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An Unholy Trinity: AIDS, Poverty and Insecure Property Rights for Women in Africa

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Abstract

Women in Africa have long had insecure rights to both moveable and immoveable property due to the coexistence of customary and statutory law, lack of clarity and poor enforcement of the formal rights to property that exist. Insecure property rights for women are most evident in the case of divorce or the death of a spouse when a woman loses access to land and household assets. This paper examines the issues of poverty, HIV/AIDS and property rights in the area where they intersect most vividly, women's lives and livelihoods. The gendered nature of the HIV/AIDS pandemic in Africa is analyzed as are the mechanisms of interaction between AIDS and women's property rights. This paper seeks to move consideration of women's property rights out of the human rights narrative and address instead the implications of poorly defined and enforced property rights from the perspective of political economy.

An Unholy Trinity: AIDS, Poverty and Insecure Property Rights for Women in Africa¹

Much has been written regarding the nature and scope of the HIV/AIDS crisis in Africa. Scholarly work, reports from non-governmental organizations and recent celebrity involvement have created a general awareness in Europe and North America that HIV/AIDS is a serious problem which has had its most significant effect on the African continent. While this knowledge of the crisis is a good thing, the deeper ramifications of the AIDS crisis and its bidirectional linkages with poverty and economic development are less widely known by the general public. John Iliffe has noted that HIV/AIDS is, in fact, not one epidemic but four: the virus, disease, death and social decomposition "...with each superimposed upon its predecessors" (Iliffe 2006: 112). The problem of social decomposition that results from AIDS is as important as the ongoing count of orphaned children and infected adults, both because we do not yet know the pandemic's full range of intergenerational consequences and because the social effects so far observed are devastating.

Property rights have also been a recent concern in the scholarly and policy-making communities. Property rights refer to the legal ability to control the use and sale or gift of a good or resource. While the term 'property rights' often refers to land and houses – immovable property; it may also be used to refer to the right to control the use of movable possessions such as television sets, cars and personal items. It is now

¹ My thanks for this paper first go to Beatrice Kadangs and to Evelyn Ndira, two women on different sides of the African continent who helped me to ask the right questions. This material is based upon work supported by the National Science Foundation under Grant #0549496 of the Law and Social Sciences Program, and the Earhart Foundation. Sarah Baggé and David Peyton gave helpful assistance at various points in the research process. This paper in a much different form, was a working paper with Human Rights and Human Welfare and I am grateful for the comments that I received there.

widely recognized that secure property rights are associated with a host of beneficial consequences including social acceptance, income generation opportunities, the ability to grow food and the potential to access capital via mortgaging or rental. Literature on economic development has long noted the importance of property rights and recent studies detail the importance of clearly defined property rights for poverty alleviation and growth (Norton 2000; Pipes 1999; De Soto 2000). Women's property rights in Africa are particularly important because women provide the overwhelming majority of the rural agricultural labor and have the responsibility of feeding their families (Blackden and Bhanu 1999; Blackden and Canagarajah 2003).

This article brings together the issues of poverty, HIV/AIDS and property rights in the area where they intersect with the greatest impact - women's lives and livelihoods. A critical assumption in this analysis is that HIV/AIDS affects men and women differently due to unequal power relationships in both social and economic realms. Women's property rights in Africa are insecure and HIV/AIDS has both increased the uncertainty and instability of property rights and made women more likely to suffer asset losses that propel them and their dependents into poverty.² Insecure property rights for African women also intensify their susceptibility to HIV/AIDS and impede their ability to cope with the effects of the virus. Much of the literature on law and women's property rights has been written from a human rights perspective (Human Rights Watch 2003; Strickland 2004) and understandably so, as unequal rights to property ownership are a fundamental inequality that has deservedly drawn the attention of NGOs and legal

² Poverty here can be understood in both the strict economic sense of household purchasing power and in the reduction of the choices available to those within the household as Sen has suggested. (Sen 1999)

professionals. In this paper we will examine the linkages between insecure women's property rights and HIV/AIDS from the perspective of political economy, analyzing the effect of formal and customary law on women's economic well-being in a context in which HIV/AIDS is shifting patterns of social relations and increasing the economic vulnerability of those with less power.

