time, we, on behalf of Nkuzi, were blamed for delaying the contracts’ signing which interfered with business operations and created new delays including the turning over the title deeds of the farms to the CPAs.
The two agribusiness companies or strategic partners, South African Farm Management, a company based in Tzaneen (SAFM) and Mavu Management Services based in Levubu (Mavu) had been running the farms for 18 months by July 2007 when the contracts were signed.30 The SPs had complained that there were heavy costs due to the deterioration of the farms during the transfer period (and indeed earlier when farmers decided to sell their farms and let them run-down). The Limpopo Department of Agriculture acknowledged the issue and agreed that there would be grants for 25% of the land’s value to re-establish orchards, infrastructural needs and new developments.31

In pushing government and the CPAs, the strategic partners also refused to provide interest free rolling loans to the new joint venture company. They insisted that loans would be made by the joint venture company on an interest basis and if the at the end of the term, the loan was not repaid the lease agreements would continue. Ironically SAFM won the argument that they needed to have control over the business because of the risks that they were taking. They claimed they were risking their own property and not CPA farms. It was agreed that they would have veto powers over the joint venture company as long as there were outstanding or unsettled loans by the company. And, indeed, their property was seized by ABSA bank in 2009 and the company was liquidated with debts falling to each of their joint venture companies.32 We will return briefly in the conclusions as to how the CPAs have done in face of bankruptcies.

Managing Commercial Farms: How Did the Strategic Partners Do?

CPAs were not formed to manage high value, export oriented farms. Nonetheless, they have had to adjust and adapt to decisions by government on the complicated issues surrounding the transfer of farms to them. They have had to do so in the formal business world where contracts and markets rule, not slow, deliberative, consultative decision making. Many crops were destined for international export and most farms were Global

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30 Both companies placed prominent black educators, business people, or politicians on their Boards of Directors to gain Black Economic Empowerment recognition and to demonstrate their compliance with government policies.

31 In addition, grants meant for either individuals or communities were in part taken by government and given to the SPs without their knowledge for emergency purposes.

32 ABSA bank is a subsidiary of Barclay’s Bank and in South Africa is an important lender to the agricultural sector.
Gap certified. Government in pushing and pursuing a business model albeit a modified one, meant that issues of discrimination, equality and poverty tended to be ignored. What rights to land means has also been transformed. In practice, the strategic partners developed complicated business models with detailed plans on crops grown, expected market prices, strategies for marketing, choices as to with whom, where and when to market and under pressure, strategies to train community personnel for administrative and skilled positions on the farms.

With the contracts signed in 2007, SAFM and Mavu opened offices. They were quite distinct. Mavu made its pitch by presenting itself as a local company, of former farmers and owners of local agro-processing plants, who had deep knowledge of the area and would quickly make profits for the communities. They insisted they were committed to maintaining the quality and quantity of agriculture production because they were so heavily invested in food processing and export. They were led by three local farmers and businessmen who had sold their farms to government. In interviews with one of the directors of Mavu, he argued that they would make the farms far more profitable than under the former owners because of efficiencies of scale.

SAFM, on the other hand, presented itself as an agent of transformation. They would rapidly train community members in the running of the farms while managing them more efficiently than the past owners. Mavu, on the other hand, the SP for Ratombo and Shigalo, set up an office just for itself in the heart of Levubu town, the old farming center. It employed only one or two community members. SAFM, on the other hand, set up its offices in a luxurious farm house but staffed primarily by community members. In addition, rooms in the house were designated for the four claimant communities under SAFM partnerships (Ravele, Masakona, Tshakuma and Tshitwani). Each SP hired its own farm managers. In the case of SAFM they had offices at the local headquarters and then raced around the farms during the day. Mavu was much the same trying to manage all the farms now belonging to one claimant community together.

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33 Global Gap has replaced Euro Gap which requires certification of pesticide use, labor practices, and crop quality. Farms are inspected at least yearly to keep their accreditation.

34 SAFM had been the choice of government to run all the farms but community resistance led government to permit other potential strategic partners to make presentations to the CPA committees which then made the decision.

35 There was much discussion about the qualities of the farms this individual used to own. Other farmers suggested he was a poor farmer but a really good businessman.
Each strategic partner was faced with a set of difficult issues. Among them was how best to run what had been individual farms as a group. In terms of expense, it was not possible to hire for example 16 farm managers for what had been 16 individual farms (667 hectares) that had now had been transferred to Shigalo CPA. SAFM tried running its farms by commodity at first. One farm manager was in charge of bananas and another for macadamia nuts. In sum, the strategic partners also had to experiment as to how best to manage farms and crops they might not know that well at a scale where no one had the experience. We thought at the time that grouping the farms into such large units would hinder efforts to make them profitable. Our suspicions have been confirmed by the former production manager for SAFM who, now hired by the CPAs, has ended the farm’s combination and has appointed farm managers for each farm utilizing their old boundaries. And, although the strategic partners and government did not listen at the beginning, the claimant community committees were skeptical that the plans would indeed work at the scale envisaged. After all, these had been individual relatively successful farms which had been turned from profitable ones into loss-making farms. The strategic partners blamed everybody but themselves.

Another set of problems emerged as well. The farms had not been maintained in the period between the purchases of the farm by government and when the SP actually began managing the farm. To complicate matters further, it took almost two years to sign the contracts thus lessening the incentives for the SPs to manage the farms well. Lastly, and of great import, was that the farms were purchased without moveable equipment, without fertilizer, without pesticides, without tractors, and often pumps. In short, the SPs had to keep the farms running without what would ordinarily be transferred with a farm’s sale and having made preparations to have equipment in place. Mavu set up a new company from which it would rent tractors, trucks and other necessary equipment on behalf of the joint venture company. It would not use its own capital to purchase such equipment for the new company but only for itself. Government had not anticipated the problem. Government and claimant communities made the assumption that the SPs were bringing capital to the table for the purchase of such equipment. The SPs saw that as too risky and tried to make profits from bringing equipment but which would not belong to the

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36 The purchase prices for these 16 farms was 37,906,000 ZAR or 56,930 ZAR per hectare.
Joint Venture Company but only to the new rental companies they created. A climate of suspicion prevailed and the scale of issues and problems underestimated. And when the strategic partners left the communities had to struggle to keep some tractors, trucks and other equipment to keep the farms functioning.

What made the process more difficult was the delayed recognition that the farms had deteriorated. The LDA proposed that 25% of the value of the land would be used for farm re-establishment, infrastructural needs and needed new developments. The government recognizing the timeframe of the original leases - ten years- was quite short from the perspective of the SPs. As a result, they then came to an agreement that the government would fund the farms re-establishment and further new farm development. On one farm, for example, large areas were not under cultivation. On another farm, the banana plants were too old and needed to be replaced. However there is a guiding policy that only allows that development support under restitution cannot be more than 25% of the purchase price. This amount will be released at the discretion of the Minister for Agriculture and Land Affairs. Often, this money takes months to release and has created a high financial burden on government whilst increasing dependence upon it. In any event this became a moot issue as the SPs withdrew or underwent liquidation. Once again, this demonstrates what a mixed model Levubu has become in practice.

The Unraveling of the Strategic Partner Model in Levubu

In April of 2007 Mavu announced that it was withdrawing from the Joint Venture Company as of June (three months notice) claiming that government owed it twelve million rand and was no longer willing to continue losing money. It did withdraw but only after another strategic partner, Umlimi was hired with 15 year contracts rather than the 10 years with the CPAs of Ratombo and Shigalo. In June and July of 2008 SAFM began borrowing money from the CPAs of Tshakuma, Ravele and Masakona to pay its workers. Shortly thereafter ABSA bank aware of SAFM’s difficulties

37 There has always been suspicion, especially of Mavu because they were made up of local farmers and businessmen that they always knew the conditions of the farms and used the deterioration argument to access capital.
38 Mavu was replaced by Umlimi in September of 2007 and signed contracts with Shigalo and Ratombo on the 8 of December 2007.
39 I was told this by a director two months before. He told me he had reached his limit and had informed government as such which he said didn't take his threat seriously. I have no reason to disbelieve his account.
Umlimi describes itself as an innovative black owned financial services company that specializes in the agricultural sector and delivers integrated risk management solutions to support its financial activities. It says that it will provide working capital finance to commercial farmers but this does not appear in the budgets that we have seen.

Interview with Umlimi Manager July 31, 2009.

Demanded the return of its loans to SAFM which totaled approximately 100 million rand. ABSA lost confidence in the ability of SAFM to repay them. These monies were not just for Levubu but for all the entities being managed by SAFM which exceeded the capacities of SAFM to effectively manage. They were not able to repay enough of the loans and declared insolvency or bankruptcy and they withdrew from their Joint Venture Companies. ABSA went to court in February and March of 2009 to take over the running of SAFM’s farms to regain their assets. This maneuver was fought by government and the CPAs, ultimately successfully.

In turn, Umlimi despite its more generous contracts with Shigalo and Ratombo retrenched all its workers in May and June of 2010. Shortly thereafter it went into liquidation in Cape Town with little information available to the Ratombo and Shigalo members of the Boards of Directors. In both the cases of liquidation the Limpopo Department of Agriculture did stand with the CPAs and provided some legal counsel.

Three of the CPAs formerly in strategic partnership with SAFM now want nothing more to do with SPs (Masakona, Ravele and Tshakuma). They have hired their own farm managers each under a contract with a general manager who is hired and fired by the CPA. Two new companies have been formed from the old joint venture ones but wholly owned by the CPA. Masakona and Ravele are now profitable. A third joint venture company, Tshakuma, continues to have internal battles while they have hired one of their own members to be the general manager. The fourth CPA is engaged in bitter infighting which is leading, unless stopped, to rapid deterioration of its farms and the waste of grant and other monies from government.

The two CPAs for whom Umlimi was SP have also hired their own farm managers, one for Ratombo and one for Shigalo. They are continuing to lose substantial monies while the capital necessary to rehabilitate or alternatively further develop the farms has not been provided by the private sector or by government. According to the former SP Umlimi, its farms could not expect to make a profit for another three to four years. They claimed to have secured loans to finance their farming operations and suggesting to government an alternative model for SPs. In November

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40 Umlimi describes itself as an innovative black owned financial services company that specializes in the agricultural sector and delivers integrated risk management solutions to support its financial activities. It says that it will provide working capital finance to commercial farmers but this does not appear in the budgets that we have seen.

41 Interview with Umlimi Manager July 31, 2009.
of 2011 Ratombo fired its general manager. As one might suspect there are rumors of corruption circulating around the liquidation of Umlimi.

**Benefits to CPAs**

While there is a broad crisis in Levubu and a more general one in terms of how government should proceed with land restitution since the SP model has many more difficulties than anticipated, some benefits continue to flow to claimant communities. These benefits include farm worker employment on community owned farms. Hiring preferences have been given to claimant community members and is leading to a gradual (or rapid) replacement of non-community member farm workers. With the formalization of employment for farm workers including minimum pay, some social benefits and formal employment, this has made a marked improvement for farm workers. Second, the strategic partners had begun to implement training programs for CPA members of the Boards of Directors of the joint venture companies and more generally for supervisory personnel on the farms. This is a specific example of how CPAs have continuously lobbied for specific plans on how they will have appropriate personnel in place for a transition to greater and greater community running of the farms. These plans are now part of the contracts with the new farm managers hired by the communities. In October 2011 there were now several farm managers at work from the claimant communities marking a significant change from past practices.

Lastly, the former Joint Venture Company paid rent on the land and rent for the houses on the land to the CPA. The rent had initially been set at 1.5% of the land's value adjusted for inflation. In the new contract with Umlimi the rent was set at 2.5% of the value paid by the South African government to purchase the land per year. This increased the monies to the CPAs but decreased the profits of the company. The CPA committees opted to use these monies for their own operations and for the purchase of what they regard as necessities for them to keep functioning. This includes computers, office supplies, pick-up trucks, sitting allowances and in two cases offices for the CPA. Without accountability and without discussion with the broad CPA it is easy to see the potential for corruption on the one hand, and community suspicion on the other. With the advent of CPA entirely owned companies rent for the land is no longer being paid to the company. The CPAs continue to rent out the houses on their farms.

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42 In the case of Shigalo land rental provided 947,650 ZAR per year. The management fee for Umlimi is 750 rand per hectare or R575,640 per year.
Farm Workers and Farm Dwellers

As noted previously, claimant community members are to be hired preferentially in all positions for work on the farms. The numbers of workers from the claimant communities vary. For example on Shigalo farms before Umlimi’s liquidation they kept the former workers and only 11% of the workers were from Shigalo (34 of 297 employees) whereas from Ratombo the percentage is 37% of a total of 106 employees. Even more dramatic has been Masakona where almost all come from the claimant community. Approximately 240 workers, the majority women, board buses every morning at five A.M. to travel to the farms. The buses don’t return until seven in the evening and the women pay for the buses themselves out of their wages which are set by the national government and travel time is not compensated.

Examining current budgets for the farms, around fifty percent of farm expenses are for labor. Labor relations are changing with increasing numbers of claimant community members on the farms. Their hiring and firing are a mixture of chiefly influence, CPA recommendations and managerial advice and decision making. The older systems of labor management are harsh, discipline is swift, and the work is arduous. It will take substantial commitment, innovation and imagination to make farm work less oppressive and exploitative while maintaining profitability. With the farms losing money workers will have to work very hard for them to return to profitability. Masakona workers have been highly productive while Ravele has opted to use non-CPA members in general. The more general issue of having workerowners has not been fully clarified on all farms. On one farm workers have refused orders from supervisors saying that they are the owners and therefore don’t have to do certain tasks. We anticipate that these types of conflicts will increase over time posing new challenges to the joint venture companies and their CPAs.

In this new context the claimant communities will have to cope with workers’ rights, worker protections, improving living conditions on the farms for those who live there. For example, in general farm worker housing in Levubu is quite run down. To date claimant communities and joint venture companies are not in an economic position to improve the quality of housing on the farms and if they were to do so, it would be at the expense of other investments. Government emphasizes the exploitation of workers on white-owned farms but has not yet addressed the conditions of workers on restituted farms.
6. Conclusions

Land, land reform, and the creation of new institutions has been a rich arena for thinking about rights and a justice driven land reform program. Land reform always relies on privileging some rights over others. In the case of South Africa there has been a substantial and significant critique of the willing buyer, willing seller based land reform for being market driven rather than justice or rights driven. In addition, limiting the amount of land transfers from white to black hands also limits the potential of land reform to alter rural black poverty. At the same time, the very basis of land restitution has not been driven by market concerns but by historical justice. This is not to say that there are real limits to how much government has been and will be willing to spend to purchase white-owned farm land thus setting real limits to the rate of transfer. To date, land restitution has been an uncomfortable blending of historical justice, development and black economic empowerment. Land restitution has been the vehicle whereby Agricultural Black Economic Empowerment (AgriBEE) businesses have been given access to some of the richest farm lands in South Africa while engaging with new communal institutions.  

The credibility of government, the SPs and the CPA leadership rested on the farms' ability to succeed in the market by producing substantial profits for distribution to the broader CPA membership. However, this became increasingly difficult as the farms deteriorated; there was a lack of investment in basic agricultural maintenance (pesticides, fertilizers, irrigation)

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43 AgriBEE is a sectoral broad-based black economic empowerment framework intended at a deliberate and systematic support of Black South Africans to actively participate fully in the agricultural sector as owners, managers, professionals, skilled employees and consumers. Umlimi and SAFM were AgriBEE companies.
and re-investment in crops and equipment. Lastly, the SPs loaned money from the banks on behalf of the joint venture companies without necessary approval from the CPAs. The banks have had to be repaid on the basis of crop revenues. While the farms are surviving for the moment there future as revenue producers for CPAs seems difficult at best. In examining current budgets for the farms there is indeed need for substantial investment in order to either rehabilitate or maintain farm production. In the short and medium term the benefits will be employment and rental monies to the CPA. This will do little with respect to deep poverty although employment has and will continue to make a big difference if the farms continue operating.

Examining the balance between state, market and rights it is clear that rights comes out a distant last. CLEP has an emphasis upon legal empowerment, agency and entrepreneurship and underestimates power. The early assumption was that government would empower people to claim their land and support new democratic institutions (the CPA). However with time government has disempowered its citizens in two ways: first by overemphasizing the market and business plans and second by continuing to support chieftainship and not strengthening the CPAs. The most important organization supporting local empowerment had been Nkuzi which worked for a number of years to empower claimant communities through using the new laws to claim their rights. Government has not fostered empowerment but believes it is the one carrying out the wishes of the people. As Nkuzi opposed government and attempted to stake out independent positions government opposed it and sought to weaken the organization. Government tends to regard those suggesting alternatives as opposing them and responds defensively and aggressively. In the absence of rural organizations other than a greatly weakened Nkuzi, government sought to have the strategic partners provide the market-based solution while ignoring and not supporting CPAs.

Land ownership is now vested in the CPAs. The business operations are vested in new companies directed by the executive leadership of the CPA. As new democratic participatory institutions the CPAs have not been supported by government and do not have clear and broadly understood frameworks of benefits and responsibilities, rights and duties and clear accountability for its leadership. Many CPAs now represent traditional authorities since they remain the most legitimate rural institution and they are sustained financially by government. If there has been discussion of what to do about CPAs these have not been made public nor alternatives proposed.
In conclusion the CPAs in Levubu and throughout Limpopo Province have yet to find the means to meet the broader objectives of land restitutio

The government has through all the difficulties and uncertainties kept their eyes on a business model and seem to have lost sight of the broader justice and property issues involved. Indeed, the legal status of the restituted farms remains unclear. They are being run as private farms in the global marketplace but owned by CPAs. The rights and responsibilities of the CPAs remain undefined and problematic with small numbers of men (usually of the politically dominant families) holding the reins of power. This is an unstable situation which will continue to produce uncertainty and contestations for control. Simply throwing more money at this problem (recapitalizing current projects) in the absence of other policies will only deepen the problems, not resolve them.

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CHAPTER FOUR

‘PROPERTY’ AND ‘RIGHTS’ IN A SOUTH AFRICAN LAND CLAIM CASE*

Knut G Nustad

The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread. Anatole France, Le Lys Rouge

Examining rights based approaches to land reform involves juxtaposing two sets of abstractions. The first is the bundle of concepts related to rights and its connection to ‘law.’ In some circles human rights and the law are described simply as instruments in the struggle for development, and the challenge described as securing equal access to these instruments. This is for instance the case with the UN Commission for the Legal Empowerment of the Poor which defines legal empowerment as “a process of systemic change through which the poor and excluded became able to use the law, the legal system and legal services to protect and advance their interests as citizens and economic actors”. This, of course, is based on an assumption of the neutrality of the law, well deserving of the scorn Anatole France heaped on it. Concepts such as rights are derived from fields with specific histories, and the layers of meaning as well as the ideological assumption behind them are difficult to divorce from the concepts themselves. Thus the whole notion of ‘rights’ comes with a heavy ideological baggage,

* The case study on which this chapter builds is based on six months fieldwork in St Lucia and Dukuduku, divided into shorter periods between 2007 and 2010. Research was conducted in close collaboration with the Association for Rural Advancement (AFRA), a land rights NGO based in Pietermaritzburg, and the land claims committee in Dukuduku. Research would not have been possible without this collaboration. I also wish to thank Bill Derman, Anne Hellum and Kristin Sandvik for their valuable comments on earlier drafts. Research on which this article was based was supported by the Norwegian Research Council grant no. 17897/S30.
as we will see when we turn to the case study that forms the basis for this chapter.

What I will argue, for both rights and property, is that when we introduce new concepts we also juxtapose analytical fields. By using categories such as rights and property to analyse land questions in South Africa, we also take with us ideological baggage from the fields in which these concepts originated. This is evident in South Africa’s land reform process, which has sought to reach a compromise between different and often contradictory histories of both rights and property. A shift in government policy, from treating land reform as a question of rights to a question of the transfer of land, has been accompanied by reification of the idea of what constitutes a ‘community’. The result is a policy that is seriously out of touch with the complex historicities of dispossession which the land reform was meant to address.

The Legal Framework

The post-apartheid state inherited an extremely skewed distribution of land. In addition to being an important material and productive asset, land and the way in which black people had been forced off land by colonial and apartheid governments, was highly symbolically charged (James 2007). Forced removals epitomised the brutally and unjustness of the apartheid government, and the restitution of land therefore became one of the key issues for the new democratic government.

Land policy was one of the last issues to be settled in the negotiations between the ANC and the National Party government prior to the first democratic elections in South Africa (Walker 2008). Many factors shaped the outcome of these negotiations (James 2007; Hall and Ntsebeza 2007; Hellum and Derman 2008; Lahiff 2008; Walker 2007, 2008) but in the end a land reform programme with three components was adopted: First, restitution of land to those dispossessed after 1913; second, redistribution to rectify the racially skewed distribution of land that resulted from colonial and apartheid policies, and; third, tenure reform for those whose tenure was insecure because of past discriminatory laws and practices (Lahiff 2008).

The Restitution of Land Rights Act, No 22 of 1994, set up an apparatus whereby a Chief Land Claims Commissioner would oversee the Regional Land Claims Commissions, which in turn would investigate cases and bring them before the Land Claims Court for settlement (Hellum and Derman 2008: 68). Because of the slow initial rate of delivery, the
Restitution Act was amended in 1999 to provide for administrative settlements of claims: the Land Claims Court would now be used only in those cases where agreement could not be reached—as in the Dukuduku land claim examined in this.

The importance of rights in South Africa, as Deborah James (2007) has shown, stems from a pre-transformation liberal legal culture, from the way in which rights and citizenship were denied through a system of indirect rule, and the subsequent struggle by liberal activists and African elites to establish a new dispensation grounded in the rights and the entitlements of the people. This history of rights became further intertwined with an international development discourse that had increasingly adopted a rights-based language.

‘Property’ is notoriously hard to define. Anthropologists treat property relations as social relations: “the rights that people hold over things which guarantee them a future ‘income stream’. They ‘own’ only incorporeal rights, not the thing itself. Property relations are consequently better seen as social relations between people” (Hann 1998: 4). As Jon Davis puts this point: “you cannot sue an acre; a boundary dispute is not a dispute with a boundary. The study of property rules in general, and land tenure in particular, is the study of relationships between people” (quoted in Hann 1998: 5). C.M. Hann believes this notion to be too limited, and argues that property is “best seen as directing attention to a vast field of cultural as well as social relations, to the symbolic as well as material contexts within which things are recognised and personal as well as collective identities made” (1998: 5). It is in this nexus involving identities, social relations, rights and environments that land reform is played out in South Africa today.

A main challenge has been, as both Cherryl Walker (2008) and Deborah James (2007) have argued, that South Africa’s land reform was meant to accomplish two, often contradictory, goals. It was, first, part of a long conversation on redress, of restoring citizenship. Apartheid had effectively denied citizenship to the majority of the population by inscribing them as subjects under a state-appointed chief, and by arguing that the legal practices of African communities constituted independent legal fields, thereby ignoring the extent to which these traditional practices were integral parts of the South African state system (Bennett 2008; Chanock 1991; Okoth-Ogendo 2008; Wilson 2001; see also Krohn-Hansen and Nustad 2005 for a theoretical discussion of the state/society nexus). At this level, the idea of restoring land unjustly taken during colonial and apartheid rule to those who had used or owned it performed an important
function, and in many ways paralleled the work of the South African Truth and Reconciliation Commission (Wilson 2001).

In addition to being an important idiom for retribution and redress nationally, land reform was also meant to create viable livelihoods for the poor. As a guide to accomplishing this, the master narrative (in Walker's words) did not function as a guide for practical policy, because the idea of redressing injustices, of turning back the clock to a pre-dispossession situation, ignores developments between dispossession and restoration—such as the dispersal of people in the intervening years; the way in which families had been moved off one farm to the next in succession, so that many families could legitimately claim the same piece of land; and the shift in the South African economy that has made subsistence farming an almost-impossible option (James 2007). In the Dukuduku case, Spiegel has pointed out that the practice of shifting settlement and swidden agriculture is complicating the processes of land restitutions because it makes it difficult to prove past occupation (Spiegel 2004). Another problem, as the Dukuduku case demonstrates, is that people living in the area claimed under restitution may have widely disparate histories and divergent interests, not all of which neatly follow the divisions of policy.

To perform the first function, that of restorative justice, land reform was expressed in an idiom of the inalienable rights of citizens. However, according to James, the problems encountered in implementing land reform led to a process whereby the South African state increasingly moved from a focus on restoring rights to the more pragmatic one of transferring specific pieces of land (2007: 34). Rights and property came to be treated as dichotomous because of the specific historicity of these concepts:

‘Rights’ was an inclusive concept, deriving its breadth and moral weight from the era of the anti-apartheid struggle.... Although it was former titled property owners who predominated within the political elite, and thus whose ‘political demand for land’ drove the restitution programme forward, the rights discourse became sufficiently broad to accommodate other actors: particularly as interpreted by the human rights lawyers with their egalitarian emphasis. If one interrogates ‘property’ in this particular regime, it refers to an increasingly pragmatic process whereby the state and its bureaucrats have attempted to transfer specific pieces of land into the hands of groups of owners or—increasingly—individual owners. In short, ‘property’ has increasingly come to mean an individualised and commodified ownership of things, transferred into the private realm (2007: 34).

This transformation, from rights to a reified and fetishized notion of property, has a parallel in an equally reified notion of ‘the community’, as
expressed in how the law defines this entity. With a group claim, the claimants are, since the passing of the Communal Property Associations Act of 1996, obliged to form a Communal Property Association (CPA). It is to this legal entity that land will eventually be transferred. The law sets some gender-balance conditions as to the composition of this body, but does not specify how membership of the community is to be determined or property rights organized (Hellum and Derman 2009). Several authors have expressed concern that this will re-create pre-existing power relations within claimant communities (Bennett 2008, Hellum and Derman 2008) and strengthen the power of local chiefs in rural areas (Claassens and Cousins 2008).

As James has argued, the model for property and ownership on which the CPA legislation draws is not based on African tradition, but is a hybrid that incorporates many influences (2007: 156): a liberal legal culture, the legal duality whereby apartheid legislation recognised traditional laws and chiefly rule, and ideas about communal ownership and egalitarianism developed in dialogue between dispossessed African elites and liberal human rights lawyers. As I will argue below, this idea of a community as relatively homogeneous and egalitarian also parallels the move from seeing property in land as a social right, to portraying land as a productive asset.

This is a concern for a further restitution case in Dukuduku as well. In the thinking of the law, the ‘community’ applies to the Commission to have the land restored to them, and once successful, will have to form a legal entity to which the land will then be passed on. This legal entity, representative of the whole community, will then decide on the actual land use as well as criteria for who will belong to the community. This assumes a link between a group of people, conceived of as constituting a community, and the legal entity.

Land and Power in the Isimanagliso Wetland Park

The Greater Isimangaliso Wetland Park in the Natal Province of South Africa is a unique natural environment with five distinct ecosystems, including an estuary, swamp forests and coastal dunes. A brochure from 1939 describes it as “being favoured by nature to a degree probably unsurpassed in any other part of the Empire”. Conservationists have long fought to preserve the area and form it in accordance with an image of unspoilt nature. Some of this work has been highly successful and in 1999 it was listed as a UNESCO World Heritage site.
Driving through the area today, however, it quickly becomes clear that many interests other than those of conservationists have left their mark on the landscape. For miles before entering the Park, the landscape is dominated by rows of Eucalyptus trees farmed by the huge South African paper industry. Gigantic sugar cane farms and a South African Defence Army camp mark the rest of the surroundings.

As in many other protected areas in South Africa, the Isimangaliso Wetland Park still has unresolved conflicts between land restitution and conservation. People forcibly removed before and during apartheid have claimed 70 per cent of the park. The largest claim, for the Eastern shore of the park, has been settled through monetary compensation, but the experience of those who accepted that settlement has made other claimants wary. This was in fact the first claim to a protected area that was settled. Removals took place during the 1950s and this made it possible to identify claimants. A rather ingenious approach was used, where the commission walked the area and identified old homesteads and then tried to identify claimants based on that. Decedents were offered monetary compensation and a part of the revenue from the park, but not a right in the land as such. This has later been criticised and deviates from the model now being followed in cases where conservation areas are involved, where land now tends to be restored but without a right to occupancy. Chereryl Walker, Regional Land Claims Commissioner at the time, and now head of Sociology and Social Anthropology at Stellenbosch, has written a detailed analysis of this case in a book summing up here experiences as Commissioner (Walker 2008).

**Dukuduku**

One of the major unresolved issues is over the Dukuduku forest part of the park. Settled by a mix of descendants of its original inhabitants and other people who have moved into the area later, but whom the authorities claim are all illegal squatters, Dukuduku has been held out as a prime example by conservationist of what happens to parks when people are allowed to stay there. Today most of the forest has been inhabited and

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1 The case study is based on six months fieldwork in the area divided into shorter periods over the last three years. Initially, I worked together with the Association for Rural Advancement (AFRA), a land rights NGO involved with helping the claimants in the forest. This also involved an initial set of interviews in the forest, as well as interviews with government and park officials.
large areas cleared for crops. The Dukuduku forest is one of the few coastal indigenous forest areas left in this part of Africa. From the end of the 18th century the forest area belonged to the Mthethwa kingdom and from around 1820 it was occupied by the Ncube clan.

White travellers going through the area in the beginning of the 20th century described Dukuduku as ‘scattered malarial bush’ and travelling there in summer was seen as highly dangerous. But in the 1920s a massive clearing of the forest began—first to make way for the pine tree plantations that still exist in the area today, and a few years later to make way for the enormous sugar cane plantations, sugar mills and attached settlements. The industrial clearing of the forest was accompanied with the forced evictions of people living there, first in 1932 to clear the forest for sugar plantations, and then again in 1955 and in 1970.

These processes have cleared away almost all the forest. Only a small area of the old forests remains, part of which have been left untouched by the forest inhabitants, and another part where smallholdings have been cleared. As Thompson (2003) notes, the massive industrial clearing of the forests makes it appear strange for the people living in it that they are accused of harming the environment:

The implications of this are evident in the attitudes of the people who have invaded the Dukuduku Forest Reserve, situated at the entrance to Lake St Lucia, which they are now accused of exploiting. Their sceptical attitude towards conservation of the environment is worrying to environmentalists, but it is understandable. These people see no logic in environmental concerns after having been removed from a conservation area where the state subsequently replaced hundreds of thousands of acres of indigenous vegetation with pine and eucalyptus forests. Add to this the fact that white farmers in the surrounding regions have removed hundreds of thousands of hectares of indigenous vegetation to establish commercial monocultural agriculture, and the logic of environmental policy seems obscure indeed. (Thompson 2003: 200)

People have been evicted from the forest for several reasons and in many stages. The latest attempt at removals has its background in a group of people taking up residence in the forest in the late 1980s. As happened in other areas of South Africa, many people began to test the apartheid government’s resolve towards the end of the 1980s, when it was becoming increasingly clear that a political change was imminent. At this time thirty ‘squatter’ families were reported in the remaining forest, and this seems to have speeded up the process of having St Lucia declared a natural reserve.

Several government departments are involved in Dukuduku, among them the Department of Land Affairs and Forestry. In the early 1990s, they
commenced negotiations with the traditional leaders in the area to have people living in the forest resettled in newly built villages outside the forest. As a result of these negotiations, 565 families were resettled in the newly created Khula village in 1995. But people continued to move into the forest. Khula village was soon seen as a disaster, both by the people who had moved there and by those who had chosen to stay behind in the forest. Another attempt at moving people out of the park took place in 1998, also with the consent of the traditional leaders. The year after, a number of families were moved to the new village of Zwelisha.

In 1998, a group of forest dwellers contacted AFRA, requesting help in filing a claim for the land. A claim that covered the whole of Dukuduku, many surrounding farms and a substantial part of the park, was subsequently filed with the Regional Land Claims Commissioner just before the cut-off date of 31 December 1998.

The land claim has been a long, drawn-out process. The Land Claims Commissioner insisted that the claimants compile a list of the people on whose behalf the claim was made, before considering the case. This was probably due to the widespread perception, voiced by conservationists and also stated in the media, that these forest residents had moved in only recently and thus did not have a valid claim. That is only partly true: our research revealed that although many, possibly half of the population, had moved into the area in the late 1980s, there were also those who claimed ancestral rights to the forest.

According to some informants, these newcomers were welcomed and given land in the forest, in return for helping in the struggle against evictions. But this part of the population has no right to land under the restitution process, and there is widespread fear among them that they will be dispossessed should the claim succeed. I will return to this conflict below.

The claim process was further complicated by another claim being lodged that, according the commissioner, overlapped with the Ncube Dukuduku claim. A decision on the Ncube claim was not made until 2002, at which time the commission turned it down.

AFRA and the claimants took the decision to the Land Claims Court and won the case in 2003. The judge stated that the commission had neglected its duty and ordered it to gazette the claim. It is unclear what was at the centre of the actual disagreement, but the judgement refers to the original letter informing the applicants of the dismissal of their claim.

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as invalid, and points out that the reasons given by the commissioner are not in compliance with the law. Among the reasons cited was that people were living on the land they were claiming, that they had decided to return to the land, that the claim was lodged to obstruct interventions in the area by the Department of Water Affairs and Forestry, and, perhaps most importantly, that ‘people have been repeatedly advised to furnish the Commission with people that were removed to no avail’ (ibid.: 2). This last statement was rejected as factually incorrect by the judge, who upheld that the applicants had in fact provided a list of people dispossessed in the past. The Land Claims Court set aside the judgement of the commissioner and judged the claim to be valid. It is difficult to know why the commissioner had dismissed the claim, but a likely reason is that much of the population living in Dukuduku at the time when the claim was submitted had moved into the area in the 1990s and thus had never been forcibly removed. This, however, should obviously not be held against those who had been forcibly removed in previous decades.

The gazetting of the claim was done in an incomplete manner later the same year, without any specific demarcation of the land being claimed. It was not until October 2007 that the land claim was fully gazetted, in a form that included the whole of Dukuduku, part of the estuary that borders on St Lucia town, and several of the white-owned sugar cane farms. What remains now is for all parties to negotiate a solution—a solution that is, according to AFRA, likely to consist of a combination of compensation and rights in land.

The process is at the moment reaching a conclusion, but it has stumbled on a number of issues that are of interest for the issue explored here. The main issue concerns the demarcation of a group of people as a community, and the consequences of a legal approach that tries to secure peoples’ rights through a rigid, formal conception of legal representation.

In past attempts at moving people out of the forest, government departments have followed the old apartheid logic of working through traditional leaders as legitimate representatives of the people. In present-day South Africa, this polity exists in an uneasy relationship with the post-apartheid system of local democratic government, with councils, wards and councillors. In many places in rural KwaZulu Natal, the local democratic system has been totally subsumed under the power of the chiefs, but in the case of Dukuduku, the catastrophic consequences of the two resettlements led to people questioning the traditional leaders’ rights to negotiate on their part and to the traditional leaders losing influence. The case thus differs from that described by Hellum and Derman (2009, 2008),
in that for this period, at least, traditional authorities did not form an integral part of negotiations, because of the widespread perception of the forest inhabitants that they had previously sold out.

The marginal role of traditional authorities may be about to change, however. The park and other institutions with an interest in the area have launched a process parallel to the claims process, which seeks to limit occupation of the forest, both to preserve it and to secure the landscape for tourism. This is an ongoing process, but the people in charge of it told us that they wanted to include all people currently living in the forest and that they did not want to relate to the ongoing claim process. More disturbingly, the person in charge of the project told us in an interview that the only authority figure that could possibly work in a place like Dukuduku was traditional leaders. He therefore wanted to re-establish traditional leadership structures in Dukuduku. The case is rare in that this is explicitly stated as a goal, but the reintroduction and strengthening of traditional leadership structures has been one of the consequences warned against both in the establishment of Community Property Associations under the restitution act, as well as of the new South African Communal Land Rights Act, aimed at formalising property relations in the so called communal areas.

Community Politics

The history of removals, disposessions and influx of people has led to a highly heterogeneous group of people living in the forest today. Their divergent interests are also reflected in the number of competing community organisations operating in the area. At the time of my fieldwork, there were five active community organisations claiming to represent people living in Dukuduku. One organisation represented people who could trace their family roots to the Ncube, who had occupied the area before white settlements, and it was people from this organisation that had first contacted AFRA. Another committee, led by a local politician, was vehemently opposed to the claim. He represented mainly those who had moved into the forest in recent decades and were thus unable to benefit from a claim. Many of these people worried about losing their land if it were to be restored to those recognised as disposessed by the land restitution process.

These two organisations, in turn, stood in an ambivalent and sometimes highly antagonistic relationship to a third organisation, the land claims committee. This is the organisation recognised by the authorities
as representing the community in the land claims process, and it is this organisation that will be transformed into a legal entity, a CPA, in charge of the land, should the claim succeed. The land claims committee was formed after members of the Ncube organisation had contacted AFRA. Recognising that any viable solution would have to include all groups living in the forest, AFRA argued for an organisation to be made up of claimants as well as people who had moved into the forest later. As such, this organisation was in many ways a product of the land claims process itself. In addition, two more organisations represent the two groups of people who were removed from the forest and resettled in the newly built villages of Khula and Zwelisha in earlier attempts at clearing the forest of people. This is how one member of the claim committee explained the situation:

What is painful here at Dukuduku is one thing; as claimants we are nothing to our brothers who came to ask for residency. One day whilst we were having a meeting in St. Lucia with these AFRA people, a fight broke out. They went and waited for us on the way and said if we continue with this meeting you will be killed if you come this way. We went to that meeting by force. We told AFRA people and continued with the meeting. When we came back.... I mean before we came back our brothers phoned and said we are waiting for you. And when we came back we had a fight, we nearly fought physically. What was the issue? The word that came out was that if we had said that if we get this land back we will chase away the foreigners [those without a legal claim]. That was not true. We just want our rights because that land is ours. That is it.

To a certain extent, these different groups represent diverging interests. But they cannot operate without fulfilling another even more important function—as brokers and middlemen between people living in the forest and the outside authorities. This became evident in May 2007, when the land claims committee had decided to commence cooperation with the Wetland Park and as a part of that plan had taken representatives of the park on a tour around Dukuduku. The fact that committee members were seen driving around with white people gave rise to suspicions that the committee was selling land to outsiders. The local politician called a mass meeting of those living in the forest, and declared to the gathering that it was he who had been responsible for all improvements that had taken place in Dukuduku, and that it was through his negotiations that people had been allowed to stay in the area. He further declared that the land claims committee should be abandoned and the AFRA thrown out of the area. He also made it clear that he was the sole figure who should call meetings in the community, and that the consequences would be grave if this were ignored.
Several people I spoke to explained the motives for his actions by his being a ‘power-hungry’ person. This is a reflection of what appears to be the political reality in Dukuduku. The politician represents a system where people and organisations build authority through accessing external resources and distributing these internally: in other words, political processes that have been described by many students of politics in Africa and elsewhere (Bayart 1993; Bayart, Ellis and Hibou 1999; Ellis 1999; Morris 2006). This form of domination was clearly recognised by many of those with whom I spoke, nor should it come as a surprise. In a situation like that in Dukuduku, where different groups of people have moved in and try to eke out an existence, where resources within the area are scarce and where there is a constant danger of eviction by the police, power struggles and competition over resources will be oriented towards the external. Adding to this, of course, is the old political organisation of rural KwaZulu Natal, where resources from the state were channelled through the chiefs and distributed by them to their followers.

This closely resembles the findings of James, that “even in situations where the state endeavours to provide basic rights for all, it often remains the case that access can only be gained to these by going through an intermediary who will derive some benefit in the process” (2007: 212.) The reason lies, again, not in any primordial characteristics of African politics, but in the interaction of the formal political structures of states and NGOs, and their mutually constitutive organisation of community politics.

There are at least two reasons why the law should come to assume the existence of a relatively homogeneous community, with its own property arrangements, and represented by an elected committee. First, the way in which liberal NGO activists and African elites had worked to frame the question of land and restitution produced a concept of the community as being relatively homogeneous. This allowed for the possibility that the community could organise itself as a legal entity.

Secondly, when bureaucracies, whether the state or NGOs, want to interact with other polities, such as the inhabitants of informal settlements, they need these polities to organise in a form that is similar to themselves: they need to create something locally that resembles a bureaucracy. If the community has no appropriate committee, the NGO or state body will most often respond by forming one. Equally important, this is not a one-way process. Some people, those to whom James refers as brokers, are well equipped for transforming this structural need to their own advantage (James 2007, Fay and James 2009). Thus emerges a doubly dependent relation between brokers and external actors. (See Nustad 2001, 2004, 2005).
In such a situation, committees or other purportedly representative structures cannot be expected to be representative of the population at large. Committees will tend to achieve legitimacy to the extent that they obtain and are able to redistribute external resources. This logic, it transpired, also lay behind the land claim committee’s attempt at setting up a project with the wetland park authorities. They argued that if they could create jobs for members of the community, that would strengthen their position and make it possible for them to function as an organisation.

We experienced this in our own research as well. As part of a larger research project, we wanted to document ownership practices and property relations in Dukuduku. This was planned together with the land claims committee which also wanted this information. By working together with one of the competing committees, however, we were also seen as a resource in the struggle over representation. The local politician demanded that we attend one of his meetings and that we formally ask for permission to work in the area. We were then treated to a process the purpose of which was to establish him as the only point through which access to Dukuduku and its inhabitants could be obtained.

All this makes the legal definition of a community, such as the one the Communal Property Association Act operates with, highly problematic. Its reification of the idea of ‘community’—as a strictly circumscribed number of people tied to a clearly demarcated piece of land, finds a parallel in the reification of ‘the law’, a process that John and Jean Comaroff have pointed to in many societies across Africa and the world (Comaroff and Comaroff 2006). The increasing profusion of ‘rights’ talk in development discourse is an example of the same trend. This short description of some of the political struggles surrounding Dukuduku points to some of the problematic aspects of this globalisation of legal cultures. There, a land claim committee that struggles to achieve legitimacy through a political process that is far from western-legal, but instead follows a no-patrimonial logic, has had to compile a constitution and demarcate boundaries. But this does not make either the committee a true representative of the larger community; any more than drawing boundaries on a map define relevant polities.

**Reifying Property**

In the same way that the land restitution process in South Africa reifies the notion of community, it reifies the other side of the relation—property. As Okoth-Ogende (2008) and many others have pointed out, debates and policies on property in Africa have been haunted by a dichotomy derived
from the European development of possessive individual property. All other forms have been labelled communal property, and understandings of these forms have built on a tactic assumption of collective ownership and that land is held in common by a homogeneous community. This is far from the case. Cousins describe existing practices as: ‘mixed tenure regimes comprising variable bundles of individual, family, sub-group and larger group rights and duties in relation to a variety of natural recourses.’ (2008: 6).

Our own research in Dukuduku bears this out: There are a number of ways that people seem to recognise as valid claims for belonging in the area. Among these are having approached neighbours and been given a permission to stay, having fought evictions together with people staying in the forest, having been born in the forest, having paid allegiance to an authority figure, having approached a committee and been given permission to settle etc. There is in other words not one set of procedures that could easily be codified in a written constitution of a committee.

The same holds for the extent of the community. Some want to include all currently living in the area, some only descendants of the Ncube, some would like to exclude as sell-outs those who accepted the settlement offered by authorities and who moved to Khula etc. But however this ‘we’ is defined, people seem to agree that it is people living in the forest who has a right to land as well as other natural resources such as wood, wild game, fish, grass etc.

‘Community’ and ‘property’ are thus closely linked. And just as a rigid definition of community is creating problems, so will a rigid definition of property, both in land and other resources. That this is the case for land is perhaps self evident, but the way in which ownership of other resources are debated and understood is less so. People were for instance extremely upset by the Park’s practice of apprehending everybody they suspected of fishing or hunting in the area. These resources were seen as belonging to people in the forest, the Park’s claim that these resources were controlled by them were experienced as analogous to theft. One old man, for instance, when asked about hunting, explained that they knew the animals in the forest. He had grown up there and knew all the antelopes that lived in the forest, as well as what seasons they carried and nurtured offspring and should be left alone. Today there are no rules, he explained, as the Park has taken control of everything.

The Park’s idea of allowing ‘local communities’ access to recourses inside the park is also met with little understanding. In order to fish and collect grass used for weaving, people have to pay a fee to the park to
pursue a license. It is quite understandable how this makes sense from a Euro-American understanding of the relationship between common and private use of resources. However, from the point of view of the people we spoke to in Dukuduku, this is doubly unfair: first, that they have to buy licenses to use resources that they experience as theirs already. A part of this complaint is allegations that people living in Dukuduku are punished for not moving by being refused licenses. Secondly, that these licenses are for sale to all that can afford to buy them, also people living outside the forest, is described as giving away resources to people who have no claim to them.

Conclusions

There is therefore an interesting and quite serious mismatch here between how people express ideas of ownership and property based on belonging, and how the park sees themselves as protecting these same resources. From the point of view of the inhabitants in Dukuduku, the park is stealing these resources by basing their claim to ownership over them on totally different ideas of property and ownership. What seems to the park as a completely fair practice, selling license for collecting natural resources to anybody interested, is by several of our informants seen as selling their rightful resources to outsiders without compensating them.

Today several different groups live in and around Dukuduku. Those who can claim descent from the Ncube clan hold that the land should be given to them. Another group of people have been living in the forest since the mid-1990s; they fear that successful land restitution will exclude them. In addition, many of those who have moved out of the forest and resettled in the two new settlements want to return to Dukuduku, or to be part of a land claims settlement with the possibility of receiving either land or compensation.

This profusion of interests is mirrored in the many community organisations that claim to represent the inhabitants in the forest. These organisations seem to work partly as an expression of these interests, but at the same time they need to function as brokers and mediators between external resources and inhabitants in order to establish their authority. In this picture, access to external organisations, such as AFRA, becomes a resource in itself, and as James (2007) has pointed out, NGOs do not always recognise that they occupy such a position in competition with other brokers and intermediaries, as was the case in Dukuduku.
The picture is further complicated, because the struggle for the restoration of rights and citizenship helped to shape an interpretation of communities as relatively homogeneous and their property relations as relatively harmonious. In addition, liberal thinking on property in South Africa has been informed by a dichotomy between what was seen as a highly developed form of the institution, possessive individualism, and its negation, ‘communal property’, where, it was believed, the entire group held resources in common.

The dual goal of land reform in South Africa, as a master narrative on restitution as well as a practical programme for creating livelihoods, has led to a gradual move away from a concern with rights to the transfer of land—thereby transforming understandings of property as social relations, as expressed in a liberal rights discourse, to a commodified conception of property as land. Together with this transformation has come a transformation in the idea of what constitutes a community—to an assumed homogeneous group of people whose interests can be expressed by a community property association. This is very far from being the case in Dukuduku.

These transformations, from property as social relations to property as specific plots of land, and from people as constituting a multitude of histories and experiences to people as members of a community, combine to create a land reform policy that seems ill suited to address the complex history of South African land disposessions and struggles.

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CHAPTER FIVE

‘WE AGREED TO MOVE, BUT WE DID NOT DO SO FREELY’. RESETTLEMENT FROM THE LIMPOPO NATIONAL PARK, MOZAMBIQUE

Marja Spierenburg

Introduction

In 2001 the government of Mozambique declared a new national park, Limpopo National Park. The declaration was the result of an agreement between the governments of South Africa, Mozambique and Zimbabwe to establish the Great Limpopo Transfrontier Conservation Area, which also includes protected areas in South Africa and Zimbabwe (see map 2). Consequently, about 27,000 people suddenly found themselves living inside a protected area. Plans were made to relocate about 7000 of these people outside the park, as they are occupying an area that is deemed most suitable for sustaining wildlife populations and the development of tourism. In December 2008 the first village was resettled.

The creation of transfrontier conservation areas, i.e. conservation areas that straddle national borders, is a growing trend. Many environmental organizations are promoting this, arguing that eco-systems overlap international boundaries (see Aberly 1999; Wolmer 2003), and therefore eco-system management and conservation should be defined by ecological criteria, not political borders. Proponents of transfrontier conservation argue that the creation of transfrontier ‘megaparks’ will generate economic development—especially through an increase in revenues from

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1 This chapter was written as a follow-up of a conference presentation that was a co-authored with Jessica Milgroom of Wageningen University. I am grateful to Jessica for her inputs. I would also like to express my gratitude to the participants of the panel entitled ‘Remaking Human Rights: Between Western Hegemony and Local Hierarchy’ at the American Anthropological Association Annual Meeting held in Washington D.C. from November 29-December 2, 2007, especially to the panel organisers Prof. dr. Bill Derman and Prof. dr. Anne Hellum. Research for this chapter was funded by the South African Netherlands Programme on Alternatives in Development (SANPAD) and the Transboundary Protected Areas Research Initiative (TPARI), a program running under the auspices of the IUCN South Africa, and funded through the Center for Integrated Study of the Human Dimensions of Global Change, by way of a cooperative agreement between the National Science Foundation (SBR-9521914).
tourism—and that communities living in and adjacent to these ‘megaparks’ will benefit from this development.

A number of authors relate the worldwide promotion of transfrontier conservation to the increased importance of the private sector to

conservation (Chapin 2004; Hutton et al. 2006; Brockington et al. 2008). Private sector donations to environmental organisations have increased significantly (Brockington et al. 2008). As a result it seems the focus in conservation is shifting from community participation—which became a dominant theme in nature conservation from the mid-1980s onwards—to creating investment opportunities in conservation areas for the private sector in an attempt to render conservation economically sustainable (Hutton et al. 2006). Transfrontier ‘megaparks’ are prestigious projects that attract media attention and offer cross-border investment opportunities. Though environmental organisations argue that such opportunities will also benefit local residents through employment opportunities and revenue sharing, Hutton et al. (2005) and Chapin (2004) argue that the priorities accorded to the private sector diminish possibilities for local residents to participate in the management of and benefit from transfrontier conservation areas, and are in fact increasing the risks of not only economic displacement, but also of physical displacement of residents from protected areas.

The growth of protected areas is leading to an inevitable scramble for resources and conflicts over rights of access and use as well as residential rights. Most protected areas, whether newly established or not, have people living in them who depend on natural resources for their livelihoods (Cernea and Schmidt-Soltau 2006). Some scholars have noted that the increased importance of the private sector for conservation, and the emphasis on marketing protected areas for tourism, seem to coincide with a movement back to so-called fortress conservation (Hutton et al. 2005; Brockington et al. 2008). Many conservationists appear to return to the idea that people and wildlife cannot coexist, and that the only solution is to physically remove people from the area (physical displacement) or to restrict their access to natural resources (economic displacement).2 According to Cernea and Schmidt-Soltau (2006), by 2012 the number of people displaced from protected areas will probably more than double in central Africa alone. Similar trends are notable elsewhere, Brockington et al (2006) suggest that worldwide many protected areas have ‘yet to be cleared of people’ and seem to be heading in that direction.

For many years, forced evictions from protected areas were considered not so much an issue of human rights, as well as mere side-effects of environmental protection (Grabska and Mehta 2008). In recent years, however, there has been an increase in attention from human rights bodies to

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2 Physical and economic displacement is a distinction made by Cernea (2005).
forced displacements resulting from both conservation and development initiatives. Various United Nations human rights bodies have declared forced evictions to be gross violations of human rights, including the Committee on Economic, Social and Cultural Rights, the subcommittee on Prevention of Discrimination and Protection of Minorities, and the Committee on the Indigenous and the Tribal Populations Convention and Recommendation. For instance General Comment No. 4 issued in 1991 by the Committee on Economic, Social and Cultural Rights, states that regardless of the type of tenure—formal or informal—all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction. General Comment No. 7 issued in 1997 concludes that forced evictions “...are prima facie incompatible with the requirements of the Covenant.”\(^3\) Despite these clear statements, the Office of the High Commissioner on Human Rights admits that there are no human rights treaties that contain an explicit ‘right not to be evicted’ and there are no individual complaints mechanisms in place, nor is there a formal petition procedure.\(^4\)

Evictions continue to take place; governments may feel entitled to displace some groups for the greater common good by drawing on the notion of the eminent domain (Mehta and Gupte 2003; Muggah 2008). Governments hence are ‘Janus-faced’, Grabska and Mehta (2008, 10) argue, emerging both as violators and protectors of basic rights. Those who are displaced often live in resource-rich yet remote areas, have a history of social, economic and political marginalization, and consequently often lack knowledge of their rights and political clout (Scudder 1996; Mehta 2008). Governments’ decisions, furthermore, sometimes are supported or influenced by funders of development or conservation initiatives. International financial institutions such as the World Bank have often been accused of being implicated in forced displacement by financing projects that entail evictions, though they often shift the blame to the borrowing governments (Mehta 2008).

Responding to both internal as well as external pressures, the World Bank drafted a set of involuntary resettlement guidelines during the 1980s


\(^{4}\) See the Fact sheet on forced evictions, paragraph 6, http://www2.ohchr.org/english/issues/housing/index.htm; see also Muggah 2008).
In 1990 the Operational Directive 4.30: Guidelines on Involuntary Resettlement was introduced. According to Muggah (2008, 35), the World Bank and its partners initiated dialogue to support the (re)formulation, codification and implementation of resettlement legislation in borrower countries. This extended to legislation pertaining to specific social and economic rights (for instance, the restitution of property and compensation for expropriation) as well as concrete proposals to ensure that certain needs are met, particularly with respect to economic livelihood restoration and transparent governance in resettlement planning. The latter were based on a model developed by former World Bank sociologist Michael Cernea, the Impoverishment Risks and Reconstruction (IRR) model, which has, Mehta (2008) argues, been key in showing how displacement goes hand in hand with physical, social and economic exclusion. The World Bank actively disseminated the Guidelines among borrower government, requiring them to adapt their own national policy and legal frameworks. The Guidelines also began to be taken into account by private sector actors involved in relocation (Cernea 2005; Muggah 2008). The Guidelines stipulate that involuntary resettlement should be avoided as much as possible, but when it takes place, it should be conducted as a development programme aimed at improving living conditions. In 2001, however, the World Bank's Board of Executive Directors approved revisions to of the Guidelines that weaken the protection of communities threatened by eviction (Clark 2002) focusing merely on the restoration of past income rather than development-oriented goals, and ignoring indirect effects of resettlement projects (Mehta 2008).