The first section of this paper will discuss the legal differences in men's and women's property rights in Africa. The second section will examine the gendered nature of HIV/AIDS and its affects on populations in Sub-Saharan Africa. The last section of the paper will examine how property rights interact with HIV/AIDS to exacerbate problems of poverty for women and their dependent children.

Legal Systems and the Definition of Property Rights

Two levels of law are usually involved in the definition of property rights in any state: constitutional law and statute law. In common law systems we might also consider the role of legal precedent and case law in creating a particular understanding of how constitutional and statute law are applied. However, in Sub-Saharan Africa there is an additional area of law to consider, customary law. Colonization has left a complex legal arena in Sub-Saharan Africa in which customary law, public or statute law and constitutional law combine and sometimes conflict in their definition of legal rights to moveable and immovable property.

Recently, as the 'Third Wave' of democratization swept through Africa, many countries have undertaken the process of rewriting their constitutions, either to make them more robust and democratic as in the case of Uganda or to create a basic law that is

better adapted to the needs of the country after 50 years of independence. This rewriting of the basic law of a country has occurred in the midst of an ideological consensus regarding the necessity of clarifying property rights to create the ideal environment for economic development (Demsetz 1967; Feder et al. 1988; Feder and Noronha 1987; De Soto 2000; Libecap 2003). Countries convinced by the theory regarding the better articulation of property rights have enacted legal reforms to provide an institutional framework that will enable economic growth. These legal changes have occurred at multiple levels. Some countries, such as South Africa, have opted for a legal redefinition of property in their basic law, at the constitutional level. Other countries, such as Ghana, have constitutions that are sufficiently flexible to accommodate change through new laws governing the articulation and recognition of property rights. Another category of countries have made changes in their basic law directed at other issues which profoundly affect property rights. One such country is Rwanda, which formally recognized women as adults in its 1991 constitution through a clause on citizen equality, giving them for the first time the ability to own property and take out a mortgage in their own name.³ These are all changes in property rights that have occurred at the formal level of constitutional or statute law.

Throughout Sub-Saharan Africa, women's rights to both movable and immovable property have been historically insecure or even unrecognized. The Rwandan example is indicative as is the absence of any legal protection for the co-ownership of marital property. As countries engage in the redefinition of property rights there is often an explicit attempt to recognize women's right to property ownership in formal law.

³ Prior to the new constitution the impediments to women owning property in their own names were such that it was necessary for a woman to form a corporation or make the purchase in the name of a son or a brother if she wanted to purchase a home, a business or a piece of land.

Namibia, Uganda and South Africa have all changed their formal law to recognize some women's property rights. Kenya's attempt to do the same in its failed constitutional referendum has led to the revival of the issue in the new National Land Policy. Yet, all of these efforts to articulate women's property rights have been difficult to achieve and almost impossible to enforce. The reason for this difficulty is the presence of customary law which, though different in each country of Sub-Saharan Africa, rarely accords women autonomous rights to moveable or immoveable property.

Customary law is a body of rules governing personal status, communal resources and local organization in many parts of Africa. It has been defined by various ethnic groups for their internal organization and administration. Customary law is recognized by the courts and exists as a second body of law (in addition to statutory law) governing citizens in countries of Sub-Saharan Africa. It has the greatest control over people in rural areas, but also affects urbanites in so far as it regulates issues such as marriage and inheritance.⁴

Customary law addresses individuals as members of kinship groups and lineages. This approach stands in sharp contrast to the individualistic nature of statutory law. Customary law also governs land tenure arrangements across much of the continent. In contemporary Sub-Saharan Africa it has been estimated that up to 75% of the land is held