Despite the World Bank's initial dialogue on rights, the Guidelines, especially in their current form, represent a needs-based rather than a rights-based approach to resettlement. Grabska and Mehta (2008, 18) maintain that this fits with the general tendency of governments, donors and aid agencies to embark on meeting practical needs rather than “...creating long-term environments where the rights of all displaced could be realized.” They argue that this approach neither questions existing allocations of entitlement, nor issues of equity in the distribution of resources and opportunities amongst various groups in society including the more marginalized and vulnerable (ibid, 13). It furthermore reduces those relocated to mere recipients of aid and denies them agency in planning for their own future (Mehta and Gupte 2003). Nevertheless, the main problem of rights-based approaches lies, according to Grabska and Mehata (2008, 19) “… in the locus of responsibility to guarantee, provide
and implement rights and access to rights.” There is tendency for governments, donors and aid agencies to shift the blame amongst each other, and/or displaced people do not know precisely who is actually responsible for their rights.

The development of the Great Limpopo Transfrontier Conservation Area (TFCA) was promoted and assisted by the Peace Parks Foundation, a South-African based NGO promoting transfrontier conservation, and initially by the World Bank as well. Originally, the idea was to create a conservation area with different land-use zones, however, as will be explained below, in the process the focus changed towards harmonizing the protection regime across all three parts of the Great Limpopo. The Mozambican part of the Great Limpopo, which was a hunting concession, became a national park. As already mentioned, plans are underway to relocate about 7000 people from the Mozambican park. In the absence of any national standards for development or conservation-induced resettlement, the World Bank’s Guidelines for Involuntary Resettlement were chosen to guide the resettlement process, even though the resettlement is purported to be voluntary.

This chapter analyses how the establishment of the larger transfrontier park resulted in pressure on the Mozambican government to favour the model of a national park over other conservation options that might have better accommodated the interests of local communities. It then proceeds with an analysis of how the meanings and framing of key concepts in the development of the park, such as park, voluntary resettlement and development have been used to justify actions and decisions that have been the source of conflict in the negotiation process about resettlement (cf. Mosse 2004). Illustrations will be provided of how the negotiations about the implementation of the World Bank resettlement guidelines was a balancing act in which all parties involved had to readjust their aims and strategies as the process moved along. Paying careful attention to the process is crucial in understanding the balancing of the needs and rights of local people with global interests in conservation.

The data used to substantiate the arguments made in this chapter are mainly based on interviews with residents in Limpopo National Park, government officials, representatives of donor agencies and local NGOs, as well as with technical advisors to the park and resettlement project, that were conducted intermittently over a period of six years, from 2003 till the present. In addition, official documents and reports were consulted and the content of websites of the major organizations involved in the park were analysed.
**From a Hunting Concession to a National Park**

The establishment of the Great Limpopo Transfrontier Park only became possible after the end of the civil war in Mozambique and the transition to democracy in South Africa. Before these transitions, the border area between Mozambique, Zimbabwe and South Africa frequently was the location of armed confrontations (Koch 1998). The area provided excellent cover for military operations that relied on covert border crossings. Furthermore, the wildlife in the area, especially elephants, provided the different armed parties with opportunities to fund their activities (Ellis 1994). As a result, wildlife populations, especially on the Mozambican side, were decimated (Ramutsindela 2004b).

Both the image of a monument to peace (peace park) in this area, as well as the ideal of restoring wildlife to a place stripped of it were powerful forces contributing to the cooperation between the three countries to establish the Great Limpopo transfrontier park (Wolmer 2003). Two months after Nelson Mandela’s release from prison in 1990, the late Anton Rupert, founder of the Peace Parks Foundation (PPF), one of the main promoters of and fundraisers for transfrontier conservation in the region, met with the then Mozambican President Joaquim Chissano to discuss the idea of cooperation in the field of nature conservation (www.peaceparks.org). In 1992 a Peace Accord was signed in Mozambique to end the civil war, and in 1994 the first multi-party elections took place in South Africa. Both events were crucial in the process of establishing the GLTP.

Negotiations about the establishment of the Great Limpopo Transfrontier Park started in earnest in 1998. Originally, when an Interim International Technical Committee was set up consisting of government officials of the three states (Munthali and Soto 2001), the conception was that the Great Limpopo would become a vast conservation area, including the Kruger National Park in South Africa, Gonarezhou National Park in Zimbabwe, Bahnine and Zipave National Park and Coutada 16 in Mozambique—the latter at the time was a private hunting concession—and also a number of communal areas in Zimbabwe and Mozambique. This changed, however, when in 1999 the ministers for the environment of the three countries established a Ministerial Committee. Despite some misgivings by the other two other ministers, the South African Minister Vali Moosa managed to shift the focus almost entirely on the national parks and on converting Coutada 16 in Mozambique, which was bordering on Kruger National Park, into a national park in order to attain cohesion.
and consistency between the three countries’ protected areas (Munthali and Soto, 2001).

The planning process was pushed through under significant time pressure. Under strict supervision of the Ministerial Committee, an International Technical Committee (ITC) was set up to draft the conceptual plan, the action plan and a draft trilateral agreement. The ITC initially was given one year to develop the drafts, and had repeatedly asked for more time to consult all stakeholders involved, but these requests were turned down. This did not bode well for the chance for residents to have their voices heard (see Muntali and Soto, 2001, 9). Late in 2000 a Memorandum of Understanding was signed by the ministers approving the action plan for the establishment of the GLTP. One of the proposals in the plan was the establishment of several Working Groups, each dealing with specific issues such as wildlife conservation, and tourism; a Working Group was also established to deal with ‘community issues’.5

In November 2001, about a year after the signing of the MoU for the GLTP, Coutada 16 was declared a national park. This was done without considering how the approximately 27,000 people living on the land would be affected. A World Bank consultant who initially was involved in the process remarked: “This was supposed to be a transfrontier conservation area, now it is becoming a transfrontier park, that is not the same thing, that is not what we had agreed upon. This was supposed to bring benefits to the local communities, but the way it is going now it will not.”6 He explained the shift in focus: “The South Africans were becoming impatient. They were anxious to show that NEPAD7 was working, and the transfrontier park would be a concrete example of interregional cooperation, so they needed it.”8 At least some South African participants and observers agree that ‘massive political pressure’ was being placed on the implementers to speed up the process (Spierenburg et al. 2006, 26).

Equally important for the initiative, Ramutsindela (2004a, 2004b) argues, was the fact that both South Africa and Mozambique have adopted a neo-liberal economic development model, allowing a significant role for

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5 Interviews with the International Coördinator of the Great Limpopo and a member of the Community Working Group, 14–16 April 2005.
6 Interview at the World Bank, Maputo, 6 August 2003. The term ‘conservation area’ generally indicates an area where conservation is important, but where sustainable use of natural resources is possible. The term ‘park’ has a much more protectionist connotation (Hulme and Murphree, 2001).
7 New Economic Partnership for African Development; the South African government was an important driving force in forging this pan-African partnership.
8 Interview at the World Bank, Maputo, 6 August 2003.
the private sector. Furthermore, given the high pressures put on these governments to redress the historically skewed distribution of resources and services, and address economic growth and poverty alleviation as top priorities, nature could only be conserved if it would ‘pay for itself’. This condition allowed the (semi-)privatization of conservation and allowed the private sector to step in (ibid., 69), resulting in the case of the Limpopo National Park in the participation of an NGO—the PPF—in the management of the park, and the decision to relocate villages to create space for the development of tourism facilities.

Representatives of various organizations involved in the implementation of the Great Limpopo TP or Transfrontier Park⁹ felt that the initiative also became a matter of prestige for the Peace Parks Foundation (PPF), which had played an important role in the initiation of the GLTP: it would be the largest Transfrontier Conservation Area on the continent. The PPF used the success of Kruger National Park in attracting tourists to enlist support for the Great Limpopo, showing Powerpoint presentations about the Kruger and its tourism facilities to Mozambican government officials and local village leaders¹⁰ and in doing so also appeared to promote the Kruger’s land use and management model. The PPF was assigned an important role in implementing the adoption of the park model; it has deployed some of its personnel to serve on the Project Implementation Unit in Mozambique that is directly responsible for taking management decisions in what is now Limpopo National Park (LNP). The brochure that the PPF published in collaboration with SANParks to celebrate the signing of the final treaty on the Great Limpopo between the heads of state in December 2002 shows how both organizations interpret the concept ‘park’:

All a Transfrontier Park means is that the authorities responsible for the areas in which the primary focus is wildlife conservation, and which border each other across international boundaries, formally agree to manage those areas as one integrated unit according to a streamlined management plan. These authorities also undertake to remove all human barriers within the Transfrontier Park so that animals can roam freely (SAN/P/PPF 2003, italics added).

The statement does not correspond with the initial statements about the importance of community participation and benefits. A further indication

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⁹ Interviews in Maputo, April/May 2005.
¹⁰ Interviews with government officials in Maputo, NGO representatives and villagers in Limpopo National Park April-May 2005.
of the increased sidelining of the interests of residents adjacent to and living in the Great Limpopo Transfrontier Park is the fact that after the signing of the treaty, the Community Working Group ceased to play a role in the management of the Great Limpopo. When the ITC was transformed into a Joint Management Board for the Tranfrontier Park, all Working Groups were transformed into Management Committees, except the Community Working Group (Makuleke 2007). The reason provided by the International Coordinator of the Great Limpopo was that the ministerial committee had decided that community issues should be dealt with at the national level.11

Although many individuals and organizations presented arguments against the development of a protected area in the border region because of the inevitable competition for resources between people, domestic animals and wildlife and subsequent human/wildlife conflicts that would arise, the area was pronounced a park before detailed plans were developed about how to deal with these conflicts. LNP authorities recognize that they have not yet resolved the issue of how to prevent transmission of diseases between livestock and wildlife,12 yet wildlife continues to be brought in to the park and the Kruger park authorities are interested in bringing down more kilometres of fencing between the two parks. Since the creation of the park more than 3800 animals, including about 110 elephants, have been translocated from Kruger National Park to the Limpopo park; followed suit by at least 500 elephants that have moved into the park from neighbouring areas in South Africa and Mozambique.13

Interpretations of the Concept of an African Park

Once the park model was adopted, management decisions followed in order to create and uphold the image of an ideal African park and create space for tourism. According to Mozambican law, a national park is conferred the highest status of protection to the land by the Forest and Wildlife Act, and internationally the Limpopo National Park is classified as an IUCN category II National Park defined as:

An area of land or sea designated to protect the ecological integrity of one or more ecosystems for present and future generations; to exclude exploitation

11 Interview 15 April 2005; see also Spenceley 2005.
12 AHEAD workshop, White River (South Africa), March 2008.
13 LNP authorities, interviews April 2007, see also Peace Parks Foundation website www.peaceparks.org.
or occupation inimical to the purposes of designation of the area, and to provide a foundation for spiritual, scientific, educational, recreational and visitor opportunities, all of which must be environmentally and culturally compatible.\textsuperscript{14}

Although this definition does not explicitly prohibit residents from remaining within the boundaries of the LNP, the zoning of the park and the definitions of the different zones effectively place conservation and tourism priorities above those of the current local residents. Following the Kruger model, the LNP was divided into five major zones designated for: wilderness, medium to high density tourism, low density tourism, low use, and what used to be called the support zone— but lately has been renamed the buffer zone\textsuperscript{15}—where the remaining 20,000 people live who will not be resettled. The land use planning and zoning exercise was conducted by a USAid consultant, and the tourism plan was developed by a PPF consultant. Both agreed that the only area that could sustain a viable wildlife population and would be most attractive to tourists was the Shingwedzi River basin where approximately 7000 people reside in eight villages.\textsuperscript{16}

The objectives of the low-density tourism zone that was subsequently superimposed on the Shingwedzi river basin and eight resident communities are: low density, mid to up-market tourism and recreation, scientific research, preservation of species and genetic diversity, and maintenance of ecological processes and environmental services. The LNP management plan describes the rationale for this zonation, explaining the need for up-market development areas offering suitable game viewing and a ‘wilderness’ type experience that would attract private sector investment. The management plan states that, ‘furthermore, the presence of more sensitive riverine vegetation calls for lower impact activities. Clearing of the relatively fertile alluvial areas for cultivation will obviously impact negatively on wildlife as well as on the visitor experience’ (MiTUR 2003, 30). This statement seems to overlook the fact that many of these areas are already being cultivated and are crucial for the livelihoods of local residents.

Many LNP conservation authorities assume that tourism can only be successful if the villages will be moved: “tourists and villagers do not

\textsuperscript{14} (IUCN, 1998) cited in the LNP management plan, MiTUR 2003.
\textsuperscript{15} Interview PIU member, March 2009; AHEAD workshop at Namaacha (Mozambique), March 2009.
\textsuperscript{16} PPF staff member, interview April 2005; Tourism Master Plan, unpublished report by the Peace Parks Foundation, Stellenbosch, South Africa; senior lecturer Universidade Eduardo Mondlane, interviews July 2003, April 2005.
match”, was a remark that they frequently made. One of them remarked that when the Giriyondo gate was opened—the new border post allowing tourists to cross directly from Kruger National Park into the LNP—the new access road was constructed in such a way that it would circumvent nearby villages because “tourists do not want to see people in the park”.

Nevertheless, some dissident voices can be heard as well. One member of the PIU argued that little attention was paid to the effects of tourism on the ecology of the area. He remarked that “… when all the lodges that have been planned actually will be build and operating, we will have a massive water problem.” He suspected that local residents and their agricultural activities may have less severe ecological impacts than a fully developed tourism area—provided some limits are place on agricultural expansion.

However, the idea that nature and communities, and hence tourism and communities, cannot co-exist is based on a certain vision of what ‘natural’ and ‘wilderness’ landscapes should look like, and the place that people may or may not occupy in those landscapes (see Draper et al. 2004). Anderson and Grove (1987, 4) claim that:

Much of the emotional as distinct from the economic investment which Europe made in Africa has manifested itself in a wish to protect the natural environment as a special kind of ‘Eden’ for the purposes of the European psyche rather than as a complex and changing environment in which people actually have to live … Africa has been portrayed as offering the opportunity to experience a wild and natural environment which was no longer available in the domesticated landscapes of Europe.

This vision is reflected in the promotion of the LNP on the PPF-website: “The pristine wilderness area of Limpopo National Park has, since 2005 offered tourists the possibility of participating in 4x4 eco-trails and of enjoying the tranquillity and seclusion by staying in the park.”

In a study by Lamarque and Magaine (2007) local populations are identified as the greatest threat to the success of Mozambican conservation areas for tourism (Lamarque and Magane 2007). The team of consultants hired in 2002 by the PPF and the Mozambican Ministry of Tourism to conduct a socio-economic and attitudinal survey among the residents of the LNP also concluded that poaching was a very likely threat to the park.

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17 LNP conservation authority, interview January 2006.
18 Interview with PIU member, March 2011.
20 Note that this was after the declaration of the LNP.
The consultants’ report speaks of ‘bandits’ in the area posing a threat, but also fears that residents will take advantage of

...the potential ‘resource’ of high profit game coming into an area where the population is currently struggling for subsistence creates a high potential for this to be seen as a potential means of additional income if communities cannot be sufficiently integrated into conservation efforts. This is especially relevant since the Limpopo National Park was formerly designated as a hunting concession, where the killing of game for subsistence as well as economic purposes was viewed as the norm. For this reason, the local population have never been conditioned to considering hunting as illegal, and only through intensive engagement of the communities will this implication of the changed land use status of the area be made clear to them. Still then the matter of subsistence needs above awareness of legalities, could potentially pose serious difficulties in protecting the game according to standards to be upheld in a reserve area (Woodburne et al 2002, 3–28/29).

Though the consultants note that the former status of the area may have shaped residents’ attitude towards wildlife, rather than questioning the change in status, the solution is to be sought in educating residents and by “including them in the conservation process” (ibid., 4–1) while disregarding the need to provide alternative sources of income and food before limiting their existing livelihood strategies.

Since the beginning of the project, the focus has been to convince those living in the Shingwedzi basin of the need to relocate rather than to look for alternative ways of dealing with human/wildlife conflicts emanating from the translocation of animals into the park. Initially, an enclosed wildlife sanctuary was built bordering on Massingir dam, where translocated animals could acclimatise. Though complaints could be heard among residents that animals were escaping from the sanctuary, the enclosure did offer some protection against human/wildlife conflicts. With the opening of the Giriyondo gate, allowing tourists access to the LNP directly through the Kruger Park, however, some of the fences around the sanctuary have been removed—“because tourists do not want to see animals fenced in”21—without consultation of the affected residents.

Combining legal implications of designating the LNP a category II national park, the push from the PPF and the national government to create an environment attractive for tourism as quickly as possible, the gap between the stated objectives of ‘conservation for the benefit of local people’ and the implementation of those objectives seemed wide from the outset.

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21 LNP conservation authority, interview January 2006.
Voluntary or Forced Resettlement?

The Mozambican government, the PPF, and the donors funding the LNP—including one of the major donors, the German development bank Kredietanstalt für die Wiederaufbau (KfW)—have always maintained that no forced resettlement would take place. However, Schmidt-Soltau and Brockington (2007) warn against the trend of calling resettlement of people in protected areas ‘voluntary’ due to complications in determining volition. They argue that the large majority of conservation areas in developing countries do not provide the conditions necessary to call a resettlement truly voluntary—i.e. the opportunity for residents to have a real choice to say no to the government or conservation organizations (2007, 2195).

Some of the park authorities admit that it may be a misnomer to call the resettlement process voluntary. An ex-director of the park concurred, stating that people had not been informed beforehand—let alone consulted—about the establishment of the park, and now they have to live with the consequences of its establishment.22 Many of the key decisions concerning the park, including the translocation of animals, were taken without community consultation, and with the abolition of the Community Working Group, the one platform created for communities to participate in the management of the Great Limpopo Transfrontier Park was lost to them. Nevertheless, in public communications, the label ‘voluntary’ continues to be applied. Furthermore, resettlement is also presented as a process that will benefit the communities, a development project. At a press conference in May 23, 2005, the then coordinator of the Project Implementation Unit of the LNP announced that the first hundred families would be resettled soon—though in reality the first families were resettled only in December 2008—and remarked:

It is hoped that this will lead the remaining families to understand that the park will not damage their interests but will actually improve their lives. Families in this area can never rely on farming [alone] to escape from poverty: the soils are poor and the semi-arid climate guarantees that yields from agriculture will always be low.23

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22 Interview in Maputo, April 2007. See also a report by the Refugee Research Programme (RRP 2002).
The PPF-website supports this view of resettlement as beneficial and voluntary: “...seven communities living in remote areas inside the park have opted to relocate to areas with better living conditions.”24 The organisation refers to resettlement as a ‘win win’ situation25 and cites a PPF project coordinator who claims that “They want to resettle,” he said. “They accept that the government wants to develop the park and realise they will benefit in some way.”

Other donors, especially the KfW, have taken the ‘acceptance’ by communities less for granted. The organisation demanded that the PIU obtain signatures from community leaders26 indicating that the communities voluntarily accept to be relocated. Once consent was obtained, the further implementation of the resettlement process was to be guided by the World Bank Guidelines for Involuntary Resettlement, stipulating procedures for negotiations for compensation. The PIU employs a Resettlement Coordinator, and a Consultative Committee on Resettlement (CCR) was established in which the communities would be represented. Through the CCR attempts were made to obtain consent, but the process moved along very slowly due to a number of factors. Firstly, the CCR met on a very irregular basis, sometimes due to logistical problems, but also because of management problems. Secondly, the whole process was put on a halt for six months prior to the general elections in Mozambique in 2004, as one of the PIU members remembers:

(…) In 2004 there were elections and for 6 months we were not allowed to talk about resettlement. The governor of the province of Gaza at that time said ‘Who said you will be resettled?’ While now he is the Vice Minister of Tourism … he says, ‘Yes, you will be resettled.’ No one wanted to take responsibility for that time and the process was stopped. In 2005 there was a [meeting of the] CCR [Consultative Committee on Resettlement] again to take up the issue and everyone blamed everyone else for the process being stopped. These pauses have had huge negative impacts in the field.27

Another reason for the delays in obtaining consent is related to shifting opinions within the communities concerning resettlement. These opinions shifted over time, but also differed within communities, and sometimes village leaders were forced by community members to change the statements they previously made during CCR meetings (Milgroom and Spierenburg 2008).

26 In 2003 community leaders were democratically elected in all villages in Mozambique as a next step in the decentralization process (see Norman 2005; Spierenburg et al. 2008).
27 Interview PIU member April 2007.
Underlying the negotiations about resettlement, is the concept that this resettlement will bring ‘development’. However there often are differences in understandings of what development means between those designing it and those subjected to it (cf. Laurie 2005).

As shown above, residents are portrayed by park authorities and the PPF as poor and unable to develop themselves as long as they stay inside the park. Yet, this is not the way many of the residents interpret their own situation. Cattle is an important economic asset, and before the civil war the area was the biggest producer of cattle in the whole country (Mavhunga and Spierenburg 2009). Presently, in one village which has 2250 inhabitants, there are roughly 5600 head of cattle. When asked about how life on the outside of the park will be different, residents rarely perceive that is will be a positive change for them. The very first concern that people express is a lack of good soil for agriculture, lack of forest resources, then lack of grazing land and the concern that their animals will be stolen (Milgroom and Spierenburg 2008). Theft of livestock is a common problem outside the park, whereas the villages inside the park are protected by rivers that make the escape routes more complicated. Elderly people particularly express concern about not having access to certain plants and resources to which they currently have easy access: “When there is no rain and we cannot produce our maize, we will die because we won’t know where the trees are that have fruits. When we get sick we will suffer because we won’t know where the medicine trees are” (cited in Milgroom and Spierenburg 2008, 440). Some residents are also concerned about access to land for their children. As part of the resettlement compensation, some agricultural fields will be replaced, but access to land for future generations ‘will be identified but not developed’ (LNP 2007, 37). A report by a consultant on possible resettlement areas furthermore concludes that: “[residents] utilise alluvial soils in the Shingwedzi valley which have higher agricultural potential than generally occurs in the region. They have access to vast areas of grazing for livestock and to other forest resources ... The villages have access to reasonable supplies of water in nearby rivers” (Impacto 2005, 1). However, a former director of the LNP, did not seem to consider this an insurmountable problem: “People will learn that it is better to have a job than cattle.” This remark appears to

29 Interview in Massingir, April 26, 2007. He was referring to the fact that part of the communal grazing area that had been planned for in the resettlement area has become
point to another reason why LNP authorities as well as government officials consider resettlement to be the best option; small-scale agricultural production is deeply distrusted and believed to be an insufficient basis for the ‘development’ of the residents of the LNP, and as Hughes (2006) argues, for the development of the country as a whole.

Residents’ willingness to move is tightly tied to their concept of where they think they can live a better life. This weighing of advantages and disadvantages is a dynamic process, the results of which change with the circumstances (Milgroom and Spierenburg 2008). It is important to note that there is no ‘people’s opinion’ about moving (see also Woodburne et al 2002, 7–14). However, it is safe to say that very few people actually want to leave, but many realized that in the long run it is potentially beneficial to accept to leave. In 2001 when residents were first informed that they were now living within a national park, the idea was met with considerable resistance.30 In 2002 when the question was asked ‘if you had to move, where would you go?’ 95% of the respondents replied that they would refuse to move.31 Although there are still people who claim to refuse to be resettled, now many people have accepted to leave for diverse reasons associated with what resettlement means for them.

Some residents, especially younger people, claim that if all of the promises that the government has made are kept, indeed they will benefit from some things that both the residents and the government consider ‘development’, such as proximity to health facilities, jobs and concrete houses. However many residents doubt that the promises of better services, water pumps, houses and proper compensation will be fulfilled and have a deep distrust of the park project (Milgroom and Spierenburg 2008, 441).

As human/wildlife conflict increases inside the park, and food becomes scarce while access to resources is limited, the prospect of resettlement becomes a more appealing option for many. At the beginning there were few concrete changes in the residents’ lives to remind them that they were now living in a park. Little by little, however, people began to feel the effects. Many people complain about being at the mercy of the elephants, “We cannot live here with elephants. We plant our corn to feed the elephants and then we suffer” (cited in Milgroom and Spierenburg 2008, 442). The years following the implementation of the LNP were drought years

part of a concession allocated to Procaná, for sugar cane cultivation for bio-ethanol production.

31 RRP database, digitalized by Rachel Demotts. See also (RRP, 2002).
that allowed for very little agricultural production, and in normal circumstances subsistence hunting would carry the local residents through times of food scarcity. However, residents of the LNP learned quickly that hunting, even small game for consumption, was against the rules and regulations of the park and would be seriously punished if caught (Demotts 2005; Norman 2005). The rainy season of 2005–2006 did finally yield maize, and as a result, it was the first year that the LNP experienced widespread human/wildlife conflict (Milgroom and Spierenburg 2008). In 2006 more than 600 elephants were counted in a third of the park, indicating that there could be as many as 1000 elephants in the entirety of the LNP. This increased number of elephants and the good harvest of 2005–2006 seemed to quickly convince residents of the need to be resettled. People complained they had no means of protecting themselves, their cattle, or their harvests against wildlife: “Whenever we report damage to our crops and the loss of our cattle to the people from the park nothing is done, but whenever we try to defend ourselves against the wild animals they are there within a minute to arrest us.” No compensation is paid to residents for the loss of crops or livestock, as one of the park’s employees remarked: “This is now a national park, agriculture and cattle keeping officially is forbidden in a park, so how can we compensate for damage to things that are not allowed?” However, as the rainy season of 2006–2007 has proven to be relatively dry, the human/wildlife conflicts have been minimal and it seems that again residents are resistant to move (Milgroom and Spierenburg 2008).

Yet, residents’ opinions are also partly influenced by the fact that relocation is not a new concept for the residents of the park. The villagers in the Shingwedzi basin have already been forced to move by their government a number of times (some up to five times) for various reasons over the last 40 years. The villagisation policies of the post-Independence FRELIMO government forced families and satellite villages into conglomerated villages. Later, some families suffered multiple relocations due to the war, first to larger, safer villages, then often to South Africa. Upon their return home after the war, and in some cases under the jurisdiction of recent versions of the same villagisation policy, people have been forced again into villages (Norman 2005). In some cases this forced mobility has caused increased resistance to moving yet again (Milgroom and Spierenburg 2008). However, in some cases, prior mobility has given people a point of reference for yet another move. People often refer to moving

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32 LNP authority, interview Massingir, May 2005.
to South Africa and getting used to living in a different place when asked about their expectations for the resettlement outside of the park. One young man who works in South Africa describes it this way: “It will be like going to SA because you arrive there and you don’t know anyone but then you get used to it. But it won’t be so difficult this time because I will be with my whole family” (cited in Milgroom and Spierenburg 2008, 442).

Another point of reference that causes people to choose to accept to be resettled is the government-assisted return from South Africa after the war, “We decided to accept to leave the park because we remember when the government offered to help to bring people back here after the war—those who didn’t take the help in that moment later got nothing” (cited in Milgroom and Spierenburg 2008, 442).

A certain resignation is often expressed in regards to the move, “This land has already been sold, they told us we have to go, so we will go” (cited in Milgroom and Spierenburg 2008, 442). For some it is more than resignation, but fear of what the government would do if they refuse. As the provincial governor said in a speech in Mavodze (a village along the Shingwedzi river) on May 23, 2007, “We are offering you development and there are people here who are making it impossible for us to help you improve your lives.” Regardless of whether or not the process is voluntary, the effects of the translocation and release of wildlife in the area greatly influences residents’ freedom of decision-making:

They say that the resettlement is not forced, but that is not true. We are forced because we are no longer allowed to live our lives as before, we can no longer cultivate where we want, we can no longer take our cattle out to graze. Yes, we agreed to move, but we did not do so freely.

Diffusion of information has been one of the biggest challenges for the LNP community liaison team—including the Resettlement Coordinator. This lack of information and subsequent misunderstandings about what to expect from the park is one of the elements that influences people’s willingness to leave their homes. Jessica Milgroom, who conducted research in the first village that was moved, found that till the very last stage of the relocation process, people were not sure about the conditions for moving and about the resettlement compensation package (Milgroom and Spierenburg 2008).

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33 In interviews with residents, often the fear of jail or punishment comes up. See also DeMotts, 2005.
34 Interview with a Macavene resident, May 2005.
The lack of clear information has created distrust on multiple levels, between the park and the village representatives, as well as between the representatives and the village residents. Some of the misunderstandings about the LNP and the resettlement process can be attributed to the way the committees operate that were established by the park’s community liaison officers with the assistance of ORAM, a Mozambican land rights advocacy organisation. These ‘park committees’ of about eight to twelve people were set up to facilitate communication between the park and the villages (Demotts 2005; Norman 2005). Originally, all park committee representatives were to be sitting on the CCR, together with representatives from a number of NGOs—including ORAM—that are active in the area, and the local, district and provincial governmental representatives. The village park committees were meant to meet on a regular basis, but according to the community liaison officer, and resettlement coordinator, logistical problems relating to transport prevented the latter from meeting regularly with the committees in their villages.35 Assembling all committee members for the CCR meetings in Massingir, where the park’s offices are located, also proved to be quite difficult and costly, and as a result only one representative per village, most often the leader36 of each village, was invited to these meetings.37 At the same time, the CCR was used as a forum to promote a more ‘participatory’ decision making process. These changes in the channels of communication and community representation have contributed to the communication problems.

Furthermore, the information that village representatives receive is not always passed on to other community members. The internal communication structures of the villages determine how information gets from one resident to another, (Norman 2005; Gonçalves 2006). According to Milgroom (personal communication), within the villages information is used as a source of power, and some marginalized members of the community are the last to receive information. However, the fact that only one person from each community (often the community leader) is attending the meetings, and that often that person comes back without anything concrete to show for his trip because of the nature of the meetings,

36 ‘Village leaders’ are the officially recognised village representatives who are supposed to be elected democratically, and represent the lowest level of the local government structure (see Norman 2005).
37 Interview ORAM staff member, May 2007. ORAM recently obtained funding for a joint project with a German NGO Brot für die Welt [bread for the world] which, among other things aims to solve transport problems.
together with the selectiveness with which residents are given access to information, has created a sense of distrust between the CCR members and the representatives. The ‘community representatives’ are distrusted by the CCR members and sometimes blamed for not representing the communities, and speaking for their personal needs and desires, while at the same time they are pressured to agree to what the park is proposing.

Within villages, the village representatives also are blamed for not speaking in the name of the community. Often the representatives either cannot negotiate anything better for the community due to heavy pressure, or there is nothing to negotiate (informational meetings) or due the pressure of time they are asked to make decisions without consulting the community each is representing. As one village representative expressed it in a CCR meeting, “We cannot accept these changes yet without talking to the communities. We know that many things that the communities want are not done. […] We are having problems with conflicts in our communities—we have to bring the news back and forth from the communities.”

The Consequences of ‘Forcing Consent’

The time and effort spent on obtaining consent have further prolonged an already lengthy process. As a consequence, many have become weary of the whole resettlement process. Residents have stopped investing in housing and agriculture, but not much headway is made with the resettlement process (Milgroom and Spierenburg 2008, 443).

As the extent of residents’ decision-making power in the ‘voluntary’ resettlement was never clearly defined, confusion, frustration and delays built up. This became most apparent in the negotiations about compensation. Village leaders were consulted on certain details of compensation, such as the design of the resettlement houses, and surveys were conducted to establish the assets of each individual household, conform the World Bank Guidelines. Then afterwards, they were told that their desires could not be accommodated due to financial problems. This led a community leader to comment: ‘You [park staff] should have just built houses and have presented them not having asked us for our opinions’ (cited in Milgroom and Spierenburg 2008, 443).

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38 CCR meeting, March 17, 2007; various other sources.
39 CCR meeting, March 17, 2007.
For the park officials the situation was equally confusing, as their mandate was both ill-defined and shifting because of political push-and-pull. The resulting lack of transparency about the resettlement process at the local level created an environment of distrust. For a while all resettlement negotiations and preparations were stopped due to budgetary problems, which were not communicated to the villagers, and this created further frustrations among LNP staff. This is not uncommon in resettlement projects, Rew and colleagues (2006, 46) even conclude that in many resettlement projects local staff are ‘prisoners themselves of completely contradictory pressures’, however, they shoulder almost all of the responsibility for contact with residents. Despite such periodic stalemates, government and donors were increasing the pressure on LNP staff to settle the first village as soon as possible, while the donors were at the same time insisting on a more participatory process. Yet, they equally insisted that funding for the resettlement of the rest of the villages would be in jeopardy if the first village would not have moved soon.

A new Park Warden was appointed to speed up the process of resettlement. The new Warden soon discovered that he was facing a tremendously complex task. Relations with the park residents were strained, but he put part of the blame for that on researchers studying the resettlement process, whom he accused of ‘stirring up’ discontent. Insisting that resettlement was to the benefit of residents, who would not be able to prosper inside the park, he announced that all research had to benefit the resettlement process, and no researchers would be allowed to speak to the residents without permission from the LNP authorities anymore.40

In December 2008 the residents of Nanguene were the first to move out of the park. The relocation of the village had been postponed several times, since the provision of water was not yet ensured, and the fields not yet cleared and ploughed as promised.41 However, residents put pressure on LNP staff to move before the start of the planting season, and the relocation went ahead before all preparations had been made. Residents were struggling in their new places, since they had to borrow or rent fields from residents in the host community, and as a result have to travel far to cultivate their fields and fetch water. Conflicts arose with the host community over land. As a result of these difficulties, most of the resettled families have since then moved back into the park, and have settled

40 Interview with the Warden, March 2009.
41 Interviews with PIU members and NGO representatives, February 2009.
mainly in the villages in what is now the buffer zone (Milgroom, personal communication). The Warden has come to understand the problems of the resettled and the trepidations of those still awaiting resettlement. At a meeting in the Kruger Park in March 2011 he told me: “It was not the researchers who were stirring up people, it was the people themselves who did not want the resettlement. And they were right, what we did to them was wrong, there was not enough compensation. I have told the Ministry that these people are real farmers, they have cattle, they need more land. I have briefed the Ministry about this, and I have insisted that all the other relevant Ministries will become involved to provide the people with the services they need.”

Concluding Remarks

This chapter described how political pressure to establish a prestigious ‘megapark’ including one of the most famous national parks on earth, resulted in hasty decisions justified by certain perspectives on nature and the environment that suited tourism development, as well as by certain views on community development that were not shared by residents. The pressure led to the adoption of the national park model on the Mozambican side, instead of a more flexible land use model that would had more potential to accommodate the interests and livelihood strategies of its residents as well as conservation—though one has to acknowledge that this is by no means an easy task. Priorities were accorded more to the conservation of natural resources and tourism development, and less so to the rights of the people living in the LNP, despite assertions that the Great Limpopo Transfrontier Park was meant to bring benefits to those living in and around it. Though the Great Limpopo may not be entirely representative of all transfrontier conservation areas in the region, the experiences related to its creation seem to justify the warnings issued by Hutton et al. (2006) and Chapin (2004) that the promotion of transfrontier conservation results in a move away from community-based natural resource management. The important role accorded to the private sector in generating economic opportunities through transfrontier conservation led to the decision to vacate an entire area of its population to create a space where tourism development can take place. This decision was also fostered by a desire by both Mozambican conservation authorities and the PPF to create a ‘pristine wilderness area’, which, in their view, precluded the presence of residents engaging in agriculture and cattle keeping. The guiding principles for sustainable resource use as laid down in the original park
management plan are described as “Acknowledging local communities’ reliance on natural resources for their survival, provide for the rational and sustainable consumptive use of natural resources...in so far as this does not conflict with the primary objective of maintaining and restoring the biological diversity of LNP” (MiTUR 2003, 44). Yet, the opposite seems to be happening.

The attitude of conservation authorities towards the residents appears to be one of distrust. Residents are believed to threaten wildlife and other natural resources. There is also the belief that small-scale farmers are not productive, and cannot produce development the way the private sector allegedly can. This kind of distrust of small-scale farmers has been quite pervasive in Mozambique, as it also has been in Zimbabwe and South Africa (Hughes 2006), where it has been expressed in terms of favouring large-scale commercial agriculture and tourism development. This idea is not unique to the region and has resulted in resettlement processes elsewhere in the world (see e.g. Scott 1998). Resettlement is presented as a benefit to both the park and its residents, who will be able to receive better services—and hence assistance—that will allow them to develop themselves. However, there was quite some confusion about what the resettlement area has to offer among those who will be relocated.

The residents of the LNP are beginning to doubt whether the government is acting in their best interest. The democratic transition in South Africa as well as the cease-fire and first democratic elections in Mozambique paved the way for the establishment of the LNP. However, the democracy that brought the park appears to be a flawed one. Residents were not consulted on the change of status of the area. The declaration of the park also meant that their local government structures, which elsewhere in the country had been reformed in a new phase of decentralisation, were stripped of any real decision-making powers.

At the same time, government and donors funding the LNP have insisted that villagers will not be resettled against their will. This appears to be some form of acknowledgement of the villagers’ residential and land rights. However, it could also be interpreted as a form of ‘passing the buck’ concerning the responsibility for decision to relocate people (cf. Mehta 2008). Donors have consistently denied responsibility for this decision, pointing the finger at the Mozambican government. Ultimately, responsibility is shifted to the villagers themselves, even though, as has been shown, the extent to which they actually had the freedom to decide to move or not can be seriously questioned.
As a result, much of the time and funding available for community consultation on resettlement have been spent on obtaining ‘consent’, and even that process moved along with fits and starts depending on national political circumstances. This process has been far from transparent and participatory as urged in the World Bank’s Guidelines on Involuntary Resettlement. Reference to the use of these guidelines also serves to grant some legitimacy to the process, while, as was shown above, the lack of funds remaining and the need to speed up the process—felt by a group of residents, LNP conservation authorities and donors alike—prevented residents of the first village that was resettled to co-determine, in a truly participatory way the contents of the compensation package.

One could argue that the possibility of using a rights-based approach (cf. Mehta 2008) to the planning of the LNP was lost when the Ministerial Committee decided to speed up the process of establishing the Great Limpopo TFCA, preventing community consultation before its establishment, and pressure was put on the Mozambican government to turn the area into a national park—though one cannot be certain that certain vested interests of members of government would not have resulted in a park as well. The result was a recourse to a needs-based approach, and a flawed one at that. Given that a number of decisions had already been taken concerning for instance the translocation of wildlife, it might perhaps have been beneficial to label the process what it actually was, involuntary rather than voluntary. In that case, more time and funding could have been spent on negotiating proper compensation for those who are going to be moved, and preparation of the host areas. The lack of clarity about rights and responsibilities both on the side of the government as well as the project affected people and also influences how the residents respond to the negotiation process about compensation. It is this lack of clarity that, Mehta (2008) argues, is the main problem hampering a rights-based approach to resettlement.

Unfortunately, it appears—also to most of the residents—that the point of no return has been passed, living in the park with all present and planned restrictions has become quite impossible, and donor funding to reduce the negative impacts of relocation is dearly needed. Nevertheless, as Brockington et al. (2006) are arguing, care needs to be taken that the creation of protected areas and the increasing stricter enforcement of protected area management does not lead to a new wave of evictions from protected areas.
References


PART II

HUMAN RIGHTS IN A GENDERED, RELATIONAL AND PLURAL LEGAL LANDSCAPE
CHAPTER SIX

INTRODUCTION TO HUMAN RIGHTS IN A GENDERED, RELATIONAL AND PLURAL LEGAL LANDSCAPE

Anne Hellum

1. Introduction

The post-independence era has seen strong African women's rights movements linked to international ones for access to equality before the law. How women's human rights claims are transformed as they travel back and forth between the international, national and local levels is the main theme of the four case studies from South Africa, Tanzania and Niger. Each country has a complex social field in which human rights, national law, local norms and practices, power structures and history form the context in which struggles related to women's rights take place. To understand the gendered outcome of these processes, a woman-focused and relational perspective on human rights and legal pluralism is utilized. Analyzing how human rights are conceptualized and delivered to women, the cases uncover the complex legal situations arising from women's positions as both individual rights holders and as members of local family and kinship groups. Taking an actor perspective, they describe and analyze how national lawmakers, rights-based development agencies, humanitarian organizations, women's rights organizations and individual women navigate in a plural legal terrain where international and national law coexist and interact with local gendered norms and practices. Rather than asking whether contexts of legal plurality are 'good' or 'bad' for women—we seek an understanding of how gendered rights claims are made and responded to within a range of different cultural, social, economic and political contexts.¹

¹ Other books that deal with legal pluralism and gender in African context from such a perspective are Hellum, Anne, Julie Stewart, Shaheen Sardar Ali, and Tsanga Amy (eds) (2007) and Sieder, Rachel and John McNeish (eds) 2012;
2. Women’s Human Rights, Poverty and Discrimination

The unmaking of gender inequalities upheld and reproduced by the dual legal systems put in place at varied times during the colonial era is a major challenge for post-colonial African states, African women's rights organizations and international human rights agencies. Both the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on the Rights of Women (the Maputo Protocol) consider (women’s) poverty and underdevelopment to be a result of how gender discrimination cause unequal distribution of resources such as land, water, food and education.2

Most African governments have ratified international and regional instruments embodying the whole plethora of civil, political, social and economic rights to ensure that women benefit from these instruments on an equal basis with men while state parties are obliged to change laws, customs and practices that directly or indirectly discriminate against women.3 Furthermore, to change the structures that create and uphold unequal distribution of resources and power between women and men, state parties are obliged to take measures aimed at eliminating and modifying gender stereotypes embedded in social and cultural practices and beliefs (Cook and Cusak 2010).4

The increasing number of court cases challenging unequal citizenship rights and property rights show how individual women and women's organizations are using these rights.5 The claims of African women, often

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2 The UN Convention on the Elimination of All Forms of Discrimination against Women establishes rural women's right to have equal "access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land agrarian reform as well as in resettlement schemes" (article 14). The African Protocol on the Rights of Women places an obligation on states parties to "promote women's access to control over productive resources such as land and guarantee their right to property" (article 19). On the relationship between the CEDAW and the Maputo Protocol see Celestine Nyamu Musembi (2013), “Pulling Apart? Treatment of Pluralism in CEDAW and in Maputo Protocol” in Anne Hellum and Henriette Sinding Aasen (eds) Human Rights of Women: CEDAW in International, Regional and National Law, Cambridge University Press, 2013.

3 Direct discrimination occurs when a difference in treatment derives directly and explicitly from distinctions based exclusively on sex and characteristics of men and women. Indirect discrimination occurs when a law, policy or program does not appear to be discriminatory on its face, but has a discriminatory effect when implemented.

4 CEDAW article 5 (a).

supported by women's rights activists, have in many instances yielded legislative or judicial interventions modifying discriminatory state-laws and customary laws. The growing body of international equal rights jurisprudence reflect how higher courts in the region have gradually extended the gender equality principle by striking down or modifying discriminatory state-law and customary law that have a bearing on women's right to property in the marriage, divorce and death (Banda 2005).

While such litigation strategies mirror the growing quest for legal change, other types of interventions are in practice equally important to ensure broad-based realization of human rights at grass-roots level. The following ethnographic studies from South Africa, Tanzania and Niger address a broad range of human rights interventions, including law reform, development programs, land registration programs and legal information programs.

3. Human Rights in a Complex Terrain: Gender, Relations and Legal Pluralism

To translate the expanding equal rights framework that is embedded in both international law and state-law into attainable entitlements for different groups of women on the ground is a core challenge for legislators, women's rights activists and researchers.

In their analysis of how human rights are conceptualized and delivered to women on the ground, the authors take into account that women are not only individuals, as assumed in international human rights instruments, but are also embedded in social and economic relationships. In order to understand women's access to law in the light of their multiple and situated positionalities, the cases combine human rights and legal pluralist perspectives (Hellum, Stewart, Ali and Tsanga 2007, xvii-xix). To come to grips with the complex struggles of power and resources that shape the relationship between international, national and local norms, they deconstruct the notion of shared community interests so as to uncover patterns of gender and social differentiation within local communities. Showing how women suffer hardships and injustices not only because they are women, but also because of their race, class or age, the cases focus on how unequal and complex gender relations mediate the relationship between international, national and local law.

Acknowledging that statutory law is not the sole regulator of access, control and ownership of resources, the cases focus the plurality of international, national and local norms that have a bearing on the outcome of
legal encounters taking place on the ground. Describing the multiplicity of norms that are invoked by the different actors that are involved in the different stages of transformation of human rights between the international, national and local level, they draw attention to the fact that the same social space and the same activities are subject to more than one body of law norms: legal pluralism (Griffiths 1986; Griffiths 2002). The legal pluralist perspective helps assess whether and to what extent international human rights principles are realized, or not realized, within a scenario of rights embedded in coexisting, overlapping and conflicting international, national and local norms and practices.

The studies by Hellum and Derman in chapter 7 as well as Ikdahl in chapter 8 emphasize the tensions between women’s rights as individuals and the wider relationships in which they are situated, in the context of land-related reform processes. Hellum’s and Derman’s analysis of the South African land restitution process shows how government, NGOs promoting land rights and business actors, by reinforcing the notion of shared community interest, have to a large extent dismissed local communities’ complexities and gendered divisions in terms of how the economic benefits of their common property should be distributed. Ikdahl’s study of women’s strategies for land titling in an informal settlement in Dar es Salaam emphasizes the situational character of women’s ambiguous relationships to state and family, and state-law’s inability to deal with the complex legal situations that women are facing.

The analyses by Bourdon in chapter 9 and Henquinet in chapter 10 examine how organizations seeking to promote women’s rights seek to combine the global human rights language with local values and social norms. Bourdon’s study explores how NGOs promoting women’s rights in Dar es Salaam negotiate human rights principles, state-law and local norms as they go about assisting women in cases concerning land and property rights. Kari Henquinet’s study of one transnational and one UN organization, both of which have adopted a rights-based approach, establishes how their effort to translate women’s right to equality through the local language of rural Muslims in Niger reinforces existing gender inequalities.

Access to Property: Women as Individuals and Members of Families and Local Communities

Access, control and ownership of land and land related resources is a key theme in the discourse on women’s rights and occupies a central place in
the exploration of the status of African women in law and society. For African women, independent and effective land rights are key for the realization of the whole spectrum of civil, political, social and economic rights including the right to participation, housing, tenure security, food and health, among others.

While human rights theory focuses on women and men as individual citizens, most African women and men are embedded in complex chains of relationships. When international human rights principles, like women’s right to hold property on an equal basis with men, is translated into national law, the form and significance of existing relations between society’s male and female members with respect to assets are changed. This implies that legal formalization and individualization of informal use will often privilege some relationships while excluding others from legal protection. A relational perspective recognizes that as family providers, most African women rely heavily on natural resources governed by communal land tenure systems and that women’s quests for land and natural resources are frequently part of a group claim. Looking at women as individuals embedded in relationships it facilitates analysis of the common and divided interests within local groups that hold property jointly with a view to law reforms that aim at gender equality through individualization and formalization of local norms and practices. As such a relational perspective challenges long-standing group rights that exclude women from protection in the event of marriage, divorce and death.

Seeing women as individual citizens embedded in family and community relationships, the cases in this book address two sets of dilemmas and conflicts related to the gendered relationship that underlie the complex and plural character of property rights. Firstly, how the recognition and formalization of group claims, unless situated in its gendered context, can result in a restatement and re-enactment of patriarchal norms of dominance over women. Secondly, how formalization and individualization of land rights, by privileging some relationships over others, can result in discrimination among different groups of women.

**The Complex Gender Relations underlying Community Claims**

Hellum and Derman’s study (chapter 7) of the South African Land Restitution Process speaks to the general discussion of how common property systems, upon which most African women rely for their access to livelihood resources, can be made more responsive to women’s concerns. With the overall focus on the complex relationship between women as
individuals and part of group claims, they explore how the right to equality, embedded in CEDAW, the South African Constitution and the Land Restitution Act, has been respected, protected and promoted by the state and non-state actors involved in different phases of the South African land restitution process. Since rural women’s right to restitution has been accommodated as part of group claims, lodged in the name of the chief, the overall focus of the chapter is on the local tensions in terms of how the pursuit of a fair balance between communities, households and individuals has been handled by government, civil society and business partners. The research shows how the social justice approach, which informed the claims-making and claims-verification period, went a long way in enacting and implementing a legal framework adopted to ensure that justice was done to all groups, including women and labor tenants. These proactive initiatives are manifested in new common property norms and new common property institutions through which women have attained equal membership and ownership rights. However, in the post settlement phase, the government’s attempt to marry social justice with a market model has led to a narrow equal opportunity approach under which existing gender hierarchies within the community and the household are regarded as private matters. The disjuncture between the principles embedded in both national law and local law and the actual practice on the ground reflects the overemphasis on the agency and empowerment of local communities and the underemphasis on the structures of domination and power that exist within these communities. In the restitution process in Limpopo, as elsewhere in South Africa, local communities as well as women within them have generally been seen as undifferentiated, having similar interests, and therefore little account has been taken of their complexities and divided interests.

The Gendered and Relational Embeddedness of Rights: Inclusions and Exclusions of Women

Ikdahl’s study (chapter 8) shows how both international law and state law frequently attempt to protect women’s equal right to a home by focusing on the husband-wife relationship, while obscuring entitlements and challenges that derive from relationships in the extended family. In line with research findings from South Africa, the study points to the fact that the wife is not the sole claimant with a stake in the family property (Claassens 2005). The right to a home is often nested in a bundle of rights and obligations between family members from past, present and future generations.
To promote an inclusive and gender-equal property rights system, it is important to consider how different groups of women are positioned in relationship to control and ownership of property. Ikdahl’s study demonstrates how lack of such considerations in international and state law can influence how registration of individual land rights plays out at grassroots level. In an informal settlement in Dar es Salaam, widows with a strong position in the local community, because of their significant economic contributions, often opted for state law protection through formal registration. However, widows in a weaker position used the names of their children or their deceased husbands on the documents so as to increase security against both external threats, such as state expropriation, and internal threats, such as intra-family property grabbing. Hence, as state law’s hegemony at the local level is incomplete, it generates diverse responses from differently positioned women, who make strategic choices with a view to ensuring a secure future for themselves and their children. This nuanced conception of how unequal and complex gender relations mediate the relationship between state law and ‘local law’ challenges rigid divisions between customary law and state law, and between registered and unregistered property. Instead of fitting women’s quest for equal property rights into these rigid categories, it makes the case for a broad and dynamic concept of tenure security whereby human rights discourse can respond to complex and situational gender relations on the ground.

4. Making Law Accessible: The Disjuncture between Human Rights and Legal Pluralism

In order to come to grips with the gap between state law and the legal pluralities on the ground, human rights proponents have turned their attention in recent years to the informal justice sector. The UN Commission on Legal Empowerment, for example, calls for a liberalization of the justice sector and recommends recognition of non-state legal services and informal justice systems. To facilitate access to law for the poor and marginalized, international human rights treaty bodies during recent years have emphasized the need for legal information programs that engage with the gendered and socio-cultural diversity on the ground. The UN

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Special Rapporteur on Violence against women has stated, for example: “Where international attention and leverage are rooted in culturally-sensitive strategies and locally supported, they can give strong underpinning to our situation-specific approaches and interventions on the ground” (Coomaraswamy 2005: xiii).

Due to limited state initiatives in making the law accessible to its citizens, dissemination of legal information has become a major undertaking for African non-governmental organizations. While initially confining information to the bare bones of the law, non-governmental organizations are gradually turning towards methods of dissemination that engage with the legal pluralities working at the family and community levels (Tsanga 2003, 2007). In this part of the book, two studies from Tanzania (Bourdon chapter 9) and Niger (Henquinet chapter 10) explore how international and national non-governmental organizations engage with legal pluralism in an attempt to make human rights available and accessible to women on the ground. The case from Tanzania shows how women’s rights NGOs, seeking to make rights accessible for women, in a situation where state law lacks integration of international human rights standards, have begun to offer mediation and conciliation with the goal of settling disputes out of court.

To connect human rights ideals to local social and moral values, while simultaneously ensuring that they retain their core content, is a delicate balancing act, as shown by these studies. There is always a risk that human rights principles, when transformed to fit local norms and values, end up promoting cultural relativism and justifying practices that are at odds with human rights ideals. To distinguish between processes where human rights are appropriated and adopted to local circumstances and situations where human rights are made resonant with dominant cultural or religious norms, the legal anthropologist, Sally Engle Merry, uses the terms ‘vernacularization’ and ‘indigenization’, respectively (Merry 2006). As demonstrated by the two case studies, there is more to these processes than a mere translation among coexisting norms and values. In a situation where the relationship between women’s right to equal status under international and national law and local norms based on gender difference is contested, a key question is who, within the local community, has the power to define, interpret, implement and enforce law at the multiple levels at which it operates. Of particular interest is how the NGOs mediating women’s rights under international, national and local religious and customary norms are situated in the local hierarchy of status and power.
Remaking Unequal Gender Relations: Towards a Plural Legal Strategy

Natalie Bourdon (chapter 9) has studied two Tanzanian NGOs, The Tanzanian Women's Lawyers' Association (TAWLA) and The Women's Legal Aid Center (WLAC) in Dar Es Salaam. Situating the two organizations in their broader national, regional and international networks, the study explores how feminist ideas and human rights principles are perceived, adopted and translated through the day-to-day work of these organizations. The study explores the normative repertoire employed by the women's lawyers to reach what they see as just settlements through mediation and conciliation. While legal rights are invoked in ADR cases, NGO lawyers also use rights as a moralizing discourse, blending notions of legal rights with religious and customary notions of rights in order to arrive at what they consider to be a just and acceptable outcome. Where the law does coincide with their notions of justice, NGO lawyers go beyond the bounds of state law to devise their own standards for payment of alimony and child support based on what they feel the men in these cases can and will pay. Bourdon demonstrates the importance of taking into account the role of language so as to be able to discern the power relationships at play in guiding the processes and effectuating the outcome of alternative dispute resolution (ADR) cases. The rhetorical devices employed in the cases, include proper gender roles, the notion of a 'good wife' and legal and moral rights and responsibilities. The use of language is thus informed by the way in which gender is construed in the CEDAW and the Maputo Protocol. Likewise, NGO lawyers take advantage of the open-ended and flexible ADR process by considering what is just and by exerting their power to reach agreement on remuneration that sidesteps the letter of the law. Bourdon's study suggests that the outcome of informal third-party mediation relies heavily on the background and identity of the third party.