⁴ See for example the much-discussed Otieno case in Kenya in which an urban, wealthy, Kikuyu woman wanted to bury her husband, a Luo on his farm outside of Nairobi as per his wishes. His family insisted that he must be buried in Western Kenya, his home area. Since his family and not his wife were viewed as the next of kin, their wishes won out. For more detail regarding the case see (Gordon 1995)

under forms of customary tenure.⁵ Since colonial times customary law has existed as an alternative system of organization to public law, administration and inheritance. However, it is important to understand that customary law is not a set of primordial principles or a body of unchallenged traditions that predate colonization.

Customary law is and has been malleable and dynamic. It has changed over time and, in this regard, it is similar to common law which evolves in response to changing circumstances and customs. Customary law was both named and developed in the context of colonization as a mechanism by which older men within traditional societies could assert control over women, younger men and children - the limited realm over which they were given authority by the colonial power. Martin Chanock has observed that "...those who were doing economically well within the limits imposed by the colonial regime were those who had the most interest in promoting a 'customary' view of persons. A view that could be presented and validated in customary terms" (Chanock 1991: 72). To some extent customary law is still used as a tool for the promotion of the interests of certain individuals who are given responsibility for its definition. In a 2002 interview with Human Rights Watch, a senior chief in Kenya recognized that customary law in the current era is created and molded by contemporary traditional authorities, saying, "Customary law is what I describe" (Human Rights Watch 2003:11). Whitehead and Tsikata note the contrived nature of customary authority, stating that

"Many of the supposed central tenets of African land tenure, such as the idea of communal tenure, the hierarchy of recognized interests in land (ownership, usufructory rights and so on), or the place of chiefs and elders, have been shown to have been largely created and sustained by colonial policy and passed on to post-colonial states" (Whitehead and Tsikata 2003: 75).

⁵ More specific country based estimates range from 10-13 of the land area in South Africa at the low end to 90% of land transactions in Mozambique and 78% of the land area in Ghana (Augustinus 2003).

Privatized and customary land tenure institutions articulate two very different bundles of rights to land. In the colonial era this dual system followed racial lines; natives used land, white colonizers owned it. Africans maintained rights to land as groups and those groups were overseen by a chief who controlled land allocation. Where chiefs' traditional authority did not include the administration of land, they were given new powers. Firmin-Sellers notes the complicity of the colonial state in supporting property rights claims proffered by traditional leaders when they served the goals of administration and control. Her fascinating study of Ghana also illustrates that different versions of 'customary law' were presented to colonial officials for their support by self-interested leaders (Firmin-Sellers 1996). In examining the development of land markets within customary land systems Chimhowu and Woodhouse note that those who gain the most from emergent markets in land are those with the most influence over its allocation (2006). Thus traditional authorities recognized by the colonial powers were able to shape customary property law to shape their own interests.

By the end of the colonial era, Africans were perceived to both define themselves in terms of their group and kinship ties and to require laws which recognized this group identity as dominant in their economic behavior. Mahmood Mamdani is quite critical of what he sees to be the entrapment of Africans in the 'world of the customary',

"European rule in Africa came to be defined by a single-minded and overriding emphasis on the customary. For in the development of a colonial customary law, India was really a halfway house. Whereas in India the core of the customary was limited to matters of personal law, in Africa it was stretched to include land. Unlike the variety of land settlements in India, whether in favor of landlords or of peasant proprietors, the thrust of colonial policy in Africa was to define land as a communal and customary possession. Just as matters of marriage and inheritance were said to be customarily governed, so procuring basic

sustenance required getting access to communal land. With this development, there could be no exit for an African from the world of the customary" (Mamdani 1996: 50).