Reinforcing Unequal Gender Relations: The Limits of Plural Legal Strategies

The rights-based approach to development has also been adopted by transnational development organizations like UNICEF and CARE. Kari Henquinet (chapter 10) analyzes how women's equal rights, as embedded in the CEDAW and the CRC are translated into development practice on a daily basis in the Maradi Region of Niger. The overall focus of this study is how a rights-based and culture-sensitive approach is brokered in a socio-legal setting where equal rights are resisted at both the national and the local level. Niger, a nation with a largely Muslim population, has ratified
the CEDAW with reservations. The Protocol to the African Charter on the Rights of Women has been signed, but not ratified. In a situation where the principle of gender equality lacks legal legitimacy at both the national and the local level, both organizations have adopted a culture-sensitive human rights approach in the way they go about informing local communities about women’s rights. As local CARE and UNICEF project leaders and employees, translate project goals like gender equality and rights, they often seek out concepts that do not challenge the dominant reciprocal, relational and hierarchical constructions of gender and rights. In situations involving complex negotiations between equal rights, custom and religion, the wish to gain public credibility often implies that patriarchal norms and perceptions are accommodated and reinforced rather than challenged and changed. For example, in response to the projects aimed at gender equality, husbands and imams have often appreciated developmental measures including providing women with goats, sewing machines or wells around the homestead, as these initiatives facilitated female seclusion. On the other hand, some women have understood that these developmental interventions carried out in consultation with local imams to mean that CARE supported seclusion. In this way, basic principles of women’s were repackaged in such a way that they resonated with and reinforced basic patriarchal notions of women’s unequal rights rather than equality. They became, in Sally Engle Merry’s terms, ‘indigenized’ rather than ‘vernacularized’ (Merry 2006b: 49). Henquinet’s work situates the process of translation in the context of local power relations. It shows how development institutions, in their negotiations with local and national power holders, frequently place the credibility and legitimacy of their own institution above women’s equal rights and how this in turn undermines their credibility and legitimacy in the eyes of the women they are committed to assist.

5. Uneven and Situational Change: The Case of Power

Through the addition of or by adding a new normative and institutional layer to existing law, human rights has clearly opened up space for individual women and women’s rights organizations that have the necessary

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7 There is no family code in Niger. This has been an extremely contentious issue as have debates around adopting the Protocol to the African Charter. Parliament voted the Protocol down in 2006. It has been signed but not ratified. CEDAW, however, has been ratified with reservations.
social and economic resources to contest male privileges embedded in state law and customary law. The case studies reflect a situation where gender and class relations are shaped and reshaped in an unsettled and contested socio-legal terrain. From a relational and situational women’s perspective, they highlight the paradoxes that legal pluralities create.

Whereas the study of the South African land restitution process focuses on communal rights, and the study of the Tanzanian land reform explores individual rights, both cases demonstrate the limited attention given by law, policy makers and NGOs to the relations in which women are embedded at the level of the family or the local community. This in turn has implications for the ability of such actors to identify and address differences among women, for example in terms of class, social and economic position. Exploring the responses of differently situated women, Ikdahl shows that, rather than merely claiming their rights under state law, they are maneuvering the plurality of legal options available. The case studies from South Africa, Tanzania and Niger show how the NGOs’ ability to promote women’s rights in a contested socio-legal terrain depends on factors like the state-civil society relationship, how the organization is situated in the local hierarchy of status and power and finally the background and identity of the mediator.

References


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8 Analysis of a how a number of women’s NGO’s in Kenya, Ghana and Zimbabwe handle power in their human rights work is found in Andreassen, and Crawford 2013.
CHAPTER SEVEN

BETWEEN COMMON COMMUNITY INTEREST AND GENDER DIFFERENCE: WOMEN IN SOUTH AFRICA’S LAND RESTITUTION PROCESS

Anne Hellum and Bill Derman

1. Introduction

In contemporary African land reform debates private and communal land tenure systems appear to be two competing models of what the appropriate governance models should be for land tenure, and what therefore should be the path toward development. In addressing this polarized discourse scholarship on African women’s land rights has struggled to, on the one hand recognize the significance of collective land rights, and, on the other hand been reluctant to yield to group claims that overlook asymmetric gender relations within groups and communities (Whitehead and Tsikata 2003; Manji 2006; Claassens and Cousins 2008; Claassens and Ngubane 2008). Observing how gender inequalities tend to be continued in land reform whether land is held communally or privately women’s human rights scholars have emphasized the need for transformative measures that in line with the demand of substantive equality, embedded in UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2005 (the AfPRW), are aimed at changing the underlying power structures that

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1 This article is a revised version of “The making and unmaking of unequal property relations between men and women: Shifting policy trajectories in South Africa’s land restitution process”, Anne Hellum and Bill Derman in the Nordic Human Rights Journal no. 2 2010. As part of the project Land, Water and Poverty it was funded by the Research Council of Norway and the Norwegian Center for Human Rights South Africa Program that both were carried out in cooperation with the Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape. We are particularly grateful to Tshililo Manenzhe, Themba Maluleke and Shirhami Shirinda who assisted in the data collection. We are also grateful to Dr. Edward Lahiff who as a former member of Nkuzi shared insights into its work during the restitution process and as an initial member of the research team. We would also like to thank Ruth Hall for her detailed and insightful comments on our work.
contribute to women’s disadvantages (Ikdahl et al 2005). It is argued that substantive equality, in the field of land reform as other areas, requires more than merely extending socio-economic rights to women. Addressing the relationship between substantive equality and engenderment of social and economic rights Sandra Fredman states.

As a start it is necessary to recognize the distinctive nature of women's experience of poverty and disadvantage. This suggests that it is not sufficient simply to extend socio-economic rights to women. Instead, socio-economic rights need to be recast in the light of the demands of substantive gender equality. Substantive gender equality goes beyond treating women in the same way as men and requires transformative measures. This in turn entails reconceptualising the rights themselves. (Fredman 2009: 410–411)

Setting forth a rights-based land restitution strategy aiming at race, gender and class equality, the South African experience makes a good case for studying how gender relations at community and household level have been handled to achieve substantive equality, as required by CEDAW, AfPRW and the South African Constitution. South Africa's land reform—encompassing redistribution, restitution and secure tenure—is underlain by a rights based approach aiming at substantive gender equality and as such held great promises for rural women.

The South African land restitution process, which started in the 1990’s, has now entered a critical phase with the restoration of hundreds of highly developed commercial farms to claimant communities that were removed by force during the apartheid years. Limpopo Province, where this case study is located, has 70 percent of its total land area under claim. The combination of productive land, substantial export revenues, pervasive restitution claims and past disappointments led the ANC government, in 2005, to embrace a new model of restitution. This model, which is known as the ‘strategic partner model’ entailed successful claimant communities forming a joint venture company with a private entrepreneur. Whether and to what extent this attempt to marry social justice with business has translated into benefits for poor and marginalized community members is dealt with in chapter 3 in this book. On the basis of on an empirical study following the legal claims of five dispossessed communities in Levubu in the Limpopo Province since they were launched in 1997 and up to date, this chapter describes and analyses the twists and turns of the land restitution process from a gender perspective (see the map on p. 54) for the location of the research sites. It examines the disjuncture between the principle of gender equality embedded in constitutional and national law and the gendered outcomes of South Africa’s land restitution program.
with the overall focus on the gendered effects of the different implementation strategies associated with shifting policy trajectories resulting in an attempt to marry social justice with a market model.

In the case of Levubu, and it is not exceptional, the rural restitution claims that have been successful are all group claims in tribal or chiefly names. The boundaries asserted for the land claims are those remembered by chiefs, royal families and elders, at often some indefinite time in the past. Thus initial legal criteria lean on past sociopolitical organization but now must respond to present imperatives including economic sustainability, race, class, and gender justice (Hellum and Derman 2009). Since rural women's right to restitution has been accommodated as part of group claims, lodged in the name of the chief, we are focusing on the measures that have been put in place to ensure real equality between individuals within the claimant communities that have been successful. The aim is to describe and analyze the ambiguities that coexisting state law and customary norms gives raise to from a gender perspective. As individual citizens women are, according to state law, entitled to hold and dispose of property on an equal basis with men, regardless of marital status. However, as members of family communities, women are, in matters related to land, expected to follow the customary norms of the group, which tend to exclude married, divorced and widowed women.

It has been claimed that land restitution has paid insufficient attention to local communities' complexities and divided interests. We ask how gender inequalities have been dealt with in this long and complicated process. An important concern of this chapter is thus to identify what Pettit and Wheeler (2005) term “the deeply embedded power relations and structural barriers to securing rights”. To come to grips with the effects of reforms that on paper are gender neutral an examination of the gendered relationships that inform patterns of use, ownership and control is key. Unless the asymmetric gender relations that underlie the notion of the household or the local community as a unitary entity are addressed, existing inequalities are likely to be reproduced whether land is held privately or communally. In seeking to secure equal rights for women, we thus ask how and to what extent has governmental and non-governmental land rights promoters been able to challenge power structures at national, local

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and household levels? What awareness do the different actors that have been involved in the different phases of the land restitution process have of structures of power at household and local community level and in what way are they challenging power-holders in these spheres? How has this awareness been translated into measures aimed at ensuring that all the members of the claimant community benefit equally?

With the overall focus on the complex relationship between women’s rights as members of claimant communities and as individual right holders we have explored how the right to equality has been respected, protected and promoted by the different actors that have been involved in four different phases of the land restitution process in the five claimant communities in Levubu. The four phases are: the claims-making phase, the claims verification phase, the claims-settlement phase and implementation of the agreement phase (often referred to as post-settlement). The main actors in each of these four phases include the participants in the claimant communities themselves, the Tshakuma, Ravele, Masakona, Ratombo and Shigalo communal property associations. Other main actors are the Regional Land Claims Commissioner, the Provincial Department of Agriculture, Makhado municipality, NGOs and the strategic partners: South African Farm Management (SAFM) (now bankrupt), and Umlimi (also bankrupt or at least dissolved as a corporation). We give particular attention to the Nkuzi Development Association, a rights-based land NGO, which from the very beginning assisted many of the claimant communities in Limpopo, later was hired by the Regional Land Claims Commissioner (RLCC) to assist the communities in the restitution process, and then continued to support communities in their efforts to finally receive the land. Nkuzi members acted as translators and mediators for understanding the law and spirit of land restitution.

To examine this process we have read legislation, policy papers, court records and empirical studies of the implementation of restitution settlements in different parts of the country. Community claims lodged with the Regional Land Claims Commissioner in Limpopo and constitutions of the five communal property associations formed by the claimant

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3 The Tshakuma, Ravele, Masakona and Ratombo are Venda speaking groups. The Shigalo is a Shangaan speaking group.
4 Ratombo and Shigalo entered into strategic partnership with MAVU that pulled out to be succeeded by UMLIMI: Tshakuma, Ravele, Masakona and Ratombo entered into partnership with SAFM.
5 Nkuzi had multiple programs including assisting farm workers and farm dwellers (Shirinda 2011; Langford, Derman, Madlingozi, Moyo, Dugard, Hellum and Shirinda 2013).
communities are key sources. We have tracked the transfer of between 80 and 100 privately owned commercial farms to these five claimant communities. We have utilized several methods and approaches in our research including: extensive interviews from 2005 to 2010 (but with greatest effort from 2006–2008) with all the parties, including local and regional representatives of the Provincial Department of Agriculture (PDOA) and the Regional Land Claim Commissioner’s office (RLCC), Municipal officials, senior managers within the three companies designated as strategic partners, leaders and members of claimant communities We also observed numerous community workshops and meetings between various parties, and analyzed the negotiations documentation. Through the archives of Nkuzi Development Association we have had access to information about the process over a longer time span. Finally, we carried out a survey of four claimant community members to explore the kinds of benefits they hoped for and preferred, the history of their involvement with the land committees and communal property associations, and their current livelihood activities.

2. The Gender Equality Principle and its Implications for the Land Restitution Process

Given the centrality of the right to equality and non-discrimination the rights based approach adopted by the South African government holds great promises for rural women. South Africa’s land reform—encompassing redistribution, restitution and secure tenure—is underlain by a rights based approach aiming at substantive gender equality. The legal backdrop is the South African Constitution and a series of specific acts related to redistribution, restitution and secure tenure that all set out to promote substantive gender equality and prevent sex discrimination.

The initial phase of the land reform process, launched by the newly elected ANC government was characterized by a strong emphasis on the political economy of poverty and the necessity for land redistribution and land restitution while including gender equity. At this time, the emphasis on the political economy of poverty and social justice went hand in hand with a rights based approach. A rights based approach would, it was envisioned by leftist scholars, land rights NGO’s and members of government alike, ensure a fair and transparent implementation of the new land policy. Through a combination of substantive rights, participation rights and accountability mechanisms, a rights based approach was seen as an
important tool to unmake existing race, class and gender in equalities. Thus, the White Paper on Land Policy of 1997 states: "Restitution policy is guided by the principles of fairness and justice. Gender equity is one of the eight basic land reform principles embedded in the land policy document." A Land Reform Gender Policy was approved by the Minister of Land Affairs the same year. It set out a set of gender sensitive guidelines to be mainstreamed at all levels of the three main areas of land reform; land restitution, land redistribution and land tenure reform (Walker 2003, 2005; Erlank 2005). These included measures to ensure women's full and equal participation in decision-making, communication strategies, gender-sensitive methods in project planning, gender sensitive training, collaboration with NGO's and government structures and compliance with international political and legal commitments, such as the Beijing Platform of Action and the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW).

The gender equality principle embedded in article 9 in the Constitution of South Africa of 1996 forms the legal backbone of South African women's right to equality in general and in the restitution process in particular (Albertyn 2007). By the right to equality is meant substantive equality in terms of "full and equal enjoyment of all rights and freedoms." Towards this end the Constitution prohibits both direct and indirect discrimination on the grounds of race, gender, sex, pregnancy, marital status, social status or sexual orientation is prohibited. Direct gender discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or women, which cannot be justified objectively. Indirect gender discrimination occurs when a law, policy or programme does not appear to be discriminatory on its face, but has a discriminatory effect when implemented. To prevent discrimination and facilitate substantive equality the Constitution allows the state to take proactive measures to "promote the achievement

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7 Land Reform Gender Policy, Minister of Land Affairs, April 1997.
8 CEDAW was ratified by South Africa in 1995.
9 Constitution of South Africa article 9 (2) 1st sentence.
10 Constitution of South Africa article 9 (3) (4).
of full equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.”

3. **Women’s Rights as Part of Group Claims: Legislative Safeguards**

The gender equality principle, embedded in the Constitution informed the content, interpretation and implementation of the legislation that was put in place to frame the land restitution process. According to the Restitution of Land Rights Act of 1994 (hereafter referred to as the Restitution Act), a right in land means:

...any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession.

What it meant to be dispossessed of “a right in land” posed problems at the legislative level. Women, who under apartheid customary law lacked capacity to hold or own land, did not in strict legal terms have “a right in land” at that point in time. A narrow interpretation of “a right in land” would have meant that women were excluded from the restitution process. Implementing the Act, the Chief Land Claims Commissioner came to grips with women’s double dispossession under apartheid and took women’s _de facto_ use rights and not their formal rights as point of departure. This broad interpretation was in line with the Constitution’s protection against direct, indirect and structural discrimination and section 35 of the Restitution Act setting out to:

insure that all the dispossessed members of the community shall have access to the land or the compensation in question on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant.

Women’s restitution claims could thus be constituted as individual claims or as part of broader group claims. In practice urban women’s restitution

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12 Constitution of South Africa article 9 (2) 2nd sentence.
claims were more often accommodated as individual claims object to economic compensation. Rural women’s claims were, most of the time, constituted as group claims and in the case of Levubu as part of the general land claim under a chief.

The Communal Property Association (CPA) Act of 1996 was written to create new communal institutions to hold and own land that was to be made available through the Restitution Act. The CPA Act defined the community and not the chief, as the owner of the land held collectively by the group. To democratize property relations within the group the CPA Act requires the drafting of a constitution regulating issues pertaining to membership and decision-making. Among the principles to be accommodated in the constitution is fair and inclusive decision-making processes and equality of membership. The legal content of membership or the individual rights of members in group claims are not specified by the act. The distribution of property between different groups or individuals is, however, guided by the equality principle in article 35 of the Restitution Act to “ensure that all the dispossessed members of the community shall have access to the land or the compensation in question on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant”. How this standard provision is translated by the communities is particularly important from the perspective of married, divorced or widowed women who lack equal property rights under customary law that regulate family property.

4. Individuals or Households: The Registration and Verification Process in Limpopo

In the following we turn our attention to how the legal safeguards that set out to protect women’s right to equality in the context of group claims have been put into practice in the different phases of the restitution process in Limpopo. How did members of the claimant community, NGO’s like Nkuzi and state actors like the Regional Land Claims Commissioner consider the relationship between the male and female members of the claimant community? How did they strike a balance between community rights, household rights and individual rights?

14 Communal Property Associations Act, No. 28 of 1996.
15 Communal Property Associations Act, No. 28 of 1996 s 8(6)(a).
16 Communal Property Associations Act, No. 28 of 1996 s 9(1).
“Equality For All”

Our study of restitution in Limpopo shows that all the rural restitution claims were constituted as group claims. There seems to have been consensus among claimant communities, the Regional Land Claims Commissioner (RLCC) and Nkuzi which assisted in the process, that the claims of people who had been displaced should be constituted as group claims. This in turn led to a focus on the chiefly boundaries at the time of dispossession as opposed to the land use of different social groups and individuals within that area. As groups like the Ravele, Masakona, Shigalo, Tshakuma and Ratombo lodged claims under their chiefs it became virtually impossible for less powerful social groups who were using the land such as farm workers or religious groups to lodge claims in their own right. While Nkuzi might have favored greater emphasis upon actual land use, traditional leaders asserted their claims to certain territories marked by boundaries which became the boundaries for the land claims themselves excluding those who were not members of the tribe.

Nkuzi provided extensive assistance to communities who wanted to lodge claims. As part of their gender mainstreaming strategy they made special calls for women’s participation. Posters and calls for meetings initiated by Nkuzi in 1996 and 1997 were titled “Women Claim Your Land before 31 December 1998,” reflect the efforts that were made to mobilize women within the dispossessed communities. The view that women used land on an equal footing with men resonates with the memories of both the dispossessed and their descendants. An Nkuzi lawyer, who grew up in a Shangaan area in Limpopo told us:

My observation as a young boy during the 60s, my grandfather who was also a headman of the place I am currently residing, had five wives and each of them had one or two plough fields on the wives’ names. We all referred to our grandmothers’ fields by their names. The one belonging to my grandmother was referred to as “Nwa-Khonyani’s field” and not by my grandfather’s name. In case my grandmother’s house ran short of food, she had to go to her maiden relatives to get food for her household. Our grandfather was fed wherever he would be staying at a particular time. It was the responsibility of the host wife to feed the husband. Women’s rights to plough fields were dependent on the existence of the husband’s household, but the women had usufruct rights to that land and total control over production on it.17

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17 Interview Shirhami Shirinda, Elim 1 May 2009.
Nkuzi issued a Land Claim Lodgment Manual in 1998. The Manual, which was used by staff members involved in the registration and documentation process, is written in gender neutral terms. The section on individual interviews states that "It is important to take statements from people who were actually living on the land and who can remember the events that led to the dispossession or the removal." The manual gave instructions to compile lists of the people dispossessed and their spouse, children/children in-law, grandchildren and grand-children in law. Nkuzi’s emphasis on equality between community members did not sit well with the traditional leader’s hierarchic notion of status and power within the community. According to Nkuzi’s gender advisor there was a lot of discussion about how they should go about ensuring that all individuals in the community were put on an equal footing. To change patriarchal power relations between the community members and the traditional leaders and between husbands, wives and children within the family Nkuzi tried to convince traditional leaders and male members of the claimant communities that everyone would benefit from an approach including women. The majority of the villagers that still could remember the forced removals were, according to Nkuzi, women. Men were often absent in the cities and mines when the removals took place. Nkuzi staff also argued that since women were the ones who catered for the wellbeing of the community members in terms of health, care and food they should be included in the claim on an equal basis. Through a strategy that appealed to traditional gender roles within the communities’ women were included as equal individuals in the community claim.

What motivated the communities’ choice of an approach based on individuals rather than households was, in the final analysis, a desire to make the claims as inclusive as possible. Lists supplied to the RLCC included the spouses, children and grand-children of both men and women who had been dispossessed. They were registered as claimants in their own right. In line with the general policy of the Commission, the RLCC in Limpopo and Nkuzi, they attempted to take down as much testimony and evidence of dispossession as possible although the claims were not made on the basis of individuals but on the group. Unlike the ‘Permission to Occupy Permits’ (PTO) utilized in the ‘so-called homelands’ during apartheid which were registered under the male household head, women were now registered in their own right. This

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18 Interview Furule Thembani, Tzaneen 25 July 2009.
broad interpretation, which recognized the realities on the ground, was in line with the Constitution and also the White Paper that set out to undo the double dispossession that women had been subject to under apartheid.

The large number of testimonies given by women who had been subject to dispossession speaks to this process. One example is Mhlaba Baloyi’s testimony:

I am a woman of 80 years of age. I was born in the year 1917 on the farm Welgevonden 4LT, under the leadership of Hosi F.J. Shigalo. In 1938 we were informed by our Hosi F.J. Shigalo that the Government was ordering us to move to a place called Musibi. The reason given was that the place Welgevonden 4LT was proclaimed white area. When the forced removal started, our home consisted of five rondavels and one cooking hut. No compensation was given to us. We lost a lot of our properties, like mealies and other crops. Trucks and donkeys were used to remove our properties to Musibi. Because of the forced removal my grandfather lost a big herd of cattle, bags of mealie, tons, on the way and grains scattered. On our arrival at Musibi it was often raining, our properties got wet. Mealies fermented, some of our elders and myself got diseases. At Musibi there was nothing to be found. We stayed at Musibi for about 20 years. We left graves of our close relatives at Welgevonden. I therefore, for myself and the community of Hosi Shigalo as the descendant of our elders who are now dead, claim that Welgevonden 4LT farm be restored to us/and or compensation paid for that land and our properties.

It became important for claimants to be able to document their claims as the Regional Land Claims Commission based in Polokwane, the provincial capital, undertook the claims verification process. Claimant communities had to demonstrate prior settlement and land use by the claimant communities and their antecedents. The RLCC accepted, in consonance with Nkuzi, that all individuals above the age of 18 who were themselves or were direct descendants of the dispossessed were eligible as members of claimant communities. The membership lists included all men and women who met the criteria now listed in the official list to be members of the CPA and the lists presented to the RLCC.

5. The Settlement Process—New Institutions, Norms, Policies and Actors

Having described the claims process we now turn to the measures that were taken by different actors to put the equality principle into practice. Particular attention is given to the way in which new property norms and
The alternative was to form a trust which would manage the new properties and resources on behalf of the community. This is a very restricted business model which was discouraged by the RLCC and Nkuzi.

Chanock describes how the received white view of African tenure was ‘communal’ which meant that the land belonged to the tribe. This dates back to the 1880s (2001: 381).

The CPA Committee can be best understood as the executive of the association. Registration as a communal property association required the drafting of a constitution regulating issues pertaining to membership and decision-making. Among the principles to be accommodated in the CPA constitution, in accordance with the CPA Act is fair and inclusive decision-making processes and equality of membership. Through equal membership rights women also attained equal ownership rights. Our research explores how the equality principle embedded in laws and policies was translated into practice in the course of the formation of communal property associations.

A main actor in this process was Nkuzi initially pressuring the RLCC to register land claims, and subsequently on the request of the RLCC, assisting the communities in the formation of CPAs. In this process, Nkuzi took steps to implement the gender equality principle in the CPA constitutions, as required by the Act. Blueprint models, containing provisions of equal representation, drawn up by legal experts were used as point of departure for the workshops with the communities. In the course of the workshops and consultations with local claimants, Nkuzi program officers actively encouraged the communities to elect women on the CPA Committee. When men resisted, saying that this was not an issue for women, the Nkuzi

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19 The alternative was to form a trust which would manage the new properties and resources on behalf of the community. This is a very restricted business model which was discouraged by the RLCC and Nkuzi.

20 Chanock describes how the received white view of African tenure was ‘communal’ which meant that the land belonged to the tribe. This dates back to the 1880s (2001: 381).

21 The CPA Committee can be best understood as the executive of the association.
staff answered that the CPA constitutions shouldn’t be discriminatory.\textsuperscript{22} The communities were told that according to the new constitution of South Africa discrimination against women was prohibited and that they needed to be represented on the CPA committee.

The formation of the CPAs went hand in hand with other initiatives directed at rural women both at government and NGO level. The strong political focus on women’s rights in general and on women’s land rights in particular was reflected in Nkuzi’s work since its founding. In line with its gender mainstreaming strategy the organization appointed one of its staff members to act as a gender focus. The aim of this strategy was to strengthen women’s participation in the land restitution process and in rural development more generally. Without a specific gender strategy Nkuzi’s work on gender equality was to a large extent driven by national initiatives. Nkuzi was part of the NLC, a national network coordinating regional and local land rights NGO’s. Nkuzi’s gender advisor was member of NLC’s gender committee and participated in NLC’s gender workshops.\textsuperscript{23} Nkuzi was also present when the Gender Education and Training Network (GETNET) in the Department of Land Affairs, Northern Province held gender training programs in Limpopo. The Nkuzi gender advisor’s report from April 2000 reflects the need to train women with a view to more actively assert their interests in the land restitution process. Returning from a meeting with one of the claimant communities he noted that:

\begin{quote}
I typed up the amendments made from the CPA adoption workshop. I also typed up minutes from the same workshop. The amendments came as a result of changes that came from the adoption meeting. The problem is that most of the changes were coming from the youth and mostly the male participants in the meeting.
\end{quote}

In his report from August 2000 he noted:

\begin{quote}
The people are starting to get interested in the claim because they are getting more involved and the youth are very keen to participate. Women’s participation still remains a problem, therefore a gender workshop for the whole community has to be organized for them.
\end{quote}

While recognizing the need to train and empower women Nkuzi’s overall strategy lacked a gender component. No systematic approach enabling Nkuzi staff, that was almost entirely male with limited gender training

\textsuperscript{22} Interview Furule Thembani 25 July 2009 in Tzaneen and interview Shirhami Shirinda 28 July in Makhado.

\textsuperscript{23} Interview Furule Thembani 25 July 2009 in Tzaneen.
themselves, to deal with the deep-seated patriarchal structures at community and household level in Limpopo was worked out. To ensure that women were brought onboard many Nkuzi staff, however, held separate workshops with women in the claimant communities.

Nkuzi’s efforts made to mobilize, include and enhance women’s participation in the restitution process made a mark on the composition of the CPA boards. However, not all respected the spirit if not the letter of their own constitutions. For example, the Shigalo constitution set a minimum of four female members out of fifteen on the steering committee while only three women were elected. The Shigalo formed an executive committee with five members, none of them women. The Masakona and Ratombo constitutions specified that four out of nine members should be women. There are four women on the Masakona CPA committee. The Tshakuma formed a trust, not a CPA. The board has eleven members, with only one of them a woman. In two of these communities women were committee secretaries. None of the female committee members had been elected chair of a CPA in any of these communities. Reflecting on the outcome of the process one of the Nkuzi staff members was of the view that the process was rushed and to a large extent dictated from the RLCC:

Because RLCC decided that people should form CPAs there was not much choice. As community lawyers we should have informed them about the advantages and disadvantages of different ownership forms. In practice most of the constitutions were just cutting and pasting. It was not time and resources to engage in broad consultations with members of the community. If there had been time for discussions about what the community wanted and how it could be translated into their constitution I think they would have taken ownership. As it now stands the communities are not following the procedures in the constitutions.

The CPA members were elected at a general meeting of the CPA. In practice it was, however, the members of the original land claims committees which had been formed to submit and pursue the claims that identified the candidates and presented them to the general membership. In spite of women not traditionally being present or speaking at meetings of elders or traditional council a number of female candidates were chosen. Like the CPA members in general the women, who were chosen, came from the

24 Interview Theresa Yates, founding member of Nkuzi, Johannesburg 2 August 2009.
25 Interview Shirhami Shirinda 29 July 2009, Makhado.
most powerful families in the claimant communities. The two female members on the Ratombo CPA committee, which generally was dominated by the royal family, were members of the royal family. The women on the Masakona CPA board were well educated and already active in many community organizations. Female representation was, to our surprise, weakest among the Shigalo where the influence of the chief was weakest. Most of the elected women had been mobilized through the gender workshops and networks that Nkuzi was a part of when they were more focused on women from 1998–2001. Our impression from meetings we have held with women in the community is that no systematic attempts were made to coordinate and discuss the interests of the female membership in the CPAs. Furthermore, there has been a lack of attention to electing women who represented women and who reported back to women members. In many instances it was women from the royal families that were represented on the CPA steering committees.

The Formation of New Property Norms: Negotiating Equal Access

The communal property association introduced a gender equal notion of property rights where all women; married, widowed, divorced or single were awarded the same rights in the restituted land as equal members in the CPA. Thus, they became individual shareholders in a collective property on an equal basis with their fathers, brothers or husbands. The restituted land is constituted as a new form of common property vested in a new institution framed by new norms.

This legal innovation adds a new layer of norms to the existing customary norms concerning property relations. The principles of Venda customary law, as explained to us by the local headman, consider married women as part of a patrilineal and patrilocal, marriage, family and kinship system. According to the Masakona Headman, who presides over the Masakona tribal court, everyone who is a member of the Masakona society (tribe), except children, can apply for land. Single women can apply for land and have it registered in their own name. If a family applies for land, it is registered in the name of the husband. That is, according to the headman

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26 Our account of the customary law of the Masakona is based on interviews with contemporary tribal authorities. The ideals and principles described by tribal authorities often differ from the varied and shifting practices on the ground that often referred to as “living customary law”. To our knowledge “the living customary laws” of the Venda and Shangaan groups that are part of our study have not been studied.
because “it is, according to custom, the man who marries the woman.”

The wife will, however, be registered as a wife in that document. When the husband dies the property will, be registered in the wife’s name. Yet if the woman gets a new partner she is advised to apply for a stand in another community because this often leads to conflicts with the late husband’s relatives. Each divorce case must be taken on its own merits even though the husband is registered as the land’s and houses owner. To do justice in the individual case, the Tribal Council, according to the headman, looks into the circumstances of the divorce case including the interest of the child, who worked the land, and who is to be blamed for the divorce. The interest of the child is seen as very important. If the father is irresponsible and violent the mother will be given custody and a right to stay in the family home with the children.

In practice there is, however, a tension between the new norms based on the principle of equal membership status and the customary norms that apply within the group. In many instances the CPA constitutions are interpreted in the light of the prevailing customary norms. Membership statuses of children of sons and daughters who marry outside the claimant community are, according to key informants in the CPA’s, not the same. Unlike sons, daughters who marry non-community members cannot, according to both women and men we have interviewed, pass on membership. The patrilineal principle, will according to the community members we have interviewed, apply to widows who remarry. They will by implication be advised to leave the community and apply for land elsewhere, which will mean they will lose rights to the restituted property.

To our surprise, the living customary law of the claimant community, appeared to be out of tune with the more egalitarian state court version of customary law, as expressed in the Constitutional Court’s decision in the Bhe case.

In the course of the registration, verification and settlement process the claimant communities adopted new norms and institution. As a result of

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27 Interview Masakona headman in Masakona Tribal Offices, 12 August 2008.
28 **Bhe and Others v The Magistrate, Khayelitsha and Others** Case CCT 49/03.
combined state and NGO interventions the land restitution process added a new institutional and normative layer to the existing customary norms and institutions. In this phase both government and Nkuzi was working from the premises of an ideal of social justice. Yet these legal changes are contingent on whether they are upheld through the training and the mobilisation of the potential of the women in the CPA steering committees and on the joint venture company board of directors.

In the course of the settlement process no measures aiming at empowering women as members of CPA’s and CPA boards were taken. None of the workshops that were arranged by the RLCC or Nkuzi addressed how gender fairness should be integrated in the management and distribution of the fruits of the returned property. While initially seeing gender inequalities at the household and local community level as an important concern, Nkuzi’s interventions in this phase turned to issues pertaining to the relationship between the CPA’s, the strategic partners and government.

A number of factors have contributed to this development. Most importantly gender issues and understandings were, as pointed out above, not systematically integrated into Nkuzi’s work. Government at all levels also failed to provide leadership on how to achieve equality. While the South African Constitution calls for substantive equality and proactive measures that address gender difference the national gender unit within the Department of Land Affairs, in practice held the view that the law was to be “gender neutral”. By “gender neutrality” was meant beneficial for both women and men. This implied that projects addressing women’s issues often were held up by DLA. Nkuzi, for example, had a proposal for a woman's project that would support women’s agricultural activities, which was turned down because it did not include men.


This stagnation in the process of enhancing women’s right and gender equal property relations at the level of the claimant community, both in terms of accountability and empowerment mechanisms, coincided with the changing national land policies and priorities in 1999–2000 where black commercial interests were given higher priority than gender equality and poverty elimination (Hall 2008). This is clearly reflected in the shift

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towards a business model geared to the formation of strategic partnerships between CPA’s and agro-business companies described in chapter 3.

Shifting Government Alliances: From Civil Society to Business Partners

Faced with the enormous scale of developmental responsibilities involved in the demand for a just and sustainable post-restitution process the government altered the land restitution process, at least in the case of relatively high value farms. In adopting a commercial farming model, successful claimant communities as a condition for the return of their land, were required to form a joint venture or operating company through an agreement with a private entrepreneur. According to the agreement the ‘strategic partner’, would invest working capital and take control of farm management decisions for a period of ten years, with the option of renewal for a further period. The potential benefits to the claimant communities would include rent for use of the land and the farm houses, a share of the profits if any, preferential employment, training opportunities and the promise that they would receive profitable and functioning farms at the termination of the contracts and lease agreements.

The joint venture company was to facilitate a transfer of agricultural and business skills to the CPA’s. This new model of restitution raises many questions about the direction of the restitution program, the realization of benefits among claimants and the extent to which the original objectives of the South African land reform program as envisaged in the Constitution, the Restitution Act of 1994 and the ambitious gender policy are being achieved. A further critical issue is the capacity of the state to plan and implement complex commercial deals on such a scale, to provide the necessary support to claimants and their commercial partners and, over the longer term, to safeguard the interests of communities and their individual members, particularly women, farm workers and the poor.

The formation of the business contracts were, unlike the CPA process, not accompanied by any overarching guidelines from the RLCC and the DLA to ensure fairness and representativeness of community members on the Board of Directors and on the executive committee of the CPA. Each CPA selects its own representatives to the Boards of Directors. There are no requirements that a certain percentage of the Board of Directors be

30 Draft Shareholders Agreement, MAVU and SAFM template, 2006/7.
31 The contestations over the contracts were described in Chapter xxx.
women or other segments of the claimant community so as to ensure fair and non-discriminatory representation.

The six joint venture companies formed and incorporated with two strategic partners, UMLIMI and SAFM, no longer exist due to their bankruptcy. Each community now has its own, wholly owned company, with its own Board of Directors which hires and fires its own farm managers. Nonetheless it remains instructive to examine the weaknesses in the Strategic Partner model in relation to the promotion of women’s rights and gender equality because they are most likely to be repeated.

No measures ensuring that men and women were equally represented on the Boards of Directors of the new companies were put in place. Only one of the five communities, Masakona, appointed two women to the Board of Directors of the new joint venture company. The one woman representative on the Board of Directors for Ratombo is the daughter of the late chief and has a supervisory position on their farms. The female members from the Masakona sit on the CPA committee and are actively involved in the farm management. None of the other groups appointed women to the board.

Neither the new strategic partners, Nkuzi, DLA, RLCC nor the Makhado Municipality made any effort to promote gender equal representation within the new business model. This is reflected in low representation of women. While recognizing that women are good workers, the agro-business companies see employment of women as a means but not an end in itself. While the SPs were functioning they wanted to hire more women including as supervisors but complained that the men were blocking them. Nkuzi, which still sometimes assists the community when there is a conflict with government or the agro-business partner, does not raise issues related to unequal power relations within the community. The lack of commitment to promote gender equal representation on the boards of directors is surprising given that the mayor, the city manager and the speaker of the municipal assembly are all women. In an interview with the speaker, we were surprised at the lack of commitment regarding the situation of rural women.32

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32 Interview with the speaker in Makhado Municipality February 4 2008. Municipalities are, according to the municipalities’ act, responsible to ensure that all stakeholders participate at all levels of community development. Makhado Municipality has engaged a special company to give skills training to ordinary communities. Gender is, according to the speaker mainstreamed into all such programs.
Under present circumstances where the farms are struggling for survival it has been difficult to include broader justice and development issues. Given the crisis now faced by claimant communities it is, in our view, unlikely that gender and poverty issues will be prioritized and will most likely be delayed further due to the crises. Broader questions of who speaks on behalf of the CPAs on the board of directors and in the CPA committee will in all probability continue to be shelved in trying to preserve profitable farms. Due to lack of regulations ensuring fair representation of different segments of the claimant communities, combined with the non-specification of CPA members’ rights and shares in the new companies it is not unreasonable to predict that this new structure is likely to have very different consequences for the entrenched gender and class inequalities within the claimant communities. It does raise the more general issue of how appropriate is the model for the claimant communities? (Derman, Lahiff and Sjaastad 2010).

7. Distribution of Benefits in the Business Model: Individuals, Household and Community

It has been claimed that land restitution has paid insufficient attention to local communities’ complexities and divided interests. In this section we explore whether and to what extent measures aiming at equal distribution of benefits between CPA members have been put in place. According to the Strategic Partner Agreement, claimant communities will benefit through a combination of rent paid on the land and houses, a share in profits, training opportunities provided by the strategic partner and preferential employment opportunities in the enterprise. Although the full value of these benefits, with the exception of rent, has not generally been specified during the negotiation phase, community members are expecting significant material benefits from the restoration of their land and their involvement in the business ventures.

Jobs and Training on the Farms

There are no transparent procedures for the election of directors or the employment of managers, technical personnel and workers. The processes are, as we have witnessed, informal. For example, available jobs are often allocated through a communication from the management company to the chair of the CPA or the chief who makes the selection. From our data more women are being hired as farm workers than men from the claimant
communities. It is possible that many more women will be trained since it has been difficult to find younger men who want to make a career of working on the farms. Yet so far the employment and recruitment patterns have been highly hierarchic. Women have been employed as unskilled labor while the majority of those selected for skills training and leadership positions have been men. The women in the claimant communities, who struggle to make ends meet for their families, see the jobs as a great achievement. According to a woman in the Masakona community:

I have been a member since the restitution process started in the late 1990’s. I did not even hope that we would get these farms one day. I have never had a paid job before so the work on the farms is an excellent opportunity to have money on my own. Now we never go hungry. In the past we would struggle. The money is still little but we are grateful.33

In general, although this may change, there is an apparent bias toward hiring men for administrative and supervisory positions on the farms. The clear exception is Masakona which has hired two female supervisors. While the strategic partners express the opinion that female workers are highly reliable and hard working they have not taken any systematic steps to work out a human resource management scheme ensuring that competent women are recruited and selected at all levels. In practice the selection process has been left to the communities who have put male candidates forward, particularly for leadership positions and training purposes. Instead of challenging patriarchal power structures within the community the business partners were reinforcing them.34

The Share of Rent and Profits: Individuals, Households or Individuals

The eventual benefits flowing to the community from the business enterprise are to be distributed amongst the CPA members. On paper, the decisions will be made by the CPAs committees in consultation with the members of the associations. The CPAs will have to make difficult decisions as to whether rent for land, which is currently being paid should be reinvested, used for CPA determined needs, or given back to individual community members. To date the monies have been used for trucks, offices and office equipment and compensation to board or executive committee members for their time contributions. In one case the monies were used for redecorating a farm house for a chief and then for his funeral.

33 Interview, Masakona. 15.04.2008.
34 Of all the white owned farms in Levubu only one is owned and managed by a woman.
It was up to the joint venture company, not the CPA, to determine distribution of profits when and if there are any. If benefits are given, the CPA committee will in theory consult with the CPA membership as laid out by their constitutions. In practice benefits have, however, been allocated to fund the work of the CPA committees without any consultation.

In the planning process in Limpopo, as elsewhere in South Africa, local communities were to a large extent seen as undifferentiated, with similar interests, and therefore no account was taken of their complexities and divided interests (Pienaar 2006). The legal content of membership and the rights of members in a group claim has subsequently not been accomplished prior to the transfer of land. How to distribute property between different groups or individuals within the community is unspecified despite the obligation under section 35 of the RA to “ensure that all the dispossessed members of the community shall have access to the land or the compensation in question on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant”.

While mandating internal democratic principles of participation and decision-making, CPA constitutions are vague or silent in relation to sustainable use of resources, individual use rights and allocation of benefits that will flow to the community from rent, profits from the new company, or grants from government. While not specifying individual use rights or individual shares the constitutions make reference to ill or non-defined principles of fairness and equity. One (typical) example is the Ratombo constitution, which in one section mandates fairness and equity, and in another, limits it:

(1) Powers of the association and committee shall be interpreted and implemented at all times in accordance with the principle of fairness and equity.

(2) Nothing herein fore contained or implied shall preclude the Association or Committee from entering into arrangements involving differentiation between individual members, provided that a bona fide attempt is made to avoid ostensible disparity, and to ensure broad equity and fairness between affected members.

Interviews with CPA members of Ratombo, Shigalo, Ravele and Masakona reflect tensions as to how a fair balance between communities, households and individuals may be reached. Out of the seventy-two members

35 These results are from a more general interview schedule for members of successful claimant communities focusing upon their backgrounds and expectations from the restitution process.
engendering the south african land restitution process

interviewed thirty six percent favor individual and/or household benefits alone. In this grouping a majority of women favored the individual whereas the men preferred household payments, over which they would likely have greater control. Twenty percent of respondents favored dividing the benefits between individuals and households and the community. Once again there was a gender difference with only two women supporting this division. Those who thought that the community alone should receive the benefits were twenty nine percent of the total of whom three quarters were men. Women were far more supportive of individual benefits whereas men supported household or community ones. In any event, decisions are already being made by CPA committees (the small group that manages CPA affairs, and most of whose members are men).

A group interview with Shigalo women illustrates how difficult it is to do justice through investment in common goods. Emphasizing internal differences between community members in terms of age, education and participation many women were in favor of cash transfers to households. The group interview we held with Masakona women (June 2007) emphasized difference between the women who got individual benefits through jobs on the farms and themselves, who were not employed. These women wanted benefits that could be distributed in the community. They wanted money to start income-generating programs and money for a water pump. Where membership is dispersed through two or more communities and members living in urban areas, reconciling these differences may pose new and unforeseen challenges.

8. Balancing Social Justice and Business: Gendered and Classed Patterns of Power and Resources

This longitudinal small scale study speaks to the broader discussion of how common property systems, that most rural African women rely on for their access to livelihood resources, can be made more responsive to the women’s quest for a fair share of the common pool resources. Starting out with the situation of different groups of women on the ground our findings are that there is a highly gendered and, to a certain extent, classed response to how benefits, if and when they come, should be distributed. Women, with variations related to age and class, favor individual benefits recognizing that if benefits are given to the community or to household

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36 Field notes, Anne Hellum and Bill Derman, June 2007.
heads they are unlikely to obtain them. The CPA leadership, where men with close connections to chiefly power are in majority, favors community distribution and they are already gaining benefits not available to others. Yet women’s views on this crucial issue are not articulated in laws, policies, constitutions or practices. Neither are they voiced in the general CPA meetings or on the CPA committee meetings that are dominated by men and women from the upper strata in the society.

The disjuncture between the principle of equality embedded in both national and local regulations and the actual practices on the ground reflects an overemphasis on the agency and empowerment of local communities and the under-emphasis on the structures of domination and power that exist within these communities. In the restitution process in Limpopo, as elsewhere in South Africa, local communities have by and large been seen as undifferentiated, with similar interests, and therefore little account has been taken of their complexities and divided interests. No attempts were made neither by government, Nkuzi nor the Strategic Partners to give voice to women’s concerns as to how benefits should be distributed. This is reflected in the lack of principles related to distribution of resources in the CPA Act, in the CPA constitutions and in the hiring policies of the joint venture companies.

Several factors have contributed to this development. The social justice approach, which informed the claims-making and claims-verification period, went a long way in enacting and implementing a legal framework setting out to ensure that justice was done to all groups, including women, farm workers and farm dwellers. In the claims-making process government laws and policies were supported by a network of non-governmental organizations who addressed gender inequalities within the claimant communities. Women have, as a result of the joint efforts made by state and non-state actors, attained equal membership and ownership rights in these new institutions, which is no small thing. Yet these legal changes are, as this study demonstrates, contingent on whether they are upheld through the training and the mobilisation of the potential of the women in the CPA steering committees and on the joint venture company board of directors. In the post-settlement phase the government’s attempt to marry social justice and business has resulted in a land restitution model governed by a narrow equal opportunity approach, where existing gender hierarchies within the community and the household are regarded as private matters.

The outcome of the land restitution process bespeaks broader trends regarding the role of rights in the context of the ambitious and
wide-ranging land reform programme which was developed by the Mandela administration after 1994. In their analysis of these broader trends Cousins and Hall address the disjuncture between: “the realm of ‘rights’ as contained in law and policy; the wider economic contexts of a changing commercial agriculture and communal areas with few economic opportunities; and the local contexts and personal relations in which rights are to be realised” (2012). In line with Cousin and Hall’s observations our study of women in the land restitution process suggests that at the intersections between these realms are opportunities to form new connections and to build institutions capable of ensuring that equal rights have traction at the local level. The shift from a social justice to a business model is, however, undermining the basic institutional architecture envisaged by the drafters of legislation and policy and has led to a profound disconnect between the realm of “equal rights” and the local realities inhabited by “women rights holders”.

References


CHAPTER EIGHT
MULTIPLE THREATS, MANIFOLD STRATEGIES: WOMEN, THE STATE AND SECURE TENURE AT THE INTERFACE OF HUMAN RIGHTS AND LOCAL PRACTICES IN DAR ES SALAAM

Ingunn Ikdahl

1. Introduction

While land itself is profoundly local and concrete, land reform often ends up as a legal affair and the object of massive international attention. Since the early 1990s, a substantial number of land reforms have taken place in Sub-Saharan Africa (Toulmin and Quan 2000; Benjaminsen and Lund 2003; Wanyeki 2003; Manji 2006; Englert and Daley 2008). These processes have involved international actors such as UN institutions, international financial institutions, donors and INGOs, alongside national governments, civil society actors and NGOs. During the same period, international development policy has re-engaged with legal institutions and with law, both as instruments towards development and as policy objectives in their own right (Trubek and Santos 2006a). Land reform has been firmly incorporated into the ‘the rule of law’ agenda. In contexts where land rights have been characterized by factors such as plural tenure systems, informal rights, communal and/or customary land rights, land reform has frequently come to signify land law reform (Manji 2006; Nyamu-Musembi 2006, 2007). The promotion of ‘property rights’ has been central.

While formalization of land rights was earlier dominated by approaches focusing on full individual title, recent years have seen an increased interest in the potential of customary systems, with interest in intermediate forms of tenure, group titles, and local authorities (World Bank 2003; Whitehead and Tsikata 2003; Varley 2007).¹ The need for such ‘alternative approaches’ is today generally recognized.² However, the state-centric

¹ For a useful discussion of the concept of ‘customary land tenure’, with focus on the continual adaptation and reinterpretation of local land tenure systems, see Cotula 2007.
² Ann Varley’s (2007) discussion of gender and property formalisation distinguishes between ‘conventional’ reform, emphasising full individual title and formal law,
element remains, through the continued preference of the state as the provider of legitimacy for land claims—whether directly or indirectly through legislation recognizing customary rights.

This situation resembles a general dilemma in the human rights system: the state and state law are important tools to protect citizens from violations which may often originate from the same state. The emphasis on legally secure tenure as an element in the right to adequate housing demonstrates clearly this double role of the state—being both threat and protection, both predator and guardian.

Gender is particularly suited as a case study to discuss the appropriateness of policy designs aiming at achieving human right ideals through formal law and recourse to the state. The relationship between women and the state has been widely debated, and “[f]eminist accounts of the state [...] range from one of a potential saviour to that of an unambiguously oppressive institution” (Charlesworth and Chinkin 2000, 167). The effectiveness of using formal law as a vehicle to improve women's situation when facing discriminatory customary law has been called into question. The field of land rights and women demonstrates how states are rarely benevolent and never almighty, and also how local norms function to create other types of threats and protection. While new legislation pertaining to land and property is often gender-neutral on paper, it interacts with gendered local norms. And while the neo-liberal land policies of the World Bank (and others) have in general had more influence on land reform in Sub-Saharan Africa than norms and principles stemming from international human rights, gender equality and the prohibition of non-discrimination has been central to the debates.

The next section of this chapter reviews land titling as an evolving topic in human rights law. It traces the development of 'secure tenure' as a central concept, and outlines some aspects of the inclusion of gender in the discourse on land as a human rights issue. Finally, the role implicitly allocated to the state and to formal law is highlighted.

Sections three and four contextualize the debate on gender, titling and human rights through an urban case study, discussing a titling process in

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and 'alternative' approaches, which are centred on intermediate forms of tenure, group title, local authorities, and customary tenure.

3 For Third World perspectives on the relationship between women and the state, see Rai and Lievesley 1996.

4 For an insightful discussion of law and women's human rights in Africa, see Banda 2005, 297–310.
one informal settlement in Dar es Salaam. The third section presents the national and local context of the case. Tanzania is well suited to examine the intersections of international, national and local norms in the context of current land law reform trends. The 1999 land tenure reform comprises typical reform elements such as recognition and registration of existing land use practice and customary rights, facilitation of a market for land rights, and efforts to ensure non-discrimination and protection of women’s use. While in part driven by local factors, the international influence is highly visible in the national reform process. Field data gathered from interviews in Hanna Nassif, an informal settlement in Dar es Salaam, forms the basis for the more detailed discussion. As the registration effort in this settlement proceeds, experiences and perspectives expressed by inhabitants in the area make it possible to explore the 1999 reform as it looks from the ground. My interviews with women in Hanna Nassif explore their agency within structures influenced by a variety of factors: international involvement, rural traditions, the legacy of the socialist era and neo-liberal trends. The fourth section discusses findings from these interviews.

The final section brings together the local and the international levels, by discussing women's use or avoidance of state law in the light of the case study.

2. Land as a Human Rights Issue: Secure Tenure, Women, and the State

From Protection of Property Rights to Land and Secure Tenure

Historically, land and property rights have not been core issues on the UN human rights agenda. While protection of property rights was included in the 1948 Universal Declaration of Human Rights (Article 17), the dichotomous nature of the concept as a classical, liberal freedom right and as the basis for calls for social justice and redistribution caused problems in the negotiations leading up to the 1966 Covenants (Banning 2002, 33–47). The state obligation to respect established property rights was eventually left out of both the International Covenant on Civil and Political Rights.

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5 The chapter, which formed part of the project Bistandsrelevant kvinnerett (Women, Law and Development), funded by the Norwegian Ministry of Foreign Affairs and carried out by the Institute of Women’s Law draws upon material collected for my Ph.D. dissertation (Ikdahl 2010). In addition to literature on the Tanzanian land legislation, the reform process and the Hanna Nassif settlement, information is derived from interviews with academics, government officials, lawyers, NGOs and urban women, carried out during visits in May 1999, April/May 2004, November/December 2005 and May/June 2006.
(ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), but regional human rights treaties have included protection of property rights—in different forms.6

More recently, the focus on land rights has increased. The issue of land rights of indigenous peoples has attracted considerable attention.7 Increased recognition of the interrelatedness of rights8 supports a new type of legal argumentation on land policy as a human rights issue, circumventing the absence of an explicit right to land in the human rights conventions: Land is central to realization of several human rights, including the right to food, housing, and an adequate living standard; and other human rights establish obligations and guidelines for the state’s actions and omissions in land-related matters. The principle of non-discrimination has been a core element in argumentation along these lines.9

A central development in the human rights system has been the emergence of the concept of ‘secure tenure’. It points out the relevance of legal regulation of land rights for the right to housing, hence embodying a strong link to the present topic. In its general comment no. 4 (1991), “The Right to Adequate Housing”, the Committee on Economic, Social and Cultural Rights (CESCR) named legal security of tenure as one of seven aspects for considering adequacy of housing, defining it as follows:

Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced

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7 This has been brought up through the ICCPR Article 27 (on minority rights), the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (no. 169, 1989), the UN Declaration on the Rights of Indigenous Peoples (UN GA 2007), as well as a few high-profile cases.

8 The Vienna Declaration (1993), the UN Declaration on the Right to Development (UN GA 1986), and the rights-based approach to development all promote a holistic focus on human rights, rather than seeing provisions separately. A prime example of the application of this type of principle is the UN Committee on Economic, Social and Cultural Rights’ (CESCR) analysis of the right to water in its general comment no. 15, CESCR 2002.

9 A three-partite framework for addressing formalization of land rights through a human rights approach, consisting of de facto equal rights to and access to land, empowerment/participation, and due process/rule of law, is suggested in Ikdahl et al. 2005. See also Ikdahl 2007; Banning 2002.
eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups; (CESCR 1991, para. 8.a)

The concept has been further developed by the same committee on later occasions. To ensure legal protection against forced eviction, recommended measures include procedural requirements, right to consultation and notice, right to legal remedies and compensation, and legislation protecting tenants (CESCR 1997). In addition, it is central to the current work of UN-Habitat,\(^{10}\) and is included in some national legislation—with South Africa as a prime example.\(^{11}\)

The development in the human rights system has thus shifted the attention from ‘protection of property rights’ to ‘secure tenure’, and law is given a more prominent role to fulfil the right to housing. One possible explanation behind the emergence of ‘secure tenure’ as a central concept is the insight that calling for protection of property rights seemed ill fit in many situations where land issues gave rise to violations of economic and social rights. Those experiencing evictions and landlessness were often those without formal property rights—indigenous peoples, pastoralists, urban dwellers etc.

Human rights call for contextualized consideration of land titling based on two potentially opposing lines of arguments. On the one hand, establishing formal land rights can enhance tenure security for people’s housing. On the other hand, it has also been noted that titling can jeopardize the fulfilment of other human rights. It may cause loss of income and landlessness—especially if accompanied by individualization and increased marketability of land rights.\(^{12}\) Measures to mediate

\(^{10}\) This is demonstrated in this UN agency’s repeated emphasis on the key role of secure tenure in efforts to fulfil Millennium Development Goal 7, as well as in its work as facilitator of the Global Land Tool Network (GLTN). See http://www.un-habitat.org and http://www.gltn.net/.

\(^{11}\) The South African Constitution Article 25(6) establishes that “A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”. Practice from the Land Claims Courts and the debates on how to secure the rights of farm workers and inhabitants of former reserves has led to a detailed jurisprudence on the concept.

\(^{12}\) See e.g., the CESCR’s response to the state report of the Solomon Islands: “Concern is expressed about the plans to privatize communal land with a view to making it accessible for commercial use and urban development. Approximately 90 per cent of the land in the State party is held under customary land tenure, meaning that the land belongs to the community as such rather than to individuals. Attention is drawn to the fact that the envisaged privatization of land under customary tenure may undermine the foundations of the State
potentially negative distributive consequences must be considered in reform processes.

*Increased Focus on Women and Land*

International human rights documents clearly establish women’s rights to equality in the context of housing as well as property, as visible in the Convention on the Elimination of All Forms of Discrimination Against Women (1979) Articles 14.2(h), 15.2, and 16.1(h). In addition to the increasingly broad approach to land rights outlined above, a notable feature of the development of human rights jurisprudence has been the increased attention given to women’s rights to and access to land in particular. Various UN actors have been driving forces in this development, including the treaty-monitoring committees,13 the Committee on the Status of Women (see e.g., CSW 1998), the Commission on Human Rights (see e.g., CHR 2005), and various UN Special Rapporteurs.14 Taking the general principle of non-discrimination as starting point, ‘soft law’ documents from these institutions have developed and concretized norms pertaining to women and land. One example of these norms being ‘solidified’ through state recognition in binding legal forms is the 2003 Protocol to the African Charter on the Rights of Women in Africa, with a number of provisions establishing state obligations with particular reference to women’s land rights.15

Attention to women’s land-related human rights has often revolved around questions of private law, highlighting state obligations to address discriminatory traditions and customary law, particularly as regards...
inheritance and marital property. Addressing the spill-over effect of such discriminatory practices on registration of land has been pointed out as a core factor to ensure gender-sensitive land reform (Ikdahl et al. 2005; Whitehead and Tsikata 2003; Benschop and UN-Habitat 2002). In addition, the new interest in women and property rights has induced attention to other questions. Not only should women have formally equal legal rights to acquire and own property, but human rights institutions have also taken interest in their access to credit as a means by which to be able to participate in the market and become owners in practice. It has been increasingly recognized that tenure insecurity is a gendered issue. Women suffer disproportionately from forced evictions (CESCR 1997, para. 10; Kothari 2006, paras. 66–70). Analysis on the individual, rather than the household level has shown how women experience additional types of eviction: evidence abounds with cases of land-grabbing by in-laws when widowed, husbands throwing out wives upon divorce and land being sold or mortgaged by the husband without the wife benefiting or even being informed (Kothari 2006, paras. 30–31). Lack of housing options makes it difficult to escape household violence (Kothari 2006, paras. 32–36; Paglione 2006).

Thus, compared to the neo-liberal approach to land policy, the human rights documents that have emerged during the past 15–20 years have been fairly successful in incorporating in the overall human rights system concerns developed from gender analyses and from empirical studies of women's situation on the ground. One possible explanation is that the combination of the non-discrimination principle, with its emphasis on de facto equality, and the focus on the livelihoods of vulnerable groups,

16 For an illustration, see the CEDAW Committee's responses to the state report of Morocco, CEDAW 2003, paras. 174–175. In a similar manner, the CESCR's requests for attention to potential effects on vulnerable groups embody an interest in biased effects of the market. Where some have lower ability to compete, introducing a market for land rights has a potential for creating deprivation and landlessness.

17 Gender often remains an add-on in neo-liberal thinking. One evident example is the fact that the influential economist Hernando de Soto (2000) excludes gender from his analysis; instead he argues that given the feminization of poverty, the pro-poor diagnosis and medicine he prescribes will benefit women as well as men. The World Bank's land policy research report (2003) recognizes that there exist gendered biases in society which are to the disfavour of women. It argues that women's land rights should be ensured, as this is economically efficient. A core problem mentioned is the use of the household as the unit of analysis. However, this continues to be the practice in most of the World Bank's own analyses, suggesting that the analysis of the role of gender is not perceived as posing a fundamental challenge to the overall narrative and recommendations. Rather, the issue of gender is seen as an additional concern which can be addressed through suggesting additional measures aimed at women, as observed by Kaarhus (2005).
provides openings for incorporating concerns about spill-over effects of normative systems outside the state law system. As the examples above suggest, normative systems causing bias can stem from family and household relations, but also from mechanisms in the market.

However, differences between women and the various strategies they employ in their everyday lives raise complex questions which are not fully dealt with. One such subject matter is the role assigned to the state and to formal law.

The Role of the State in Human Right Perspectives on Secure Tenure

The essence of the human rights emphasis on secure tenure is simply that if individuals lack state recognition for their interest in remaining in their home or on their land, they are vulnerable to threats, whether from the state itself or from private parties. Hence, the state is cast in a central, but somehow ambiguous role. It can provide security through formal recognition of interests, whether in the form of a property right or through other types of protective legislation. But the state is also a potential threat, for example through forced evictions and expropriation of land. Law, and property rights in particular, is the instrument through which the state can restrict its own scope of action. Through legal recognition, it ties itself to the mast in order to avoid being tempted by Sirens such as rising property values or alluring offers from developers. Thus, law is given a prominent role. Less attention is paid to state failure through lacking enforcement, and people are portrayed as passive receivers of support, rather than as actors capable of making strategic choices in interaction with the state or within the family. As to the role of the market, it is largely invisible: the agency of individuals is mainly framed as ability to take part in state-induced consultation processes. The role of other normative systems capable of providing legitimacy and protection remains largely undis-cussed, except when their frequently discriminatory character is pointed out. Such implicit state-centrism can be based on an unrealistic view of the capacity and benevolence of states, as well as a view of local norms which ignores the role they play for livelihood, security and identity.

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18 See for example the range of examples provided in CESC 1997, paras. 6–8: International armed conflicts; land acquisition measures associated with urban renewal; unbridled speculation in land; or the holding of major sporting events like the Olympic Games or the World Championship in football.

19 On how UN institutions have depicted ‘culture’ as an impediment to gender equality, see e.g., Banda 2005, 249–250.
The limited discussion of the role of the state in human rights documents on secure tenure is somehow surprising, given the critique that has been raised against rights and formal law as a vehicle for change, ranging from general (Kennedy 2004) and gender-specific (Charlesworth and Chinkin 2000, 208–212) critique of rights, to efforts to address the interaction of customary and state law through dynamic, context-based and pragmatic interpretations (Nyamu-Musembi 2000 and 2002; Hellum 1999, Hellum et al. 2007). Former UN High Commissioner for Human Rights Mary Robinson has challenged the human rights movement to discuss how to achieve the objectives where the state is not responsible and responsive, or where people for other reasons “don’t look towards the state to meet their needs” (Robinson 2005, 36–37). The challenge remains largely unmet in the context of the right to housing and secure tenure.

3. Land Titling in Tanzania and Dar es Salaam

3.1. The 1999 Land Reform in Tanzania

The roots of Tanzania’s 1999 land legislation go back to the colonial policies of plural land tenure systems, the villagization policy of the 1970s and the economic crisis of the 1980s, and the country faced both internal and external pressure for land reform as the 1990s began. In 1991, the government appointed a Presidential Commission of Inquiry into Land Matters, which submitted its report in 1992 after extensive consultations around the country (URT 1992). The subsequent years witnessed further debates: a consultant was hired to draft a bill and a National Land Policy was enacted (URT 1995). Eventually the two Acts were enacted by Parliament in 1999, and entered into force in 2001.20

The numerous actors and agendas in the debates during the 90s contributed to the similarly mixed objectives of the final legislation. The Presidential Commission documented widespread insecurity and confusion related to access to and rights to land.21 The Acts reflect this, stating as one of the fundamental principles: “to ensure that existing rights in and recognized longstanding occupation or use of land are clarified and

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21 Caused by factors such as ambiguous and, in part, contradictory laws, double-allocation of land rights, the legacy of the villagization process, and generally flawed land administration.
secured by the law” (section 1.1.b). However, forces pushing for liberalization of transferral of land rights caused the recognition of another fundamental principle: to “facilitate the operation of a market in land” (s. 1.1.j). While inconsistencies between these two objectives can serve to explain tensions and ambiguous elements in the legislation, setting out procedures for registering land rights was deemed an appropriate measure to address both.\(^{22}\)

However, experiences from titling in other countries, for example Kenya, have made registration processes notorious for favouring men when carried out in patriarchal societies. While gender issues received little attention in the initial documents, women’s organizations gradually became high-profile participants in the debates preceding the Acts (Manji 1998, 2005, 2006; Benschop and UN-Habitat 2002; Tsikata 2003; Ikdahl et al. 2005; Ikdahl 2008).\(^{23}\) They have received praise for what they achieved, but also accusations of state co-optation and class bias, as well as being part of “international law imperialism” (Manji 2006, 104). The final versions of the Acts included a range of ‘gender-progressive’ provisions: general provisions on women’s equal rights to own land and prohibition of the application of discriminatory customary law; provisions aimed at protecting women’s interests in specific situations—for example spousal consent as a prerequisite for transactions regarding marital property; and quorums for women’s participation in decision-making.\(^{24}\)

**Current Land Registration Practices**

The implementation of the new legislation has been slow, but a number of different initiatives are in progress, in urban as well as rural areas (Adams...
and Palmer 2007). International actors are also involved in the implementation of the Acts.\footnote{The EU and World Bank cooperate with the Ministry of Land on planning and funding of state implementation measures, URT 2005. Various donors have funded Tanzanian NGOs in doing awareness-raising, training, translating and spreading information, etc.}

In urban areas, several land-related programmes have been underway over the last few years. In 2004, the Ministry of Lands with the support of the World Bank started a large-scale project in Dar es Salaam to regularize urban informal land holding. The project aims to establish a comprehensive urban land property register with information on individual land parcels in the unplanned settlements, combined with measures to enable property owners to apply for and to collect two-year Residential Licences (RL). While this programme focuses on existing owners in unplanned settlements, the so-called 20,000 Plots Programme, started in 2002, aims to increase the number of surveyed plots available for future residential accommodation. In addition, The Property and Business Formalisation Programme, usually known by its Swahili acronym Mkurabita, was launched in autumn 2004. The first two phases were funded by Norad, largely carried out by consultants from the Lima-based Institute of Liberty and Democracy (ILD), and based directly under the President’s office, but also formed the basis for a new network of relations between these actors, as well as segments of international NGOs and Tanzanian civil society.\footnote{For an impression of the debates in the early phases, see Ikdahl et al. 2005; Policy Forum 2005a, 2005b; Sundet 2006; Adams and Palmer 2007.}

However, while the need to harmonize its efforts with other government programmes was recognized, the relationship to the Strategic Plan for the Implementation of the Land Laws (URT 2005), for example, remained unclear, and apart from a few pilot projects, the concrete results of the programme appear to be limited.\footnote{It is illustrative that the official website of the programme contains a detailed report from the first stage, Diagnosis (2004–2005), but only superficial data on the Reform Design Phase (2006–2008) and the Implementation Phase (2008 and onwards). See http://www.mkurabita.go.tz/index.php, last accessed 9 January 2011.}

In addition to these three programmes, the legislation allows for locally initiated registration processes. There have been several such efforts in Dar es Salaam, one of them taking place in the informal settlement of Hanna Nassif, where I conducted interviews.

Registration in Hanna Nassif

In this informal settlement, a process of legalising the area was initiated in correspondence with the Land Act. The procedure has proven to be
complex and time-consuming: a layout plan for the area was submitted in 2004 and accepted by the authorities in 2005. Contact was established with a surveyor, and by the end of 2007, most plots had been surveyed and applications for title deeds were being submitted. Reportedly, by the spring of 2009, roughly 50 households had received their title deeds.28

During two visits in late 2005 and May/June 2006, I met with local authorities and two institutions aiding the registration effort: one NGO and one academic institution. Furthermore, I conducted interviews with 21 women living in the area. I was introduced to the women by a member of the Mtaa (sub-ward) committee, the lowest level of official local authority. The women do not form a statistically representative group, but they were chosen with a view to seeking insights in a variety of life situations. They belong to different age groups, have different marital status, are in varying socio-economic positions, and both tenants and landladies are represented in the sample group. The interviews were semi-structured, with open-ended questions on various land-related issues: their own ways to access housing; problems and support they had experienced; local practices as regards inheritance, marital property, and buying, selling and renting of houses; and their views and expectations as to the registration process.

Read in conjunction with other studies of the area (Mulengeki 2002; Nguluma 2003; Sheuya 2004; Precht 2005), the interviews provided a rich picture of how matters of land and housing are dealt with in the area. Systems for transferral of land rights (both within and outside family relations) and dispute resolution are in place. However, these practices were at times contested and in the form of broad principles with room for individual agency and contextual considerations, rather than forming strict rules. On the whole, the local practices are far from stereotyped pictures of unitary communities and ‘pure’, static customary law. Existing land practices in Hanna Nassif give testimony to a mixture of influences in addition to the formal law: A donor-supported programme to upgrade the physical infrastructure in the 1990s provided contact with international actors, theories and norms; the inhabitants’ own backgrounds bring in traditions from various rural areas, and local administrative structures from the socialist era are still present. The abundance of norms creates a complex field where the boundaries between international, national and local

28 A more detailed account of the history of this area and its titling process can be found in Ikdahl 2010, 124–153.
domains are blurred. This is the context in which claims over property are currently established, justified, contested and reinforced.

The plural local system, which has its biases and weaknesses, but normally manages to prevent escalation of conflicts, thus forms the backdrop for the registration process allowed for by the formal law. The interviews provided insights into different meanings women in the settlement vest in the state recognition of their interests (represented by the registration), and how they respond to the possibilities it brings. This is the topic for the next section.

4. **Women's Views on Ownership, Titling and Naming in Hanna Nassif**

**Manifold Norms for Establishing and Justifying Rights**

Mary has lived in the area since she married 25 years ago. She has her own successful business trading clothes, and has also been working for the local community development organization. She and her husband have two houses, and have already paid the titling costs for both. The house they are living in will be put in the name of the husband, “according to African tradition”, she explains. They had constructed it together, improving it gradually since they bought the plot in 1981. The other house was rented out to pay school fees for their five children. It was built using money from her business, and her name only will be on the title deed. She tells me that “Even the children say ‘Mama’s house is over there!” Her husband agreed to do it this way.29

Mary’s situation demonstrates the plurality of arguments available for justification and legitimacy of property rights. Formal law states that land itself cannot be bought, only the developments on it, and unregistered land in urban informal settlements has an ambiguous legal position. In practice, however, Mary (as well as my other respondents), told stories of buying plots from previous ‘owners’—without expressing any doubt that such transfers were legitimate. As regards the division of property rights between Mary and her husband, her explanations demonstrate two different norms to justify ownership. The gendered “African tradition”, where it is appropriate that the man be registered as owner of the matrimonial home, came up in some other interviews as well, and in much of the literature. However, rights can also be justified by virtue of having contributed to the acquisition of the house. As was the case with the house which was

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rented out, ownership then stems from being the one who provides the work and money (or inheritance) to purchase or build it. And this link between acquisition and rights came up repeatedly in the interviews with women, as an explanation either for why they themselves were the sole owners of houses, or that they were co-owners with their husbands.

The above example demonstrates how different norms regulate and justify ownership at the local level, and the minor role of formal law. However, the interviews appeared more puzzling when the answers to who would be registered on the title deed did not correspond with the person purported to be the owner. To understand the strategies employed by the women, it was helpful to distinguish between titling and ‘naming’—the question of which name to put on the title deed.

*Why Title—And in Whose Name?*

Magdalena had bought a plot with her husband 1969, and incrementally they had built two houses and one smaller shed there. Today she is a widow, and she was surrounded by a group of younger family members when I interviewed her in the backyard. She spoke of herself as the owner of the houses, but when we talked about the titling, she said jokingly “it is difficult to tell you now who will be on the title deed—as all the children are here listening!”30

When Naomi married her husband in 1979, he had already started building the house—but they had made a lot of improvements together: the floor, the windows, etc. Her husband was an engineer, she was selling food from a small kiosk. The husband also had a second wife in Bagamoyo, and had started building a house there. He had written a will saying that “everybody should cooperate”, so when he died, the whole family worked together to finish the house in Bagamoyo. The other wife still lived there; they were on good terms and had not divided the property—“maybe the children will do that later”. They planned to use the deceased husband’s name on the title deed.31

Rose married in 1984, and the couple bought the plot and built a house on it in the period 1986–88. She rents out five rooms, and has an additional income from selling clothes. When the husband died very suddenly in 2002, her in-laws moved into the house and later tried to sell it. They filed a case with the police, accusing her of having killed him. The investigation found that he had died a natural death. Acting upon advice from her own family and a women’s organization, she took her case to court and managed to stop the sale of the house, and the in-laws later moved out again. Now she is

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Titling is often portrayed as a way to assert one’s status as owner, but Magdalena answered the question as if it was obvious that she would not use her own name. Given that local practices appear to function fairly well as regards defining and deciding ownership, it is thus interesting that women who consider themselves owners choose to title in someone else’s name. While some women expressed that they prefer to have their own names on the title deeds, others, like the examples above, stated that they preferred to use someone else’s names. Several planned to use the names of their children, two would use the name of deceased husbands.

A recurring theme when discussing the advantages of registration was the fear of state expropriation without compensation. As one woman expressed it: “Before you have a title, the government can take the area for any purpose, they can just change the use.” Magdalena stated that with a title deed, “you will not be affected by demolition. Or if you do, you will get compensation and be moved to a recognized area”. Naomi also feared demolition without compensation, as she had heard rumours that a road would soon be built passing right through where her house is located.

Acquiring a title deed for the house was a way to reduce threats from the state or from third parties without previous relations to the land, but with potentially overriding formal rights—what can be termed the external threats. The importance attached to state recognition of their property rights through titling thus broadly corresponds to the human rights argument of securing tenure through legal measures.

Still other types of insecurity exist, and can serve to explain the strategies observable in relation to the question of naming. Division of property after the death of a husband is a well-known conflict area, as Rose’s story aptly illustrates. While formal legislation vests rights in widows, local
practices are more ambiguous about their claims to property. Incidents of land-grabbing relatives abound, both in the local stories and in literature (Mtengeti-Migiro 1991; Rwebangira, TWLA and WLEA 1993; Benschop and UN-Habitat 2002; Scholz, Gómez and COHRE 2004).

These internal threats can be defined as situations where exclusion can be caused by people with an existing relation to the land and/or the present users, including in-laws, husbands (divorced or not), and local leaders. To reduce insecurity of this nature, strategies are employed depending on the particular situation of the woman. Rose explained she couldn't put the house in her own name, as her husband's relatives (who suspected her of having murdered him) would be disturbed and say “there you see, she wanted the property for herself”. Titling in the name of the children would make them safe when she passed away. If Naomi used the name of the deceased husband on the title deed, she reduced the risk of conflicts with the other widow over the division of property.

The relationship to the husband's family, and the wish to ensure that their children will inherit the house, appear to be core issues in explaining women's naming strategies. Widows, especially if they have children, are able to remain in their homes by avoiding open conflict over transfers or openly challenging notions of lineage rights. While claiming the title deed in their own name could serve as a provocation, using the names of children or of a deceased husband allows the woman to seek protection in both external and internal dimensions: to increase security against state expropriation, without jeopardizing social relations that provide other types of protection and support. Correspondingly, the women who said they would use their own name were older women, with strong positions and respect in the community, who had built the house themselves after being widowed or had brought the house into the marriage. Thus, it seemed unlikely that claims from relatives would be successful, and the formal and social regulation of property rights could be combined through titling the plot in their own name.

Hence, local principles and practices for inheritance and division of marital property influence strongly on how the formal law is used at local level. Women's insecurity upon widowhood, and their uncertainty about their ability to transfer property to their children through inheritance, are among the factors influencing women's actions responding to the opportunities presented by the new legislation.35 The difference between

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35 A factor that came up in interviews I conducted with women lawyers and NGO officials in Dar es Salaam, was the wish to maintain the good relationship to their husbands:
external and internal threats plays out as a variety of a well-known theme: the public/private split.36

5. What’s Law Got to Do with It?

Ambiguous Responses to State Legislation

The stories from Hanna Nassif provide examples of individuals’ strategies in situations where land rights are given legitimacy, contested, transferred and protected within a ‘system’ where formal law is only one of several normative sources. The mixture of local practices and formal state law provides some (albeit limited) room for manoeuvring. The registration process carries a potential for a stronger state involvement—but while some women take this opportunity to be registered as owners, others choose to continue relying on social relations.

Women’s mixed responses illustrate a certain ambiguity in people’s engagement with the state. The overall community involvement in the registration exercise demonstrates at least some belief that state recognition through titling is potentially useful. Nevertheless, the ‘naming’ strategies seem to downplay the role of the state, while highlighting the importance of social relations as providing basis for secure property rights. The repeated failures of the state to fulfil promises of infrastructure and legal recognition in Hanna Nassif may have added to the perception of the state as a weak ally. Reluctance to act with full trust in the state in land issues is also visible elsewhere in Dar es Salaam. The ongoing programme to establish short-term residential licences has witnessed a large number of plots being addressed, but only a low number of residential licences have been applied for—and even fewer actually picked up (Kironde 2006, sec. 5.2).37 Some studies from rural areas suggest that unregistered custom-based tenure may be felt to provide sufficient security, while registration could serve to make people less secure.38 The clumsy implementation

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36 For a related observation on how the distinction between customary and statutory law establishes a legally structured form of the public/private divide, see Stewart 1996, 30. For a critique of the private/public dichotomy, see Lacey 1998.

37 According to an official in the Ministry of Lands, one reason is the practice developed by the local government branches, who use the occasion to collect taxes and fees when people come to pick up the licences. Others suggested that wealthier landlords simply do not want their properties, and the related incomes, documented.

38 An empirical study by Englert (2003) documents local-level occurrence of the argument that titling implied duties to pay tax, whereby the government would redeem the
of the joint titling provision, included in the 1999 legislation in order to strengthen the land rights of married women, demonstrates serious shortcomings in the government machinery’s commitment to achieve the stated objectives.\textsuperscript{39}

If women’s actions are understood as strategic responses to threats against their continued access to their homes, a correspondence exists between the threat and the strategy employed to establish protection. The formal recognition represented by the title deed offers valuable protection against threats from external sources that achieve formal rights which override the local system. Conversely, internal threats may take advantage of elements of local norms, for example the “African tradition” establishing the matrimonial home as the husband’s property. In theory, formal law establishing gender equality will override the local norms. In practice, however, some women find that seeking protection through other elements of local norms is more beneficial than challenging them.

\textit{Conceptualising Women’s Withdrawal from the State}

The stories and postures from Hanna Nassif provide examples of situations where women do not respond to the options presented by legal reform in the anticipated manner. It thus allows for a more detailed examination of a specific version of the debate on the effectiveness of legal reforms,\textsuperscript{40} namely situations where women circumvent the law.

The topic has been explored in other studies. Ann Stewart (1996) discusses “the great public controversy” aroused by four cases where African women went to court to claim the rights given them in formal law. She suggests that the post-colonial African state and African legal systems have a legitimacy problem, which afflicts women using state law to claim individual rights. As a consequence, using the law in a struggle for equality becomes controversial. In line with Stewart, Ambreena Manji (1999) highlights the lacking legitimacy of the state, and that feminist activism is

\begin{footnotesize}
\textsuperscript{39} I have written elsewhere on the implementation of the joint titling provision in Dar es Salaam (Ikdahl 2008). Obstacles abound: the documents, the procedures for registration, the procedures and attitudes when wives try to challenge registration in their husband’s name only, and how both officials and NGO workers demonstrated a lack of interest in a matter still considered to belong to the family sphere.

\textsuperscript{40} The difficulties in achieving social change through legal reform are much discussed. For an overview of this debate in the context of women’s rights in Africa, see Banda 2005, 299–305.
\end{footnotesize}
sometimes associated with an elitist bourgeoisie. However, Manji’s focus is on the reverse situation: not on women who use the law to claim rights, but on women avoiding the law. State law is viewed as coercive and patriarchal, and she suggests that “women’s response to state power has been to avoid a public confrontation with it” (Manji 1999, 444).

Manji’s focus on “exit” as a means for voicing discontent with the state echoes how for example James Scott (1985) sees withdrawal to the informal sector as resistance to the state and the powerful, as “weapons of the weak”. In her study of the informal economy in Dar es Salaam in the 1980s, Aili Mari Tripp (1997) makes a convincing argument for another way of understanding such activities. She sees them primarily as parts of everyday survival strategies. Without necessarily undermining the state, people manoeuvre to create a livelihood within a limited set of possibilities established by a complex landscape of norms, power and positions.

In the case of Hanna Nassif, the choice not to take the opportunity to register land in one’s own name did not appear to derive from the lacking legitimacy of state legislation, or from the intention to voice objection against state power. Women spoke of themselves as owners, and most expressed approval of provisions supporting women’s position as owners. Indeed, Rose’s story demonstrates that she was willing and able to take a family matter to the court to protect her own interests. Nevertheless, her wish to minimize the conflict with her in-laws made her give preference to local norms over state norms in the question of naming.

Thus, the titling process can create dilemmas. If a woman defies local norms and expectations by claiming formal property rights in her own name, will the protection offered by state law outweigh the risk of jeopardising local social relationships? I suggest that women’s responses to titling and naming in Hanna Nassif can be understood mainly as strategic choices for their own future, rather than as resistance to ‘Western’, ‘bourgeois’ or ‘coercive’ state law. It is not so much a question of explaining disengagement with the state, as reconceiving the role of formal law in a matrix of plural normative systems regulating land rights. As formal law does not have hegemony at the local level, it can generate diverse responses—depending on the particulars of the situation of the woman.

*International Responses to the Strategies of Individuals*

The foregoing discussion of the role of formal law in an urban Tanzanian context gives reason to re-examine the assumptions inherent in strategies for achieving social change through formal state law. In particular, it
provides a challenge to the concurrence of international development policies on the central role of the state in relation to property and land rights. Certainly, state failures in fulfilling this role are noticed—but prevailing responses to such failures are less than satisfactory. Neo-liberal thinking tends to suggest that progress can be achieved simply through a technical exercise of increasing state capacity, thus underestimating how social relations, including gender, may create specific ‘costs’ as well as benefits that can lead people to disengage with the state. In a similar manner, the main concern of the human rights system appears to be finding and documenting implementation gaps, rather than discussing the foundational issue of how to achieve the objectives where the state is not responsible and responsive, or where people for other reasons “don’t look towards the state to meet their needs” (Robinson 2005, 36–37).

Clearly, the presence of local norms influencing the effects of legislation, and people’s possible reliance on these, does not relieve the state of its human rights responsibilities. Rather, in cases where people don’t trust the state, or for other reasons choose not to rely fully or solely on the state for protection, the state is obliged to find other measures that facilitate the fulfilment of human rights.

International policy-makers and human rights institutions may have lessons to learn from case studies emphasising the agency of local actors. The debate on whether customary or statutory law best protects women, and more specifically the choice between ‘conventional’ and ‘alternative’ approaches to tenure reform appears to gradually give way to studies of land tenure reform suggesting that both paths can be detrimental to women (Varley 2007; Whitehead and Tsikata 2003; Ikdahl et al. 2005). Arguably, whichever strategy is chosen, reform agendas need to be informed by analysis of gendered implications, and of the power relations shaping norms. The human rights debate on strategies to ensure secure tenure should draw on this body of research. If reliance on state law shall

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41 On the ‘chastened neo-liberals’, see Trubek and Santos 2006b, 18.
42 Banda points to “women’s social dependency”, and the failure of law to address this issue, as an element in why women sometimes uphold discriminatory practices (Banda 2005, 302).
43 See in particular the Convention on the Elimination of All Forms of Discrimination against Women Article 2.f, which obliges states to: ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’.
continue to serve as a core element in land policy, the legitimacy of the international engagement will depend on its ability to accommodate lessons from close studies of its encounters and interaction with local agency. Actor-oriented perspectives are crucial to understand both the transformative potential and the limitations of law in contexts where local normative practices already generate both threats and protection and therefore heavily influence the effects of legal reform. Awareness of local politics of change and of the strategies and preferences of local actors in places such as Hanna Nassif is important in order to understand how property rights to land are established, shaped, contested, legitimated, and how they can be legislated. Such understanding is a precondition for acting to ensure tenure security.

Women’s strategies in Hanna Nassif thus bring up questions that should be considered of anyone seeking to tailor legislation to this pluralistic context. Should one allow for registration in names of other people than the owner? If so, who should carry the obligation to pay property tax, and have the right to compensation in case of eviction? How can one minimize potential negative consequences, for example if grown-up children want to throw out a mother who has used their name on the title deed? How can generational transfer be facilitated? Clearly, practices associated with private law must be central in the design of titling efforts.

The stories presented above came from women who were middle-aged and in fairly comfortable economic positions. The matrix of different social and economic positions, power, and a plurality of norms lead to situations where different women face different threats, have different options—and corresponding differences in the strategies they employ. Some register in their own names, some in the names of others—and other women are not eligible for registration at all.

While strands of international human rights literature have tended to favour state solutions over local norms, the foundational argument that tenure security is an element of the right to adequate housing creates rights for all women. Attention to the differences between women can help expose how titling includes and excludes different groups from the tenure security the state seeks to establish. Human rights arguments pertaining to titling are reconcilable with more realistic understandings of the potential and limitations of both state law and local norms. However, in order to develop human rights in this direction, close engagement with the complexities of individual agency and local politics of change must be made part of international legal analysis.
References


CHAPTER NINE

COERCIVE HARMONY?: REALIZING WOMEN’S RIGHTS THROUGH ALTERNATIVE DISPUTE RESOLUTION IN DAR ES SALAAM’S LEGAL AID CLINICS

Natalie J. Bourdon

1. Introduction

The majority of African countries are now signatory to most major international and regional human rights treaties and conventions. While formal legal rights are a necessary first step to ensuring women’s rights, they do not tell us how women’s rights are actualized within a specific context. Furthermore, while many developing countries do not have the robust legal system necessary to implement and ensure human rights at the local level, citizens must look to other means for settling disputes. As many Tanzanian women do not have access to courts, they have begun to utilize free legal aid services such as those offered by legal and human rights non-governmental organizations (NGOs).

Women’s rights lawyers in Dar es Salaam’s human rights NGOs handle disputes in a number of ways, the most popular being alternative dispute resolution, or ADR. ADR involves arbitration, mediation and conciliation with the ultimate goal of settling disputes out of court. ADR in developing countries has come under criticism and scepticism from lawyers and social scientists, being referred to as a process of “coercive harmony” (Nader 2002) and a Western “legal transplant” (Greco 2010). Tanzanian lawyers and NGO professionals mediate the gendered complaints that
come before them in this quasi-legal setting. This chapter explores the possibilities and constraints of the theoretical underpinnings and practical use of ADR as a tool for effectuating women’s rights in Tanzania. I examine the processes of translating and appropriating human rights discourses (Merry 2006) by both clients and lawyers while recognizing that local conceptions of rights already exist. I argue that when viewing mediation through a feminist jurisprudential lens, context and the mediators’ role are significant factors that shape and reveal a complicated matrix of possibilities for women’s rights to emerge.

2. ADR—A Transnational Transplant or an Amended Historical Tool?

There are a variety of perspectives on the reasons for promoting and using alternative dispute resolution as a means to settling disputes. Much of this theoretical and empirical work has been conducted in the U.S. Some scholars have cited the national political motivations for using ADR as a way to keep social justice issues out of the courts (Nader 2002), while others have written about the necessity of ADR as a means to lessen courts’ caseloads (Vandervlooi and Pearson 1983). Other scholars argue that ADR reduces the alienation litigants experience in court while inducing durable consensual agreements (Herrman et al. 1977; Spencer and Zammit 1976; Treuthart 1993; Blaustone 1994). Still others have documented individual preferences for mediation and other dispute resolution procedures (Hensler 2002). More recently, the use and institutionalization of ADR in African countries has drawn much attention by scholars in the global North.

Laura Nader has constructed one of the more pointed critiques of what she calls the transnationalization or ‘Americanization’ of ADR (2002). In fact, many scholars researching ADR processes in African countries have mistakenly assumed the transnationalization of ADR as the starting point to their inquiries without recognizing the long history of ADR within

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2 The term ‘quasi-legal’ is employed to recognize that cases mediated outside of court have no recourse to legal enforcement measures if one party does not comply with a decision. However, this setting is in some sense ‘legal’ as mediators are often lawyers or trained advocates who use legal doctrine to decide disputes. Further, if an out-of-court mediated dispute cannot be solved or adhered to by the parties, they have recourse in the civil court system.

3 ADR was structured and incorporated into the national justice system in the U.S. after the Pound Conference in 1976.
Coercive Harmony?

African contexts that often originate before and is supported by colonial regimes. Elizabeth Grand asks, “is ADR... an institution that can easily be transplanted to Africa where the original transplant of the Western state has failed?” (1999) while Greco’s (2010) recently titled work “Other Contributions: ADR and a Smile: Neocolonialism and the West’s Newest Export in Africa” similarly worries about transplantation. There is certainly evidence that ADR, as a legal strategy, is a transnational phenomenon and ADR is being encouraged by Western/Northern agencies as a means to settling contractual disputes. In Tanzania, ADR has been integrated into state law; private practice lawyers specialize in ADR, the World Bank has promoted its use in Tanzania’s legal sector, and international donors fund ADR within Tanzanian NGOs.

While there are legitimate concerns over the dynamics operating between Western agencies and African states’ adoption of ADR, dispute resolution has well-established roots in pre-colonial and colonial Africa especially in the area of family disputes. In fact, most conflicts and their resolution have historically and predominantly been local and between individuals, communities, and villages (c.f. Brock-Utne 2001, Moore 1978, Chanock 1998). The objective of such conflict resolution was and often still is according to Brock-Utne, “to mend the broken or damaged relationship, [and] rectify wrongs, and restore justice” (2001:9). In contemporary urban Tanzania, where one might access the state legal machinery to resolve disputes, ADR is desirable for lawyers and clients alike because it lowers the cost to clients and decisions are reached with greater speed (Bendeman 2007). As revealed in my own research, newcomers to the city of Dar es Salaam find ADR more edifying partly because the procedure

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4 The Civil Procedure Code was amended under the Civil Procedure Code (Amendment) Act (1999) (GN. No. 140 of 1999) to introduce alternative dispute resolution (ADR). ADR has also been integrated as an option in the High Court, resident Magistrates and District Courts since 2002.

5 A Google search will produce lawyers in Dar es Salaam and Arusha who specialize in ADR widely spanning different bodies of law including; mining, banking, insurance, intellectual property rights, corporate law, domestic and international business, civil litigation, investments, trade law and company law.

6 As an example, the World Bank has financed projects such as “Private Sector Competitiveness - Business Environment Strengthening for Tanzania (BEST) Program: Conducting an Analysis of Alternative Dispute Resolution (ADR) in Tanzania and for Training of Trainers for the Enhancement of ADR to Judicial Officers in Tanzania” and has jointly funded projects with USAID to promote ADR within the country.

7 The World Bank, USAID, the Norwegian Agency for Development Cooperation, the Ford Foundation, and the Canadian International Development Agency have all funded ADR projects.
resonates with reconciliation processes with which they are already familiar. Furthermore, women oftentimes find satisfactory the results of ADR processes when adjudicated by women’s rights lawyers.

A few scholars have examined how certain groups of people fare under ADR and have suggested that ADR could be a venue for empowerment (Bush and Folger 1994; Tsanga 2003). Specifically, researchers have begun critically examining the outcomes for women who use ADR as a means to settle disputes, especially disputes over marriage and divorce, inheritance, child maintenance, and affiliation (Grillo 1991; Hirsch 1998; Rifkin 1984; Tsanga 2003). How could there be such a wide range of pronouncements regarding the outcomes of ADR for the underprivileged? Where some deem ADR an index of neocolonialism, others submit it is a tool for empowerment. I suggest examining the political-legal context in which ADR is being employed and the political commitments of the mediators and lawyers handling cases. The constraints of the national legal and political environment, the way in which laws are translated, the ideology guiding legal services programs, and the agency of lawyers will shape to what extent women experience ADR as empowering.

3. The National Legal Context—Constraints and Opportunities

In Tanzania, customary and religious laws are both recognized alongside state law. Where such plural systems of law exist, the state has played a decisive role in validating each body of law while attempting to reconcile customary laws with national and international laws. In 1988, Tanzania amended its Constitution to include a Bill of Rights. Based on the principle of nondiscrimination, the Bill of Rights has given leverage to legal advocates who claim that religious and customary laws discriminate against women. The Tanzanian state has made clear that customary laws can be practiced so long as they do not discriminate based on gender (Constitution of the United Republic of Tanzania, Article 12(5)). However, Tanzania is reflective of a broader practical problem that “African governments’ failure to develop comprehensive programmes to raise people’s awareness of state law means people are often oblivious to the nature of state law even though it is generally applicable to them” (Tsanga 1996:11). Therefore, Tanzanian human rights lawyers have the opportunity to use

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8 Tanzania is currently undergoing a Constitutional review process and hopes to have a new Constitution in place by 2014.
the principle of nondiscrimination embedded in the Constitution. However, many people remain uneducated about the Constitution while maintaining a strong knowledge of customary laws that often discriminate against women.

Along with national legal reform, Tanzania has adopted and ratified a number of international human rights declarations and conventions, including the Universal Declaration of Human Rights (UDHR) and the Convention to End all Forms of Discrimination Against Women (CEDAW). Tanzania’s ratification of these documents establishes its commitment to bring local and national laws in line with the spirit of those international instruments. While the UDHR and CEDAW have been of special use to Tanzanian human rights organizations and advocates, the process of translating international law to local villagers and customary judiciary bodies becomes an immense and complex task when considering institutional constraints such as funding shortages, personnel experienced and expert at translating such documents, and the workload of many of the NGOs.

A further constraint is that while NGO human rights lawyers and activists used the UDHR and CEDAW, they feel pressured by members of government to constrain their usage of these documents to selected, ‘nonpolitical’ arenas. In fact, the Tanzanian government attempted to deregister the Baraza Kuu la Waislam wa Tanzania, or BAKWATA, in 1997 because the government viewed it as becoming “too political” after it had criticized the ruling party’s policies (Tripp 2000, Nshala 1997). BAKWATA was one of the largest NGOs in post-independence Tanzania and was involved in policy advocacy on issues including violence against women, child sexual abuse, inheritance laws, land ownership and girls’ access to education. On July 2nd, 1997, the government banned the organization saying it was too akin to a political organization and not focused on “developmental goals.” Shortly following the ban, the Vice President issued an NGO policy stating “NGOs as legal entities are restricted from engaging in any activity that will be construed to be political in nature,” but are allowed to “engage in debate on development issues (Tripp 2005:239).” NGO practitioners therefore feel constrained to use human rights in ways that will not directly and publicly challenge state policies.

Along with institutional constraints and constraints imposed by the government, Tanzanian human rights advocates face the challenge of making international rights accessible, understandable, and desirable to communities and individuals who may have vested interests in maintaining customary laws that privilege them in one way or another. For
example, when advocating for a new law that would give legal land rights\textsuperscript{9} to women, Tanzanian human rights lawyers had the task of effectively educating villagers about why the new law was better than longstanding values and practices of the community. As Tsanga (1996:21) points out, “taking (international) law to the people” is challenging where “law is only one normative system among others that influence people’s lives and compete for their attention”. Despite the institutional constraints faced by the NGOs, government-NGO relations, and the varied cultural practices they confront in any one region, Tanzanian human rights NGOs have looked upon international human rights laws as useful tools for advocating gender equality. The existing tensions between human rights NGOs in Dar es Salaam and the Tanzanian state have worked to conscribe the activities of rights NGOs to politically acceptable arenas and avenues. Yet, NGO human rights lawyers find the flexibility within ADR settings to creatively translate and utilize human rights in ways that are immediately meaningful to women.

4. \textit{Cause Lawyers and ADR—WLAC’s and TAWLA’s Legal Aid Clinics}

Anthropologists researching the role of authority figures including lawyers, judges, and advocates within different legal settings have argued that these are influential individuals with the ability to shape legal discourse and outcomes for clients. Sally Engle Merry (2006) demonstrates that power among NGO delegates at UN meetings is closely connected to language mastery, the delegate’s place of geographical origin, and their knowledge of human rights instruments. In Tsanga’s study of legal literacy projects in Zimbabwe, she finds that legal educators and service providers are most productive when they connect new legislation to their client’s own sense of cultural identity. In the same vein, Susan Hirsch’s (1998) study of \textit{kadhi} courts in Mombasa demonstrates the powerful role of both judges and clients who use cultural norms and rights to support their arguments.

The lawyers and trained mediators that compose this study were members of a group of human rights and feminist NGOs in Dar es Salaam called

\textsuperscript{9} In NGO members’ conception, “legal land rights” would mean giving women legal rights to possess land separate from their family members. While the new land laws (Land Act 1999) provide women the legal right to own land through purchase, the NGO members went further and argued that women should be given legal rights to inherit land as that is the predominant means by which a majority of Tanzanians come to possess land. The NGO land rights advocates were not successful on this front.
the Feminist Activist Coalition (FemAct). The lawyers and mediators in Tanzania's NGO legal aid clinics are trained in human rights law and advocacy. They are 'cause lawyers.' Sarat and Scheingold state that cause lawyering as a distinctive legal practice encompasses "...lawyers who devote their entire professional lives to a single cause as well as lawyers who are less closely identified with any cause" (Sarat and Scheingold 2005:51, citing Hilbink 2003). Hajjar (1997:474) notes, “In contrast to ‘conventional’ or “client lawyering,” which is tailored to accommodate prevailing arrangements of power, cause lawyering involves the application of professional skills and services to transform some aspect of the status quo.” Human rights lawyers working in Dar es Salaam's legal aid clinics are agents of change who employ local, national and international human rights laws with the view of changing women's social and economic status. Importantly, although a cause lawyer may occupy a subject position of human rights lawyer, these same advocates are also products of their cultural surroundings and bring to their lawyering not only human rights discourses, but culturally and religiously informed discourses on rights and what they conceive to be 'proper gender relations.'

Within the FemAct Coalition, all interviewed members identified themselves as human rights and/or women's rights activists while a large majority (70%) of NGO members identified themselves as feminists. While there existed a wide range of ideological positions in regards to feminism, there was consensus among Fem Act members that women's social, economic, and political status in Tanzania needs to be raised and made equal to men's. Members advocated women obtaining equal rights with men and a large majority argued that the best way to ensure equality was to give women equal and individual legal rights. Complicating the commitment to individual rights however, was the issue of land rights, where a significant number (around 20%) of NGO professionals argued that group rights might be just as important as individual rights in special circumstances. However, most NGO lawyers agreed that if rights were granted to groups, room could still be made for individual rights within the group. Legally speaking, FemAct members argued for a liberal conception of rights; a conception that assumes an autonomous self who makes freely chosen rational decisions. However, in their ADR interactions

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10 This research was carried out from December 2004-December 2005 with funding from the Fulbright Hays Doctoral Dissertation Research Abroad Fellowship.

11 A total number of 29 NGO members, 25 women and 4 men, were interviewed working in eight of the different FemAct NGOs.
with clients, NGO members were reflective of more recent liberal thought which advocates a theory of the self that finds room for cultural membership and other non-chosen attachments and commitments that also constitute the self (Kymlicka 1989).

The two NGOs on which this research is based administered free legal aid clinics that exclusively catered to women. The Women’s Legal Aid Centre (WLAC) and the Tanzanian Association of Women Lawyers (TAWLA) began their legal aid schemes in 1989 recognizing that a majority of Tanzanian women were unable to access legal resources due to cost. Both of the organizations offer free legal services to women regardless of color, race, religion, political or ethnic affiliation. Both organizations have seen a consistent and significant annual increase in the number of clients they receive (WLAC 2003 Annual Report, personal communication Tumaini Silaa, TAWLA).

At the time of this research (2004–2005), the majority of cases received by the women’s legal aid centers were matrimonial cases. Grouping the cases into family disputes versus non-family disputes, the majority of cases in the clinics were family related disputes. These include matrimonial cases, child maintenance, child custody, affiliation, inheritance and some land disputes. Non-family disputes included civil cases, criminal, labor, insurance, education and also some land disputes. In 2003, WLAC reported that out of a total of 3,639 cases attended by the Centre, they were able to represent only 94 clients in various courts of law (WLAC Annual Report 2003). While they did not disaggregate their data to show which types of cases were represented or which reconciled, there are many more cases reconciled (or advised and counseled) than sent to court.

Family cases are represented by both WLAC and TAWLA; however, typically as a last resort. In those cases, the majority of women clients won favorable judgments. Why are women not being referred to or represented in court more often? Would it not contribute more toward addressing the underlying gender inequalities and injustices if these records were public instead of private affairs? Feminist scholars and activists have argued for the importance of getting ‘private’ cases into the public record (Bold et al. 2002), in order to serve as precedent for future cases and become part of a nation’s legal history and cultural memory. Indeed, in Tanzania judges and lawyers recognize the importance of case precedent as has been shown in the famous 1989 case Epharahim v. Pastory.12

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12 Recognizing this problem WLAC spearheaded a test litigation inheritance case that went to the High Court in 2006 (Bourdon, 2013). If the case is unsuccessful at the Court of
Could there be an underlying presumption that women's cases are still considered unimportant or is something else at work here, situations that are more complex?

While the NGOs inhabit a liminal space between local venues of dispute resolution and state courts, they are in the position to effectively act as a bridge between the two. On the one hand, they are familiar with their clients’ positions and the clients trust the women lawyers. Lawyers are able to sympathize with their clients while providing them with a new language of rights by which they can differently conceptualize and understand their grievances. Further, as women continue to be educated about their rights at the clinics, one can hope they will bring that education to their local women's groups or to other members of their community. These processes, the way the law ‘travels,’ require new analytical tools for measuring the effects of the law on women’s lives.

5. Lawyer-Client Interactions and the Transformative Potential of ADR

Research for this chapter is based on one year (2004–2005) of anthropological research in which I interviewed a total of 29 NGO professionals and 35 clients and sat in on dozens of lawyer-client interactions including initial meetings, follow-up meetings, a fact-finding mission to Singida where lawyers spoke with clients of paralegal centers, and in reconciliation sessions. I was also part of a fact-finding mission where our NGO team spoke with clients of paralegal centers about human rights. The research focused on family law cases including marriage and divorce, inheritance and land cases. Nearly all of the clients arriving at the clinics had sought advice from other sources before arriving at the NGOs including advice from friends and family, religious and community leaders, primary courts or religious courts. Women gave a number of reasons for visiting the NGOs. First, they utilized the NGOs for legal document drafting and to follow up with court decisions. Second, clients viewed the NGOs as places where their voices would be heard. Third, a majority of clients believed that

Appeals, the lawyers have considered taking the case to the Human Rights Committee rather than the African Court on Human and People's Rights precisely for the reason mentioned above. The African court does not make its decisions public, something the lawyers consider important for the case. See Nipashe 18th June, 2004 "Sheria za mirathi za kimila zibadilishwe."
women lawyers would understand their (clients’) issues. Finally, women felt that they would be able to ‘get’ their rights at the NGOs. In fact, 96% of the clients interviewed expected to win their cases and get their rights by utilizing the NGO.

The remainder of this chapter explores lawyer-client interactions through resolution / reconciliation in WLAC and TAWLA. Tanzanian NGO lawyers are working at the interstices of law and society. Those spaces are explored in greater depth; particularly in lawyer-client interactions and in cases of alternative dispute settlement. In Dar es Salaam, NGO professionals in the legal aid clinics do less arbitrating and more mediating. In what follows, I present a contextualization of ADR by examining the central role it plays in Dar es Salaam’s NGO legal aid schemes. Using an actor-oriented approach to examine these situations, I analyze actors’ “moves” as they reveal clues to broader gender relations and people’s relationship to law in Dar es Salaam.

Processes of dispute settlement involve norms and rules on the one hand and interests and power on the other (Otterbein 1977:167). Traditionally, lawyers have given weight to the former while social anthropologists have studied the later. By studying processes of dispute resolution within the context of Tanzanian human rights NGOs, the juncture between the two reveals how and which rules (broadly speaking) are invoked and who promotes their interests and in what ways. This research reveals how NGO practitioners integrate human rights laws and other normative discourses in dispute settlement, particularly in land and property disputes. I focused on three types of disputes, all of which are inextricably intertwined with women’s access to and ownership of land / property: land cases, divorce cases, and inheritance cases. Since land is intimately tied to marriage and inheritance arrangements, it is necessary to examine these types of disputes.

Pursuing certain themes in dispute settlements provides insight into the social dimensions of the case beyond the borders of the manifest dispute (Nader 2002:44). A matrimonial dispute will not only involve the legal processes of adjudication, but also will reveal peoples’ positions of power relative to each other, influencing how they position themselves, assert their interests and actively reframe the direction of the case. Nader

13 An actor-oriented approach refers to a method(ology) of looking at individuals’ actions with particular interfaces, say development, law, or medicine. While these interfaces /interactions are power laden, an actor-oriented approach facilitates understanding of how people shape processes and outcomes in ways that are creative as well as constrained by the structures and sets of power relations of which they are a part.
suggests using the power relationship or asymmetry between the individ-
uals involved in the case as a measure of analysis. However, since power is
practiced rather than contained, and since it is practiced differently by
individuals depending on context, we must be cautious in proclaiming
‘women’s empowerment’ in one context without recognizing that empow-
erment is also dependent and contextual.

Individuals in the reconciliation cases that I observed employ three
main argumentative tools to frame or guide the dispute resolution: “gen-
der roles,” the notion of “the good wife” and “legal and ethical responsibil-
ity.” These tropes are powerful rhetorical devices that guide the case
toward an individual’s desired outcome. Language plays a critical role in
these discursive events as I discuss below. There are other motivators that
influenced how parties of a dispute discussed their cases and these
changed over time. For instance, the extent to which a person was knowl-
edgeable about their legal rights influenced how aggressively they pur-
sued a case. How complainants envisioned the weight of the injustice
committed against them acted as a further motivator. All of these issues
were at play in influencing how a reconciliation proceeded.

A client’s experiences at the NGO are informed by the initial encounter.
When a new client arrived, the manner in which they were received very
much depended on the lawyer. For instance, some lawyers immediately
made eye contact, smiled and welcomed the client, promptly asking about
their problem while others took a different approach. Clients would arrive,
apprehensively sit in front of a lawyer after a cursory welcome and then
remain sitting, unspoken to for sometimes up to five minutes. This is a
common practice in Tanzanian bureaucratic environments, but just the
same it effectively establishes the parameters of the relationship, indicat-
ing the privileged position of the lawyer in relation to the client. A more
forthright greeting and commencement of the case would suggest other-
wise, perhaps a relationship of mutual respect and one that indicates the
lawyer is at the service of the client. In this opening encounter, consciously
or not, the lawyers and NGO professionals made their first ‘move,’ estab-
lishing their authority, that informed the boundaries of the exchange
about to take place.

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14 This was observed at one of WLAC’s paralegal offices in Shinyanga in some form or
other during research in 2010. One lawyer was particularly stern and demanding of his cli-
ents. When asked about this, he responded that he “didn’t want to be taken advantage of....
or manipulated....or lied to” by clients.
Language plays an important role in these interactions. Language as an analytical tool can broadly be viewed in two ways. A formalist approach views language as an abstract system; a formal grammatical structure through which information is being conveyed. For formalists, the use of language as a medium to express meaning is of little interest. In contrast, an instrumentalist understanding of language, considers language as it is used as a means to an end. Only through its use is it possible to approach an understanding (never a ‘meaning’ per se). This second view is most useful in looking at language in the context of lawyer-client interactions.

Scholars studying dispute processes have examined how language use in the courtroom can act as a powerful control device as well as influence outcomes (Englund 2006; Hirsch 1998; Mertz 1994). Mertz has noted that “language structure and use in the courtroom may exert a power of its own” (1994:444). Wanitzek goes further to claim that, “Language in the courtroom may be described as an asymmetrical discourse between court officials and parties to a case. One party (the court official) has institutionally constructed control over talk and a good deal of actual power over the other party” (2002:7). Wantizek argues that language instantiates power; I will argue a more subtle point based on my data, which is that language use between people with asymmetrical status can influence the direction and shape of a case. This is an important distinction. It is people’s relationship to and use of legal language, which Wanitzek discusses, that can hinder their access to justice in the courtroom.

While “language structure in the courtroom can exert a power of its own” (cf Wanitzek 2002; Hirsch 1998; Obeng and Stoeltje 2002), what of language use outside of formal (i.e. courtroom) legal spaces? How is language used by NGO lawyers and professionals and their respective clients? In what follows, I provide a detailed account of one dispute resolution to illustrate how narratives are constructed by each of the parties during the meeting. I am using detailed evidence from one case as an example of the types of linguistic strategies I recorded in other lawyer-client interactions. While this case includes more than one of the rhetorical devices that I discuss, there were other cases that only employed one device such as the narrative of ‘the good wife’ but did not employ others.

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15 Wittgenstein (1953) reminds us that, “...the meaning of a word, is its use in the language” (Philosophical Investigations).
16 I agree with Hirsch’s assertion that “As a practical matter, it is extremely difficult to present more than one set of initial narratives in their entirety.” Detailed study of one example can reveal how subjects organize their dispute and illuminates the construction of social life through talk (Hirsch 1998; Moerman 1988).
6. Gender Roles and Responsibilities—Navigating Normative Frameworks for Women’s Rights

Other research on gender, language and law in the courtroom illustrate how strict rules of behaviour and procession in the courtroom are important factors that inform the litigants’ speech and what types of narration are acceptable in courtroom proceedings. In their work on Akan juridical discourse Obeng and Stoeltje (2002) detail men’s and women’s styles of narration in the court where men are more aggressive and direct in their speech patterns while women employ downtoning and other polite forms of speech. Their narration and argumentative styles are accepted by the court differently which can play a significant role in the way a case proceeds and how it is decided.

The atmosphere in reconciliation sessions in the NGO clinics is much different than those in the Akan courts described by Obeng and Stoeltje. There are no particular ‘rules’ per se but it is expected (by the lawyer) that the parties will proceed in a respectful manner and when this does not happen, the lawyer will assert her position as mediator to correct, stop or guide the complainants’ narration. The following excerpts (Excerpts 1–5) are based on a matrimonial reconciliation case. The couple had been in once before and reconciled but the reconciliation broke down and they were returning for another session. The husband and wife arrive and are guided into the office by a legal officer at WLAC, who will conduct the reconciliation.

The husband and wife are equally well dressed. The husband is in slacks and a button down long sleeved shirt and the wife wears a kanga wrapped around her waist worn with another one expertly wrapped around her head. The lawyer takes a seat at her desk and the couple sits side by side barely more than a foot away from each another, facing the lawyer. I sit in a corner desk a few feet from the lawyer facing all of them. Theirs is a Christian marriage. Everyone greets each other respectfully and the atmosphere is generally relaxed.

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17 While this reconciliation was not tape recorded, I am relying on my notes of the event. Where quotes are used, they indicate an exact account of what the individual said. Otherwise, some of the conversation is paraphrased. “H” indicates husband, “W” wife, and “L” is the lawyer. The dialogue is translated from the Swahili.
Hirsch notes that this gendered pattern is typical across mediations. She states, “Women tend to refer to real-life events, while men justify their actions and beliefs on the basis of rules” (1998:176). In this case the husband is referring to what he feels are socially agreed upon rules of marriage.

Excerpt 1

L: [In a playful manner, sitting down and smiling] “We all want reconciliation in the case of marriage!”
H: “Everything is changing now in Africa. Before the wife would do the washing, cooking, cleaning, now everything is being changed, turned upside down.”
L: “You make a good couple. Many things in life are now changing.”

In these opening remarks, the lawyer makes a claim to everyone’s desires though the parties have not spoken. By stressing that everyone wants reconciliation in marriage, she asserts a moral claim that what is considered socially desirable is the maintenance of the marriage. Without directly rebutting her (though below his intentions become clear), the husband changes topic, reframing the issue in more abstract terms and asserting the core problem in this dispute. The problem is changing social conditions, especially changing gender roles (in all of Africa). He says nothing directly about his own marriage thus far but it is alluded to in his generalization—“before the wife would do the washing, cooking, cleaning, now everything is...turned upside down.” The lawyer then attempts to try to draw the mood back toward one of amicability and stresses that they “make a good couple.” This is not an uncommon practice in therapy settings as well.

In the next excerpt, we see the husband begin to express his grievance with the wife, with issues specific to his marriage. At the same time, he attempts to rely on an assumed culturally shared notion of the essence of gender and proper gender roles and responsibilities. He emphasizes that the problems specific to his marriage are not merely his own perceptions of what a “good woman / wife” ought to be but ones that are shared by other Tanzanians.

Excerpt 2

H: “You know it’s easy for people to forgive, it’s easy for women to forgive but for men to forgive it’s very hard, not like for women” but in Swahili society these changes are hard. She goes out and I don’t know what she’s doing...if she’s working, going to the shop, or going here or there.

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18 Hirsch notes that this gendered pattern is typical across mediations. She states, “Women tend to refer to real-life events, while men justify their actions and beliefs on the basis of rules” (1998:176). In this case the husband is referring to what he feels are socially agreed upon rules of marriage.
L: People change, society changes.

H: She can go outside, can go out to do business and return. When she goes out and these things happen and she returns late...and then I'm at home and say I'm tired. But you [addressing the anthropologist researcher]. “Do you think these things are because of external forces or...”

The husband in this excerpt again attempts to paint himself as a victim of a fast changing society with which he is not ready to move (both of which may well be the case). Again relying on what he perceives are innate gender differences, he pleads that for him, as a man, he cannot forgive as easily. The use of the word “forgive” in this instance indicates that there has been a wrong committed against him. It places blame and the wrongdoing on the wife. She has not lived up to her wifely responsibilities, presumably by going out “here or there.”19 His complaint that he “doesn’t know what she’s doing” indicates that her activities are perhaps not desirable. It is apparent that he is ill at ease with these societal changes as he again asks, this time directing the question at the anthropologist researcher, why is this happening? Are these changes due to some external forces?20 As Allott notes (1980), law is only one normative system among many which compete for the attention and allegiance of those who use them. von Benda-Beckmann (1988) concurs as he asserts that villagers “readily shield themselves behind their own culture, their folklore and world view, when they do not want to follow somebody else’s instructions and yet they may constantly deviate from it when it suits them” (in Tsanga 1996:54).

In the next excerpt, the lawyer makes a move invoking the law to guide him away from his moralizing of gender roles toward making the parties aware of the legal (gendered) responsibilities that accompany a marriage.

Excerpt 3

L: You know...what the laws in Tanzania say? “One, that husbands must take care of their wives and children and two, that women and children must be cared for in each and every thing.”

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19 The expression *kuenda hapa na huko*, “to go here and there,” is often used by men and women in a derogatory manner if there is suspicion of bad behaviour (on the part of the other sex) and is likely being used here to indicate that the wife is having extramarital sexual relations.

20 This is reflective of widespread use of gendered ways of questioning. See Hirsch (1998:189).
H: I know these things but you know “human rights say that women and men are equal so we should take care of each other—men [should take care of] women and women should take care of men.”

L: Yes, but in history, what have women done for work? What have women been? Housewives! Women have not had the opportunity to make money like men. I don’t want you to go to court. Going to court will really disturb you….According to the law, you have to help her.

H: The court will say that I have to give her this, that, this, that, maybe all. But she has changed in this marriage.

In this exchange, the lawyer’s discourse weaves between Tanzanian state law21 while integrating her perspectives on and imparting a lesson about the historical role patriarchy has played on family gender dynamics and work. The lawyer also relies on a customary / religious /ethical notion of responsibility that the husband needs to provide for the wife. At this, the husband becomes defensive and a bit angry and invokes his understanding of human rights, which states that women and men are equal. For him, human rights supports the notion that men and women have a responsibility to each other—men providing financially for the women, and in turn women ‘caring for’ the husband (i.e. by cleaning the house, cooking the food etc.). This speaks directly to the notion of gender complementarity discussed by other scholars of African feminisms (see Mikell 1997). While his notion of rights is interpolated with a customary understanding of gendered rights and responsibilities, the lawyer does not correct him by making the finer point that human rights laws state women and men should be given equal opportunity (not that they are equal, as the husband asserts). Tsanga (1996:102) would speak favorably of the lawyer’s approach here. In her own research in Zimbabwe, she notes that taking into account men’s own fears, interests and needs, “legal literacy programmes that are confined to orthodox approaches that emphasize knowledge of rights only, are bound to miss the crucial multiple and interdisciplinary issues that need to form a core of the message if change is to take place.”

The lawyer then points out that the two spheres which men and women have occupied are not the same economically. Men have been given the opportunity to work outside of the home while women have not. Here, the lawyer asserts a political position that reflects her understanding of justice and fairness in gender relations. She moves away from a normalized and naturalized notion of gender relations to one that speaks of their socially

constructed, and thus changeable position. At this point, it seems the reconciliation has broken down. The lawyer is no longer speaking in terms of salvaging the marriage, but keeping it out of court. Still, she stresses that the husband must compensate or “help” the wife as the law says he must do.

Until this point in the dialogue, the wife has said nothing. She has remained quietly seated without rebuking her husband’s claims that she is exhibiting unacceptable behavior or that she is the party responsible for the breakdown of the marriage. However, during the discussion of compensation, she interrupts her husband to say, “We built the house together.” *Tuliyopata pamoja.* (lit: “We got it together”) It appears that all else that has been said does not matter as much as the fact that this house belongs to both of them and she wants to be sure that this is known. There ensues a short inquiry that reveals the husband and wife possess a house in Tembeke but they also have started building a frame for another at Tegeta (both of these are areas in Dar es Salaam).

After discussing how much has been spent on the house, the husband makes note that his wife owns her own shop and yet when asked, he has given her money for small things. To this the lawyer responds, “You know things involved here are many. You know you control the money and she depends on you. Many poor women don’t know how to use money well.” Once more, the lawyer integrates into the conversation historical configurations of husband-wife relationships while recognizing the wife as a ‘communal liberal self,’ one who is constrained in her actions by social conventions and local arrangements of power. During the lawyer and wife’s discussion of the financial assets, the husband interrupts:

*Excerpt 4*

H: I paid for each and every thing when she went to the hospital until she got well and left, is this right [to the wife]?

W: Yes.

L: Michael, she’s your wife! [slightly laughing]

W: Every time he speaks of our house Michael says, “It’s not our house, I paid for it.”

L: Michael, you both built that house, even if she was doing work in it, she contributed to it. The house is *both of yours.* Natalie, you see if another woman came into my own house and claimed that he is her husband...eh! It is not possible.

[All parties begin to raise their voices and talk at once]
Since the reconciliation is failing at this point, the lawyer begins to assign the wife victim status with the hopes of eliciting some sympathy from the husband and holding him to his marital duty to provide for her, since he is the primary breadwinner. This part of the exchange ends when the lawyer insinuates to me a deeper problem in the marriage that has not yet surfaced, whereupon all parties begin to argue. After the reconciliation, I learned from the lawyer that the husband had found himself a mistress (*nyumba ndogo* lit: a "little house") and this is what was really at the root of the marriage dispute. He wanted out of the marriage and the mistress had recently been coming to the house claiming that Michael was her husband, a preposterous accusation since reportedly the entire community knew that he and his wife in this dispute were the real couple. However, since they contracted a customary marriage, with no certificate, ploys such as these are commonly used to dissolve a marriage and additionally to protect the husband’s assets against any claim by his ‘legal’ wife. While this strategy may seem a stretch, its success is often contingent upon the woman’s status in the community and who she can garner support from. If she has poor relations with her in-laws and a bad reputation in the community, they may back his claim that she was “just a girlfriend” and that they were never really married. The reconciliation ends with the final excerpt.

*Excerpt 5*

H: “For two years now, we have been fighting. Help us. I want to go to court.”
L: “She loves you. Do you love her?”
H: “I, well…”
L: “Do you love her?”
H: “I love her when she is a good wife.”
L: “What do you want?”
H: “I want a divorce. I want her to get her rights and I want mine.”
L: “You want to go to break the marriage.”
W: “I haven't agreed to the divorce.”
L: He will pay 60,000 a year for the house. She has agreed. And 60,000 a month for food and business things. I don’t like to dissolve a marriage at all. You have to start paying this month.
H [Taking out his money and giving her a wad]: “You know I don't have money. It is hard to find money.”

In the end of the session, the lawyer makes one last attempt to bring the husband and wife together. Speaking for the wife, she tells the husband
that the wife loves him and then asks if he loves her. He answers that he loves her “when she is a good wife,” which we now know by his earlier confession is one who cares for the house and does the cooking and cleaning, not one who is out doing business or staying out late without informing him of where she is going. The wife, having hardly spoken, says she still has not agreed to the divorce, but the lawyer concludes by telling the husband what he will pay to the wife in alimony after the dissolution of the marriage. The husband pulls his money out in anger on the spot and pays the wife her monthly allowance.

The lawyer-client exchange above is exemplary of the theoretical framework and organizational models in which WLAC and TAWLA lawyers work (see Tsanga 1996 163–165). While the two NGOs emphasize the need to make the law accessible to the most marginalized, advocate for and pursue test cases aimed at legal reform based on notions of equality, and work to establish paralegal centers in rural areas, they use ADR as another strategy to ensure that women are being treated equally before the law, even in cases where the law does not provide for that equality. This type of work, their discourses that rely both on individual notions of rights as well as existing notions of gender roles and responsibilities, must be understood and appreciated within the the wider socio-political context of Tanzania.

The lawyer in this case exerts her power when she feels the husband is out of line with his generalizing and moralizing of gender roles and shifts the discussion to the woman’s legal rights and the husband’s legal (and moral) responsibilities to provide for those rights. She is the one who determines, without input from the couple, what is to be the proper monthly allowance the husband is to pay the wife, effective immediately. Since per capita income in 2004 was $USD 300, the payment owed by the husband is considerable at 65,000/= or $65 a month. During other reconciliation / mediation sessions, NGO professionals were able to sidestep the letter of the law to obtain more money for the woman than the courts would give her. As parties agree to the terms of reconciliation by signing a contract, the agreement can be taken to court should the husband not follow through with regular payments.

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22 U.S. State Department website http://www.state.gov/r/pa/ei/bgn/2843.htm Dar es Salaam has a considerably higher per capita than the rest of the country.
23 60,000 monthly alimony plus the 5,000 monthly allowance for the house, roughly $65 a month.
7. Conclusion

When struggling for land law, marriage, and inheritance reform, NGO lawyers at WLAC and TAWLA most often make use of international human rights instruments in order to pressure and shame national leaders into compliance with international conventions. They repeatedly asserted that the CEDAW was the most useful tool for advocacy, stating that it is very clear about state responsibility for ensuring women’s rights. At the local and individual level however, cause lawyers must translate these individualist conceptions of women’s rights in ways that are acceptable and preferable to their clients. However, there is a schism between the conception of gender equality embodied in the CEDAW and local ideas about gender equality based on notions of ‘complimentarity.’ While legal rights are invoked in ADR cases, NGO lawyers use rights as moralizing discourses, blending notions of legal rights with religious and customary notions of rights in order to arrive at what they consider to be a just conclusion. Where the law does not meet up with their notions of justice, NGO lawyers rely on extralegal maneuvers to arrive at decisions regarding standards for payment of alimony and child support based on what they feel the men in these cases can and will pay. This chapter has examined how the domain of ADR has the potential to change women’s situations under the law and how the law is actively employed to implement women’s rights, albeit on an individual basis.

What do we learn through this and other examples like it of the potential for human rights through processes of alternative dispute resolution or informal legal settlements? Are the cases illustrative of an ideology of coercive harmony as Nader argues or could they be as Mertz suggests, informal spaces where the “...invocation of formal “rights” discourse [can] sometimes ha[ve] the effect of empowering marginalized people” (1994)? As is most often the case, the answer lies in neither one nor the other in absolute terms. On the one hand, by keeping these cases out of court they do not have the potential to serve as legal precedent or to be made public in conventionally legal ways. However, these disputes are mediated by human rights lawyers, whose goal is to make rights a reality for women. Their cases would be handled differently in other contexts and be contingent upon the position of the mediator. Over time with the state’s receptiveness to the NGOs’ evidence and persistence of mounting matrimonial and inheritance problems and how they affect women’s status, one can hope for legal change.

The popularizing of ADR both through transnational processes, governmental endorsement, and local initiatives has been both problematic and
promising. For instance, the Tanzanian state has made it compulsory for a couple to seek out ADR through the Marriage Conciliatory Board (Usuluhishi ya Ndoa), if they wish to seek a divorce. There were a number of clients at the clinics who complained about this process since their marriages involved instances of domestic violence. Still, they were forced to go through a process that tried to mend their marriage while at the same time forcing them to make a decision to publicly expose what was to them an embarrassing narrative. These cases are indeed ones of ‘coercive harmony’ and are in urgent need of redress by the state.

In this chapter, I have argued for the importance of attending to the role of language use in order to discern what power relationships are at play in guiding the processes and outcomes of ADR cases. The rhetorical devices including proper gender roles, the notion of a “good wife” and legal and moral rights and responsibilities were employed by lawyers in most lawyer-client interactions and in reconciliation cases at the legal aid clinics. Central to these processes and outcomes is the lawyer’s role as mediator in framing the discourse in terms of legal and human rights while at the same time relying on culturally accepted notions of gendered rights and responsibilities. However, lawyers often framed situations in moral terms, detailing the duties and responsibilities of ‘the good husband.’ Finally, NGO lawyers take advantage of the ADR process by considering what is just and asserting their power to make decisions about remuneration that sidestep the letter of the law.

As the role of language use and the position of judges were central in Hirsch’s (1998) study of kadhi courts in Mombasa, gendered subjects and gendered language remains an important area of inquiry into ADR practices in different contexts. Though we must critically analyze how and why transnational actors and organizations advocate for the use of ADR in particular domains, we must also recognize this as a relatively new and additional layer to long-standing dispute resolution processes in African countries. We must examine closely how ADR is being used in some contexts as a tool for empowerment and as an alternative pathway toward the realization of women’s rights.

When looked at through a feminist jurisprudential lens, ADR offers a venue where women can narrate their stories in their own voices (Rifkin 1984). Mediation allows procedural flexibility (McCabe 2001) often not found in courtroom settings and recognizes women’s demands to be acknowledged. While these cases are not building legal precedent, the first step toward a feminist jurisprudence is “to claim women’s concrete reality” (MacKinnon 1989:244). In the case of Tanzania’s human rights NGOs, the role of the mediator is especially significant in allowing a space for
women to have their complaints heard in a language of their own. As demonstrated here, Tanzanian human rights lawyers use ADR to challenge gender relations and make legal awards to women in ways that would not be possible in other legal settings such as the courts.

References


CHAPTER TEN

TRANSLATING WOMEN'S RIGHTS IN NIGER:
WHAT HAPPENED TO THE ‘RADICAL CHALLENGE TO PATRIARCHY?’

Kari Bergstrom Henquinet

1. Translating Women's Rights

This chapter examines the process of translating women's rights in two transnational aid organizations in Niger, CARE and UNICEF. Debates around international promotion of rights and gender equality are often centered on whether or not these concepts are imperialistic or universal with little emphasis on non-Western alternate conceptions of human rights and actors’ agency to reshape hegemonic ideas. However when one grounds studies of women's rights in concrete histories and languages, the focus moves away from simply dominant and normative Western ideas of rights embodied in constitutions and laws of liberal democratic states and promoted by the UN to multiple frameworks, translations, and reformulations of women's rights. In my study in Niger, the process of translation and negotiation of women’s rights in prominent transnational aid organizations results in reformulations of women's rights and many times an accommodation of patriarchy rather than the challenge to it that is evident in official policy documents at the highest levels of these organizations.

Rights are understood to be inherent, individual, and equal in the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and formal legal systems of liberal democratic states. Yet certainly other ways of conceptualizing rights exist. Some studies have moved beyond debates over whether human rights are simply imperialistic or universal to see such alternative conceptions of rights. For example, Makau

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1 This research was funded by a Fulbright-Hays Doctoral Dissertation Research Abroad Grant. I am grateful to the editors of this book, Sara Thiam, and Rebecca Lorins for their helpful feedback on earlier drafts of this chapter. I am also greatly indebted to my research informants and colleagues at CARE and UNICEF in Niger for their collaboration on this project.
Mutua (2002) presents a case for pre-colonial African conceptions of rights centered on rights and duties within family and community relationships. Similarly Nzenza-Shand (2005) argues for a collective view of human rights in many African societies. Ciekawy discusses notions of “freedom, the importance of cultural expression, justice, and human accountability” among Mijikenda kaya elders in Kenya (2000, 24). And Speed describes rights among Zapatistas as “existing in their exercise, not as designations from God/nature or the state/law” (2007, 184). The encounters such groups have with other conceptions (often hegemonic) of rights and gender continually produce new reformulations and translations of rights. An analysis recognizing such alternative histories and conceptions of rights allows for a richer study of the process of translation.

In this chapter I describe and analyse how ideas about women’s rights as individual, equal and inherent that are promoted by two transnational organizations, CARE and UNICEF, become reformulated as rights that exist within relationships with reciprocation of duties and that accommodate social hierarchies when they are translated into Niger’s linguistic and cultural context.

In understanding how such differences are created, the anthropologist Sally Engle Merry has pioneered a framework for studying translators of human rights, who in her work constitute a wide range of transnational social movement activists (2006a, 195–212, 222), legislators (2006a, 206–212), social workers (2006a, 195–212), development professionals (2006b, 43), and scholars (2006b, 45). In her framework, she uses the term ‘vernacularize’ (Merry 1997, 2006a, 2006b) to discuss how ideas from transnational sources are “adapted to local institutions and meanings” (Merry 2006b, 29). While this means reframing a concept to resonate in a particular culture, to ‘vernacularize’ does not involve changing its fundamental meaning (Merry 2006b, 49). ‘Vernacular’ rights, Merry argues, maintain “basic assumptions about the values of choice, autonomy, equality, and the protection of the body” (Merry 2006a, 216). ‘Indigenization,’ Merry emphasizes, does shift the meaning of a concept as it is made resonant with cultural norms (2006b, 39). However, Merry argues that in her research on gender violence human rights ideas were not fully ‘indigenized’ because of connections to the transnational legal order, states, funders, and ‘local communities’ (2006a, 225, 2006b, 49). Drawing on the complex and uneven process whereby human rights is translated, Merry in her research concludes, “Although human rights ideas are repackaged in culturally resonant wrappings, the interior remains a radical challenge to patriarchy” (2006a, 221).
It is precisely these issues of ‘vernacularization’ and ‘indigenization’ in translation processes that I too explore in this chapter. However, I argue that in the process of translation, the radical challenge to patriarchy found at higher levels of CARE and UNICEF often becomes reformulated or ‘indigenized’ to accommodate patriarchy. My focus on transnational development interventions (rather than Merry’s main focus on international law, transnational activists, and governments) in the specific historical, cultural, and linguistic context of the Maradi Region of Niger illuminate processes of negotiation when translating women’s rights in a strongly patriarchal and hierarchical society. As noted in the introduction to this volume, “translations are active, innovative, and local, providing new meanings to rights” (see page 40).

2. Development Organizations and Women's Rights

The role of non-governmental actors in promoting human rights has become increasingly significant in recent years. The downsizing of government and growth of nonstatal development organizations throughout the period of structural adjustment policies (SAPs) in developing countries is critical to understanding the backdrop to why organizations like CARE and UNICEF have come to play a prominent role in communicating and advocating for rights with the general public in Niger. As the capacity of the state to be involved in development work has been shrinking in countries like Niger under structural adjustment since the 1980s, transnational aid organizations, community-based organizations, and other non-governmental groups have been stepping up to fill the gap. At the same time, ideas about gender relations and human rights were becoming prominent in transnational development discourses throughout the 1990s, continuing to the present. As a result, one finds non-governmental actors communicating women’s rights to the poor alongside various forms of development aid.

In this context, language is particularly critical. State law incorporating human rights in most African countries remains unknown to many citizens due to what Alamin Mazrui refers to as “the excessive centrality of the imperial languages” (2004, 62). Little attempt is made by governments and NGOs in Africa to make quality (or any) translations of African constitutions or other human rights documents available in African languages (Englund 2006, 55–7; Mazrui 2004, 63). In Niger, where the adult literacy rate is merely 28.7 percent of the total population, few can read such

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2 Mazrui notes that Tanzania is an exception as Swahili is used in parliament (2004, 64).
documents anyway (UNDP 2010, 195). With government downsizing throughout Africa, few resources exist for educating the public on legal matters in general. National human rights laws, therefore, remain inaccessible to a large number of citizens in African countries. Thus, those not fluent or literate in European languages tend to derive notions of rights from local customs, religious beliefs, historical practices in the region, and interactions with development organizations promoting human rights. Furthermore, employees, volunteers, and collaborating partners working with development organizations such as CARE and UNICEF act as translators and communicators of human rights concepts into African languages. Many of them, but not all, are fluent in French as well as Hausa, the dominant language in the Maradi Region where this research was carried out. In their search to understand and negotiate the meaning of women’s rights in their work, they too draw on competing, alternate conceptions of rights in Islam and historical practices in the region. They blend Hausa and French, at times carefully choose terminology, and struggle to find ways to express women’s rights as discussed within their organizations in wider Nigerien society. Notions of rights that they end up communicating can vary considerably from national legislation, international human rights law, and policy documents of CARE and UNICEF.

3. Methods

This chapter is based on the multi-sited ethnographic field work I undertook in Niger in 2004. I conducted interviews, collected documents, and participated in meetings and daily life at six different sites where CARE and UNICEF work: the capital city Niamey, the regional capital Maradi, the sub-regional capital Madarounfa, one rural town where UNICEF intervenes named Tchikaji Gajéré, one rural town where CARE intervenes named Garin Jakka, and a vibrant trading town named ‘dan Issa where CARE holds trainings. The latter four are all south of the town of Maradi in Madarounfa Department. At these six sites, I conducted a total of 28 semi-structured interviews with key Nigerien employees and volunteers of UNICEF and CARE involved in gender and rights-based programs. In addition, I drew a random sample of households in Garin Jakka and Tchikaji Gajéré from a list of all households that I compiled with key informants. I conducted 84 in-depth, semi-structured interviews on household economies, gender roles, and rights with one man and with one woman in these households. All interviews were conducted by me in Hausa or a
combination of Hausa and French, according to the interviewee's preference. I also participated in numerous CARE and UNICEF activities in the Maradi Region, including administrative meetings, workshops, trainings, and health promotion activities, and spent two months living in Garin Jakka and Tchikaji Gajeré.

4. CARE and UNICEF

CARE and UNICEF are the largest transnational aid organization presence in terms of resources and activities in the Maradi Region of Niger, and they do similar types of activities, including women's microcredit, literacy training, assistance with seeds, helping women obtain small animals, and trainings on gender and rights issues. Both organizations are also attempting to integrate contemporary development approaches and discourses such as gender mainstreaming and a rights-based approach. Official rhetoric of CARE and UNICEF endorse the centrality of inherent, equal, and individual rights to their work.

For example, a UNICEF booklet entitled *Human Rights for Children and Women: How UNICEF Helps Make Them a Reality* explains that the Convention on the Rights of the Child (CRC) and the CEDAW are cornerstones of its work and lay the groundwork for understanding children's and women's rights:

The application of CRC and CEDAW principles, now the driving forces behind UNICEF's work for children and women, can deepen and make real the world's resolve to end conditions that lead to crimes against humanity and the denial of people's fundamental rights and freedoms. [1999, i].

UNICEF affirms the understanding of rights within such conventions in “The Rights-Based Approach: Statement of Common Understanding,” by describing human rights principles as:

- Universality and inalienability; indivisibility; interdependence and interrelatedness; nondiscrimination and equality; participation and inclusion; accountability and the rule of law. [2004, 91]

In a much cited CARE discussion paper on the rights-based approach in CARE International, Jones and Ghanim write, “A rights-based approach recognizes poor, displaced, and war-affected people as having inherent rights essential to livelihood security—rights that are validated by international law” (2001, 1, my emphasis added). Concerning women's rights, CARE’s website for International Women's Day 2005 explains, “There is another motivation to make the advancement of women and girls a
priority in all we do. Simply put, women and girls have the inherent human right to be treated equally and to equally enjoy the opportunities that life has to offer” (CARE International 2005, my emphasis added).

While there is some recognition of a relational aspect to rights in CARE and UNICEF documents, this is distinct from prominent ideas about rights in the Maradi Region. For example, the CARE report on rights-based development acknowledges the relational nature of rights, but only in terms of global responsibilities of all humans to uphold already existing rights. These responsibilities are “tied to defined and universally agreed standards” such as the Universal Declaration of Human Rights (Jones and Ghanim 2001, 2). Interestingly in the UNICEF statement on the rights-based approach to development mentioned above, interdependence and interrelatedness refer to the relationship of rights themselves, not people (e.g., “realization of the right to health may depend...on realization of the right to education or information”) (UNICEF 2004, 91). According to such thinking in CARE and UNICEF, rights are considered inalienable, and the duty of recognizing and upholding them is laid mainly on the state, but also society in general. If, however, one’s rights are not recognized, they are still considered to exist. In contrast, rights in the Maradi Region exist within relationships in which duties are reciprocated. Furthermore, rights are not necessarily equal among all people.

CARE and UNICEF also recognize the importance of being culturally sensitive in their work. In the case of women’s rights, this means that they actively seek to identify cultural norms that resonate with their goals as organizations. For example, these organizations have collaborated with Nigerien imams and Islamic organizations to talk about Islamic understandings of rights and gender relations in Niger. Trying to balance and reconcile a rights-based approach with cultural sensitivity is a challenging issue often resulting in ‘indigenization’ of rights in CARE and UNICEF, as I illustrate further below.

5. Gender, Rights, and Social Change in Niger

Before moving on to discuss translation of women’s rights in CARE and UNICEF, it is first essential to further explain the socio-historical context for this study and recent social change in terms of gender, rights, and religious identities. While the Nigerien constitution guarantees equality for all without regard to sex (Article 8), the reality is that most family matters (e.g., marriage, divorce, inheritance) are dealt with under customary law rather than civil law. Efforts to guarantee equality for men and women in such matters under Nigerien civil law have not yet been successful. The
Family Code—an attempt to reform the law so that men and women are equal in matters such as marriage, inheritance, and divorce—has been strongly resisted, especially by Islamic groups who argue that equal treatment of men and women in such family matters is counter to their religious beliefs (Alidou 2005, 164–168; Charlick 2004, 101). The code has not yet been implemented in Niger.

The CEDAW, another attempt to achieve gender equality in Nigerien law, was ratified in Niger only with significant reservations and a declaration. The government’s reservations mirror the same sorts of issues resisted in the Family Code. Specifically, Niger’s reservations relate to: 1) equal inheritance (Article 2d and 6); 2) the right of married women to choose their residences (Article 15, paragraph 4); 3) “the same rights and responsibility during marriage and at its dissolution, the same rights to decide freely and responsibly on the number and spacing of their children and the right to choose a family name” (Article 16, paragraph c, e, and g); 4) modifying social and cultural patterns of conduct of men and women (Article 5a); and 5) the procedures for arbitration (Article 29) (United Nations 2005, 27, 65). An additional declaration by the Nigerien government on family education in Article 5b indicates that this term “should be interpreted as referring to public education concerning the family” (United Nations 2005, 28). Matters similar to those raised with the CEDAW and Family Code have been debated in Niger regarding the Protocol on the Rights of Women in Africa, which has not been ratified.

In the context of political corruption, severe economic hardships, and religious revivalism in the Muslim world, Niger has seen the rise of Islamist movements over the last three decades, which have greatly impacted gender roles and social relations. Furthermore, Alidou argues that politicians have tried to draw media attention to such issues and away from criticisms of national crises, resulting in a further amplification of women’s bodies and social roles being debated publicly (2005, 157). As a result, a surge of discourses from many directions concerning man as the provider and woman as the dependent housewife have pervaded the public space.

The material circumstances Nigeriens find themselves in amidst SAPs, drought, and other economic hardships are certainly linked to these changing gender roles and relationships. Some Nigeriens, feeling that the West has failed and exploited them, have looked to the rest of the Muslim world for new development strategies and moral critiques of their society and government. In the towns of Garin Jakka and Tchikaji Gajeré, increased male labor migration to urban centers of Northern Nigeria due to hard economic times over the last three decades has had tremendous consequences for women’s mobility and income generating opportunities. Male
migrants bring home ideas linking Muslim piety, wife seclusion, and male provision. As a result, gender work roles have changed so as to exclude the majority of women from farming, increasing their dependence on their husbands. Among all residents of Garin Jakka and Tchikaji Gajére today, only one third (19/57) and a little over one quarter (70/246) of women still farm in these two towns, respectively. Three decades ago, all able-bodied women farmed, and seclusion was not practiced in these towns. Historically in the Maradi Region, women often provided for themselves and their children during the dry season through crops from fields given to them by their husbands through usufruct rights. Today in Garin Jakka and Tchikaji Gajére, secluded women are understood to be exempt from farming, going to the well, and collecting firewood. Rather, their husbands fully provide for them year round, at least in principle. And secluded women in these towns are normally confined to the home unless granted permission by their husbands to leave (Henquinet 2007).

In the Maradi Region, notions of rights exist, although they are generally understood as existing in relationships where duties are reciprocated and within a social hierarchy. For example in Garin Jakka and Tchikaji Gajére, residents clearly and consistently stated to me in interviews that a woman's main duty (and a man's right) in marriage is obedience to her husband, while a man's main duty (and a woman's right) is to provide for his wife or wives. These rights exist as the marriage relationship is maintained. Also they are not the same for a man and a woman; rather, the husband is understood to be in charge and have more authority than his wife or wives.

Class relations are understood similarly. As with a wife and husband, talakawa (commoners, farmers, and non-royalty) and sarakai (members of the royal family) as well as Alhazai (wealthy Muslim traders) and barori (servants/dependents) have certain rights and duties to one another in this society. Maradi historian Mahamane Addo, writing of the 19th century Maradi Katsina kingdom, also links the relationship of the sarki (king) and the subjects of his kingdom with that of a husband and wife:

The sarauta order can be explained, to a certain extent, as the act of marriage between the king as husband of Katsinaland and the kingdom. That which makes possible bringing the union of the king and his kingdom together is the union that governs the relationship between a groom and bride. The relationship between the role of king and the role of husband is evident in the mentality of Katsinawa people. The king is the master of the kingdom as the husband is the master of the home. [Addo 2003, 169–7, my translation]
Nicolas also notes that the Sarkin Gobir is called mijin ‘kasa (husband of the kingdom) (1969, 217). Furthermore, talakawa have the right to expect certain duties of sarauta. For example, sarauta are called on to resolve conflicts and expected to give gifts on occasion. Sarauta in Maradi or Gobir also serve a spiritual role to interact with spirits of the land to ensure the health and fertility of the kingdom (Nicolas 1969, 220). At the same time, talakawa have the duty of paying tribute to the sarauta through, for example, gifts of food at the harvest or participating in collective work for a sarki at the canton level, although less so today than in the past (Olivier de Sardan 1999, 144–145).

Similar kinds of hierarchical reciprocity also exist between Alhazai and barori. The Alhazai are a particular group of merchants who arose in Maradi with a strong Muslim identity and trade networks. Grégoire explains that Alhazai are patrons who have servants/dependents (barori) (1992, 148). As with husbands and wives or sarauta and talakawa, Alhazai and barori have rights and duties in a hierarchical and reciprocal relationship. Their rights exist as these relationships are maintained.

While many women in Garin Jakka, Tchikaji Gajéré, and other rural towns near Maradi have stopped farming and taken on seclusion, this does not mean that women do not have rights to inherit and own property. Common practice in this region has slowly shifted beginning in the colonial era from a system of inheritance that excluded women and junior males to one in which Maliki inheritance patterns have been adopted in customary law, allowing women and junior males to inherit (Boubacar 2000; Cooper 1998, 32). However, a Maradi imam explains that inheritance should not be passed down to certain individuals such as nonbelievers, illegitimate children, and slaves (Salifou 2001). Normally today in Garin Jakka and Tchikaji Gajéré, property is passed down from parent to children, daughters receiving 1/3 and sons receiving 2/3. Thus, men and women are recognized as having rights to inheritance in Garin Jakka and Tchikaji Gajéré in principle. These rights, however, are not equal between men and women and not guaranteed for all persons as one can be excluded on the basis of religion or birth status.

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3 Gobir is a neighboring kingdom to Maradi.
4 A canton is a collection of towns with a lesser sarki under the authority of the sarki of the entire kingdom.
5 There are no slaves in Garin Jakka and Tchikaji Gajéré, although slavery does exist among some groups in Niger.
6 Imams in this region also recognize inheritance rights for other relatives, although this is not often acknowledged in Garin Jakka and Tchikaji Gajéré.
The idea of individual and equal rights that are inherently given to all humans does not find much resonance in this worldview. In this social context, then, what transpires when notions of rights and gender roles that are relational, reciprocal, and hierarchical interface with notions of gender equality and inherent, equal rights of individuals evident at senior levels of transnational development organizations?

6. Translating Gender and Rights among Employees

Not surprisingly, CARE and UNICEF find it a challenge to talk about inherent, individual rights and gender equality in this social context. To a certain extent CARE and UNICEF employees have to accept or negotiate with Nigerien notions of patriarchy in order to gain credibility. Some of the most prominent ways in which this happens are in discussions about religion and custom. Additionally some negotiations play out in the nuances of language and choice of terminology.

Religion and Custom

In an attempt to be culturally sensitive, CARE and UNICEF have been building on already existing conceptions of rights in Islamic practice in the Maradi Region. As these are explored and discussed, the idea of rights as individual, equal, and inherent is carefully negotiated and at times transformed. Additionally, what is perceived as correct Islamic practice is often juxtaposed with *al’adu* (customs/traditions) and misunderstandings of Islam when discussing women’s rights as a way of skirting around any radical challenges to patriarchy (of the sort that Merry refers to concerning an understanding of rights centered on values such as individual choice, autonomy, or equality for women) in one’s religion. Certainly scholars (for example see Ali 2000) have argued for interpretations of Islam that are compatible with women’s rights in international law, but these are not among the strategies used by my development professional informants in Niger.

My development professional informants did not see themselves as qualified to engage in theological teaching and interpretation of religious texts, so UNICEF and CARE have collaborated with prominent imams in Niger to do public education about rights in Islam. These collaborative processes produce a variety of interpretations and reformulations of rights, an idea already prominent in Maradi discourses on religion. For example,
one Islamic scholar\(^7\) spoke at a joint meeting of UNICEF and the Association of Traditional Chiefs in Niger on early marriage of girls, a common practice in the Maradi Region. As he wove his way through an eloquent speech on Islamic marriage, he stated that a girl and boy who marry should be old enough to give their consent. Elsewhere, however, he explained that a marriage before puberty is indeed a valid marriage and the bride’s relatives have the duty to decide when she is ready for conjugal life. In the end, he concludes that Islam does not speak for or against early, pre-pubescent marriage (Daouda 2002). In this example, the rights of the individual are blurred with rights of relatives over an individual. One would have a hard time reconciling such conclusions with the CEDAW and CRC that UNICEF upholds so centrally. In particular, article sixteen of the CEDAW ends, “The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory” (United Nations 1979).

At the request of CARE, the Muslim Women of Niger Association put CARE in contact with influential imams in Maradi as well. These imams have traveled with CARE employees to rural towns near Maradi where CARE intervenes to lead educational sessions on topics such as rights and duties in marriage, women’s rights to education and land, divorce, and wife seclusion according to their interpretations of Islam. CARE also circulated a document on marriage rights written by one of these imams. In it, he states:

\[
\text{Islam has only prescribed rights for a man after having performed his duties to his wife, in accordance with the word of the exalted God when he said, “Women have rights equivalent to their obligations and in accordance with everyday practices. Men, nevertheless, have a preeminence over them.”}^8
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[Saliou 2002, my translation]

Thus, rather than being inherent and equal, rights only exist as duties are performed within a gender hierarchy, according to such thinking.

Seeing the multiple interpretations of rights that exist in CARE, I asked two Nigerien, Muslim women working for CARE in rural areas of Maradi Region what they thought of this statement. Troubled by the last sentence, the women quickly slipped into a discussion about bad interpretations and people’s (especially rural people’s) ignorance of Islam. One of them replied:

\(^7\) This imam is a graduate of l’Université Islamique de Mèdine in Saudi Arabia, the Friday imam at the university in Niamey, and author and translator of numerous Islamic texts.  
\(^8\) This quote is paraphrased from the Koran 2:228, although taken out of context.
I don't know if this one is in [the Koran]...religion doesn't say that a woman must stop at whatever her husband says. In fact in the villages, it's not like the men don't want this. It's lack of understanding. There is a lack of understanding. They don't understand.

The deflection to rural people and ignorance draws on common stereotypes of aid recipients and allows the women to dismiss instead of argue directly with the substance of the imam's claims. Interestingly they remain skeptical of a scriptural basis for this imam's words rather than being able to offer an alternate interpretation of the passage from the Koran he refers to. Clearly, however, in a general sense they do not understand their religion to allow men to dominate women.

Similarly, a CARE male administrator in the Maradi office told me, “It's not understanding Islam. Lack of understanding is what brings deteriorating gender relations.” Indeed, this idea that there is a ‘true’ Islam out there to be understood is central to CARE employees' thinking. When something is done in the name of Islam that one of them does not like, the usual explanation given is a misunderstanding or ignorance of some vague notion of ‘true’ Islam rather than a substantive debate over more empowering interpretations of Islam for women. In this way, patriarchy in local understandings of Islam is not directly challenged, but skirted around as the issue is deflected to misinterpretations of Islam.

The notion of not practicing Islam the right way is invoked by some CARE employees when talking about wife seclusion as well. Seclusion is understood by many in Niger to be a part of Islam, although clearly many Muslims globally do not share this view. Several interviewees talked about two kinds of seclusion—one situated in poverty and ignorance, and another situated in wealth and that follows the rules. In other words if a man provides for all of his wife/wive's needs and she has chosen seclusion, it is permissible. Then they go on to explain that most men in Niger do not provide properly for their wives or respect their wife's wishes about seclusion. By focusing again on how Muslims are not practicing their religion correctly rather than engaging with debates about seclusion's place in Islam and its effects on women's positionality, Muslim CARE employees avoid having to critique what they often assume to be a part of Islam itself.

Other Nigerien Muslims in CARE and UNICEF are more critical of seclusion, particularly at senior levels of these organizations. One senior female CARE administrator in the country office (Niamey), speaking about seclusion's relationship to Islam and human rights, said:

[Seclusion] is not obligatory, only if she wants it. Although religion says so, well, in my opinion, if a man wants to do [seclusion], it is necessary that he
has all the means to give his wife everything; she should have no troubles. At that time, he can do it to her, but nonetheless she has made a big mistake since truly she does not have her freedom [liberté]. Total freedom. Therefore on the other hand even though it is true that Islam says so, if one looks at universal rights, one is restricting women from one side of things. Now the problem is how does one balance universal rights and Islamic rights. That's the thing.

This informant was not willing to challenge seclusion as a part of Islam; however, she clearly struggled over how to understand universal rights in the context of her faith as she understood it, beginning to articulate a challenge to patriarchy (of the sort that Merry talks about) that is more substantive and less dismissive than the previous examples in this section.

One of the harshest critiques of seclusion comes from a senior male UNICEF administrator in the country office (Niamey) who is also a Muslim.

Seclusion. It’s an institution of men to protect their wives against possible conquering or against possible lovers. That’s it. In fact, it’s a question of jealousy. If my wife stays in her home so that she does not go out, no one else can see her except for me.... It’s true that it’s a custom, but is it really a foundation of Islam? I am not very strong in Islam but I ask the question—Is it truly an Islamic way?

This informant went on to talk about the violation of women’s rights and freedoms through seclusion. He was willing to ask the question of whether or not seclusion is really a part of Islam, rather than assuming it is and falling into the rationale of differentiating good and bad types of seclusion. But in so doing, he is still working under the assumption that there is a ‘true’ Islam out there to be understood and attempts to relegate seclusion to the level of custom—something easier to critique, change, or reject than Islam. Yet more than any other informant, his interpretation of Islam sought a challenge to patriarchy from within Islam that may accommodate a notion of individual rights and choices of women.

CARE and UNICEF employees also invoke al’ada (tradition/custom) to explain women’s inferior status. In an interview with a CARE employee working in rural areas in Maradi Region, I asked her what prevents women from knowing their rights. She said:

What prevents it? It’s all about al’ada. Therefore, from the time a woman gets up, since her grandparents’ and parents’ time, she knows that in the rural areas, a woman is nothing. Therefore, to them, since they wake up, they see their work, this work in the home. The work is threshing, pounding, going to the field, getting wood, getting water. That’s their only work. Any work concerning the development of the town that comes along, their intention is
that it is not for women. It’s *al’ada*, since their parents’ and grandparents’
time. But also that’s not how it is. Now in this time, it changes. So *al’ada*,
whenever one says *al’ada*, it’s a thing that can be changed. So necessarily,
this *al’ada* is what prevents them [from obtaining their rights].

In this statement, she acknowledges both *al’ada* having a negative impact
on women, but also its dynamism and potential for change. *Al’adu* (plural
of *al’ada*) are seen by many CARE and UNICEF employees to be dynamic,
unfixed, and changing. However, they do not see ‘true’ Islam as any of
these; it remains the same. And it is often believed that one can and should
seek to understand this ‘true’ Islam. These perceptions of *al’adu* and Islam
make implementing gender and rights oriented programs in CARE and
UNICEF a challenge, but in different ways. Islam is harder to critique than
*al’adu*, especially if a belief or practice is based on a passage in the Koran,
since *al’adu* is seen to have the potential for change but not Islam. On the
other hand, Islam itself often serves as a critique for *al’adu*. For example,
issues such as women’s inheritance and marriage rights are raised by some
Muslims as part of Islam and a critique of *al’adu*. For example,

Choosing Terminology

Terminology is also important for understanding the goals that CARE and
UNICEF employees have reformulated for women’s rights. For many
Nigeriens, women can be empowered to make their lives better as long as
they do not become equal with men. For such people, male headship is an
important part of their worldview and the proper social order. Several
Nigerien employees of CARE and UNICEF told me that they do hope for
equality or women’s emancipation, but are careful who they say this to.

For example, a Nigerien CARE administrator at the senior level who
advocated for true equality explained to me that most Nigeriens prefer the
term *équité* (equity) rather than *égalité* (equality). She said, “If one says
equality, it’s like a woman becomes equal/level [daidai] with a man. Whereas in the Koran, a woman and a man are not equal." She goes on,
providing examples to distinguish the two terms:

Equality, men and women are able to go to school, able to have a job,
right? They are equal [égaux]. But equity, it’s not the same thing. It’s still
possible they have equal work; they don’t have the same salary...It's less strong.

A CARE workshop guide for gender sensitizing states that *égalité* means, “That which is identical, the same in number, rights, power.” *Équité* means, “Something fair; it’s the equality of opportunities” (CARE 2002, 53, my translations). *Équité* connotes, in this context, a sense of justice or fairness without having to mean completely equal. Diarra (1974) also makes such a distinction concerning gender roles in Niger using the term complementarity. In other words, men and women are understood to have different roles and positions in a society; they are not meant to be the same. By using *équité* rather than *égalité*, many Nigeriens can acknowledge the importance of some women’s issues without having to deal with the seeming contradiction created between their religious beliefs and the idea of gender equality. For example, one can say that women have rights to inheritance according to Islam by using *équité*, since women and men do not inherit equally. *Équité* can still accommodate female domesticity, wife seclusion, and male provision as *better* alternatives to historical household economic systems around Maradi in which women worked hard to fend for themselves much of the year.

As with many words in Hausa, there is no direct translation of the English or French terms ‘right’ (*droit*) or ‘human rights’ (*droits de l’homme*). Right is sometimes translated *hakki*, which implies something is owed to you by someone, and sometimes *yanci*, which implies a sense of freedom, power over, or ownership of something. CARE and UNICEF employees often use the two terms interchangeably, although some are more intentional about choosing one term over the other. Nevertheless, the distinctions above were pointed out to me as I compared *yanci* and *hakki* with numerous native Hausa speakers in CARE, UNICEF, the government, Tchikaji Gajeré, and Garin Jakka.

Expectations of rights and duties in marriage illustrate well the notion of *hakki*. For example, a husband fully provides for his wife (his duty and her right), while she fulfills her duty and his right by being obedient to her husband. This understanding of rights is reciprocal, relational, and hierarchical. Rights exist because duties are fulfilled. *Yanci*, however, better captures the Enlightenment conceptions of individual Rights of Man in Europe, the 1948 UN Universal Declaration of Human Rights, and civil rights movements in the U.S. that form the basis of ‘rights’ in Western traditions (Cowan et al. 2001; Merry 2001). *Yanci* (or *yancin kai*) is used, for example, to express Niger’s independence from France. One senior male UNICEF administrator, who is a native Hausa speaker, made a distinction
between the two terms by explaining to me that Nigeriens are not ready to hear about ‘yancin mata (or as he translates it émancipation des femmes),\(^9\) which includes, for example, a woman’s right to remain single or to do as she pleases. He continues that UNICEF can, however, talk about hakkin mata (or as he translates it droits des femmes),\(^10\) which is compatible with Islam and includes, for example, improved opportunities for education, health care, and work. He confessed to me, however, that UNICEF’s ultimate goal is ‘yancin mata.

These nuances in translating and choosing terminology are significant tools Nigerien employees of CARE and UNICEF use to accommodate or critique male headship. Équité and hakki allow male headship to remain, while égalité and ‘yanci leave less room for it.

7. Translating Women’s Rights among Volunteers and Aid Recipients

Like CARE and UNICEF employees, CARE and UNICEF volunteers in rural towns where these organizations intervene translate and reformulate project ideas and activities. These volunteers, who are aid recipients and project leaders in their communities, have varying degrees of training and exposure to development discourses in CARE and UNICEF, and few know much French. Therefore the ways in which they reformulate project ideas and activities differ among them and are distinct from employees’ reformulations.

Accommodating Patriarchy

The messages about gender relations and women’s rights that CARE and UNICEF communicate in towns around ‘dan Issa are heard and interpreted in various ways so that patriarchy is accommodated rather than challenged. Residents of Garin Jakka and Tchikaji Gajeré recognize that CARE and UNICEF have a special interest in helping women, as some of their activities are only for women such as helping women acquire goats, loans to women in the case of UNICEF, and a women’s credit and savings group in the case of CARE. Sometimes it is understood that these activities are done to help women when their husbands are away from home, or people are simply thankful for the extra support that UNICEF or CARE provide for the household no matter who receives it. At times, however,

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\(^9\) Women’s emancipation/liberation.
\(^10\) Women’s rights using hakki.
men are puzzled by this explicit help for women. Several men in Garin Jakka are of the opinion that CARE should also help men acquire animals; however, it should be cattle instead of goats as this is what men tend to own. One of them explained to me that men are the ones who support their wives; therefore, they also need this kind of help from CARE. By helping the men, he explained, you are also helping women. In fact, some of the men in Garin Jakka and Tchikaji Gajeré were interested in project assistance specifically so that they would be able to better keep their wives at home. For example one UNICEF volunteer expressed to me:

As far as UNICEF’s work with us here in town, is there some step that we can take so that we can get more support from you and better convince our women so they can agree to [seclusion]?...Convince [the women] even more because, as I told you, some of them, if [the men] want to seclude them, some of them don't want it because they go around here and there. They think they received a little freedom. But if she is secluded, she doesn't go out, and she thinks she is restricted...Help us with our wives. Teach them a trade in the home, or help us with a sewing machine to give to a woman and teach the woman how to sew. You see, all this work is in the home.

Indeed, this man hoped to convince UNICEF to use its resources, intended to empower women, as a way to keep them secluded in the home. He seemed to have no reservations that UNICEF should consider this.

In a random sample interview in Garin Jakka, a woman in her 70s who farms had similar thoughts about CARE supporting seclusion. She first explained to me that she had never been secluded and that when she was young seclusion was not practiced. I asked her why people today practice seclusion. She replied:

Interviewee: Because of education/sensitizing [wayewar kai].
KBH: Who is sensitizing?
Interviewee: This thing, it comes from the project [CARE]. Before the project too, everyone was secluding. Now too the project has gone out and caused everyone to. They are going from town to town and giving advice. They gather and talk with all the men and women and give them the history of this. You see, even if someone has not yet started, he will do it. You say you will take a woman and leave her to wander about? It's not right. You can forbid her to go to the well, to get firewood, and to do threshing too. Now the women in our town, you see...we [the older women] do the

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11 Although I explained to this and other informants that I did not work for UNICEF but was doing research on their work to be shared with UNICEF, I was nevertheless often assumed to be among those determining policies and programs in UNICEF.
threshing for women. And that's it. You can forbid a woman everything and provide her clothing, soap—hey if you have the opportunity and the means—buy everything for her to maintain the home.

KBH: Then, if I understand, you said that the project is doing the sensitizing?

Interviewee: Yes, they are causing people to. They are giving people advice.

Indeed, she was recounting educational activities CARE had done in collaboration with Maradi imams from her own perspective. CARE was sponsoring these discussions about women and Islam, and she understood this to mean that CARE was supporting seclusion of women through the imams talking with people about it. Her detailed accounts of other educational events put on by CARE about HIV/AIDS and other health issues led me to believe she was a careful listener in general to what was said in such meetings. Yet she got the idea that CARE is advising men to seclude their wives. She and the UNICEF volunteer had reformulated the meaning of why these organizations work with women. Instead of a focus on equal rights and empowering women to have more autonomy, they envisioned using CARE and UNICEF resources to make women more dependent on their husbands and less mobile.

A relational and reciprocal understanding of rights came to the fore at times in discussions between CARE employees and volunteers. For example during a CARE training on Women’s Leadership, the CARE facilitators explained to women volunteers from rural towns around ‘dan Issa that rights (‘yançi) and duties (nauyi) have a relationship much like a man and a woman. One of the facilitators asked the group, “Why do you have rights [‘yançi]? Why is it necessary that the government do this for you?” He went on to answer the question himself, “You pay taxes. The government has to do these things for you.” This seemed to make sense to these women, who tend to see rights as relational and reciprocal, as the participants referred back to this point throughout the training. Yet this example stands in contrast to an idea of rights that is inherent for each individual (‘yançi). Rather rights are guaranteed through fulfilling one’s duties and thereby maintaining a relationship (hakki), as noted above for marriage and class. As with marriage or class relations, this latter understanding of rights easily accommodates patriarchy and other social hierarchies. The CARE employees, perhaps with little reflection, chose to translate right as ‘yançi rather than hakki in this case, although the meaning they were attaching to it would have been better expressed with hakki. Not carefully thinking through the choice of term in Hausa further complicated the issue of translation.
Challenging Patriarchy

Thus in Garin Jakka and Tchikaji Gajeré, CARE and UNICEF are sometimes perceived to be reinforcing the status quo rather than challenging patriarchal norms. However, I did find patriarchy recognized and critiqued on a few occasions in my interactions with people from Garin Jakka and Tchikaji Gajeré. For example in the training on Women's Leadership, Amina from Garin Jakka seemed to continually remind CARE instructors about the social constraints she has as a young secluded woman.

“Can a woman be a leader?” a CARE employee asked the group of women trainees. Amina confidently replied, “If there is a man, he is the leader.” The CARE employee then asked, “Why has this been designated something for men?” Amina explained, “Even if she is chosen [as a leader], if she is a young woman [karamin mace],12 not an older woman, and married, she has to follow her husband. She has to go back home and discuss it.” I knew from talking with Amina and her husband that her husband had indeed given her permission to attend this CARE training. Later in the same training, Amina reminds the group again of a woman’s constraints. “How does a leader call people together?” a CARE instructor asks. The group starts listing off answers: announce it at the savings and loan group, at the well, a naming ceremony, or on the radio. Again Amina speaks up and points out that radios are not very accessible to women.

The fact that a secluded woman like Amina could travel to another town to attend a CARE training is not common and was due in part to the fact that she was one of the only participants who lived close enough to walk home in the evening rather than sleep there. Men in Tchikaji Gajeré and Garin Jakka told me that most men do not let their secluded wives go to another town for a couple of days to attend a training. One of them explains:

You keep your wife from farming, going to the well, and getting wood. You do all of these. Then someone says a car will come and pick her up to go somewhere. You, who are hiding your wife, there she is, they are going from town to town with her. And someone says he doesn’t know where they are taking her to sleep.

Some even keep their wives from attending CARE or UNICEF meetings in their home town. As a consequence, many of the women who are involved in CARE and UNICEF activities and trainings are older women who tend

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12 Literally karamin mace is a “small woman,” meaning in terms of her social stature.
not to be secluded or practice a looser form of seclusion. Amina was well aware of her unique position as a CARE volunteer at a training away from home, and she competently spoke about the constraints of patriarchy on her ability to be a leader. At the same time, CARE employees strove to convince the women at their training that they have the right to be leaders and run for elected government offices.

A man in Tchikaji Gajeré, who had attended several UNICEF trainings, shared with me a clear challenge to patriarchy in the work of UNICEF. He explained that he agreed with most of what UNICEF said about rights, but there were some points with which he disagreed concerning women’s rights. For example, he explained:

One thing that we disagreed with, [UNICEF] said a woman can, when you are a young unmarried woman [buduruwa], you have boyfriends who you chat with. So they said that even after you are married, this boyfriend of yours, this male friend of yours, you can call him over and you act like you did before when not married...We do not agree with this. It is not possible that in Islam you marry a woman so that she can act like an unmarried girl and go to some town to date someone.

In these communities, *hakkin mata* (what is owed to and expected of a women) is well accepted, while *yancin mata* (freedom or emancipation of women), which someone from UNICEF was expressing in the example above, is an uncomfortable concept. The idea that a woman would be emancipated or free to do as she pleases, which implies she does not need a husband or elder over her, is unacceptable. Not only a woman, but all community members see themselves as part of the social community and hierarchy; according to age, kin group, gender identity, education, occupation, and wealth. It is important to know one's place and one's rights and duties within these relationships, whether at the household, community, or national level as the example about paying taxes demonstrates. An overly individualistic notion of rights and freedom implies disrespect, isolation, and irreverence for one's community and superiors in Garin Jakka and Tchikaji Gajeré. If CARE and UNICEF communicate a notion of women's rights that is individual, inherent, and equal without regard for reciprocity, relationships, and social hierarchies, these ideas are resisted or understood to be irrelevant.

8. Conclusion

Women's rights are reformulated, translated, and/or rejected in multiple ways by actors at different levels and layers of CARE and UNICEF's
development interventions. The examples given in this paper highlight the process by which reformulation and negotiation occur in translation. In many of these examples, the meaning of women's rights has been transformed or ‘indigenized’ by Nigeriens in CARE and UNICEF's interventions. Complex negotiations occur within CARE and UNICEF over ideas about equality, Islam, and custom in order to gain credibility publicly, work through identity issues as Nigerien Muslims working for gender and rights-oriented programs, and balance a rights-based and culturally sensitive approach. Some of these negotiations play out in terms of how Islam and custom are understood. Other times, terminology and competing conceptions of rights and gender relations are debated and strategically selected. And still other times, little attention is given to terms used in translation.

Senior level administrators in CARE and UNICEF seem more willing to ask questions about women's rights in Islam and try to incorporate a notion of rights that emphasizes individual choice and equality. This is likely due to their frequent contact with donors, familiarity with official organizational documents, and little time spent with aid recipients. Those who do work with aid recipients and the public are more pressed on a daily basis to negotiate a balance between pleasing their employers, building rapport with a population that embraces patriarchy, and working out their own identities as Nigerien Muslims working for transnational organizations promoting women's rights. At this level, an understanding of rights that is relational, reciprocal and hierarchical often emerges. Among volunteers and aid recipients in Tchikaji Gajéré and Garin Jakka, CARE and UNICEF’s work is sometimes understood as supporting dominant social and religious norms around gender relations. Thus, individuals within CARE and UNICEF offer various interpretations of women's rights. While variation in views is evident, particularly between different levels of these organizations, there is also considerable consensus over some ‘indigenized’ definitions of rights among Nigeriens such as a preference for équité over égalité and hakki over ‘yanci.

Nevertheless in this process of translation, accommodation of patriarchy rather than a radical challenge to patriarchy often does occur. Women's rights are transformed from being individual, equal to men, and inherent as evidenced in senior level documents of CARE and UNICEF to existing within social relationships when duties are reciprocated and where hierarchies are maintained. In this way, many working with CARE and UNICEF in Niger seek to improve women's lives in some ways within the latter understanding of women's rights while at the same time maintaining male headship and rejecting gender equality.
These development organizations have faced the same challenges that the Family Code and CEDAW have in Niger as these pieces of legislation have been pushed aside as in the case of the Family Code or ‘indigenized’ through reservations and a declaration for the CEDAW. However, few Nigeriens know much about international or national laws dealing with human rights. They do, however, hear about often reformulated ideas about rights through CARE and UNICEF’s work in addition to alternative conceptions of rights from religious leaders or others in their culture. Indeed, transnational aid organizations promoting women’s rights have become prominent actors in translating, negotiating, and reformulating ideas about rights for the general public in Niger.

My focus on transnational aid organizations (instead of national and international law), in depth ethnographic detail in the sociohistorical context of Niger, and translators from senior level administrators down to aid recipients sets my study and conclusions about translating women’s rights apart from Merry’s. My data points to both ‘vernacularization’ and ‘indigenization’ of women’s rights occurring through translation. As nonstatal actors, such as CARE and UNICEF, communicate rights to the public, the language and meaning of rights must be translated so that they resonate with Nigerien worldviews. Yet there is considerable freedom among Nigeriens affiliated with these organizations to reformulate the meaning of rights while translating from official documents to programs and discussions in the field. This discussion of Nigeriens involved in CARE and UNICEF programs shine light on a variety of ways that women’s rights are ‘indigenized,’ especially at less senior levels of these organizations.

References


PART III

THE MULTIPLE TRACKS OF HUMAN RIGHTS
AND HUMANITARIANISM
CHAPTER ELEVEN

INTRODUCTION TO THE MULTIPLE TRACKS OF HUMAN RIGHTS
AND HUMANITARIANISM

Kristin Bergtora Sandvik

Due to the problematic conceptual underpinnings of “rights-based humanitarianism”, the ambivalence of African host states, and the hierarchical relationship between humanitarian elites and local populations, we now have not one but many parallel ways of envisioning the relationship between human rights and humanitarianism. Below, three case studies from Uganda, Eritrea and Malawi that explore different transnational dimensions of rights-based humanitarianism are presented. As these case studies demonstrate, ethnographic approaches may help us untangle the transformation of political agency and rights claiming that happens when individuals become the object of humanitarian ‘interventions’ and when international humanitarian actors become targets of such claims, in addition to, or to the exclusion of, the African state.

1. Humanitarianism as a Response to the ‘African Crisis’

Many parts of Africa are affected by high levels of poverty, illness and war. The problems encountered range from the HIV/AIDS epidemic, the ongoing humanitarian catastrophe in the Democratic Republic of Congo, the decades-long conflict in Somalia, and the violent struggle over resources in Darfur, to the persistence of famine in parts of the Sahel, the Horn and Eastern Africa. In the Francophone and Anglo-American political and cultural imaginations, the entire African continent is still commonly depicted as a “humanitarian emergency zone” (Ferguson 2006) in need of benevolent paternalism. Today, new variations on this theme are entertained by rising Latin-American and Asian powers that have recently become humanitarian donors and ‘doers’. At the same time, responses to the ‘African crisis’ are increasingly heterogeneous, involving more players and resources. Actors who engage in humanitarian action on the African continent today do so for a variety of reasons and through a myriad of approaches.
The humanitarian practices of the large UN agencies UNHCR, UNICEF, and the World Food Program (WFP); international NGOs such as Oxfam and CARE; faith-based initiatives ranging from Islamic charities to U.S.-based evangelical churches; the new global philanthropy exemplified by the Gates foundation; and the humanitarian donorship of the governments of Norway, China or Brazil. These all represent highly diverse ways of addressing emergencies at local, regional, and international levels. At the micro level, Africa is increasingly the practice ground for a new type of humanitarian, the so-called “lay humanitarian” which has emerged in direct contrast to the general professionalization of the humanitarian enterprise. As part of local faith-based initiatives in their home countries or inspired by global celebrities and enabled by cheap airfares and easy means of communication, large groups of ordinary, Western, middle-class individuals of all ages go ‘overseas’ for short stints of charity work or on tours to inspect the result of their fundraising efforts.

Important early ethnographic critiques of the refugee regime (Harrell-Bond 1986; Mallkki 1996) have in the past decade and a half been supplemented by a broader anthropological scholarship on humanitarianism in Africa which tackles this increasing diversity and identifies the questions of power, agency and social change that arise (Hyndman 2000; Fresia 2008; Dijkzeul and Wakenge 2010; Redfield 2010; Fiddian-Qasmiyeh 2001; Sandvik 2011).

A specific challenge is how to make sense of the continuing transformation of the relationship between humanitarian action and human rights. According to the Western liberal tradition, human rights offer democratic access to a uniquely emancipatory discourse because human rights subjectivity is universal, everyone is a priori a valid claimant. Humanitarianism, on the other hand, focuses on the suffering of victims. According to its classic definition, humanitarianism has been understood as a “transnational concern to help persons in exceptional distress” (Forsythe 2006:234), based on a humanitarian imperative declaring the obligation to provide humanitarian assistance where needed (Terry 2002), and premised on the principles of neutrality, universality and humanity. This classic humanitarianism understood itself to be governed by international humanitarian law (IHL) which set limits on permissible conduct in war (Darcy 2004:9–10). From the mid-1990s, a gradual ideological rapprochement between the human rights framework and international humanitarianism resulted in what became labeled ‘rights-based humanitarianism.’

Legal commentators inspired by critical and Marxist perspectives soon began to unpack how discourses on human rights (Mutua 2001; Evans 2005)
and humanitarianism (Kennedy 2004) separately and together served the quarters of power. However, there has been a general dearth of ethnographic attention towards the processes through which the emancipatory thrust of human rights combines with the altruistic and sometimes paternalistic sensibilities of humanitarianism to reshape social reality in complex and often unexpected ways during and in the aftermath of humanitarian crises; or how these discourses contribute to the framing of human suffering as a humanitarian problem. This lack of attention is particularly significant with respect to understanding humanitarianism in Africa. In order to help fill this gap in the literature, this volume provides a set of ethnographic accounts of the multifaceted relationship between human rights struggles and humanitarian practice as it plays out in African locations.

2. The Quest for Legitimacy: Addressing African Suffering through Development and Rights

The end of the Cold War and its attendant upheavals provided growth opportunities and increased room to maneuver for humanitarian actors. However, in the mid-1990s, this field began to suffer from a prolonged crisis of legitimacy caused by failures to intervene to protect civilians in Srebrenica, Somalia, Rwanda, and the Eastern Congo. As the number of humanitarian actors and their budgets kept growing, the humanitarian enterprise was accused of inefficiency and bureaucratic mismanagement (Barnett and Finnemore 2004). According to the influential critic Alex De Waal (1997), humanitarianism had been taken over by “the humanitarian international”, a self-interested group consisting of the staff of international relief agencies, academics, consultants, specialist journalists, lobbyists, ‘conflict resolution’ specialists and human rights workers. Idealism and altruism had been replaced with elite politics, without making humanitarianism any better. In response, donors as well as humanitarian actors themselves began to pursue reform through the institutionalization, standardization and professionalization of practice. During the same period, humanitarianism also embarked on a controversial quest to transform the substantive content of its actions by expanding the humanitarian agenda to include long-term development and by shifting the focus from needs to rights.

According to its advocates, the expansion of the traditionally limited humanitarian agenda to include long-term development-related objectives was premised on the notion that the ethics of both endeavors, “the
humanitarian ethic of restraint and protection and the development ethic of empowerment and social justice”—value the same common goods and embrace the same ideal of full human dignity” (Slim 2000:492). At the turn of the millennium, humanitarianism’s gradual adaptation to New Public Management approaches, information technology and market based solutions helped ensure continuous growth, and enabled transnational humanitarian actors, now donning the mantle of development aid, to play an important role in filling the gaps left by the shrinking African state. As observed by Slaughter and Crisp (2009), long-term ‘care and maintenance’ programs allowed organizations such as UNHCR to transform from humanitarian organizations to ones that shared certain features of a state. Today, with the resurgence of the African state and the forging of new political agreements and trading patterns between African states and emerging powers such as Brazil, China and India, the quasi-sovereignty enjoyed by the large UN organizations and international NGOs is likely to change.

The humanitarian agenda was also significantly expanded by the decision to engage more actively with the international human rights framework. In its early phase between and after the two World Wars, humanitarian aid was distributed on the basis of religious and ethnic identity by agencies catering to designated groups. As humanitarianism went global in the 1960s, the emphasis on impartiality and non-discrimination led to a focus on distribution of relief according to need (Barnett 2011:120). In the late 1990s, the move from needs to rights was conceived by some commentators as a way of formally improving the conceptual framework of humanitarianism, while others saw it mainly as a way of allaying public relation concerns. Conceptually, ‘relief’ became ‘assistance’, which then merged with practical legal notions of rights in war and asylum, to evolve into “humanitarian protection” (Slim 2002:14). Assistance should be provided in a manner that is consistent with human rights, including the right to participation, non-discrimination and information, as reflected in the body of international human rights, humanitarian and refugee law (Minear 2002).

For the advocates of this approach, it meant the “move beyond a dysfunctional philanthropic mindset” (Slim 2002:1), to “give humanitarianism an integrated moral, political and legal framework for affirming universal human values”; Rights would “dignify rather than victimize or patronize people” (Slim 2002:15). Nevertheless, according to the critics, rather than actually changing what aid agencies do, the rights-based approaches was linked to the need to reinvent a new identity periodically in an
increasingly competitive and skeptical world (Duffield 2001:223). The critics pointed to a number of possible risks with human rights-based humanitarianism, including the destructive politicization and securitization of humanitarian space (Chandler 2001); co-option by political actors; technicalization of rights; instrumentalization of rights or token uses of rights language; the subjection of humanitarianism to a conditionality agenda; and inflated and unrealistic claims (Darcy 2004). Reviewers of practice noted that while the aims were clear, rights-based humanitarianism has suffered from endemic problems with respect to the conceptualization of rights, and to the exact role these rights would play. The concept of rights that was integrated into humanitarianism was remarkable for its malleability, which meant that it has always been somewhat unclear precisely which idea of rights was in question (Kenny 2000).

3. Rights-Based Humanitarianism Today

More than a decade later, human rights has to a degree become mainstreamed in humanitarian practice as a staple both of humanitarian rhetoric and of the numerous handbooks, codes of conduct and standard operating procedures developed to guide practice. A great deal of work has been done on accountability, particularly through the Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP) (1996), the SPHERE Project handbook (1996), and the Humanitarian Accountability Project (HAP) (2003). Importantly, in the African context, the human rights accountability issues stemming from humanitarian crises are also increasingly being addressed through international criminal law, as seen in the practice of the International Criminal Tribunal for Rwanda, the Special Court of Sierra Leone and the International Criminal Court.\(^1\) At the same time, the relationship between rights and humanitarian action remains unsettled both conceptually and in practice. On the global scene, there is continued controversy over the perceived politicization of humanitarianism engendered by the turn to

\(^1\) This development has led to important debates about the relationship between peace, justice, responsibility and accountability which to some extent have echoed previous discussions about relativism and universalism.

Ethnographic scholarship on this topic is at a very early stage. Clarke (2009) observes that while the focus during the 1990s was to overcome humanitarian catastrophe through forgiveness and transitional justice, today attention is given to criminalizing and punishing. As noted by Lohne, human rights organizations play a key role in this development (Lohne 2010).
rights. In response, some organizations, such as Médecins Sans Frontières (MSF), the erstwhile champion of rights-based humanitarianism (Chandler 2001), have turned their backs on human rights, arguing that a rights-based approach fundamentally compromises the ability of humanitarianism to address human suffering, and hence threatens humanitarianism itself (Barnett 2011).

In the African context, the blurring of the triangular relationship between humanitarian actors, the African state and the international human rights framework is problematic. From the start, the idea of rights-based humanitarianism has suffered from an in-built tension between the limited agenda of alleviating humanitarian suffering and the much broader transformative agenda of addressing structural injustice through human rights. Who should do what? International organizations and transnational NGOs, regardless of their resources, competence and governance powers, are not duty bearers under the international human rights regime, but the proliferation of conflicting definitions of duty-bearers and rights holders with respect to rights-based humanitarianism can actually make it more difficult for affected populations to demand their rights from the host state. For their part, African governments may be unable or unwilling to respond to a humanitarian catastrophe. In recent years, many African states have become more sensitive about sovereignty, and increasingly attempt to regularize and control the humanitarian and the human rights sectors, either by enacting strict laws regulating NGOs (such as Eritrea, Ethiopia, Zimbabwe, Uganda and Sierra Leone) or by simply expelling humanitarian actors (such as Sudan, which expelled leading humanitarian agencies from Darfur after the ICC’s arrest warrant for President Omar al-Bashir over alleged war crimes). At the same time, African states increasingly engage as humanitarian actors themselves, either by taking on dual roles as donors and recipients (South Africa) or by placing peacekeeping forces on the ground (such as Rwanda and Uganda with AU missions in Darfur and Mogadishu).

Looking only at the practice of international actors, the participation aspect of rights-based humanitarianism remains particularly difficult. In his seminal defense of a rights-based humanitarianism, Slim suggested that rights “[m]ake people more powerful as rightful claimants rather than unfortunate beggars. Rights reveal all people as moral, political and legal equals” (2002:15). Nevertheless, when examining humanitarian action from a beneficiary’s perspective, the focus on empowerment and participation that animated the erstwhile idea of a rights-based humanitarianism seems to have evaporated and given way to the designation of two
groups of African victims as the deserving beneficiaries of humanitarian relief. In a trenchant critique of the costs of rights, Rieff (2003:316) claimed that individuals who failed to formulate their demands or basic requirements as “rights”, or who claimed rights in a context where it is structurally impossible to manage the expectations of rights holders, would risk having their claims discredited as “unrealistic” or “opportunistic”; even less worthy than “needs”. A related criticism is that presented by Meyers (2011), who argues that the “pathetic victim paradigm” demands the passivity of victims as a guarantee of innocence, while the heroic victim paradigm, countenances innocent agentic victims. (Meyers 2011, also Sandvik 2008).

4. The Contributions

The contributions to this volume suggest not only that a coherent and transformative conceptualization of rights-based humanitarianism remains elusive, but that in some ways, humanitarianism may have come full circle back to the distribution of aid and protection based on identity that preceded needs-based humanitarianism. The chapters are concerned with how people engage—or fail to engage—the vocabulary and ethics of human rights when they find themselves in contexts that are defined as “humanitarian crises”, attempt to claim resources from humanitarian actors or when they themselves play the role of humanitarians. The main analytical focus of the chapters is the shift in legal status and the re-articulation or dislocation of political agency that happens when the individual is transported to the humanitarian sphere. While the contributions to a degree exemplify Meyers’ pathetic and heroic victim paradigms, whereby women at risk of sexual violence or children orphaned due to war or HIV/AIDS typically fall into the first category and the second category typically is inhabited by mainly male human rights defenders, they also show us the complexities involved in the everyday negotiations regarding rights-based humanitarianism. Sandvik’s urban refugee population struggles to get recognition for their claims of suffering, as well as for their claims for refugee status, right of residence in Kampala and access to the resettlement procedure. Hepner’s Eritrean activists make use of human rights claims in multiple ways, to effect social change, to bolster claims for humanitarian protection and to carve out a new social and political identity. Freidus describes the marginalization of agency where the ‘victim’, the Malawi orphan, is reconceptualized from rights subject into a passive object of charity.
In her chapter, Kristin Sandvik uses anthropological perspectives on rumors and gossip to critically explore human rights claims in the context of the volatile and distrustful relationship between the UNHCR legal protection officers and the urban refugee community in Kampala, Uganda. This relationship is dominated by struggles over the allocation of refugee status and third-country resettlement for vulnerable urban refugees. The 1951 refugee convention, the 1969 OAU convention and their attendant protocols deal with allocation of refugee status, but not with the distribution of resettlement. Previously given to ad hoc considerations of need or personal preference, the selection of resettlement candidates has been bureaucratized and is today guided by soft law instruments such as handbooks, guidelines and standard operating procedures, and by the organization-wide quest to show itself accountable, efficient and transparent. The objective of the resettlement screening process is to identify individuals who can be categorized as victims of human rights violations. All the same, there is no right of access to consideration and few due process guarantees involved in the determination process. Consequently, claims-making is permeated by suspicion. On the ground, rumors and gossip about malpractice, corruption and sexual exploitation of resettlement-seekers allegedly perpetrated by humanitarians are continuously reproduced and circulated.

Sandvik suggests that while these stories could be read as claims for dignity, integrity and security, their authors are construed as gossips and rumor mongers by humanitarians striving for regulatory efficacy and bureaucratic tidiness. Because the discrimination is collective, individual refugees face a daunting task when trying to convince UNHCR staff of his or her predicament. The perceived instability of these narratives also means that where refugee organizations attempt to appropriate the formats, categories and technologies of human-rights based humanitarianism to translate refugee stories into rights claims, these endeavors are often met with the cynical view that “all refugees are liars”, and that reconfiguring demands as human rights claims is merely opportunism. Hence, in this scheme, refugees become subversive agents unable to legitimately and authentically communicate experiences of human suffering or to claim their rights.

Looking at the activism of Eritrean refugee associations in Germany, California and South Africa, Tricia Hepner examines how these associations use human rights discourse, information technology and social movement strategies to create forums for expressing political dissent, but also for carving out a new type of Eritrean citizenship (as well as a new
social identity in the West, where the human rights activist from the South is a cultural hero). Subsequent to the border war with Ethiopia (1998–2000), the Eritrean national project continues to be plagued by endemic violence, what Hepner calls a “crisis of human rights”. The government enforces mandatory military service, strict censorship of the media and crackdowns on real and perceived dissident activities. The 1998 Eritrean Constitution has never been ratified, and human rights are construed as a Western, imperial project. The Eritrean state aims to control its citizens not only on Eritrean soil, but also abroad, through surveillance of dissidents, infiltration and threats.

Noting the limited possibility for capturing power from the authoritarian Eritrean state, Hepner suggests that this activism may nevertheless expand the transnational social field. Emergent human rights initiatives operate simultaneously at the national, international and transnational level. At the national level, Eritrean activists advocate on behalf of asylum seekers and refugees in human rights and forced migration circuits, and assist at asylum procedure hearings. In the international context, they aim to connect with NGOs, activists and international norms—sometimes with the goal of engaging politically, sometimes with the objective of presenting themselves as worthy beneficiaries of humanitarian protection. At the transnational level, they resist the policies, practices and ideological suppositions of the Eritrean government using short wave radio, the internet and word of mouth. The struggle over national identity takes place in a context of extreme suspicion between activists and the government—and because of a widespread practice of government infiltration and the continuing relevance of old political allegiances, the attempts at building social movements are also marred by internal strife.

Appropriately, Hepner points attention to the instability of the internet as a tool for organization. The risk associated with activism has given information technology a significant but capricious role. Describing the circulation of ‘empty vessels’ on the Internet, Hepner points to the speed and frequency with which projects are initiated, publicized and abandoned. As a result, while information technology does provide a measure of anonymity and security for activism, these faceless practices exacerbate communal mistrust.

Humanitarian organizations, often faith-based, attempt to bypass the complexities of assistance, justifying their approach based upon immediacy with unclear consequences for the children and their communities. Andrea Freidus explores a historically embedded process of social and cultural displacement that concurrently takes place within the state and
across international borders. The subject matter is the internationalization of orphan care in Malawi, and what this may tell us about the construction of political agency and rights claiming in the context of ‘lay humanitarianism’, with no professionalization, bureaucratization or discourses on rights. Due to the HIV/AIDS epidemic, Malawi now faces the task of caring for a growing number of orphans. Previously, these children would have been absorbed into the extended family structure. Freidus suggests that an indigenous Malawian perception that greater outside safety nets are needed has been both constitutive of and constituted by a broad based intervention by Western NGOs and donors.

Consequently, the rights-based framework provided by the Convention of the Rights of the Child, which Malawi has ratified, is largely eclipsed by the politics of suffering that lie at the heart of humanitarianism. These interventions are characterized by the use of a moral imperative to ‘save’ the abandoned African child and the strategic deployment of the concept of bare human life as to indicate that these children exist in a social, cultural and historical vacuum, resulting in the continued production of unequal power relations. Freidus describes how these initiatives engender the legal, social and cultural dislodgment of Malawi orphans from their families and communities. She locates her analysis in the context of a governance humanitarianism that eschews the logic of law and human rights for that of the creation of arbitrary hierarchies of compassion by way of a form of ‘traffic in suffering’. This traffic takes place through multiple discourses and imageries, including websites, picture galleries, fundraisers and volunteer tours of orphanages. Going beyond the conceptual and empirical criticisms laid out above, Freidus articulates a critique of rights-based humanitarianism that is anchored in the need to account for cultural diversity and local agency in the production and dissemination of rights in addition to shifting the paradigm away from the predominantly ‘legal’ dimensions that are currently at the core of rights.

References


CHAPTER TWELVE

RIGHTS-BASED HUMANITARIANISM AS EMANCIPATION OR STRATIFICATION? RUMORS AND PROCEDURES OF VERIFICATION IN URBAN REFUGEE MANAGEMENT IN KAMPALA, UGANDA

Kristin Bergtora Sandvik

1. Introduction

Through a study of the tension between the increasingly state-like practices of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the frames for rights claiming available to the refugee population, this chapter tries to complicate our understanding of the relationship between rights struggles and humanitarianism by exploring informal processes through which refugees are construed individually and collectively as illegitimate rights claimants. The last fifteen years have seen a comprehensive reform of the international refugee regime through the institutionalization and regularization of UNHCR's practice. Moreover, since the mid-1990s, UNHCR has referred to itself as a “human rights organization” and has emphasized the importance of refugee rights in securing international protection. The focus on reform and the turn to rights have generally been viewed as marks of progress. However, seen from the perspective of refugees and asylum seekers, in subtle ways, these developments may also serve as vehicles for subjugation and control in global migration management.

In this chapter, I examine how discourses on human rights and international protection are appropriated and played out with ambiguous effect in the encounters between UNHCR legal protection officers and urban refugees in Kampala, Uganda. These interactions are characterized by formal and informal negotiations over a set of scarce resources; urban residence permits, financial support for basic needs, refugee status and resettlement to the West. The struggle for resettlement is intense and...

1 The research for this chapter was made possible by generous grants from Harvard Law School, the University of Oslo and the Research Council of Norway. I am grateful to Ingunn Ikdahl, Bill Derman and Anne Hellum for comments.
structures much of the social life in the refugee community (Sandvik 2008). The chapter is based on my experience as a caseworker for UNHCR (2004), and data from fieldwork among urban refugees with the Refugee Law Project (RLP) (2005), both in Kampala. My research methods included participant observation, unstructured interviews with urban refugees and employees of the international and national refugee bureaucracy, a newspaper review of Uganda’s three main newspapers covering refugee issues from 1992–2005 and an analysis of grey literature.

The empirical starting point is the suspicion and distrust which infuse the relationship between refugees and humanitarians. During my time as a caseworker, I was struck by how humanitarians, and here I include UNHCR legal protection officers, Ugandan government officials and local service providers, commonly referred to urban refugees as people “who always tell stories” in order to obtain benefits, such as a place on UNHCR’s urban caseload or access to resettlement interviews. The perception of refugee clients as unruly subjects seemed to be intrinsic to bureaucratic practice and to the humanitarian outlook more generally. During my subsequent fieldwork in the urban refugee community, I was warned numerous times by former colleagues to be both skeptical toward the veracity of any refugee narrative, and to be careful with the questions I asked, as rumors were so easily triggered. In the course of fieldwork, I noticed that a similar degree of mistrust was held by the refugees. In their narratives, humanitarians emerged not only as incompetent bystanders, but also as the actual perpetrators of violations of human rights and bureaucratic procedure.

I accumulated a number of reports and statements offering serious accusations of corruption and sexual exploitation involving humanitarians in conjunction with disbursement of economic support, the granting of refugee status and the selection of resettlement candidates. These accounts were always what legal terminology defines as ‘uncorroborated’—not supported by evidence or credible information. Consequently, they were seen as lacking in veracity, and dismissed as rumors by UNHCR staff and other refugee bureaucrats. Given the many and severe ways in which humanitarians of various pedigree in fact have failed to serve their constituency, both in Uganda and elsewhere, I was pondering what to make of the content and frequency of these accusations. These types of accusations are familiar to humanitarian researchers, but offer particular conceptual and methodological challenges for ethnographers, who must make sense of how and where they fit in the social fabric. To that end, instead of considering their veracity, I will take them as narrative practice,
adopting the label ‘rumor’ as a lens for examining the promise of protection through human rights claiming and humanitarian assistance.

The chapter proceeds in seven parts. In the first and second part of the chapter, I juxtapose the rumors born out of a culture of suspicion among urban refugees in Kampala with the types of procedures, formats and knowledge coming out of the humanitarian reform project. Engaging communicative formats such as rumors offered a repertoire of resources with which refugees could challenge and critique formal refugee management discourses as being against “their human rights”. However, in turn, this practice seemed to undermine resistance by reinforcing a perception among UNHCR’s legal protection officers and others that urban refugees were legal subjects with dubious credibility. In an effort to unpack this tension, the remainder of the chapter will interrogate how contestations over procedures of verification and knowledge formats have moved to the centre of the activities of UNHCR.

In parts three and four, I frame the slippage between the regularization of the resettlement procedure, and the subversive stories of malpractice and corruption in resettlement practice as told by urban refugees in Kampala. In parts five and six, I look at the use of rumors by the powerless—the urban refugees—to articulate experiences of illness, neglect and exploitation, and their appropriation by the powerful UNHCR staff and other members of the refugee bureaucracy. In conclusion, I consider the following. In the context of a profound disagreement about authorship of knowledge, how does the possibility of epistemological instability inform our understanding of the use and function of humanitarian assistance and human rights protection in situations of fundamental power differences between those entrusted to do good, and their beneficiaries?

2. Rights, Regularization and Resettlement Reform

The broader thematic context for the discussion is the reform of the humanitarian enterprise through the introduction of human rights protection mechanisms and lawlike bureaucratic procedures. As a consequence of the crisis of legitimacy which hit humanitarianism in the mid-1990s, humanitarian organizations, including the UNHCR, started to emphasize the importance of human rights as an ethical framework for their operations, while intensifying the focus on improving management practices through regularization.
Since the mid-1990s, the UNHCR has called itself a human rights organization and described its activities as promotion of human rights. In 1993, the High Commissioner for Refugees, Sadako Ogata observed that “Humanitarian assistance is much more than relief and logistics. It is essentially and above all about protection—protection of victims of human rights and humanitarian violations” (Ogata 1993). In 1994, affirming the wider context of international human rights treaties, Ogata stated in her address to the 50th session of the UN Commission on Human Rights that “UNHCR today is very much an operational human rights organization, albeit for certain categories of people” (Kenny 2000:4). The following year, Ogata pointed out that “human rights concerns go to the essence of refugee movements, as well as to the precepts of refugee protection and the solution of refugee problems” (Kjaerum 2002). Nevertheless, while taking a human rights based approach to refugee protection, refugee assistance activities are still framed through a vocabulary of “beneficiaries” and “needs” (Sandvik 2010).

Regularization was the second important component of the reform of the international refugee regime. As noted by Kingsbury, Krisch and Stewart (2005) in the late 1990s, new mechanisms began to be developed to address decisions and rules made within the intergovernmental regimes, and more generally to address the concerns about legitimacy and accountability deficits in the growing exercise of transgovernmental regulation. In this system, regulatory norms were determined and applied by bodies such as the UNHCR that were not legislative or primarily adjudicative in character, and which were not directly subject to control by national governments or domestic legal systems or the state parties to the treaty.

The idea that the deployment of human rights and procedural rules could result in the necessary reform of the refugee management regime also featured prominently in the restructuring of resettlement which has taken place over the past decade. During the late 1980s and early 1990s, UNHCR’s resettlement operations suffered a crisis of legitimacy. A 1994 influential evaluation report pointed out that UNHCR had been “slow to adjust its procedures and allocation of resources to the new realities.” “The lack of clarity in implementation of the resettlement policy” they noted, had “led to misconceptions that resettlement was something which could be rewarded for good behavior or services rendered from interpreters or refugee workers, or simply to get rid of difficult refugees” (Fredriksson and Mouge 1994). Among the new initiatives undertaken thereafter was the adoption of a comprehensive Resettlement Handbook in 1997 (Martin 2005). At the time of fieldwork, the most recent update of the handbook
was from 2004. In the 2004 Handbook, UNHCR emphasizes that the organization uses clear standards for referring individuals to prospective countries. UNHCR underscores “[t]he importance of ensuring that resettlement policies and criteria are applied in a consistent and transparent fashion in every region of the world.” Moreover, “[a] rational and transparent approach will, furthermore, strengthen the credibility of UNHCR in general and widen the confidence of refugees, resettlement countries and other partners, which in turn should help to ensure that resettlement can be done efficiently and effectively”.

3. Suspicion and Rumors in Kampala

In 2005, Uganda was home to some 270,000 refugees, produced by the many political conflicts which have plagued this part of Africa. While the vast majority come from Sudan, thousands of refugees from Burundi, the Democratic Republic of Congo, Eritrea, Ethiopia, Rwanda, and Somalia have also sought protection in the country (UNHCR Global Appeal 2006). As a consequence of difficult living conditions in Kampala, getting “out of” Uganda is seen by urban refugees as the only realistic means of social improvement. According to my informants, the refugee community is constantly being targeted by governments, paramilitaries and rebel factions who attempt to abduct or recruit refugees and to infiltrate refugee organizations. Periodically, refugees are being attacked on the street or in their homes by ‘unknown people’. The perception of constant insecurity coupled with difficult material circumstances and fierce competition for the goodwill of humanitarians and the coveted resettlement placements means that the refugee community in Kampala is rife with speculation and mistrust.

This ‘culture of suspicion’ is a feature common to marginalized communities who find themselves in client roles vis-à-vis bureaucrats. In her discussion of the relationship between inmates and medical program administrators in a Georgian prison, Erin Koch notes that in the absence of trust, suspicion mediates cultural boundaries of morality and civility.

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2 Since 2005, I have been receiving intermittent e-mail newsletters from an association of francophone refugees, mostly of Congolese origin, called People for Peace and Defense of Rights, PPDR. These newsletters describe attacks against members of the association or francophone refugees committed by “unknown people”, which appears to be a euphemism for Congolese rebel factions. Most of these newsletters can be found at http://www.ppdr-inter.org (last visited March 31, 2011).
and operates as a widespread, unexceptionable etiquette (Koch 2006). Koch’s perspective is illuminating. Invariably, the refugee groups I interacted with appeared to see themselves, in comparison with other ethnic and national groups, as systematically discriminated against by UNHCR, the government and service providers. I listened to informants speak about ‘security problems’ which forced them to stop working, change residence or ‘go into hiding’. I heard accounts of refugees who kept their children away from school in order to avoid exposure, and for the same reason, some professionals stated that they had refused good job offers. Many used local transport into town in order to avoid walking, even though they would have preferred to economize by going on foot (see also Human Rights Watch 2002; Macchiavello 2003). The fear based interpretations of events underlying these strategies are routinely dismissed by UNHCR legal protection officers and service providers as either unsubstantiated or as products of common crime. As explained by William, a legal aid advocate: “I advise them to avoid security problems, by not moving at night, or going to bars. Me, I must always be at home by 9–10” (interview with author, Old Kampala, July 15, 2005).

The powerlessness of urban refugees does not entail voicelessness, but rather demotion to a suspect mode of communication. In a context where refugees are lacking rights, resources and legal literacy, rumors become important. As a communicative practice, rumors provide marginalized people with information about the nature of majority society and its institutions, and work as strategies to oppose the perceived abuse of power by bureaucrats and politicians (Gluckman 1963). ‘Rumor’ is a form of “unsubstantiated information, true or untrue, that passes by word of mouth, often in wider networks than gossip” (Stewart and Strathern 2004). A rumor must have a plausible plot, and usually consists of the identification of characters, a story, and an evaluation of conduct (Haviland 1977). Rumors can be understood not only modes of understanding the world, but as implicated in “sequences of action”, both subversive of, and as sources of, new power. They are “prime vehicles of interpretation, which give it its narrative, shape and meaning” (Stewart and Strathern 2004).

In many parts of the world, rumor retains the quality of being a form of ‘news’, irrespective of either its source or whether the information presented can be corroborated through other channels of information (White 2000; Ross Owens 2005). Rumors represent people’s attempt to find or create a ‘truth’ about events that helps them to make narratives about social values and judgements about the morals of others, and they may be conceived as attempts to impose order or influence categorization of
knowledge. They do not merely substitute for other channels of official news and information, but also constitute tactics and collective efforts to interpret ambiguous situations (Kapferer 1990; Samper 2002). Writing on the ‘new’ African context, Stewart and Strathern suggest that “contemporary cycles of rumors tend to fit into the picture of expanded and extended relationships signaled by the term ‘globalization’ and that they all tend to depict the equivalent of government or business ‘conspiracies’ against the people” (Stewart and Strathern 2004).

The encounter between the humanitarian quest for legitimacy and the culture of suspicion which characterizes the urban refugee community invariably results in a deep clash of rationalities. For the UNHCR particularly, the impetus for reform orders the construction of legal knowledge and the modalities of legitimate authorship in a way that moves the problem of verification to the core of bureaucratic practice. The objective of reform is specifically to ensure that the refugee management apparatus will construct knowledge about its practices through a limited and legalistic inventory of information-gathering techniques and standardized modes of authorship. In law, information which fails to be recognized as legal facts or sanctioned as ‘true’ is either ignored, or may be relabeled as slanderous or defamatory, and in itself becomes a form of illegality. Hence, from the perspective of the UNHCR and the refugee bureaucracy, the rumor mongering among urban refugees becomes an illegitimate mode of authoring knowledge from unreliable sources of information. In the following subsections, I will explore how the dilemma of verification plays out in the struggle for resettlement.

4. The Resettlement Procedure

When an individual has been granted refugee status, the next step is the search for a durable solution, which in the terminology of UNHCR means repatriation, local integration or resettlement. According to the definition used by UNHCR, resettlement involves the selection and transfer of refugees from a state in which they have initially sought protection to a third state which has agreed to admit them with permanent residence status. Resettlement is primarily a solution for those refugees with “legal and physical protection needs,” when there is an immediate or long-term threat of refoulement to the country of origin or expulsion to another country from where the refugee may be refouled, and/or when the refugee is under threat of arbitrary arrest, detention or imprisonment or threats to
physical safety or human rights in the country of refuge, and this threat renders asylum untenable. While refugees must be proactive to obtain refugee status, they cannot officially ‘apply’ for resettlement. Candidates are either identified by implementing NGO partners or by UNHCR staff during screening for the refugee status determination. Whereas the individual has a right to seek asylum under international human rights law, resettlement is a discretionary response on the part of nation states and UNHCR.

The bureaucratic typology promulgated in UNHCR’s 2004 Resettlement Handbook emphasizes fair and transparent distribution. Resettlement is a rule-governed, formal process where the selection of resettlement candidates takes place through sequential, administrative steps aimed at categorizing or excluding the refugee as a victim of, or at risk of being victimized by one or more designated human rights violations. This includes a detailed bureaucratic vetting process, and the deployment of sophisticated modes of collecting information about the candidate (his or her social and economic profile, evidence of previous torture or sexual abuse, corroboration of ongoing security threats), and the larger political context out of which claims emerge (country of origin information, the nature of human rights violations commonly occurring in particular conflicts).

According to the handbook, individual UNHCR Legal protection officer makes the determination of resettlement as the appropriate solution during face-to-face encounters, or through a facilitator. Depending on the outcome on the case assessment and verification, the Individual Case (IC) will then start a procedure which may take anywhere from weeks to years. If the status as a potential resettlement candidate is confirmed, the case moves forward with collection of documentation and the resettlement interview. The rendition of biographical data and history prior to flight, as well as the interviewees’ predicament, is subjected to thorough credibility assessments. Following the interview, the legal protection officer compiles the resettlement registration form, and the responsible officer reviews the

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3 However, seven other categories are also described in the 2004 version of the Resettlement Handbook, embodying various aspects of post-cold war humanitarianism. These include survivors of violence and torture, medical needs, women-at-risk, family reunification, children and adolescents, elderly refugees and refugees without local integration prospects. The legal basis for resettlement is the tripartite agreements between host states, receiving countries and UNHCR. The largest resettlement countries in 2004 were the United States, Australia and Canada, followed by the Scandinavian countries, the Netherlands and New Zealand.
quality of the submission. Depending on the intensity of the violation, or risk of violation, the submission is categorized as ‘normal’, ‘urgent’ or ‘emergency’. If the regional hub accepts the case, the resettlement dispatch is submitted to a potential resettlement country, which may accept or reject cases referred by UNHCR. The UNHCR handles the departure in cooperation with the International Organization of Migration, which facilitates travel and arranges for medical screenings. Upon arrival in a resettlement country, the new host government assumes responsibility for the integration of the refugee.

Official and Subversive Stories about Corruption and Malpractice

As the numbers of resettlement slots have increased without a corresponding increase in the level of regional conflict, the availability of resettlement from Uganda expanded accordingly. For 2006, the number was projected at 2,500, up from 1,500 the year before and 35 in 1997 (RLP 2002; UNHCR Global Appeal Uganda 2006). While resettlement remained a scarce resource at less than one percent, obtaining resettlement was no longer a statistical impossibility. Refugees engage in the demanding process of constructing ‘credible resettlement identities’ through the vocabularies and artifacts of humanitarianism and human rights. If successful in these endeavors, refugees who are considered victims of human rights violations, or at risk of such violations, become resettlement candidates. Nevertheless, for every ‘successful’ resettlement candidate, there are hundreds who for various reasons are not considered to be eligible for resettlement. Some who come forward are deemed to be economic migrants looking for a better future, or suspected of having committed war crimes. Others fulfill the criteria set out in the resettlement procedure, but are rejected due to procedural, purely subjective or haphazard, never determined bureaucratic reasons, including the failure to generate credible performances of suffering.

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4 The application of the ‘normal’ criterion usually entails a drawn-out process lasting months, perhaps years. Depending on their level of legal consciousness, some refugees may thus also undertake an effort to be placed in the ‘urgent’ category, where cases proceed slightly faster. The ‘emergency’ category is rarely used. Since it is routed via Geneva, it will usually generate a response from a potential receiving country within hours. Only the categories of legal and physical protection needs and medical needs qualify for the emergency category, and family reunification and lack of local integration prospects qualify exclusively for the ‘normal’ category.

5 In 2005, the number of resettled refugees worldwide was 80,800. This accounts for less than 0.5% of the total refugee population.
While resettlement has been legalized, the relationship between the procedural guarantees we know from refugee law and the resettlement procedure is disjointed. While cast in the mold of the due process rights, the handbook introduces a formalization approach wherein the lack of relevant guarantees cements an asymmetrical relationship between the legal protection officer and the resettlement applicant. If unsuccessful, the interviewee usually receives a standardized letter of rejection, which makes it impossible to determine the reason for rejection more precisely. This leaves the individual in question and his or her surrounding community deeply bewildered both about the specific rejection and the nature of resettlement as a bureaucratic process in general.

The suspicion and disbelief among urban refugees surrounding UNHCR’s denial of the possibility that ‘everybody can be resettled’, and that legal process is determinate for the selection of candidates, must be understood in the context of the unstable bureaucratic culture of UNHCR, which in the past has been marked to some degree by incompetence, personal favoritism and lack of administration. The social disconnection between administrative law and outcome means that substantial confusion and suspicion exists as to why some people get resettled and others do not. The struggle to access legal identities and to develop informal relationships with humanitarians is subjected to a host of rumors about what people do to succeed. Stories of refugees who have been resettled circulate by word of mouth through refugee communities, often becoming distorted as a result. The mere plausibility of scandal seems to provide fertile ground for new rumors.

In 2001, it was revealed that a resettlement-for-pay scheme had been going on since at least 1999 in the sprawling Kyangwali refugee settlement, located in the Western part of the country, with the result that Kyangwali had become known as a ‘resettlement camp’. One informant summarized what appeared to be a general consensus: “[E]veryone knew you could pay money for resettlement”. The officer responsible for resettlement during the scandal increased the number of resettlement cases from 35 cases before his arrival in 1997, to 443 cases in 2000. An officer from the Joint Voluntary Agency (JVA), an American NGO on contract with the U.S. government, had apparently unwittingly helped refugees to fill out forms, after which names and pictures had been substituted (RLP 2002). Lawrence, a legal aid provider I interviewed, explained that “the refugees had continued complaining that there was corruption in the settlements. The representative denied it, but eventually the rumors reached Geneva, and the Americans came to carry out an investigation and to verify the
claims. When they came to the settlements (Kyangwali), the refugees would say that you could get resettlement for 500 dollars...the Americans were horrified...during this time there had been a drastic increase in resettlement..." (interview with author, Old Kampala, July 13, 2005).

The RLP reports that in June 2001, approximately 50 refugees camped outside the front gate of UNHCR Kampala protesting the loss of their applications for resettlement, which they were subsequently allowed to reapply for. After an investigation, the national resettlement officer in question was removed from the resettlement section, and an international staff member was transferred (RLP 2002). However, stories about this particular corruption scandal still circulate in the refugee community in Kampala, along with the sense that ‘everything is for sale’, or can be bartered in exchange for sexual favors. Simon, a Sudanese asylum seeker, told me in June 2005 how a particular Ugandan protection officer could fix resettlement for 500,000 Ugandan shillings; refugees simply filled in the resettlement form and photocopied details and then waited for countries to select them (interview with author, Old Kampala, July 14, 2005). George, another informant of Hutu origin gave a more colorful account. He explained that his friends had bought resettlement from the same protection officer, and added that Tutsis who purported to be Banyamulenge were still being resettled. The protection officer had even taken a woman off the plane at the last minute for not having paid her bribe. This protection officer had a beauty shop at a hotel, and a Congolese woman who had worked for her had tried to blackmail her about the resettlement scam. The protection officer had then allegedly recruited an assassin to have the Congolese woman killed (interview with author, Old Kampala, July 11, 2005). It should be mentioned that for unclear reasons related to her employment with UNHCR, this protection officer had in fact gone abroad for studies in September 2004. Subsequently, her position had been eliminated and she did not return to the organization.

The ongoing struggle between humanitarians and refugees concerning ideas about procedural rigor extended to the allocation of refugee status, a prerequisite for being considered for resettlement. According to the government, “the process of granting status is done by a technical committee, which eliminates chances of graft.” At the same time, the endemic pervasiveness of corruption in the Ugandan state apparatus means that there are also rumors about cheating and bribe-taking in conjunction with the

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6 A persecuted Congolese minority of Rwandan origin.
procedure for determining refugee status. During my fieldwork, various informants talked about three named officials at the refugee section of the Office of the Prime Minister. These officials were accused of demanding bribes in order to allocate refugee status to asylum seekers. Bribes had to be paid to the receptionist, so he could set up appointments (10,000 shillings, or almost 6 dollars) and to the officers. The size of the bribes appeared to be based on nationality. According to an Ethiopian asylum seeker I interviewed, for the Somalis, Eritreans and Ethiopians who could not get *prima facie* status (automatic status on the basis on place of origin, in practice allocated by UNHCR), the ‘fee’ was 100 dollars, or 174,000 Ugandan shillings. Simon, who as a Sudanese asylum seeker was theoretically eligible for *prima facie* status, reported that he had only been asked to pay 75,000 shillings. Simon added that he had told lawyers at the RLP that once he was able get hold of some money; he was planning to “buy himself” a refugee status, and then go to a human rights organization (interview with author, Old Kampala, July 14, 2005).

Yet, the fact that refugees were clearly irked about the corruption and chose to talk to researchers about it, did not exclude the possibility that a flawed bureaucratic process could sometimes serve as an advantage, at least for refugees who could offer financial compensation or sexual favors. It might be productive to contemplate a notion of corruption as an economy of favors and dual moralities which not only operates in, but is intrinsic to, official and semi-official bureaucratic spaces. The accounts I heard from refugees about corrupt humanitarians and government officials were partly phrased as translations of international anti-corruption agendas. But while perceived as unfair and ‘bad’, the availability of legal protection and resettlement through monetary exchange provided some sort of predictability which could not be had through a well-functioning version of the official UNHCR administrative machinery, or be claimed from the resettlement handbook. The rumors, and this form of *bricolage*, make it difficult for both UNHCR and advocacy groups to distinguish between genuine and alleged cases of misconduct, and it greatly complicates the prospects of bureaucratic reform through rights and bureaucratic procedures. As we will see in the next section, the presumption of untrustworthiness also has more general epistemological consequences.

5. Illness, Neglect and Sexual Exploitation

I accumulated a number of accounts of past and ongoing transgressions by humanitarians involved in refugee management. These accounts came
with only slight variations to the plot lines and referred to instances of intentional medical neglect and sexual misconduct. The liminal status of these accounts, and their problematic content radically exacerbated the tension between refugees and humanitarians.

Medical rumors can arise from a range of sources, from the alarm or assurances expressed by a relative or friend, from information provided by the mass media, or from organized groups offering alternatives to conventional medical treatment (Suls and Goodkin 1994). In their analysis of storytelling about medical services among marginal immigrants in Australia, Manderson and Allotey (2003) suggest that stories of misadventure, misunderstanding, and poor quality of care experienced through contact with medical and health services provide narratives of marginality, and fuel the suspicions held by recent immigrants. Similarly, in Kampala, tragic stories of perceived neglect abound.

I found two types of medical rumors to be common. The first type of narrative concerns sick refugees who die in camp or urban locations as a consequence of the callousness, indifference or incompetence of humanitarians. These stories frequently contain an explicit criticism of the urban refugee policy, which severely restricts the refugee population’s freedom of movement by confining refugees to rural settlements, and which only allows a very small number of refugees on the urban caseload to receive medical treatment financed by UNHCR in Kampala. A middle class Congolese couple—the husband was a lawyer by profession - told me how some of their friends, a husband and wife, had agreed to go to the settlement and ‘dig’. Before long, the husband had fallen seriously ill. The wife had wanted to bring him to medical treatment in Kampala, but it had taken so much time to get the permit to leave the settlement that it was too late when they finally arrived in the city. The husband died (interview with author, Old Kampala, July 11, 2005). In an edition of their newsletter, a Congolese refugee organization called PPDR reported that a seventeen-year-old refugee boy had been attacked by unknown people and suffered a serious head injury. The report goes on to state that his family made fruitless attempts to seek help from UNHCR’s implementing NGO-partner in Kampala. On August 1, 2006, the boy died at the hospital. Blaming the inaction of the UNHCR and the Ugandan Office of the Prime Minister (OPM), the newsletter gives a gruesome account of this death. The written message was followed by a number of graphic headshots of the dead boy taken with a digital camera:

As he had no money, the medical prescription showed that he was taking malaria drugs. The XR showed that before the 1st August 2006, his head stank
and was developing maggots...According to the official version from the UNHCR and OPM that declares any denial of assistance to any refugee staying in town and so the ID may be granted to refugees, they have to sign a letter showing that they will not ask for any assistance from the UNHCR. According to the Inter—Aid, Mr. Tshibangu should not be assisted because his father wrote that “letter.”

The second type of narrative concerns stories about infants who are stillborn or die due to neglect. Usually, these rumors implicate Ugandan medical staff or UNHCR’s implementing partner directly, but assign blame to the UNHCR, which hovers in the background while failing to intervene to protect refugee children’s right to life. During an interview, a Sudanese refugee leader recounted how he had confronted UNHCR’s local implementing partner over a situation where a sick refugee child had been brought from northern Uganda to seek treatment at the Mulago hospital in Kampala. He described how, after five days,

They had realised that the boy had not received food, nor treatment nor nothing, he was just there. The boy had finally died, and even the burial had been robbed (interview with author, Rubaga Cathedral, Kampala, June 29, 2005).

A different newsletter from PPDR, again accompanied by grotesque photographic material, carried the following caption:

Fearing expenses, a humanitarian NGO […]—Uganda: a UNHCR Uganda implementing partner for urban refugee program throws a child of a Congolese lady in a box and dropped the body on the road. The child belonged to the Congolese Madame (name removed).

This newsletter alleged that the woman in question had delivered a stillborn baby due to the fact that UNHCRs implementing partner “did not rush her to the Hospital.” The newsletter details how the NGO workers continued to lie to the bereaved mother about the whereabouts of the dead baby, which the NGO workers subsequently disposed of by the side of the road to save burial costs.  

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8 These are identical to the kind of ‘killing babies’ rumors common worldwide, where minority babies are either forcibly aborted or killed at birth. See Samper (2002) for a discussion about rumors of organ transplants and killing of children, and Manderson and Allotey (2003) for examples of rumors about state policies to get rid of unwanted Somali foetuses in Australia.
9 Email communication from PPDR, 3 May 2006, on file with author.
Furthermore, during my internship and subsequent fieldwork, I heard allegations of sexual misconduct against individuals working for UNHCR, their implementing partners, the government and leaders of refugee organizations. The same individuals are named over and over again, as people who exhort sexual favors from refugees. Whatever the merit of these allegations, they are being reproduced as purportedly true statements, and have a significant impact on the communal perception of justice. Occasionally, these allegations find their way into reports written by advocates and refugee activists. In 2005, the advocacy and legal aid centre, The Refugee Law Project (RLP), issued a highly controversial report called ‘A Drop in the Ocean’: Assistance and Protection for Forced Migrants in Kampala.

The report stated that a number of female refugees and asylum seekers reported sexual harassment at different stages of the refugee status determination process. One female Rwandese refugee stated that the man who interviewed her at OPM tried “to get me to be with him. He said he could help me only if I was with him. I said no and he sent me to Special Branch.”(138) In another example, a female Ethiopian refugee claimed that

I have been delayed because one of the officers at the Special Branch says that I was stubborn. He wanted to get me in an interview in a restaurant, when I refused, he delayed my process maliciously. (139)

A male Congolese refugee argued that it was easier for young, beautiful women to advance processing of their files as they could prostitute themselves to officials charged with determining their status (140). Yet another male Congolese refugee suggested that if you gave money and sexual favors to workers at UNHCR’s implementing partner, your case would be handled faster (141) (RLP 2005:4).

These examples of rumors about medical neglect and sexual misconduct illustrate a twofold problem: First, how the proponents of the accusations struggle to fit their perception of the nature of transgression into the humanitarian frame of accountability, and second, the inability of the refugee community to provide ‘sufficient’ proof.’ ‘A Drop in the Ocean’ was badly received by the Ugandan government and by UNHCR.10 Second,
while the quality of the research documenting these accusations remains poor and poses enormous methodological and ethical problems, the reluctance of the refugee bureaucracy to undertake any serious investigative activity contributes to a spiral of increasing distrust.

6. Contesting the Credibility of Formats

The examples above also illustrate that rumors function as ways to organize the bureaucratic process. The sociology of bureaucracy tells us that rumors which produce exaggerated negative renditions of encounters between clients and service providers are a common way to vent frustration and allocate blame, and to reinterpret both the client identity and the legal rules at play. As noted by Michael Herzfeld, clients are not the only people who tell such stories. Bureaucrats too, he argues, often seek means of exonerating themselves from blame by blaming ‘the system’, excessively complicated laws, their immediate or more distant superiors, ‘the government’ (Herzfeld 1992).

I propose that humanitarians appropriate refugee rumors in two ways to organize their external relationship. First, to construct populations and individuals as non-credible communicators. According to McCroskey (1966) credible communicators are persons who are not only experts on the topic, but also impart this knowledge in a truthful and honest manner. Conversely, the non-experts, the refugees, are seen as gossips who might be viewed as non-credible communicators. At the same time, in the context of the pervasive indeterminacy of both law and social circumstance, these accounts to some extent are taken at face value and used to navigate relationships with government officials and refugees. What differentiates the various refugee accounts referenced above from urban legends is that they are partly channeled through particular, ‘officialized’ formats. They are communicated through cyberspace, with the vocabulary of human rights reports, and with digital footage. Nonetheless, they are considered by humanitarians as little more than gossip in print. How they come to constitute discredited sources of information merits closer attention.

The use of ‘facts’ is intrinsic to the practice of human rights reporting. The reliability of human rights reports rests upon the trustworthiness of the genre itself, and the organizations which produce it. The authorial interpretation is concealed in order to preserve the rendition of events as ‘legal facts’. Subjectivity belongs to victims and is enlisted through ‘listening and voicing’, typical ethnographic devices. Objectivity is the domain of
the organizations who report (Wilson 1997). The format and style of reports created by refugee activist groups such as PPDR combine the formal documents produced by international organizations with vernacular grassroots speech geared to prove familiarity with the international human rights framework. The goal is to combine political rhetoric with the requisite amount of ‘authenticity’.

As described above, the PPDR circulates e-mails denouncing individual cases of ‘human rights violations’ and illustrating their claims with grisly digital footage. These images are usually designed to illustrate the extreme insensitivity and greed of UNHCR’s implementing partner, and indirectly, UNHCR’s callousness towards refugees. While the scripting of the text and the targeted use of email are carefully tailored to reach recipients, both the categories of inquiry and the use of imaging technology frequently defy western standards for “legitimate” renditions of suffering. Sometimes the reporting fails to fit this format due to failure to take into account social and economic difference. A different Congolese refugee association composed a very formal report about their livelihoods in Kampala and combined this format with an exposure of humanitarians they alleged were corrupt. The allegation was presented in the form of interviews with two refugees whose ‘anonymity was protected’ for their safety, and without any corroborating evidence. The problem was, of course, that the amount of money which allegedly had changed hands, US $1000, amounted to a fortune for the authors, but a pitiful sum for a humanitarian audience, who as a ‘moneyed elite’ would be unlikely to believe that someone had risked a prestigious position for such a relatively modest sum.11

Conclusion

In this chapter, I point to the possibility that human rights discourse can also work as a discourse of stratification, which only allows knowledge about human rights practices and their implementation to be legitimately constructed from particular subject positions and through specific categories. As observed by Kirsten Hastrup, “people will show more or less competence of expressing their rights within the idiom of international legal language, which now functions as the legitimate representation of a global

moral economy” (Hastrup 2001). Thus, we must ask how this capacity for authorship and classification is distributed between categories of individuals, and what the significance of this distribution is. Who is designated as a victim? Who designates victimhood as the key signifier? To illuminate this question, the chapter has examined a particular set of interactions between international and local actors in which human rights discourses are mediated and transformed.

I have suggested that rumors provide fruitful insights into how power structures produced by refugee reform are constructed and contested. The focus on reform through the introduction of rights and accountability-generating procedures give organizations such as the UNHCR enhanced legitimacy. An important element of these procedures is that they contain mechanisms tailored to permit voices of protest and complaints about misconduct to penetrate the local administrative hierarchy and reach the upper echelons of the bureaucracy. At the same time, much of the information which circulates in the refugee community fails to acquire the status of legal fact that is necessary in order to register and entertain valid claims within these structures.

Finally, I will put forward the view that the circumscription of the capacity to produce valid knowledge is not an accidental, but an inherent feature of rights-based humanitarianism. Given the grim realities of life on the margins, it is not unthinkable that the corruption allegations, the accusations of neglect, the dead children and the graphic footage illustrate a plausible scenario. Without commenting on the validity of the rumors I overheard, it should be noted that the revelations of the many scandals connected to the governing of the organization or directly to UNHCR-workers have usually been preceded by long periods of gossip and rumor-mongering.12 Paradoxically, the disregard for form embedded in the framing of refugee claims somehow seems to diminish the veracity of allegations and the realism of tragedy. Authored by ‘non-experts’, the people who live these tragedies are relegated to the role of incompetent

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12 In the 1990s, UNHCR came under fire for financial mismanagement and lack of transparency. International media picked up donor-countries discontent with accounting practices, resulting in headlines proclaiming such indignities as “Refugees’ agency lost in wilderness of bungling and waste” (Burns and Williams 1998). The allegations of widespread sexual abuse of refugee women and children in West-Africa resulted in a devastating report from Save the Children UK and the UNHCR Office of Internal Oversight Services (OIOS). In 1999, it was discovered that a large-scale resettlement scheme was taking place at the regional UNHCR-hub in Nairobi. Up to 70 people were found to be involved in a complex scandal to extort money from refugees. Eventually, the investigations led to the dismissal and/or arrest of a number of UNHCR staff. For an extensive account, see Browne 2006.
communicators, forever engaged in the politics of suspicion. By providing a nuanced understanding of the ability of humanitarian organizations to provide human rights protection for African refugees, ethnographic analysis can shed light on the hierarchy between those with a “transnational concern to help persons in exceptional distress” (Forsythe 2006: 234) and the children, men and women they are employed to serve.

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CHAPTER THIRTEEN

EMERGENT ERITREAN HUMAN RIGHTS MOVEMENTS: POLITICS, LAW, AND CULTURE IN TRANSNATIONAL PERSPECTIVE*

Tricia Redeker Hepner

Introduction

In mid-2001, the Horn of Africa nation of Eritrea underwent its third dramatic transition in recent decades. Unlike those that took place in 1991 and 1993, which marked liberation from Ethiopian rule and the country’s internationally-recognized independence, respectively, the 2001 transition was not marked by intoxicating fanfare and collective euphoria. Rather, it signified an unfolding crisis of human rights that has since distinguished Eritrea as one of Africa’s most repressive states and among the top ten highest refugee-producing countries worldwide. To wit, a decade beyond the 2001 transition, more than 200,000 Eritreans remain refugees or asylum seekers abroad, from Ethiopia and Sudan to North America and the European Union.1 Accompanying their flight has been an increasing consciousness throughout the global diaspora of the dynamics of militarism, structural violence, political intolerance, and human rights abuses in Eritrea. And while some deny the crisis, attributing reports to Ethiopian propaganda, CIA interference, or the selfish individualism of post-liberation youth (e.g. Tesfamariam 2009), others in the global diaspora have developed initiatives that both challenge state repression and represent genuinely new features on the Eritrean scene.

This chapter is an exploration of emergent rights-based initiatives among Eritrean refugees, asylees and exiles in the United States, Germany, and South Africa. I draw on interview data collected either in person or via

* An earlier version of this paper was prepared for the African Studies Association—UK conference, London, September 11–13, 2006 and subsequently appeared as Working Paper 36, Forced Migration Studies Programme of the University of the Witwatersrand in September 2007. Data gathered in Germany includes contributions by Bettina Conrad (University of Hamburg). Special thanks are due to the editors of the present volume, to ASA-UK 2006 participants, and to Dr. Loren Landau for their helpful comments.

1 UNHCR Statistical Online Population Database, United Nations High Commissioner for Refugees (UNHCR), Data extracted: 13/02/2011.
electronic communication between 2006 and 2008; primary documents and testimonials produced by new rights-based groups and actors in the Eritrean diaspora; and previous research on Eritrean transnational politics and governance (see Hepner and Conrad 2005; Hepner 2003, 2005, 2008, 2009a; Conrad 2003, 2005, 2006). I examine three specific movements that were active in the mid-2000s—the Eritrean Anti-militarism Initiative (EAI) in Germany; the Eritrean Movement for Democracy and Human Rights (EMDHR) in South Africa; and the Eritrean Human Rights Action Group (EHRAG) in the U.S. Situated in an already-existing transnational social field marked by political repression and conflict, these groups sought to articulate rights concerns on three different levels. At the international level, they tried to connect Eritrean diasporic movements and objectives with global human rights organizations, strategies, and politico-legal norms. At the national level, they pressed for the rights of new refugees and asylum seekers vis-à-vis countries of residence within the national human rights and forced migration policy environments. And finally, at the transnational level, they critiqued, confronted, and resisted the policies, practices, and ideologies of the Eritrean government that severely compromised basic civil and political rights within Eritrea and the diaspora, and contributed to renewed refugee flows. Despite their ephemerality in situ, which I will discuss further, I argue that the primary significance of these three rights-based initiatives was the “important cultural work” (Merry 2006b) they did through expanding the frame in which Eritreans interpreted their political experience from a nationalist to an internationalist one. They also contributed to an important and ongoing structural shift in the existing transnational social field by fostering new linkages and cross-fertilizations between Eritrean diaspora organizations, and institutions, discourses, and practices specific to societies of residence and/or the global ecumen.

1. The Transnational and Nationalist Contexts

Rights-based initiatives among Eritreans in the diaspora are situated within a historic and contested transnational social field that (imperfectly) binds the Eritrean nation-state and its citizens abroad. Since the late 1960s, the Eritrean Liberation Front (ELF) and especially the Eritrean Peoples Liberation Front (EPLF) forged and utilized institutional linkages with refugee populations around the world to channel economic and political support into the nationalist independence struggle. The transnational social field that developed during the independence war (1961–1991)
helped solidify the power and ideological authority of the EPLF such that by the time independence was achieved in 1991, the worldwide diaspora was either organized beneath it or, at the very least, subject to its ideology, policies and procedures (Hepner 2005, 2008, 2009a). This pattern was continued after formal independence in 1993 under the ruling People’s Front for Democracy and Justice, or PFDJ, which sought to mobilize Eritreans exclusively within diasporic wings of its official institutions, such as mass organizations of women and youth and chapters of the PFDJ party. It also included pressures on adults to pay the 2% annual diaspora tax and set conditions on identity cards, passports, property sale or transfer, and any other official transactions relative to one’s degree of political and financial compliance.2

A fuller history and analysis of Eritrean transnationalism and its ‘enforced’ or repressive characteristics is provided in recent scholarly work (al-Ali et al 2001a, b; Hepner 2003, 2005, 2008, 2009a, b; Hepner and Conrad 2005; O’Kane and Hepner 2009; Woldemikael 2005). For the present analysis, it is important to note that, while the mechanisms for transnational behavior are well-developed from the perspective and goals of state-defined nationalism, they have been heavily circumscribed in the areas typically defined as ‘civil society.’ Organized political and civic groups linked directly to EPLF/PFDJ have been efficacious in channeling funds and political support into Eritrea, while those that resist identification with the government or represent sub-(or supra-) national identities or interests have been repressed within the transnational environment and completely excised from Eritrea proper. Routinely subject to exclusion and intimidation, groups with opposition, reformist, or non-partisan agendas, independent religious bodies (including a major wing of the Orthodox Church), and non-governmental development or aid entities have in some cases been actively thwarted by the state and the transnational institutions and actors that help comprise it.

Not surprisingly, the historic Eritrean transnational social field has been highly insular. While some informal linkages did form in the earlier years of the liberation struggle between pro-EPLF Eritrean activists in exile and other anti-colonial, left-wing, or Black nationalist groups, these were

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2 According to the Eritrean Proclamation No.21/1992, any person born to one Eritrean parent anywhere in the world is a national of Eritrea. In practice, however, nationality and citizenship tend to be defined largely on the basis of one’s compliance and support for the government and one’s financial contributions, including payment of the annual 2% diaspora tax. Adejumobi (2001) argues that this ‘loyalty’ conception of citizenship is common in postcolonial Africa, and is a key factor in contemporary conflict, civil war, and state-perpetrated rights abuses.
largely pragmatic alliances to help publicize and further the objectives of EPLF-dominated nationalism. Indeed, evidence from US-based activism the 1970s indicates that the internationalist impulses present among some organized Eritrean activists were deliberately quashed by EPLF (Hepner 2005, 2009a). The forging of genuine cooperative ties between Eritrean organizations and non-Eritrean ones that go beyond a calculated interest on the part of nationalists to serve immediate needs or goals has been virtually absent in the Eritrean experience until very recently. Whether for economic needs (including emergency relief and development efforts) or for socio-cultural and political ones, the role of international, foreign, or diaspora-based organizations has been very limited in Eritrea (see Hayman 2004). Stemming from the ethic of self-reliance that underpins nationalism and party-state policy, this insularity has helped protect Eritrea from a range of potentially hazardous interventions common in other post-colonial African countries, from overzealous structural adjustment programs to religious missionaries. However, it has also reinforced and perpetuated the notion, also foundational to nationalist identity, that Eritrea has been ignored, forgotten, misunderstood, or betrayed by the rest of the world. From a historically-informed transnational perspective, however, it rather seems that political elites have for many years rebuffed external actors and non-partisan Eritreans who might otherwise contribute to social, economic, cultural and political development and affairs. This hostility towards ‘foreign influences’ is largely justified with reference to national security, economic, political, and cultural sovereignty, and models of development that reject Western political-economic approaches in favor of those characteristic of East Asia and China in particular (Cameron 2009). Indeed, the rejection of broadly-defined foreign influences and concerns about maintaining sovereignty in a world dominated by neoliberal globalization (see Ferguson 2006; O‘Kane and Hepner 2009) also underpins the current crisis of human rights in Eritrea.

Today, the Eritrean transnational social field is still characterized by the dynamics described above. However, it has also begun changing in significant ways. Since the Ethio-Eritrean border war (1998–2000), and the subsequent decline of internal socio-political and economic conditions and the rise in militarism and human rights abuses, Eritreans all over the world have attempted to create new organizations that seek linkages with non-Eritrean bodies and articulate a broader ideological position. Whereas Eritrean transnationalism to this point has largely been confined to those flows which connect the party-state to its dispersed citizens, the emergence of more independent organizations and rifts in long established
ones (such as the Orthodox Church) suggest that patterned, structural changes, as well as cultural ones, may be at work. New rights-based initiatives not only represent an effort to overcome the internecine political conflict that marks Eritrean nationalism and the transnational social field, but the latter’s insularism and xenophobia as well. That is, organizations and coalitions have proliferated that not only resist the ubiquitous influence of the party-state and its orthodox nationalism, but also reach out to non-Eritrean organizations and internationalist or universalist discourses, such as those based on human rights. In the process, they adapt or ‘vernacularize’ human rights (Merry 2006a) to fit the Eritrean experience. These efforts are helping restructure the Eritrean transnational social field from one whose flows and networks are largely confined within and between Eritrea and its scattered exile populations, to those which extend into many different organizational, national, and international environments (see Glick Schiller et al 2002; 2005). Among other things, this restructuring heralds a departure from the ‘methodological nationalism,’ or enduring fixation on the nation-state framework, that has been operative among Eritrean transnational actors and migration researchers to date (see Wimmer and Glick Schiller 2002).

As this process unfolds, moreover, Eritrea and Eritreans become drawn into the global environment in ways that may be at considerable odds with the party-state’s objectives. As rights abuses and refugee flows continue unabated, diaspora organizations with critical agendas proliferate, often created by new arrivals with firsthand experience of militarism and repression. But escalating abuses also complicate the ability of new groups to formulate discourses and movements of peaceful transformation that remain autonomous from opposition political actors, who advocate regime change and/or armed struggle as the only solution to the current situation. The lack of clarity and tenacious political rifts of the past lead to the re-identification of rights-based approaches with opposition movements aimed at capturing state power, thus retarding their appeal among skittish exiles and forcing them back into the insular, nationalist framework.⁴ Moreover, because emergent rights-based initiatives represent an internationalist impulse, they are vulnerable to charges of neo-liberal, Eurocentric imperialism or ‘foreign interference.’ I explore how these dynamics play

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³ Of critical importance, but beyond the scope of this chapter, is the role of the Ethiopian government in hosting, supporting, and (arguably) manipulating Eritrean opposition platforms and the larger refugee population there, which government loyalists see as clear evidence that these groups are threats to Eritrean sovereignty and regional security.
out on the ground in the next section, where I sketch the experiences of three rights-based initiatives in the US, Germany, and South Africa vis-à-vis countries of settlement, the broader Eritrean diaspora, and Eritrea proper. While all three have since been largely reconfigured or absorbed into further developing initiatives or groups, they remain significant for being among the first to engage discourses and practices associated with human rights and therefore precipitate shifts in the structure of the transnational social field and the Eritrean political and cultural imagination.

2. How to Spell Human Rights: EAI, EMDHR, and EHRAG

A cursory search on-line for all things Eritrean returns an overwhelming array of acronyms, each representing a group somewhere along the continuum of inception to disintegration. After the establishment of mission statements, by-laws, and list-serves, many of these organizations seem to fade rapidly. The ephemeral nature of Eritrean diaspora organizations demands that analyses of their activity, and assessments of their potential impacts, be undertaken with caution. Even those which have been permitted or sanctioned by the EPLF/PFDJ have often tended towards internal conflict and malaise as a result of tensions dating to the EPLF-ELF civil war and attempts by PFDJ members to dominate (Hepner 2009a). As one US-based leader explained in an interview, “There is a great mistrust which dates to the armed struggle. People in exile want to do something but they do not want to be told what to do, and there is always intervention from political groups, trying to control them.”

In the mid-2000s, however, a discernible structural shift had occurred in the Eritrean transnational environment with the appearance of groups that explicitly engaged the language of human rights and broader international discourses. This shift had several interrelated causes, the first of which was the objective deterioration of conditions in Eritrea following the border war with Ethiopia and new refugee flows. These new refugees, many of whom belong to younger generations, began leaving Eritrea after 2000 mainly due to the conditions described above and, following earlier paths of migration, went to places like North America and Europe. Others opted for South Africa, Ethiopia, or the Middle East. However, changing immigration and refugee policies in Western countries after 9–11, and in South Africa as a result of post-apartheid immigration spikes (see Crush and McDonald 2000, 2001; Handmaker 2001; Handmaker et al 2007; Klaaren and Ramji 2001; Landau 2004; Nyamnjoh 2006; Peberdy 2001) add additional layers of hardship, wherein persecution at home is
compounded by increasingly stringent conditions with respect to asylum and refugee status abroad. Thus, even ephemeral organizations demonstrate that their historical frame of reference has shifted from that of the independence struggle to the post-independence environment. The practical realities they face entail a complex mix of navigating Eritrean transnational politics and often harsh migration policies and laws. Moreover, the challenges of seeking asylum abroad contribute to changing shape and location of many organizations as they shift and reconstitute with the movement of refugees themselves.

The three organizations addressed here include the Eritrean Anti-militarism Initiative, EAI, based in Frankfurt, Germany; the Eritrean Movement for Democracy and Human Rights, EMDHR, based in Pretoria, South Africa; and the Eritrean Human Rights Advocacy Group, or EHRAG, based in California, U.S.A. While EAI and EMDHR were created by refugees of the post-independence generation, EHRAG was created and led by men of the revolutionary nationalist generation. When data collection for this research began in 2006, all of these groups were active; by 2008, however, only EMDHR had developed and matured further, despite the fact that many of its members had been forced to leave South Africa for a more hospitable asylum environment. Although EAI and EHRAG have not maintained the same level of activity over time, albeit for different reasons, all of these groups have shared a stated commitment to furthering human rights agendas in Eritrea by building consciousness (at home and abroad) about what constitutes universal rights and rights-based activism, as well as assisting new refugees and asylum seekers from Eritrea to articulate their protection claims. All three groups have also sought to develop relationships with non-Eritrean organizations, including international human rights groups, local agencies that provide legal aid to refugees and asylum seekers, and in the German case, the Protestant church. Finally EAI, EMDHR, and EHRAG participated in the creation of a transnational coalition called the Eritrean Global Solidarity, which aims at coordinating the many ‘civic societies’ and political parties burgeoning around the globe to draw international attention to the crisis of rights and to apply pressure to foreign bodies and governments. Thus, we can analyze how each group represents various broader trends in Eritrean transnational

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4 The onward migration of many EMDHR activists from South Africa to the EU and North America has resulted in the reconstitution of the organization under different names in various locations. What appears to be ephemerality of organizations, then, is tempered by the ongoing efforts of individuals involved to remain active under other groupings as they resettle in various locations.
political activity and demonstrates unique characteristics and approaches to human rights due to the national and cultural environments of Germany, South Africa and the U.S. as well as the character of their formation and leadership, with generational differences and migration ‘vintages’ (Koehn 1991) being particularly relevant.5

The Eritrean Anti-militarism Initiative

The Eritrean Anti-Militarism Initiative (EAI) was founded by two asylum seekers who arrived in Germany in 2002 and 2003, respectively. Based in the Frankfurt metro area, the group remained deliberately small in membership over its active lifetime, with less than thirty members, most of whom were also recent asylum seekers. Three Germans also belonged to the organization, including the pastor of an Evangelical Church, who had met the two co-founders when they were living in a Frankfurt asylum center. The pastor facilitated EAI’s linkages with several non-Eritrean groups, including War Resisters International (WRI), a non-governmental organization founded in 1921 to further the rights and principles of conscientious objection (CO) and non-violence worldwide; Pro-Asyl, a Frankfurt-based NGO formed in 1990 to advocate for policy change and provide assistance to asylum seekers; and Connection e.V., a local non-profit with a platform nearly identical to that of WRI. In 2008, after most or all of its members had received legal status in Germany, EAI ceased to be active in an organized, cohesive way. But its former leaders and members continued to pursue important projects related to human rights and refugee rights as both individuals and members of other groups, as follow-up interviews conducted in Germany in 2010 confirmed.

Organized broadly on a rights-based platform, EAI was therefore partly an advocacy organization for Eritrean asylum seekers in Germany, and especially those with a background of military resistance or desertion. EAI also provided a forum for Eritreans to record in detail human rights abuses they experienced and encouraged others to do the same, within the broader framework articulated by WRI and Connection e.V., and facilitated on the legal front by Pro-Asyl. One aspect of EAI’s work in recent years has been the publication of asylum seekers’ testimonials (see EAI/C.e.V. 2005) describing the abuses they endured in compulsory military service and

5 The three groups analyzed here do not represent the full range of rights-based activity among Eritreans. In cities as far flung as London, Sydney, Oslo, Washington DC, and Khartoum, numerous groups advocating for human rights have emerged.
how these influenced the development of their anti-war and pro-human rights perspectives. As the Protestant pastor who worked closely with EAI reported in a 2008 interview, the process of sharing and publishing testimonials, and articulating a critique of militarism and war, was an important strategy for these young asylum seekers to achieve a level of control over their lives, in what is otherwise a dehumanizing, depersonalized, and bureaucratic process. Moreover, it helped these individuals hone their narratives, which proved useful within the legal context of claiming asylum.

In its efforts to forge a coherent cultural or historical linkage between conscientious objection as a human right and specifically Eritrean experiences and sensibilities, EAI connected its principles to similar values espoused by Jehovah’s Witnesses in Eritrea, who have long been subject to persecution and denial of basic citizenship rights under EPLF and later PFDJ. To trace one’s roots to one of the most despised and oppressed ‘foreign religions’ in Eritrea, and to profess principles of non-violence, conscientious objection, and anti-militarism in the context of one of the most militarized societies in the world, was a striking break from Eritrean political culture. Indeed, this produced some tensions between EAI activists and the broader Eritrean diaspora in Germany. In addition to provoking government loyalists, EAI’s approach also vexed opposition party activists, who rejected an anti-militarist approach as inherently alien to Eritrean culture and threatening to some opposition groups’ objectives to mobilize for another armed struggle. Yet, as the leader of Connection e.V. reported in a 2008 interview, the tension nonetheless forced opposition parties to engage with principles of CO and explicitly discuss them in relationship to Eritrea, which was itself a crucial development.

EAI’s focus on conscientious objection and non-violence therefore developed through the interaction of Eritrean asylum seekers within the German human rights environment, itself shaped by the devastating impacts of two world wars. German anti-militarism movements spoke a language that reflected the Eritrean experience in a way that was unthinkable in Eritrea: “It is a new experience for me that there are groups which are engaged with the issues of CO [conscientious objectorship] and advocate against war... As a soldier I would have never thought that this was possible. In Eritrea you cannot even talk about it ...Here I learned that resistance is possible” (EAI/C.e.V. 2004, German edition). The linkages developed with War Resisters International, Connection e.V., and Pro-Asyl both reflected and reinforced EAI’s particular focus, and made this a key dimension of individual asylum claims. However, EAI’s main goal was to
raise consciousness among Eritreans in Germany (and ideally inside Eritrea) that an international rights regime exists which provides people with an option to refuse serving in the military and/or participating in war. EAI did not raise a universal objection to military service, but rather sought to develop awareness about the ways in which compulsory military service in Eritrea masked widespread human rights abuses by the government, and how abuses originating within the military context were largely indistinct from those in civilian contexts. Framing its mission in these terms helped EAI members to not only articulate an Eritrean perspective on human rights, but also to tap into a discursive and activist environment that is well developed in Germany. These linkages in turn provided support to individual members throughout the asylum process by connecting their experiences to a wider human rights framework that resonates in Germany and made their stories intelligible in the German legal context.

Despite its small size, EAI also participated in an impressive array of projects organized either independently or in conjunction with NGOs like War Resisters International. EAI leaders and members attended and made presentations to a seminar on Eritrean issues held in Cologne in September 2004, as well as one in Italy that was organized by the Network of Eritrean Civil Societies, a coalition based in Sweden. They provided information on Eritrea to groups like Connection e.V., Pro-Asyl, and Amnesty International; held press conferences on Eritrea with the German media; took part in the annual German Protestant Church Symposium; coordinated demonstrations with other Eritrean organizations; collected signatures for a petition to grant Eritrean military deserters asylum in Germany; and gave a brief presentation on Eritrea at a human rights hearing at the United Nations in Geneva. They also produced two booklets with Connection e.V. that detailed the human rights crisis and articulated a conscientious objection position for the Eritrean context. The booklets contained detailed testimonials from several asylum seekers about the abuses they suffered in the military (EAI/C.e.V. 2005). In May 2006, EAI also toured several German cities to give presentations about the human rights situation in Eritrea. For the first time (at least in some locations) a larger number of Eritreans were in the audience, some of them government supporters. These kinds of partnerships, and the outreach work done by such a small group as EAI, represent a significant change from the heretofore insular and nationalist-centered character of Eritrean transnational mobilization.

Those affiliated with the established political opposition were largely unreceptive to the CO platform, however. As the leader of Connection e.V. reported in an interview, they accused EAI members (unfairly, in his view)
of engaging these concepts opportunistically for the purposes of seeking asylum. Female members of EAI were especially harshly criticized by opposition party members, and several dropped out of the organization because of it. Moreover, EAI members were criticized by other Eritreans for being engaged in several different efforts to disseminate a human rights position. In addition to being the leader of a group like EAI, one of the co-founders also produced a television program for another independent civic group known as Sinit Selam, or ‘Peace Party.’ Whether for his work in EAI or his presence on television, he described being harassed and monitored by the PFDJ government, including through the presence of party officials at their events. EAI members also reported being videotaped and photographed during demonstrations and turned away at the Eritrean Consulate when seeking paperwork related to their legal status in Germany. Two young women associated with the group were shouted at, insulted as traitors, and told they were blacklisted and would not receive any help from the Consulate because they were no longer considered Eritrean. Like others who attempted to forge autonomous groups abroad, EAI was marginalized and subjected to obstacles and intimidation within a transnational social field dominated by the state and contested by the opposition. Finally, the fact that some EAI members and leaders did share links with opposition parties in exile, including the Eritrean Democratic Party (EDP) and the Eritrean Liberation Front—Revolutionary Council, reinforced the perception that EAI was part of the broadly-defined opposition, and exposed EAI to interference or co-optation by those opposition voices who criticized their wider engagement with non-Eritrean discourses and institutions.

Eritrean Movement for Democracy and Human Rights

The Eritrean Movement for Democracy and Human Rights, or EMDHR, was formed in Pretoria in 2003–2004 by graduate and post-graduate students sent to various institutions in South Africa in 2000–2001 by a PFDJ government program funded by the World Bank. EMDHR’s constitution, adopted in October 2004, defined the organization’s mandate as “a non-partisan, independent civic organization dedicated to the promotion and defense of human and democratic rights for all Eritrean citizens inside and outside Eritrea” (EMDHR 2004:5). In particular, the organization opposed the PFDJ’s ruling of Eritrea without a constitution and its denial of basic rights and freedoms to its citizens. It also opposed compulsory National Service and the Warsay-Yike’alo campaign, viewing them as “a
pretext for the mistreatment and abuse of youth, women, and the under-age" (EMDHR 2004:2; see also Hepner 2008). Like EAI, EMDHR advocates the principles and practices of peaceful change through non-violent means. With a membership of approximately 600, EMDHR also entailed an advocacy component for the rights of asylum seekers and refugees in the South African national environment. However, because of the difficulties facing all asylum seekers in South Africa, many EMDHR members eventually left the country and moved on to the U.S. or Europe. Their activism with EMDHR then forms part of their asylum claims in those locations, as it demonstrates a political opinion forbidden in Eritrea.

The founders and leaders of EMDHR did not originally appear in South Africa as refugees or asylum seekers. Rather, they were members of the most well-educated and urbanized strata of Eritrean society who were selected for the World Bank-funded program. In developing the program, the PFDJ's stated aim was to send its best and brightest to Africa's finest institutions of higher learning so they could develop the skills and credentials needed to serve national development. All those participating in the program were required to sign contracts with the government, affirming that they would return to Eritrea upon completion of their training. However, the program was initiated at precisely the time when the negative consequences of the border war were becoming obvious and the government began steadily clamping down on Eritrea's public sphere. The young men (and few women) sent to South Africa were ushered out of the country just as their less fortunate colleagues and compatriots at the University of Asmara were being sent to work-camps as punishment for forming and participating in an independent student union that was critical of university and government policy; when private presses were being shut down and journalists were being arrested; and when eleven reformist members of the government were arrested for dissidence. As the students witnessed these developments from South Africa, they not only suspected

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6 Literally meaning “the heirs [of the struggle] and the ones who can do all things,” Warsay-Yike’alo is a package of policies and programs designed to transmit the values of the guerrilla generation to the post-independence one. One component of the campaign is compulsory military and national service. The campaign also extends into the realm of education, labor, and public culture.

7 Ongoing research has turned up evidence that asylum seekers are advised by compatriots, lawyers, refugee counselors and others that becoming involved in opposition organizations can help build a stronger asylum case. This raises serious questions about the motivations for political activism operative among some asylum seekers and suggests that no direct link can be assumed between political activism and critical consciousness of political issues.
that the program was at least partly designed and implemented to get them out of Eritrea during a time when they, too, may have been critical of the government, but that had they remained in Eritrea, they may also have been detained and held indefinitely without charge (see Mekonnen and Abraha 2004).

Following a pattern which harks back to the nationalist activism of the 1970s diaspora (see Hepner 2005), EMDHR formed ‘spontaneously,’ as one leader put it in an interview, in response to the mounting political crisis in Eritrea. After several months of exchanging information and opinions with one another over the internet and via informal and largely personal meetings from Cape Town and Stellenbosch to Pretoria and Johannesburg, the students began developing common critiques of Eritrean government policy and issues related to civil and political rights since independence. At meetings held with the Eritrean ambassador to South Africa, the students raised some of these issues and concerns. Shortly thereafter, as one leader reported in an interview,

The government started to put pressure on us by different means—threats, telephone calls, and bringing divisions among the Eritrean community [in South Africa] by smear campaigns, etc. Nevertheless, this bonded us together to further our plea in an organized way. [And] there were many initiatives in the different cities of South Africa, some of which we were aware, and some of which were clandestine. So we decided to make a call and form an interim committee that will draft a constitution and conduct a founding congress [for EMDHR].

Hence, EMDHR solidified as a result of PFDJ’s repressive transnational response, which escalated when several people were singled out by officials at the Embassy in South Africa and had their funding, health insurance, and passports revoked by the Eritrean government, who then notified the South African Department of Home Affairs that they were ‘illegal’ and should be deported to Eritrea (Mekonnen and Abraha 2004). The incipient EMDHR leadership, some of whom were studying human rights law, rallied behind their colleagues and articulated the situation to the South African authorities with respect to international conventions and the South African Bill of Rights (ibid). The transnational presence of the government had carried the repressive political situation in Eritrea to South Africa, and EMDHR activists used the national context of South Africa to fight back, even as it changed their status from international students to asylum seekers as a result.

Of all new rights-based initiatives to emerge in diaspora, EMDHR’s platform remains squarely focused on the articulation of a universalist
rights-based framework appropriately adapted for the Eritrean context as viewed by the educated, urban elite. Its central goals include the dissemination of concepts of rights and government accountability throughout Eritrea, and non-violent methods of social and political change. With the help of its own members who received legal training in South Africa, as well as its linkages with local refugee and immigrant legal aid organizations and forced migration policy research groups, EMDHR has also advocated on behalf of asylum and refugee issues within the South African environment. At the international level, it has developed links with Amnesty International and has received some practical assistance and funding from the Massachusetts-based NGO Grassroots International, as well as from the National Endowment for Democracy. More recently, it worked closely with the popular Eritrean website Asmarino.com to establish and run a daily radio broadcast, Voice of Meselna Delina⁸ which is heard on shortwave radio throughout Eritrea, on the internet, and other local Eritrean radio programs throughout the diaspora. In addition to providing commentaries and analyses of basic human rights related concepts and issues, the radio broadcast also reads statements by various Eritrean organizations and other human rights NGOs about the state of affairs inside the country. EMDHR has also held numerous meetings and seminars, and has authored a booklet on non-violent struggle, anti-militarism, human rights, and democracy, which they disseminated via the internet and by other means. Its leaders and members have largely rejected involvement with opposition political groups and have incorporated into their outreach and education a focus on the distinction between civic organizations and political parties.

In terms of the transnational social field, the Eritrean government has been able to penetrate into EMDHR’s efforts to some degree, as described above. However, because South Africa is relatively insulated as a diasporic space within the larger transnational context, EMDHR has not been subjected to the same level of interference as EAI in Germany. The majority of Eritreans living in South Africa arrived there through the World Bank funded program; few others have arrived as voluntary or forced migrants. Moreover, South Africa lacks any historically established Eritrean diaspora

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⁸ “Meselna delina” means “we want our rights,” and plays on a slogan used by pro-independence student activists in the late 1950s, who during the General Strikes of 1958 chanted “Natsinet delina,” or “we want freedom.” Hence, we observe a reframing from the nationalist orientation of the previous generations to a more universalist, human rights orientation among contemporary activists.
population, meaning that opposition parties with roots in the nationalist independence struggle are absent. This unique positionality and the fact that EMDHR operates in an African context that has been internationally lauded for its advanced constitution and human rights framework (in theory, if not in practice), has afforded the organization much greater relative autonomy than any of its counterparts in North America, Europe, and even Ethiopia (Harmon-Gross 2009), where the transnational social field is dominated by ongoing power struggles and conflicts among PFDJ members and those affiliated with the established opposition. This may partly explain EMDHR’s greater capacity to endure and mature over the past several years compared to other emergent rights-based initiatives.

**Eritrean Human Rights Advocacy Group**

The Eritrean Human Rights and Advocacy Group (EHRAG), based in California, has been the most ‘virtual’ of these new initiatives, lacking a discernible membership and role beyond its close affiliation with the larger and somewhat controversial Awate Foundation which exists largely on-line though its website, www.awate.com. Primarily “a media source which is argumentative and polemical in nature,” according to one of its founders (interviewed in 2006), Awate.com aims to provide both free-flowing information about Eritrea as well as a voice to those who remain silent either due to fear, inexperience, or lack of knowledge about their rights. Founded in 2000, Awate’s mission is to create a democratic space where Eritreans can read, write, and think in an environment of democratic but critical dialogue “regardless of party affiliation,” again in the words of one of its founders.

The Awate Foundation, the website, and now EHRAG, were organized and funded entirely by a five-person board, with one person located in Eritrea. Although none of the board members were themselves permitted join Eritrean political organizations, according to the by-laws of the foundation, at least two of its leaders were at one time affiliated with the Eritrean Liberation Front (ELF). Their experience in the armed struggle clearly informed their strategy and objectives, as they have parlayed the discourse on national liberation into one that now speaks to human rights issues. Reflecting on the history of nationalism and war in Eritrea, one of Awate’s founders described the ‘parallel universes’ that Eritreans live within and must constantly navigate and manage. These universes, he explained in an interview held in Los Angeles in summer 2006, roughly correspond to the socio-cultural divisions in Eritrean society between
Tigrinya and Arabic speakers, Muslims and Christians, highlanders and lowlanders, and ELF and EPLF political identities. Awate’s mission, he said, was therefore to move beyond these divides to draw the parallel universes into conversation. Building on the notion of reconciliation and inspired in part by the South African post-apartheid model, Awate envisions the establishment of forums and institutions that are conducive to collective healing from war, the growth of democratic social and political behavior, and eventually, democratic governance in Eritrea proper.

Awate’s origins among former ELF fighters, and its tradition of writing tri-lingually in English, Tigrinya, and Arabic, as well as its hosting of various opposition political organizations’ writings, has led to the widespread perception that it is merely a tool of the ELF or broadly-defined opposition. Its leaders rejected this charge, however, stating that it is precisely this kind of zero-sum political thinking that Awate, working through the concept of reconciliation, has aimed to overcome. Moreover, within a diasporic climate that is strongly polarized due to the long-term transnational interventions of first the EPLF and later the PFDJ government, Awate has attempted to create a space for Eritreans that is ostensibly open, democratic, and neutral. The chief writers for Awate defined themselves as “equal opportunity critics,” meaning they subject each different political organization and agenda to similar analytical rigor.

EHRAG, as the advocacy wing of Awate, mirrored many of its parent organization’s objectives. In the mid-2000s, EHRAG remained, in the words of one of its creators, “mainly a bundle of goals and ambitions” which one day could materialize into an independent human rights watchdog organization inside Eritrea, with a full-time staff and multiple sources of funding. At the time of data collection, it was focusing on drawing on its information networks within Eritrea to document events regarding human rights issues and abuses; translating reports produced by other rights organizations into Arabic and Tigrinya; attempting to collect and organize testimonials from asylum seekers and refugees; and providing advice and supporting documentation for those navigating the US asylum system. EHRAG was also involved in creating a ‘Martyrs Album,’ which documents the names of the deceased from the beginning of the border war in 1998 through the present, recording (when possible) when and how they died.

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9 They also correspond, I would add, to the time period and political context (‘vintage’) during which one left Eritrea, as well as whether a person was born and/or raised in Eritrea or a diasporic context. In this sense, the Eritrean diaspora is not a singular entity but a remarkably diverse, multi-layered, complex and contentious social field.
Shifting the language of martyrdom from the exclusive meaning sanctioned by the state, which refers to those who died during the 30-year war of independence, to one that includes the legacy of those who died as a result of militarism and rights abuses, is controversial within the Eritrean transnational terrain. It is also not the only clever linguistic twist initiated by EHRAG. The acronym of the organization itself is actually the Arabic word meaning ‘to shame.’ As one of the leaders explained in an interview, “because the persuasion in human rights is a moral one, you must literally shame governments for their abuses.”

While all emergent Eritrean rights initiatives are controversial and highly politicized in the Eritrean transnational social field, EHRAG is even more vulnerable given its leaders’ association with the historic ELF-oriented opposition, and the fact that the latter have regularly traveled to Ethiopia to attend opposition meetings and obtain information from recent refugees from Eritrea. Furthermore, its orientation still largely reflects the insular character of earlier Eritrean nationalist activism. It has mainly concentrated on the immediate mission of being “the little guy helping the little guy,” as one leader put it, rather than representing an effort to create durable and broader links with international human rights organizations. EHRAG’s goal of providing a genuine ‘third-way’ and galvanizing the ‘unaligned’ by deploying universalist human rights discourses to bridge the historic social and political divisions among Eritreans has not met with the initial success in the US-based diaspora that its leaders hoped for. And while the Awate team consistently writes in English and draws heavily from the experience of living in Western countries to illuminate and critique Eritrean realities, these intellectual linkages with non-Eritrean sources of knowledge have not led to the formation of non-Eritrean organizational ties, nor have they won any goodwill among those still captured by official nationalist discourse. Due to their roots within the ELF-EPLF rivalry and other historic socio-political divides, Awate and

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10 One of the PFDJ regime’s most prolific defenders in the US, Sophia Tesfamariam, published an on-line essay in early 2008 in which she charged that the Awate Foundation and EHRAG were being controlled by the Ethiopian government; that the founders were not really Eritrean; and that the organization had “fooled some gullible Americans and served as easy tools for groups such as Amnesty International, Human Rights Watch and Reporters Sans Frontieres.” The essay also personally attacked one of the founders of the organization, leading to threats of legal action on both sides. In its substance and form, the essay is an excellent example of how the PFDJ regime has responded to emergent human rights discourse as well as international critiques, and illustrates the ways that longstanding political (and personal) conflicts become re-expressed in such debates about human rights in contemporary Eritrea. See http://alenalki.com/index2.php?option=com_content&do_pdf=1&id=4393.
EHRAG are often dismissed as opposition organizations ‘polluted’ by foreign ideas and agendas, including Ethiopian, Western, and Islamist/Arab ones. Like all emergent Eritrean initiatives that utilize the discourse of rights, they have been subject to processes of othering and out-grouping that are the classic features of political conflict. Such patterns of out-grouping and marginalization have been analyzed by social scientists working on violence in various contexts (see Hinton 2002; Sluka 2000), and have been identified as important precursors to forms of violence ranging from structural and symbolic to genocidal (Schepers-Hughes and Bourgois 2004).

Thus, of the emergent rights-based initiatives discussed here, EHRAG seems to remain most embedded in the dynamics of the historic Eritrean transnational social field. However, EHRAG also has crucial first-hand knowledge of the historical conditions that gave rise to the current power configuration. Their considerable experience in the Eritrean nationalist and transnational environment, their long-term familiarity with the American political and legal environments, and their intimate knowledge of Eritrean diasporic and homeland political culture, provided EHRAG’s leaders with a capacity for endurance that many of the new organizations may lack. Speaking of the sharp rise in the number of ‘civic societies’ worldwide, one Awate/EHRAG leader mused in an interview, “Yes, well, are they sprint runners or are they marathon runners? The new non-violent approach is like water dripping on a rock, eroding it day by day, dissolving it over time, not attacking it with headbutts. But many people who are drawn to advocacy are impatient. They want change right away, and they get frustrated. EHRAG chips away at the regime, documenting case by case what has happened, so people don't forget it and don't forget the chronology of it.” Here, the experience of protracted guerrilla warfare within the historic armed struggle has provided EHRAG with a unique perspective and set of skills, enabling them to pursue their goal over a long period of time, using tactics both overt and subtle.

3. Expanding Transnational Struggle: Refugees, Asylum Seekers, and Human Rights

Emergent Eritrean rights initiatives participate in the expansion of Eritrean political culture to include ideas, practices, beliefs, and values which are associated with both international ecumenism and with specific forms found in places like the U.S.A., Germany, and South Africa.
Comprised of recent or former refugees and asylum seekers, or formed in response to the accelerating crisis of rights in Eritrea which has produced a new outpouring of forced migrants, and advancing their positions against a shared backdrop of warfare and violence, EAI, EMDHR, and EHRAG also represent genuinely new patterns of activism within the Eritrean transnational social field. By seeking to develop organizational and discursive links with non-Eritrean groups and modes of thinking and acting these new initiatives challenge the insularism of Eritrean nationalism and at the same time resist the state’s institutional domination of the transnational social field. Experiences as refugees and asylum seekers in Germany, South Africa, and the U.S.A. likewise highlight the crisis of rights in Eritrea by articulating the culturally-specific experiences of persecution, which include forms of transnational state repression like surveillance and threats, within the framework of national laws that respond to international human rights norms.

For over four decades, all organized activity among Eritreans either at home or in the diaspora, and the systematic dissemination of ideas, values, and experiences, has taken place under conditions of emergency or near emergency. Whether during the 1961–1991 war of independence, or since the recent border war with Ethiopia that culminated in the ‘third transition,’ or current rights crisis, the role of nationalism in defining and controlling all acceptable activities and identities has been paramount. Moreover, this nationalist logic and the organized structures that supported, financed, and reproduced it were ‘transnationalized’ from the earliest days of the struggle (Hepner 2005, 2008, 2009). New Eritrean initiatives therefore emerge within this already-existing arrangement, meaning that their capacity to network, organize, advocate, and even develop new forms of discourse and practice are already compromised by the ideological and institutional influence the party-state exerts across borders and within the most intimate spaces of individual and community life.

The first challenge facing these new rights-based initiatives is therefore confronting the considerable power of the Eritrean state to govern its exiles by means of both coercion (e.g. surveillance, threats, exclusion, and harm to loved ones ‘back home’) and consent (appealing to the shared nationalist past, themes of belonging, sacrifice, cultural essence and loyalty). That several of them, like EAI and EMDHR in this analysis, created alliances and linkages with organizations in Germany and South Africa, respectively, is a considerable achievement given the structural and ideological impediments to doing so. That others, like EHRAG, turned to the universalist discourse of human rights in spite of (or because of) their
deeper and longer entanglement with the historic and conflicted transnational social field, is likewise significant. All of these initiatives have confronted a cultural legacy in which political elites have discouraged or dismantled popular mobilization, civil autonomy, and local customary institutions in order to replace them with state-led nationalist forms glossed as ‘mass mobilization’ but carefully orchestrated from above (see Tronvoll 1998). With few to no models of non-violent, civic organizing or non-governmental and internationalist activism in recent history or collective memory, contemporary Eritrean actors strive to see and move beyond a political culture that has reduced virtually all thought and action to a two-dimensional battle between pro-regime and anti-regime. With political parties forbidden from forming in Eritrea, opposition groups have proliferated in exile, and virtually all descend from either ELF or EPLF. Any critique of the current government is defined as ‘opposition,’ and opposition necessarily means groups with an anti-regime orientation. With precious little space to create a ‘third way,’ contemporary Eritrean activists are caught between the state and its others. The transnational social field resembles a minefield for these new rights-based initiatives, which not only must navigate the state’s ideological and coercive power across borders, but must first conceptualize, and then fiercely defend, their autonomy from contending political bodies. They also often do so as profoundly vulnerable asylum seekers navigating complex legal terrain that intersects with the dynamics of Eritrean transnationalism in various ways.

Developing linkages with non-Eritrean organizations and discourses is more than a first step in thinking beyond the dualities and zero-sum games that characterize Eritrean politics. It is a decisive act that initiates structural change within the transnational social field. Glick Schiller (2002, 2005) has argued that transnationalism must not be viewed simply as those flows which connect migrants to their homeland, but rather the whole network of individuals and institutions and discourses that spread out and situate people, communities, and states in webs of cross-border relationships. Through the efforts of rights-based initiatives this definition may now also apply to Eritrea. The consequences of the broadening of the transnational social field have yet to play out, but inevitably will include the raising of greater international consciousness about Eritrea, and the fostering of values, ideas, and behaviors among Eritreans that run contrary to nationalist doctrine. Among these are concepts like conscientious objection, civil society, non-violent change, and human rights.
Expanding the structure of transnationalism to include linkages with non-Eritrean and international organizations and discourses is a political challenge to the state both in Eritrea proper and in diaspora communities around the world. As noted earlier, narratives of isolation and preoccupations with sovereignty have played important roles in underpinning nationalist consciousness and the ethic of self-reliance. They have also served the interests of power in Eritrea by allowing the state and military apparatus to grow increasingly coercive with few real sanctions from an international community that lacks both knowledge and pressure points in the country. The development of ties to international and foreign NGOs by emergent Eritrean rights initiatives, especially on the basis of human rights claims like asylum and refugee status, simultaneously exposes the state’s repressive character and subjects it to critique in the international arena. However, these ties, and the experience of seeking asylum or refugee status abroad within the context of relatively clear legal frameworks, also seems to raise consciousness among Eritreans themselves, who imagine different possibilities for Eritrea (Hepner 2009b).

The issue of ‘rights’ itself is an enormously thorny topic among Eritreans, and especially as codified in much international human rights discourse and law, where popular (and misguided) views have tended to prioritize ‘first generation’ civil and political rights as the basis for inalienability. The rejection of the individualist bias in these aspects of human rights is not uncommon among oppressed peoples who have had to struggle for the collective right to exist vis-à-vis a larger ruling entity (Adejumobi 2001; Preis 1996). Although the Eritrean government has been signatory to many international human rights instruments, in practice it has become extremely hostile to rights as constructed in international instruments, and has argued that ‘second generation’ economic, social and cultural rights should take priority over civil and political ones (Hepner and Fredriksson 2007). In Eritrea today, however, rights simply do not exist, neither de facto nor de jure. Ratified in 1997, the constitution has never been implemented, meaning that citizens are denied even the most basic guarantees by the state within the national environment. On an international level, the notion of ‘human rights’ is also strongly rejected by the regime, which it views as based on Western, neo-liberal assumptions about individuals and culturally inappropriate for a country whose focus must always remain on collective national survival. As in other African contexts such as Zimbabwe, the basic recognition of human rights is viewed by the PFDJ regime as an extension of Western imperialist attacks
on hard-won state sovereignty (Derman and Hellum 2007; see also Hepner and Fredriksen 2007; Mutua 2002), making human rights discourse easy to reject among those who continue to support the state’s actions despite abundant evidence of violations.11

That some Eritrean refugees and asylum seekers are now developing conceptions of rights that emerge simultaneously from the Eritrean constitution and the experience of seeking protection in places like Germany, South Africa, and the U.S.A., is highly problematic for the regime. Redeploying the nationalist logic that has heretofore been highly effective for achieving and consolidating power, the government has defined this new language of rights as emerging from either ‘foreign’ or ‘opposition’ influences. This position helps explain why rights abuses seem to escalate in Eritrea in proportion to the growth of rights-based activism abroad. But it also highlights the stark contradiction between a transnational nation-state that seeks to control and police its own cultural and political boundaries while moving seamlessly across, and adapting to, those of the countries in which Eritreans reside.

4. Eritrean Rights Initiatives and the Potential for Transformation

In their simultaneous linkages with international human rights values and regimes, national-level asylum and refugee rights policy and concerns, and the articulation of rights vis-à-vis the PFDJ-dominated state, new Eritrean rights-based initiatives resemble what Keck and Sikkink define as transnational advocacy networks:

Transnational advocacy networks are proliferating, and their goal is to change the behavior of states and of international organizations. Simultaneously principled and strategic actors, they ‘frame’ issues to make them comprehensible to target audiences, to attract attention and encourage action, and to ‘fit’ with favorable institutional venues (Keck and Sikkink 1998:2).

11 Interestingly, among those who overwhelmingly reject human rights critiques of Eritrea are second-generation young people born and raised in Western contexts. As Tecle (2011) has been exploring, youth raised in the diaspora who return to Eritrea for brief summer visits experience a version of Eritrea that is carefully managed and packaged by the state. Exposed to a highly controlled ‘Disneyland’ experience, they resonate strongly with official nationalist discourses of cultural belonging and as a result appear virtually unable to communicate with their refugee peers and to critically comprehend the dramatically different experiences of those raised in Eritrea.
They also form what Sally Merry (2006a) has termed ‘the middle’ when examining transnational movements for human rights: the organizations and movements which help connect specific human rights struggles in their national contexts to the discourses and movements happening at the international or global level. Based on her comparative analysis of women’s rights organizations and gender-based violence programs (2006b), as well as the process of implementing the terms of the Convention on the Elimination of Discrimination Against Women (CEDAW) in settings ranging from the United States and India to Hong Kong and Fiji (2006a), Merry concludes that one of the primary effects of such programs and movements is their potential to affect cultural transformations. Merry examines how approaches to transnational women’s rights initiatives may represent either replication (wherein a model developed in a place like the US, for example, is simply transplanted into a different socio-cultural context); or hybridization (when a model originating in one cultural setting is adapted and changed to resonate with another). In both replication and hybridization, human rights are being vernacularized; however, in those settings where new ideas and practices associated with rights are most challenging to the status quo, Merry argues, the greater the potential for cultural transformation. Non-governmental organizations of both international and national scope are essentially ‘translators’ of human rights concepts wherein international, transnational, and local contexts and meanings converge; however, as Merry explores in detail, their situation is often fraught with conflicting loyalties and shot through with power struggles associated with the specific setting in which rights-based discourses are intended to take root.

Certainly, EAI, EMDHR, and EHRAG, as human rights translators, seem to occupy such a complicated, controversial (and painful) role in the Eritrean transnational terrain. Their situation as simultaneously rooted in (contested) Eritrean realities while adapting and deploying rights-based discourse and strategies that lack indigenous status in Eritrea itself, illustrates many of the key dynamics analyzed by anthropologists of human rights. In particular, they illustrate how cultures are not the homogenous, pure, or ‘authentic’ entities constructed in nationalist ideologies, which so easily lend to exclusion, out-grouping, and human rights abuses. Rather, Eritrean culture, like cultures generally, is internally contested and differentiated, flexible and porous, and capable of readily adapting ‘foreign’ or international concepts like human rights to make them meaningful to the specificity of Eritrean experience (see Cowan et al 2001; Preis 1997). That this adaptation would be seen as threatening to official nationalism and
the power of the party-state is not in the least surprising; as Abdullahi An-Na'\'im (2009:69) has noted, “dominant groups or classes within a society normally maintain perceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture.” When the Eritrean government and its supporters argue that emergent human rights groups like those analyzed in this chapter represent un-Eritrean or foreign agendas, at least part of what is at stake is the definition of Eritrean national culture itself, and the PFDJ party’s monopoly on defining it.

The emergence of Eritrean rights-based initiatives therefore demands a comprehensive and nuanced analytical framework than conjoins, but goes beyond, existing concepts like networks, transnationalism, advocacy, law, and human rights. It requires a framework that takes into account the ethnographic realities of legal pluralism, which Merry (1995:7) defined as “the shifting importance of local, national, and global legal systems... in which the critical questions are how these systems intersect with and exert power over one another.” Moreover, it demands that we acknowledge how policy and law provide sites of resistance through the ways they are culturally appropriated by Eritreans and help constitute new forms of consciousness about resistance itself. This initial assessment of emergent transnational rights-based initiatives among Eritreans in diaspora suggests that their efficacy probably lies not so much in the way they can capture power directly from the state as much as how they might expand the transnational social field, tap into the power of legal pluralism with respect to human rights, and expand culturally-specific understandings of universal rights. These initiatives have thus “opened up new emotional spaces where conversations and actions that were once impossible, even unthinkable, are now happening” (Scheper-Hughes 2004:466).

References


CHAPTER FOURTEEN

MALAWI'S ORPHANS: CHILDREN'S RIGHTS IN RELATION TO HUMANITARIANISM, COMPASSION, AND CHILDCARE

Andrea Freidus

My first reaction is the feeling of helplessness, and hopelessness. Seeing so many eyes of the orphans, innocent and pure makes me feel a little overwhelmed...Poverty and HIV/AIDS, malaria, are now all over southern Africa... Without a heart of compassion and love, without a true passion in helping and offering Madonna could not do this. So I give more credit to her now than before, and I see this as a gift to Malawi rather than a tool of celebrity propaganda.

—MSU undergraduate after viewing Madonna's documentary on Malawi.

As an assignment for a women's studies undergraduate course, students viewed the film "I am Because We Are." Produced by Madonna to raise awareness about her organization, Raising Malawi, it focuses on the situation of orphans and AIDS in Malawi. Students were asked to respond to the content of the documentary including their perceptions of orphans in Malawi, their overall reaction, and the film's impact on their desire to be connected or involved with these issues. The above quote is one of many that captures the ability of humanitarians and the organizations they support to use the media to foster an emotional response. This response is based on the recognition of a common humanity and the need to address suffering. The student's reaction highlights the power of the image of the orphan to bring about a sense of compassion drawing on the innocence of children. Nearly all students in the course were ‘moved’ by the images of the sick and dying AIDS patients, the orphans left behind, and the overall poverty evident in the film.

Madonna's documentary is also effective in framing the situation of orphans as an emergency placing it within a humanitarian response

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1 A Fulbright Hays Doctoral Dissertation Research Abroad Fellowship funded this research. I would like to thank Anne Ferguson and Bill Derman for their guidance during the fieldwork that went into this project. Finally, I am especially grateful to Daimon Kambewa, Bunda College, and the innumerable Malawians who graciously hosted me and participated in this work.
matrix. This crisis rhetoric and its subsequent humanitarian call to action are exemplified in the story Madonna tells. Victoria Keelan, a local Malawian, called Madonna pleading for assistance saying that there are over a million children orphaned by AIDS. Victoria says that there are not enough orphanages, and children are sleeping on the streets, in abandoned buildings, and under bridges. Children are being abducted, kidnapped and raped. We are told, “this is a state of emergency”. Madonna is elevated to the position of humanitarian who believes she is capable of and required to make a difference, despite having limited knowledge about Malawi, orphans, or AIDS. This belief materialized in the creation of her NGO, Raising Malawi, and the orphan projects she funds and implements. Madonna is not alone. Innumerable others have followed suit.

This chapter focuses on orphan care associated with western-directed humanitarian interventions. I present an analysis of the particular images and discourses revolving around orphans in Malawi produced by NGOs used to generate a global response predicated on a moral imperative to bring relief to those facing a crisis. I focus on images and discourses because they are both a means to legitimate NGO responses as well as serve as an indicator of the logic that frames NGOs activities (Manzo 2008). I examine the rise of a particular type of humanitarian—the “lay” humanitarian (Hefferan 2009). These are individuals or groups, many of whom are enthralled by global images and discourses of orphans, that create or become involved with orphan projects despite having no training or limited knowledge concerning humanitarianism, childcare or development. Many of these individuals are professionals in other areas whose involvement with these projects occurs during their free or volunteer time.

I begin with a brief overview of the development of humanitarianism and explore the emergence of what Hefferan (2009) notes are “ordinary” citizens becoming humanitarians, development workers, coordinators, and funders. I argue that lay humanitarians occupy a unique position within the larger field of humanitarianism. They are in contrast to previous and current waves of professionalization and institutionalization of humanitarianism (Barnett 2005). These lay humanitarians are quite different than those associated with the professionalization of humanitarianism that has been occurring since the 1990s. While humanitarian work has become a highly specialized enterprise, where technical, medical, legal, and economic knowledge combined with experiences and familiarity with emergencies have evolved into sub specializations required in the expanding humanitarian industry (Barnett 2005), I demonstrate that lay humanitarians are also a part of the burgeoning humanitarian machinery.
They serve as a counterpoint with no professionalization, bureaucratization or discourses on rights, which can be problematic as they work intimately with the populations they seek to serve. I use ethnographic examples to highlight three features of lay humanitarianism that are evident in orphan care responses in Malawi. I then interrogate the place of human rights within these organizations. I note a lack of explicit rights and rights-based agendas in these humanitarian regimes.

The lack of attention to rights by lay humanitarians is relevant to both legal and ideological debates about children’s rights. Malawi ratified the Convention of the Rights of the Child (CRC) on January 2, 1991. In September of 1999 Malawi signed the African Charter on the Rights and Welfare of the Child. These are legally binding documents that spell out what rights children are to be afforded. In a recent United Nations press release the Committee on the Rights of the Child in Malawi reported on the advances they have made to ensure the rights of orphans and other vulnerable children in Malawi and reaffirmed their commitment to scaling up their response to fully implement the CRC (UN 2009). NGOs are implicated in this legal framework as they increasingly appropriate child welfare and orphan care services. The Committee on the Rights of the Child in Malawi should ensure the operations of humanitarians in Malawi are working in consonance with the CRC. As my data demonstrate, through NGOization, the Malawian State’s rights-based framework is usurped by a politics of compassion and associated suffering as children are increasingly conceptualized as passive victims in need of saving—not rights-bearing citizens with specific freedoms.

Children are a problematic case because they do not organize themselves to struggle for their rights. This makes them different than the other cases in the book. This is demonstrated in the last section where I provide ethnographic data highlighting the lack of rights and their possible implications for children. I explore what potentially positive contributions could result from the incorporation of a rights-based approach to humanitarianism. I also ask if the current conceptualization of rights imagined by signatory states and the international bodies that design such conventions are the most productive way to think about and employ human rights theory. Drawing on Sen’s (2004) work, I postulate the need to account for cultural diversity and local agency in the production and dissemination of rights. Rights are universal in that all humans have and should make claims to rights, but the form those rights take are dependent on context. In addition, I believe it would be productive to shift the paradigm away from the predominantly ‘legal’ dimensions that are currently at the core of
rights-based discourses and ideologies (Sen 2004). Rights exist independent of the judicial and should support moral and ethical claims to freedoms regardless of structural limitations.

1. The ‘Lay’ Humanitarian

At the end of the 19th century, characteristics associated with humanitarian responses and the professionalization of humanitarianism were commonly tied to the rise of the International Red Cross and Red Crescent Societies (ICRC) (Aeberhard 1996). The ICRC embraced the tenants of impartiality, neutrality, and confidentiality to provide a framework within which to conduct their responses to crisis (Allen and Styan 2000; Macrae 2000). Impartiality refers to the “provision of relief on the basis of need and regardless of political affiliation, race, nationality or creed” (Macrae 2000:89). The ICRC was also committed to remaining neutral during political conflicts (Macrae 2000). In fact, it was ICRC policy not to intervene during a humanitarian crisis without the permission and support of all sides engaged in conflict. Confidentiality was important in maintaining this neutral position. Additionally, it was ICRC policy not to report human rights abuses and the atrocities committed on civilians in the hopes of retaining access to these vulnerable populations (Allen and Styan 2000).

These policies and practices were predicated on the idea of “respect for sovereignty” (Macrae 2000). At their inception, humanitarian organizations recognized the power and legitimacy of states. They did not want to become enmeshed in internal affairs. In fact, the majority of ICRC resources were distributed through state actors and not independent contractors or international channels operating on the ground (Macrae 2000). Critics have pointed out that in many cases the state itself is guilty of fueling or directly committing human rights abuses. The power of the state to commit human rights atrocities is evident today in the Sudan, Zimbabwe, Myanmar, and many other countries. However, it was the crisis in Biafra that challenged the nature of humanitarian interventions and called into question the tenets of impartiality, confidentiality, and neutrality (Allen and Styan 2000).

Bernard Koucher, a volunteer for the Red Cross during the Biafra conflict, was outraged at the human rights atrocities committed by the Nigerian state against innocent civilians (Allen and Styan 2000). He was equally upset by the silence of humanitarian organizations, which did not make the genocide known, viewing this silence as akin to complicity and
even responsibility for the continued massacre (Macrae 2000). Koucher spoke out, and purposefully engaged the media to engender international pressure on the Nigerian state. Koucher and his supporters reported on the 2 million innocent civilians who died in the massacre, primarily women and children (Aeberhard 1996). Today, the media plays a pivotal role in reporting humanitarian crisis situations to bring awareness, provoke a global response, apply pressure to nation-states, and also legitimize humanitarian organizations involvement in relief endeavors.

By 1971, Koucher founded Medecins Sans Frontieres (MSF, or Doctor’s Without Borders), an organization not framed by the principles of neutrality and confidentiality, but rather one that embraces an ethics of humanity. The need to recognize, publicize, and address human rights abuses was at the crux of the emergence of MSF leading to the politicization of humanitarian aide (Barnett 2005). At this time, numerous private voluntary organizations sprang up and a much more extensive humanitarian complex materialized.

The right to interfere emerged and state sovereignty could legitimately be challenged (Miller 1999), opening the door to new transnational regimes of governance (Pandolfi 2003). Humanitarianism, as epitomized by MSF, is characterized by the acceptance and incorporation of human rights (Fox 2001; Manzo 2008; Pandolfi 2003; Slim 2000); purposefully engaging in peace building (Fox 2001); and “ending the distinction between development and humanitarian aide” (Fox 2001:276). In the past, quick fixes to address immediate needs were sufficient in the eyes of humanitarians. Today, there is an emerging ethos of needing to rebuild within these humanitarian narratives that requires a longer-term commitment.

There has also been a professionalization and institutionalization of humanitarianism. In the past, individuals with limited experience were confronted with humanitarian disasters and expected to learn and function on the fly (Barnett 2005). Today, humanitarianism is primarily characterized as having trained professionals working within a bureaucratized system that produces standards and protocols for humanitarian actors to follow (Barnett 2005). In an effort to appease donors and ensure proper accountability and effectiveness the humanitarian apparatus professionalized to maintain their legitimacy. I will demonstrate below how the emergence of lay humanitarians is a counterpoint within this emerging humanitarian landscape.

The scholarly community has engaged with and published extensively on children’s rights ideologies and the need for the global humanitarian community to address situations whereby children’s rights are being
abused, especially in the areas of child labor (Gallinetti 2008; Majka and Majka 2005), trafficking/slavery (Bilocerkowycz 2005; Gallinetti and Kassan 2008), land inheritance (Izumi 2007), or violent geopolitical struggles (Mapp 2011). Additionally, the majority of states have ratified child right's conventions that are meant to guide any organization or entity working with children. Large transnational humanitarian NGOs such as Save the Children and UNICEF have incorporated some components of children's rights into their projects (Manzo 2008). Yet, the humanitarian orphan care organizations I studied had limited knowledge of rights and none incorporated an explicit rights-based approach to serving orphans.

One explanation for the lack of engagement with children's rights may be that my work examines a particular demographic within the extensive humanitarian complex that now exists. I focus on that population of lay humanitarians, like Madonna, whom are 'ordinary citizens' engaging in humanitarian and development projects. Hefferan's work (2007, 2009) on church-to-church partnering between Michigan and Haiti captures some of the dimensions I noted in the NGOs working with orphans in Malawi. I found the same emergence of a lay humanitarian who is driven to "make a difference" premised on the desire to ease suffering. The lay humanitarian has limited experience with cultural differences, development theories and practices, or knowledge about the political, economic, social, and historical context. Many of these individuals are professionals in areas other than development such as medicine, law, or singing as is the case with Madonna. For this reason, they often lack the knowledge of how humanitarian approaches to human crises have evolved. As I discuss below, lay humanitarians can replicate certain antiquated characteristics of humanitarianism that are not producing the most positive outcomes. It is also important to note that larger, more 'professional' humanitarian experts and organizations that have adopted a rights-based discourse do not always abide by them (see Manzo 2008).

2. Background to Malawi

In southern Africa, the effects of neoliberal reforms set in place by international organizations such as the World Bank and The International Monetary Fund (IMF) have resulted in limiting the size and scope of governments—changing their functions to promote open markets, free trade, and the free flow of capital (Schoepf, Schoepf, and Millen 2000).
The neoliberal logic of decentralization and privatization has led to a deliberate shift in social service provision away from the central government toward local governments, NGOs, churches, and the private sector (Ferguson 2006; Stein 2010).

Malawi has not been immune to these processes. In 1981, Malawi adopted structural adjustment policies (SAPs) advocated by the IMF to promote economic recovery (Chinsinga 2002). As a result of these austerity measures, social indicators—including life expectancy, poverty levels, access to potable water, and school enrollment—have deteriorated (Harrigan 2008). Today, Malawi has the fifth lowest GDP in the world. These negative economic indicators coupled with a limited government have caused a strain on many communities and families. Children are disproportionately impacted by poverty, rising unemployment, declines in social services and welfare, erosion of local support networks, and widespread, rampant disease (Stephens 1995).

The maturing of the HIV pandemic and the deliberate State focus on children’s rights and welfare converged within the rubric of this economic restructuring, which has led to a target-specific emphasis on orphans and orphan care. HIV was first discovered in Malawi in 1985. As of 2009, UNAIDS (2009) reports the HIV/AIDS prevalence rate to be 11% with an estimated 920,000 people living with AIDS. Orphans are a visible sign of this aging pandemic. According to the United Nations Children's Fund (UNICEF), there are one million orphans in Malawi, many of whom face poverty, stigmatization, food insecurity, and limited access to education, and health care (Conroy et al. 2007; UNICEF 2006). As AIDS awareness continues to blossom and significant resources are raised to address the epidemic, children are proving to be effective bodies for rallying support.

To serve the needs of these children and tap into global AIDS resources, the Malawian State has created policies and drafted the appropriate documents to allow NGOs to take over social services they cannot provide. Malawi produced a seminal document in 1992, which opened the floodgates for the mobilization, administration, and distribution of vast amounts of transnational money tied solely to orphan-centered projects (GoM 1992). With the guidance of UNICEF, Joint United Nations Programme on HIV/AIDS (UNAIDS), the United State Agency for International Development (USAID), and the United Nations World Food

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2 UNAIDS (2004) defines an orphan as a child who has lost one or both parents to AIDS and who is under age 17. This project will include all orphans, regardless of their HIV status or the status of their parents.
Programme (WFP), the Government of Malawi (GoM) wrote and later revised the National Plan of Action for Orphans and Other Vulnerable Children (GoM 2005). This policy drew on the guidelines of the CRC and served to legalize, justify and frame the presence, power, and production of donor visions of orphanhood and orphan programming. I now turn to ethnographic examples taken from three such organizations.

3. Transnational Orphan Care Programs

Humanitarians working with orphans in Malawi are heterogeneous, ranging from Community Based Organizations (CBOs), and local churches to larger more established transnational organizations. I present three transnational organizations with programs in Malawi that were founded and are administered by lay humanitarians who were spurred to action in an effort to ‘do good’ and ease suffering.

Miracles Orphanage is located on the land of a Malawian entrepreneur, but is supported and run principally by an evangelical, faith-based organization in Alabama. The orphanage was built in 2005 after a short-term missionary came to Malawi and was “overwhelmed by the famine and seeing children dying.” In 2008 there were 141 children in the orphanage. The majority of children have been separated from siblings and other extended family members. Some of the children have a living parent, but they meet the UNICEF definition of “orphan” which is a child who has lost one or both parents through death and who is under age 17. The children were selected to live in the orphanage according to “how sick they looked during the 2005 famine” (Personal communication, Miracles Managing Partner), and were taken in without informing the district social welfare officers. Their guardians in the village were notified of their selection, but no other official records of their institutionalization are kept.

Miracles is affiliated with the Church of Christ and carries out most of its fundraising in their churches. Food, clothes, schooling, bible study, and healthcare are all provided through child sponsorship programs. There is a sponsorship coordinator who develops profiles of the orphans including stories about their past to distribute at church events in the U.S. to secure sponsors. Additionally, Miracles hosts over 200 international volunteers annually. These visits are meant to inspire participants to fundraise when they go back to the U.S.

Interfaith Coalition (IC), my second example, began in 2003 and was initially funded by the Gates Foundation. IC is based in the western US
and supports Malawian-led grassroots projects. It follows a liberal, non-denominational, community participation approach supporting a range of AIDS and orphan-related activities. Community-based childcare organizations (CBOs) submit grant proposals to IC members in the US for a variety of activities including food and blanket distributions, educational support, transportation for HIV positive children to ARV clinics, and HIV-related training.

Currently, the Elizabeth Taylor Foundation supports IC, but board members and volunteers in the U.S do the bulk of their fundraising. Fundraising events take place in Los Angeles and San Francisco usually on an annual basis. Other supporters from a variety of different churches across the U.S. often host their own fundraising events. Every summer, IC board members and volunteers bring a group of prominent donors to Malawi to tour their various projects.

Madonna’s project, Raising Malawi, began in 2006. Madonna supports multiple projects including Community-based Childcare Organizations (CBCCs), community centers focused on orphans and vulnerable children, and the orphanage where she found her adopted son. She has also raised money to build a girl’s boarding school. This project is currently on hold due to issues of corruption and mismanagement of funds (Nagourney 2011). Madonna relies on her position as a prominent celebrity to raise awareness about orphans and vulnerable children. She has hosted concerts, appeared at various celebrity events and on television shows, and produced the previously mentioned documentary “I Am Because We Are” to demonstrate the plight of Malawi’s orphans.

These organizations illustrate that transnational humanitarianism has many faces. As demonstrated below, the appeals these organizations make to recruit funders and volunteers differ in many ways from one another but nonetheless retain similar elements. I have identified three characteristics present within all of these organizations—the use of a moral imperative to garner support, paternalistic ideology, and the concept of bare life.

4. The Moral Imperative

NGOs working with orphans are predominantly about the moral imperative to bring relief to the suffering and to save lives. They purposefully draw on an orphan meta-narrative that evokes an ethics of compassion. Orphans are an effective trope for rallying transnational support because the suffering of a child is emotionally charged and ethically deplorable.
Humanitarian organizations often legitimate their presence and garner material support through a specific iconography of a sick, suffering, or innocent child (Manzo 2008; Ruddick 2003). One’s suffering must be palpable enough to spur action. Action requires compassionate funders.

The appeal of the orphaned child is powerful because it is juxtaposed to idealized western constructions of childhood (Manzo 2008). In the west, children are constructed as innocent, pure, and passive beings who occupy a sacred or secure space—childhood (Stephens 1995). They are imagined as naive, unsocialized beings (Stephens 1995), which relegate them to the status of victim in the context of the HIV/AIDS epidemic. Orphans, constructed in Oliver Twist-like terms, are assumed to be abandoned, poor, and without familial support. It becomes the moral obligation of the ‘west’ to rescue these needy, poor, and vulnerable children.

The western constructions of both an ideal childhood and orphanhood do not resonate with Malawian realities. Children’s social value in the southern African context is more complex than western constructions. In southern Africa, children continue to provide invaluable skills to the running of households. Children assist in farming, gathering wood, cleaning, washing clothes, cooking, and selling or trading goods. When adults fall ill, children take on many of their responsibilities (Subbarao and Coury 2004). In the context of HIV, children become more invaluable. They are rarely abandoned or isolated. All of the sixty-eight orphans in my research had identifiable family members that were invested in their care.

Arendt (1990 quoted in Ticktin 2006:43) notes that compassion is most effective in intimate interactions between those who suffer and those who do not. This is illustrated by the Miracles Complex’s webpage as well as the ‘orphan profiles’ distributed at churches and fundraising events. These materials contain pictures of children and compelling stories of their suffering. Children talk about hunger, illness, witnessing the suffering of dying parents, abuse, sadness, and need—lack of education, health care, and love. The following profile describes Pilirani’s situation:

When her mother and father could not care for her young Pilirani went to live with her aunt. Her aunt could not care for her and problems grew. Pilirani tells of the other children in the house eating porridge with sugar on it, but she was given salt for her porridge. She also remembers the pain of going outside to play, but being forced to play beyond sight of the house while the other children could play near home. When she was given support (resources from organizations, neighbors, etc) her aunt took it away from her. She can remember sleeping outside for there was not enough room in the house, and often going without food, because there was not enough food to go around. Then her aunt deserted her, and returned her to her
mother. In time both her mother and father died and Pilirani found herself alone, except for a young neighbor girl, Emily Chimgeipe, who helped her by giving her a place to sleep.

These ubiquitous appeals are constructed to draw contributors into virtual encounters with children. Anyone channel surfing has found themselves watching an advertisement for Save the Children or a similar sponsorship program. It is in these moments in the comfort of our homes that many Americans come face-to-face with the suffering of children.

A new phenomenon, voluntourism, takes these encounters a step further by physically transporting individuals directly into the lives and spaces of Malawians for a literal face-to-face experience. Innumerable volunteers from northern-based groups embark on touristic adventures that include a humanitarian component that provides an opportunity for these travelers to give back and serve ‘the poor.’ One of the organizations, IC, takes a handful of influential donors to Malawi to visit a variety of their programs. These potential donors act as liaisons between Malawian children and transnational capital. They are encouraged to ‘hold babies’ and take pictures. These images are powerful fundraising tools in the US and are included in website galleries and used at fundraising events. Malawians are often complicit or even active in the production of discourses and donor exposure to experiences of suffering, aloneness, and desperation in an attempt to capture these funds.

I was able to travel with a group of Americans who came to experience the suffering of Malawian men and women in an effort to learn about HIV/AIDS and its effects. As part of the tour I was taken on home-based care visits. We journeyed into rural villages accompanied by local gatekeepers who displayed dying patients outside of their homes as a testimony of the need for global support. Several American participants said the experience of bearing witness to suffering was necessary for them to go back and “tell the story” of AIDS in Africa to raise funds for programs and support the innocent children left behind. Photos were taken and minimal words exchanged, yet it was imagined as a space for American donors to experience and understand suffering through an intimate encounter. One participant explained,

I’m not inclined to say it’s worthless to visit the very sick. I don’t think you want to do that full time, or anything remotely close to that. But to me,

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3 Later I discuss Save the Children’s adoption of codes of conduct that recognize children’s rights to dignity, which prohibit depictions that are dehumanizing. However, they continue to use these images because they are effective.
I know intellectually there's many, many, many, many sick people and VERY sick people and I don't see them and I...and most people in the United States don't ever want to see them, but somehow I feel that it's important to see a few of them to remind me of one of the things that we [IC] are doing. And when I give money to IC, It's much more meaningful to me to give them money and you know, whether it's seeing the orphans, or seeing the very, very sick, or seeing the hospitals and how lousy the stuff they have is, they don't have enough surgical gloves, they don't have enough sterile equipment, they don't have enough blankets, you know, they don't have enough of ANYTHING! It's good to see that, for me.

The encounter of visiting sick patients typically lasted less than five minutes, played into notions of a mythologized Africa—a diseased, dark Africa producing innocent children in need of saving that raises donor dollars.

Some participants believed these experiences were productive because it gave them the opportunity to recognize the humanity in another. Travelers felt it was important to make Malawians who are suffering or dying feel connected. They also wanted to show their support for the Malawians working with HIV/AIDS patients and orphans. They believed that they were able to validate the lives of the dying and the lives of those dedicated to alleviating suffering. One participant explained her purpose and expectations for these orphan tours:

I expected that I'd be with Malawian people. That I would somehow find a way to communicate with them even though I didn't know Chichewa. That I'd be able to see them in a number of different settings, the urban as well as the rural/village settings, that I would be able to touch them, you know, hands on, shake their hands, that I'd somehow feel my heart moved by them and not in pity, but feeling touched that there was something that was common between us. I guess those are the main things.

In these situations, children functioned as ‘depoliticizing’ agents. They were sites of benevolent humanitarianism whereby capital was redistributed and western consciousness about structural violence, global inequalities, and the HIV/AIDS epidemic eased. For example, SOS Children's Village, a prominent orphanage, purports that for $28 dollars a month the lives of youngsters can be enriched—they can be provided an education, food, health amenities, a roof over their head, and even a family—yours. Through these supposed intimate relationships, contributors are assured they are making lives better without having to focus on the structural dimensions that created the orphans’ situation in the first place.

This moral imperative to help produces unexpected consequences. Bornstein (2001) has uncovered some negative local-level effects of World
Vision’s child sponsorship program in Zimbabwe including the disruption of familial ties and feelings of alienation on the part of sponsored children. Ironically these relationships are imagined as familial and unifying to donors (who receive letters and reports of the child’s progress), yet within the communities where the sponsored children reside they are a source of conflict. World Vision workers and local community leaders identify children in communities they deem to be the most vulnerable. Once sponsored, they receive resources including school fees, clothes, food, games, and access to health care, among other things. Some donors pay for their sponsored children to attend private schools and universities. Overall, it appears that these children are significantly better off physically once they become supported through transnational channels.

However, Bornstein (2001) reported that many faced anxiety and social isolation because of their participation in this program. Many children live with siblings and stepsiblings who do not receive benefits. Moreover, parents have no say in how to spend the money sent to their children. Instead, World Vision program officers, driven by the wishes of the donor, dictate how the money is spent. Power is taken away from parents and situated at the transnational level, leaving parents frustrated and angry. Recipient children bear the burden of these frustrations. Donors from Australia, Canada, and the U.S. are able to make choices about what is “best” for children that they have never met, who live in circumstances they cannot imagine, and who have parents and local caregivers looking out for their needs.

I found that targeting resources to orphans who live in impoverished context leads to jealousy. Children who do not have access to orphan-focused resources begin to desire orphanhood (Freidus 2010). One of Madonna’s Raising Malawi staffers explained:

Here you hear so much on the radio about ana amasiye (orphan). All the time, ana amasiye...orphan this, orphan that. And it’s hard. In our programs I know orphans and vulnerable children have to be identified, labeled as such, but once you do that, if we are labeling children like that and then giving them a lot of things the children start to say, ‘but mom, when are YOU going to die so I can get better shoes and food and clothes? I am losing out because you and dad are alive. And so, when are you going to die so I can get better shoes and food like my friend? When are you going to die?’

In a similar vein, children from Miracles orphanage are sent home during the school holiday break, and many report issues of jealousy from neighbors and family members. Children at Miracles eat three daily meals as well as drink milk and occasionally have treats including candy, soda, or
meat. They are given clothing, shoes, and bed sheets. Miracles’ children go to school daily and have tutors and playtime. Their peers in the villages do not have access to these resources. During the hungry season most children in villages are limited to one meal a day. Few have the quality and quantity of clothing and shoes as those in the orphanage. Village children have a heavier daily workload and going to school is not always an option. It is no surprise that when the Miracles’ drivers go to the villages at the end of the break to collect their children there are a multitude of others hoping to be taken back to the orphanage. This leads to conflicting feelings. Many orphans want to visit family and friends, but also express anxiety about how they are treated and perceived when home. Some children in Miracles try to refuse going back to their villages, leading to disconnection and alienation.

The effects on children often go unnoticed by volunteers and funders whose goals include enlisting those in the U.S. and around the world to support their programs. By creating relationships based on empathy, voluntourists come to feel that it is their moral obligation to care for these innocent children. Children framed within such a moral milieu are depoliticized—this compassionate gaze largely overlooks the broader political and social dimensions that lead to their situations. This emphasis on compassion and morality may result in discrimination and stigmatization against those targeted by humanitarian efforts (Bornstein 2001; Chirwa 2002).

5. Paternalism and Unequal Power Relations

Humanitarian endeavors may reproduce unequal racial relations built on colonial legacies, that maintain certain people as less than human (Ticktin 2006; Malkki 1995). Orphan meta-narratives propagate the notion of the North as being inherently superior to the South. Madonna should be allowed to adopt Malawian David Banda because he will undoubtedly have a better life in the west. It is this paternalism and its underlying assumptions that need to be called into question to cultivate a more appropriate humanitarian response.

The racial power differentials that are being reproduced in the postcolony are evident in the discourses of blame associated with HIV/AIDS. The power of these depictions was evident when I returned from a research trip to Malawi. I went to visit family and neighbors, many of whom were interested in my travels and inquired about my research. I explained
that I was exploring orphan care in relation to humanitarianism and development with a focus on the role of transnational organizations. I was told by one inquirer that although such work was noble, I was wasting my time because HIV/AIDS was a Malthusian response to over population in Africa. A more frightful response was that if Africans could just control themselves sexually, there would not be a problem; as it stands, they were getting what they deserve.

These ideologies aid in situating orphans within a moral framework that obscures other factors related to the spread of HIV. They depict AIDS in Africa as due to immorality, specifically hedonistic and barbaric sexual appetites, traditional ‘backward’ practices of scarification, polygamy, virgin and widow cleansing myths, and prostitution (Fassin 2007; Packard and Epstein 1991; Schoepf 2004). There were early reports that African sexual practices drew HIV into humans from apes (Fassin 2007). Africans are often depicted as culpable for the rampant spread of HIV due to ‘uncivilized’ sexual practices. In reality, the majority of HIV transmission is not the result of hedonistic sexuality or exorbitant numbers of sexual partners. In reality, Africans, on average, have fewer sexual partners than Americans (Epstein 2007). It is the nature of their sexual relationships that facilitate the spread of the disease.4

It is within this discourse of blame that a meta-narrative of innocent victims emerges. Innocent, pure, and untainted children, the focus on many humanitarian interventions, should not be blamed for the sexual impropriety of their parents, but rather ‘saved’ and shaped into responsible, moral, and upstanding adults. Children depicted as tabula rasa can be saved from the fate that took their parents though humanitarian intervention. These discourses erase or at the very least blur the ‘structural violence’ that Farmer (2003) shows is ultimately culpable in shaping the lived experiences of those living in poverty and on the margins of society.

An example of this practice is Madonna’s work in Malawi. The power of this pop-star to create and disseminate an image of Malawi—a Malawi in need of a savior—is particularly revealing. Madonna’s organization, Raising Malawi, fundraises to support orphan care projects, and in her 2005 Confessions tour, she publicized her project. Her website contained a clip from the tour where she uses powerful images of orphaned children. She is dressed in red, wearing a crown of thorns and standing in front of

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4 Westerners tend to practice serial monogamy having one sexual partner at a time. In sub-Saharan Africa, concentric sexual partnering is more common. This type of partnering exposes more individuals to the virus (Epstein 2007).
a cross. In the background, on either side of the cross, flash images of children’s faces (presumably orphans). These pictures are engulfed in red, fiery imagery. These scriptures appear: “When I was hungry, you gave me food,” “I was naked, and you gave me clothes,” and “Whatever you did for one of the least of my brothers...you did it to me.” She concludes the song by falling slowly to the floor, as if sacrificed, laying on her stomach with her arms outstretched. This imagery suggests that a white Madonna sees herself as a savior for these black bodies/children, and that she is able to help them escape the hell that is their reality in Malawi. In her fundraising, Madonna similarly draws on depictions of poor, diseased, unloved, and desperate African orphans in need of the saving and benevolent hand of the west.

Madonna began her crusade with the colonial-esque idea of wanting to ‘save’ a child from the ravages of HIV/AIDS and poverty that is ubiquitous in Africa. In her video, “I am Because We Are”, she tells the story of how she came to rescue baby David. According to Madonna, David was on the verge of death from malaria, and she had to heed her own call for a more global engagement and “stand at the front of the line.” She sees herself doing this through her transnational adoptions. This discourse idealizes the ‘West’ as being the key to a better, happier, and healthier life for a poor, diseased child from Africa (Sharra 2006). Madonna assumes that David will benefit from her wealth and fame, thus suggesting that money and a “key to the global North” (Sharra 2006) will ensure this child a rich, full life not obtainable in Malawi. Madonna further described Yohane, David’s father, as a “simple” man from a poor rural village who is overwhelmed by the intrusion of western people and technologies, such as cameras (Oprah Show, aired October 25, 2006) thus suggesting that he lacks modernity. These media depictions highlight the continued racial assumptions of African ‘backwardness’ that form part of many humanitarian fundraising efforts.

Bare Life

Another central characteristic of lay humanitarian discourses is how they often erase the historical, social, political, and economic context. Recipients of aid are often reduced to passive victims who are objects of charity rather than active subjects (Malkki 1995, 1996). Bodies become labeled, targeted, and ultimately governed within a new structure that can be vastly different from that within which they came (Agamben 1005; Malkki 1995, 1996). For Malkki (1995, 1996), it is the refugee as constructed
by humanitarians that is taken into a camp and provided the barest existence, who is reduced to an ahistorical victim existing in an in-between space without state, land, or citizenship. The refugee is “stripped of the specificity of culture, place and history—is human in the most basic, elementary sense. The refugee as bare humanity stands for all of us at our most naked and basic level” (Malkki 1995:12). It is this simplification and standardization of a particular state of being, refugee—or in this case orphan—that once defined becomes manageable and governable.

Ruddick (2003) argues that orphan narratives and images purposefully depicted suffering, potential death and children wholly dependent on donors.

This ‘Child’ comes to stand as the universal child of developing nations, disconnected from context, with few clues as to his or her culture or background. To the extent it is included, context simply signifies excessive and incessant labour and/or poverty. What I am asked to consider is this person’s aloneness- his/her absolute dependence on me as a funder, political supporter, volunteer for his/her welfare. Support mechanisms—kinship structures, village context—are absent. This absence intrigues me: it makes invisible a context that might be disrupted by my intervention, and it allows me to fill the emptied space with fantasies of my own idealized interpretation of childhood. Moreover, it is precisely this context in which I am asked to collude—the construction of buildings around the child are imagined structures of the modern world (2003:342).

The morality of humanitarianism, based as it is on a politics of compassion, gives rise to images of circumscribed lives focused on suffering and potential alleviation via western assistance. Many of the orphan care organizations I studied are driven by the humanitarian discourse of compassion, not justice. They do not aim to change systems that disempower people. In fact, many of them knew little about Malawi’s history or social and economic circumstances. It is not uncommon for the lay humanitarian to have limited knowledge about theories of development including an understanding of macro and micro-economic systems that shape poverty and illness. Nor are they aware of the cultural context within which they work. Lay humanitarians contrast sharply to the large movement of professionalization of humanitarianism mentioned above. Lay groups did not participate in any extensive preparation, and it was clear in exit interviews that few attained any significant knowledge about Malawian

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5 The lay humanitarians I was working with were primarily US citizens. It is possible that British volunteers working in Malawi would have a different knowledge base or perspective because Malawi is a former British colony.
culture, politics, economics, kinship systems, or development theories. More often than not, they assume a “west is the best” mentality and a simplified response to easing suffering is sufficient.

Many of the websites present orphaned children as existing in a social and political vacuum. Much of these children's appeal actually resides in this separation from family and community even though many of those in rehabilitation centers and formal orphanages have nuclear and extended families. Madonna, again, epitomizes this bare life trade-off—the extraction of children from their social milieu. In both her adoption cases she sparked controversy and, in David Banda's case a human rights lawsuit to prevent his adoption. The children she sought to adopt were not living in isolation, but rather were members of extended kinship systems. David, her first adopted child, has a living father and other extended family members. Chifundo 'Mercy' James, her second adopted child, has a grandmother. Madonna simply erased the social systems and cultural configurations within which Malawian children live.

Many of the voluntourists interviewed in the course of this study held a view of African orphans as completely abandoned, isolated, and stripped down to the barest form of humanity. One voluntourist working at the Miracles orphanage explained:

When I had heard the word orphanage before, orphan, it made me think like, you know, they all live in one room, they all get one bowl of pea soup a day, and none of them have clothes, and they don't have anything.

Many of the orphanages in Malawi run by transnational organizations seek to create a new polity and transnational identity for children. This embodies a ‘bare life’ trade off similar to the one Ticktin (2006) describes concerning illegal immigrants in France who are seeking to gain legal residence papers. French immigration laws in the late 1990s privileged those who are seriously ill leading illegal immigrants to embrace an illness identity that, although it may gain them some more time in France and the future possibility of French citizenship, divorces them from ties to family and community in France and in their countries or origin. Malawian orphans brought into institutions have these decisions made for them. The former director of an orphanage in Malawi changed his views on institutionalized care. He now believes the orphanage is the worst model for childcare resulting in a loss of culture and kinship that are vital to the African identity. This loss may outweigh the imagined transnational identity and polity provided to them by orphanages via access to superior
health care, education and nutrition. Children, especially those who have matured within institutions, feel alienated. One child explained,

[ALF] Do people treat you differently when they learn you went to Rescue?
[I try to hide it.]
[Why hide it?]

Yeah, because, as I told you, it becomes sort of a thing that people try to embarrass you with, that you are under sponsorship or you are maybe an orphan. They will try to do everything to make fun of you and you will not always be comfortable with the community. A lot of people will just be talking of your situation as if it is something vile.

[ALF] When people ask where you are from, what do you say?

I don't tell them I'm from here. Because if you do, they are usually like, “Ah! That village for orphans! So, are you an orphan? Were you raised there?” NO! I don't find that good. I try to hide that... [the community] looks at that thing, being an orphan, as very disgusting. Or, even maybe somebody wouldn't be comfortable even chatting with me—they think that maybe I will just be complaining things to them. They feel that maybe...maybe people are afraid, they think that maybe you will be asking things from them, maybe you will be begging something from them. If you tell them that, ‘I don't have parents.’ They will think that every time you are asking favors. Maybe you are telling them your status so that you should be favored. So, I see that element. That even girls. First of all they look at the status.

[ALF] Girls you are dating ask about your status?

No, it doesn't come up easily, because most of us hide our identities. (laughing). So, it's like we cheat them. Yeah, you see. So you see, if you tell them they will think like, ‘can this guy afford to take me out?’ Because, I mean, they will say, ‘Ah, if I see him with some money that means he is being sponsored. That means he can not even take his own money to take me for an outing, or what.' Yeah. So. It can just be embarrassing, if someone could say, “look, he is an orphan.”

The orphan identity that has emerged as a result of humanitarian interventions appears to be contradictory. For some children it is a gateway to needed resources, while also creating community and familial jealousy. A more sophisticated understanding of what happens when these programs are implemented could prevent some of these unanticipated consequences. A first step is to move beyond creating and perpetuating particular images and discourses about Africa, orphans, and AIDS that do not fully capture the reality—both structural and particular—of what children, communities, and countries are facing. Another possibility is
to consider the pros and cons of incorporating a theory of rights into humanitarianism.

Rights and Lay Humanitarian Perspectives in Malawi

Children, in all contexts, do have rights and should be afforded particular protections and freedoms. That being said, neither culture nor rights should be conceptualized as unchanging and eternal, but rather as fluid and mutable (Stephens 1995). Rights need to be about ethical claims to freedom and obligation that are agreed upon through open and public dialogue, which allows for a diversity of constructions that would better fit a multiplicity of contexts (Sen 2004). Moral rights, as ethical affirmations, once endorsed can and have motivated and inspired legislation. But, law is just one use of rights; rights are not exclusive to laws (Sen 2004). The CRC and the African Charter of the Rights of the Child are legally binding documents. I would propose a similar set of documents that are not legally binding. Instead, they would present a framework that will begin the process of publically debating and dialoguing about what rights are relevant to Malawi’s children and when and how to bring these ideas into practice. Two aspects of Sen’s argument are pertinent to this discussion. The first is that institutionalizing rights through legislation is not the foundation of developing rights. Second, is the need to recognize that rights are and should be used in multiple ways. Sen (2004) points to activism and education as arenas where rights can be discussed, formulated, and incorporated into people’s daily lives without having to be backed by legal or punitive instruments. One can and has claimed rights without having to rely on the reinforcement of laws and courts for them to be effective and recognized.

This is not to suggest that rights should be discussed and dialogued only at the level of the nation-state or some circumscribed cultural or geopolitical boundary. Sen (2004), drawing on Adam Smith (1759 quoted in Sen 2004:350), emphasizes the importance of “public reasoning” and “public participation.” The ‘public’ in this case includes the broader global community, what he calls “open impartiality”. Smith (1759:110 quoted in Sen 2004:350) suggests the need for the “eyes of other people” and a scrutiny “from a distance” to understand one’s own sentiments and reason.

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6 Many human rights instruments do not actually have legal sanctions attached to them if rights are violated; however, I demonstrate below that there seems to be a sense among lay humanitarians that a legal framework capable of prosecuting violators is a necessary foundation before any engagement with rights discourses or practices can be considered.
Such a positioning facilitates an awareness of the variations of practices and norms that exist in the broader global community. As a result, cultural practices that impinge upon human rights are opened to contestation, activism, and change as has already been demonstrated with such issues as female genital cutting, forced marriage of children, wife burning, and other oppressive practices. In this theory of human rights, ‘distance’ becomes an essential component in the formulation of and activism around protecting and promoting people's freedoms. There is a universality afforded to moving the scope of the dialogue outward while also retaining specificity in the process of determining particular rights for particular contexts.

One final point worth clarifying is the often repeated notion I demonstrate below that is associated with lay humanitarian projects, which suggest rights come later if there is no institutional, often read as judicial but also economic and social, capacity to ensure them. This is relevant to the following discussion as many individuals and organizations working with orphans assert that providing emergency relief to AIDS orphans frees them from the obligation to address, understand, or recognize the children they are assisting are rights-bearing individuals with guaranteed freedoms. Rights do not have to be immediately attainable for them to exist as an ideal or goal to strive towards. If there is a lack of institutional capacity to ensure rights then a focus on institutional development and reform should be included in the recognition of and movement toward ensuring children their rights and freedoms (Sen 2004).

In this case, the discussion would be eclipsed by a broader emphasis on the role of the government in relation to children’s rights and the care of orphans. As I have shown, NGOization has led to a plethora of private organizations involving themselves in the lives and well-being of young children. The sustainability, or lack thereof, is of concern because these are children who are increasingly dependent on outside support. As these organizations and their resources ebb and flow their purposeful avoidance of the government needs interrogating. Shouldn't collaboration be mandatory so that structures are put into place to provide for the long-term well being of children? If this process takes place, then a rights-based framework would be brought back into the picture—a framework, which I suggest above, should be critiqued and reframed.

None of the organizations I studied framed their work using human rights based language or practice. Instead, they focused on easing suffering, saving lives and providing basic necessities. While some of these are considered rights, these organizations did not explicitly incorporate a
rights-discourse or purpose within their mission or ethos. The founder of one organization explained,

Rights is a huge topic and it is a little bit blurry. I am blurry on it...to talk about rights you have to think about enforcement. I don't see that happening, but I'm quick to say I am not an expert. Orphans need them, but I don't see public philosophical thinking on that and at present I don't see the political will to respond to these social issues.

The founder alludes to “enforcement” and “political will”, which suggests that rights are something to be maintained and ensured by government bodies thus falling outside the purview of his organization. His reference to “enforcement” can be interpreted to mean a legislative or punitive association with rights. This is thinking too myopically. If we consider dislodging rights from the legal domain the potential for engaging these organizations, the global community, the State, and children themselves about what types of freedoms children should have secured seems more probable.

A donor to the aforementioned organization suggested that rights are a western-inspired matter that are not relevant to Malawi because they are “underdeveloped” and facing a host of difficulties that take precedence over a rights-focused agenda. He also alludes to issues of food and care that are identified as rights without recognizing them as such. He stated:

[Rights] have become a big issue in the United States and there are whole organizations ... and they lobby in Congress and you know all kinds of things, that's not [my emphasis] the issue over here at all, in my opinion... I mean there are so many issues ahead of that one here, you know, surviving and eating halfway well. Having somebody look after you if you are kid, and if it's an auntie or grandmother or whatnot is so much more important than any children's rights concept, but you know we're in a different spot completely in the United States. I think it's somewhat beyond [the organization's] role.

The belief that rights are something relevant to the US, and not necessarily Malawi was made by several respondents. Respondents believe that once Malawi becomes more developed, in essence more western, then rights will be relevant. There are a lot of assumptions in these assertions that need to be unpacked. Sen's (2004) work can begin to address these misconceptions. Rights exist for all societies, and as they get publicly debated, discussed, and formulated they can take on different forms and meanings. In this process, nation-states, especially in the global south, are then freed from the neocolonial indoctrination that occurs when they are forced (to 'look' agreeable to the UN and international donors) to sign legally binding
codes that can later be used to justify outside incursion or the dictation of the use of international funds for a particular political project.

Many of the NGOs I study do not frame their work within a rights-based matrix, and thus are able to imagine and implement projects that are ‘technical’ and immediate fixes to circumscribed problems (see Hefferan 2007). The problem is imagined to be the fault of the local communities within which they are manifest, and macro-level or structural factors that shape the local context are ignored, dismissed, or never considered (Hefferan 2007). As I have shown, orphans are imagined to be a problem produced by Malawians; they are the result of the misdeeds of their parents. In this scenario, the west will provide the solution replicating unequal and paternalistic power dimensions reminiscent of the colonial era. Lay humanitarians create and implement a solution to the problem, which is often disconnected from local customs, ideas, and desires as well as being ineffective in producing any real change.

Framing the situation within a rights-based rubric might alleviate some of the problematic outcomes I have discussed. A rights-based approach, if “rooted and legitimized within the local cultures of African societies” (An-Na’im 2002:8) can ensure self-determination, as Malawians would be afforded the freedom to define their own priorities instead of bending to the priorities of humanitarians and their donors. This is possible if Malawians, with the public participation of the global community as discussed by Sen (2004), can determine what children’s rights ought to be. The ‘best interests of the child’ cannot be spelled out in great detail in institutionalized universal doctrines because what is best for a Malawian child can look quite different from that of a child in China, India, the United States, or elsewhere. Additionally, this more pliable approach can lead to the extension of the protection of human welfare (An-Na’im 2002:8) beyond the minimalist easing of suffering. Context specific structural barriers to ensuring human rights and dignity can be brought to light and better addressed.

Data suggest that one of the reasons rights are avoided in humanitarian and development circles is because of the lack of infrastructure, either perceived or real, of states, to uphold them. As one of Madonna’s consultants, and the former director of a well-established orphanage in Malawi said,

There are so many things you have to do for a child before you can even get to rights. There are the basics—food, water, shelter. There are so many children in the villages just running around and needing things. Basic things have to happen. For that reason, people don’t think in terms of human
rights or child’s rights because so many other things have to happen. In order to enforce human rights amendments you have to have a legal framework. There isn’t one here. Those with money can bypass it and the poor cannot access it. Here, stealing a goat gets more severe punishment than raping a girl child. It is just impossible to think that way [about rights].

There is a distinction between what respondents consider rights and what they consider bare necessities. One of the reasons many of these humanitarians fall into this pattern is because they are indoctrinated into the belief that rights are equated solely to legal institutions, which fall under the purview of the state. These two things are perceived of as underdeveloped or corrupt in the eyes of many NGO workers and volunteers. Rights are imagined as something that will be extended down the line; necessities, which they are providing, are addressed today. This prevents these groups from grappling with their own responsibilities and practices concerning children’s rights. In this reasoning, children are discursively stripped bare, which can expose them to human rights abuses by the very organizations caring for them. In actuality, all children, not just western children, have rights, with or without the government’s capacity to enforce laws.

Moreover, there is some question as to whether or not “easing suffering” is a sufficient enough goal for humanitarian interventions. Slim (2000) argues that humanitarianism, currently being framed within a rights-based discourse, is now mandated to expand beyond a quick, often myopic, technical “fix” towards interventions that ensure a right to life with “full human dignity.”

While there are some legitimate claims about government capacity or the potential for corruption at the state or judicial level, the constant maneuvering by NGOs around states is not encouraging the development of a more cohesive, transparent, and established governing system. Two of the NGOs I studied have registered with the state, as required by law, while the third operated out of compliance for a number of years before beginning the registration process in 2008. One of the other organizations that did register with the state regularly works around local governing bodies. The District Social Welfare Officer overseeing the regions where IC implements programs complained saying,

I don’t know why they (IC) don’t want to work with the district social welfare officer. It’s strange. It’s really strange because our role is to coordinate the CBOs in the district. But, here I am and I don’t have any information on IC and what they are doing. I have told the folks at MCBO [the Community
Based Organization funded by IC] to tell IC to come here and formalize their involvement in the district. It's been a year since I made that request and I still have not heard from them.

[ALF] What types of repercussions can IC face for not following protocol and going through the district?

We, as a district, as of now, I can say the only mechanism is to put a stop on their activities and funding. But, we don't really want to do that because I have been told that people are being helped because of them and so we don't want to stop that. What we want is for IC to come straight to us, but we have only gone to MCBO with this matter asking them to tell IC to come to us. We don't even have the IC phone number to call them ourselves.

The founder of IC explained why they avoid becoming too closely affiliated with the government,

If one starts from the initial premise that we are doing worthwhile work in this country and you can say ‘it's better to do business than to leave' then you can't convey the appearance that you're leaping into bed with politicians...So, we don't have ties to politicians so we can stay here long term. Maybe we should have a relationship with the government, but we want to survive...

By working together instead of avoiding the government there is the potential for the evolution of a more legitimate governing system. Again, this rights-based approach would draw on humanitarians to think more holistically about their approaches to addressing orphan care and move beyond band-aid fixes. Purposefully engaging with the government could set up longer-term solutions.

Finally, several larger child-centered NGOs have become signatories to codes of ethical conduct regulating the use of images to generate funding and support (Manzo 2008). Save the Children, Oxfam, and the British NGO Make Poverty History (MPH), have adopted polices framed by children's rights meant to protect the dignity of children. These guidelines prohibit the use of images that depict children's suffering in ways that portray them as “pathetic,” passive and “helpless victims” (Manzo 2008:638). The policies are meant to combat the perpetuation of the paternalistic logic that “reproduces colonial visions of a superior north and an inferior south” (Manzo 2008:636). The organizations I studied were not aware these codes existed. In fact, as I have shown, most purposefully draw on the image of dying or sick child to foster a humanitarian response as well as reinforce their own legitimacy.
Incorporating these children's rights ideologies could have positive consequences for both the organizations producing them and the children being targeted with both resources and a camera lens. They hold the potential to end some of the mythologized ‘backward’ notions of Africa and end paternalistic notions that have in many ways framed the lay humanitarian-type proliferation I have described. In addition, they may open a space for a more sophisticated discussion that highlights those factors—global, local, and everywhere in between—that actually shape the HIV pandemic, endemic poverty, and human rights abuses.

I have presented potentially positive impacts a newly constructed rights-based framework can bring to orphan-focused humanitarian responses in Malawi. Putting these ideas into practice is difficult. As the proliferation of lay humanitarians continues we are likely to see a continued trend of seeking out or defining simplistic “problems” that can easily be targeted with western-inspired ‘technical’ fixes. Proponents of a human rights approach to development and humanitarianism need to imagine a way to capture the minds of compassionate donors, much like images of suffering children do, in order to create a paradigm shift that incorporates theoretical discussions and pragmatic solutions.

**Conclusion**

Madonna says in her documentary, “When you lose your parents, you lose your direction in life. You think, Oh my God! I have no future.” She presents the film and her organization, Raising Malawi, as a solution to the problems facing these children. Madonna imagines these children as naked humanity or tabula rasa that exist in a vacuum without culture or an identity awaiting western involvement to ensure them a proper future. Through specific representations of children, she perpetuates this particular notion of orphanhood to a western audience readily accepting. There is an overt paternalistic sentiment of the west saving those who are cast as unable to save themselves (Abu-Lughod 2002). The west is responsible for ensuring the future of these children. We are their hope. In this iconography, we imagine our involvement, especially as everyday humanitarians, is essential and necessary to creating a new life for children.

International funding continues to pour in for orphan care projects sponsored by a wide assortment of transnational humanitarian organizations and their local Malawian counterparts. Many of these organizations are driven by an ethical code and form of governing involving benevolence.
and charity. Their discourses maintain certain characteristics that can be problematic and ultimately reinforce current power constellations that continue to disempower those already living on the margins. The way orphans are constructed in these meta-narratives do not reflect the realities most children face. The result is the design and implementation of programs that are incompatible with Malawian needs, which leads to unanticipated outcomes (see Freidus 2010).

Rights are about justice, the protection of freedom, and standards of obligation that promote human dignity and welfare while lay humanitari-
anism is based on compassion and focused on generosity and the moral imperative to relieve suffering (Castenada 2011; Ticktin 2006). Rights are not overtly present in the language or mission of these organizations because lay humanitarians imagine rights to be one of two things. First, they are considered the domain of the State, which is regularly characterized as underdeveloped or corrupt. Or, rights are imagined as something to be extended down the line once basic necessities are met. Rights come later. In addition, because children rarely organize themselves around rights-based activism or make claims to their rights it is easy for children's rights ideologies and discourses to remain paternalistic as adults tell children what their rights are. It also allows for a lack of engagement with children's rights as I have demonstrated above.

I have argued here that we need to think differently about rights—in both theory and practice. First, all children have rights and freedoms regardless of a state's juridical capacity. This is what makes a theory of human rights universal. The lack of state capacity should not elide engagement with children's rights discussions. Disentangling the notion of rights from the judicial allows for a more constructive and salient dialogue about what rights and freedoms children should be afforded, and makes all actors accountable for ensuring children's rights are met. I also believe that while rights are universal in theory, they need to be culturally relevant (Sen 2004). Malawians construct childhood differently than the west; therefore, children's rights might look different than those stipulated in the CRC or even the African Charter on the Rights of the Child. We should move away from enshrined universal doctrines to a concept of human rights that reflect locally situated realities and regional circumstances. As Sen (2004) has argued, the crafting of these rights would still be informed by the broader 'public' or 'the eyes of the rest of mankind' as globalization creates a more connected and informed community. In the end, I believe rights can and should be simultaneously global and locally situated, which allows for the promotion of rights and freedoms for children living in particular milieus.
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