There is a disagreement among scholars, some of whom view customary law as invented by colonial powers (Ranger 1983; Chanock 1991) and those who hold the more moderate position that through its ambiguities, customary law created a realm of struggle over power and the allocation of resources (Nyambara 2001; Berry 1992). Whichever perspective one takes, African customary property rights nowhere give women autonomous access to land. In fact, it would not be too strong to say that in many areas they cannot obtain autonomous rights to agricultural land because of cultural patterns of control and inequalities in customary law.

In areas where land has a high value relative to other factors of production, customary land ownership patterns can empower and enrich those who make decisions regarding its allocation. "Authority in land whether vested in the chiefs, or in the government officials and political leaders, can in turn, lead directly to private economic benefits for these actors, derived from land accumulation, patronage and land transactions" (Toulmin and Quan 2000). Where land values are high, traditional leaders can and often do, practice the politics of exclusion, denying land to those with less political power, such as divorced women, widows and migrants.

The most optimistic assessments of the situation for women under customary law acknowledge that their rights to land are not autonomous or inviolable, but are subject to the ability of women to exploit customary rules in their favor (Rose 2002). Whitehead and Tsikata note that 'Women have to fight harder and strategize more skillfully [than men] for their access to land ' (Whitehead and Tsikata 2003: 102). This is due to the fact

that although women have the right to use land under customary law, they do not have control over which land they are given. They have access to farmland only by virtue of their status as wife or daughter - secondary rights to the land. A typical scenario in East Africa would be for a married woman to be given a plot of her husband's lineage land on which to farm. The land is given to her to use in providing food for her family. She has the right to use the land, but could not sell it, rent it or give it to someone else. If she were to leave her husband, or if her husband were to divorce her, she would lose access to that land. The woman has the right to use the land by virtue of her relationship to her husband who is a member of the lineage and has primary right to the land. Her right to use the land is also conditioned on her ability to use it and if she falls ill or ceases to farm a particular plot, it may be claimed by someone else in her husband's lineage.⁶ Women's property rights will be weakest in areas where there is a high demand for land.⁷

Throughout Sub-Saharan Africa, land is owned by lineages or kinship groups, and women are *not* considered to be part of the lineage of their husband. Group rights over land, manifested in the control of land by the lineage, supercede individual rights to land

⁶ Whitehead and Tsikata detail objections to the understanding of women as holding only secondary rights to land noting that it is women's social embeddedness that gives them rights to land and that these rights are stronger than implied by the words primary and secondary. Yet, they also note that women's land rights are not protected by social embeddedness when the value of land increases in relation to other factors of production. (Whitehead and Tsikata 2003). In examining women's property rights in West Africa, Kevane and Gray note that among the Mossi in Burkina Faso women are given plots of their husband's family land to farm, but that this 'right' is entangled with the 'obligation' that she use her grain for household consumption. The idea that a woman produces and then controls the output resulting from her labor is illusory Kevane and Gray also note that there are substantial differences among ethnic groups in Burkina Faso regarding women's obligations to provide food. They also note that men may also be obligated to share with their wives the produce from their fields in some ethnic groups. (Kevane and Gray 1999)

⁷ A word on land titling is in order here. In the past in areas where land titling has occurred, a high demand for land was created where it did not previously exist because of the potential to mortgage or sell the land. Once title was given the land could be put to a greater range of uses. If titling occurs in a man's name without any acknowledgement of the joint ownership or use rights of his spouse, then women face the possibility of losing land that they farm, as their husbands sell it in order to gain capital for other pursuits. The formalization of informal land rights is what Hernando De Soto recommends as a form of poverty alleviation. Yet, when it is done without a concerted effort to give voice and protect those who have use rights, women may face land alienation.

in customary tenure systems and women are not part of their husband's lineage.⁸ Asimwe notes in the Ugandan context that "... since women are seen as belonging to neither their families nor marital clans, they are denied by both sources the opportunity to own land. As a result, they are alienated from land ownership from childhood to widowhood" (Asimwe 2001: 175). In Ghana this customary belief is captured in statutory law that makes no provision for the joint ownership of property by a man and a woman even if they are married because they are not considered to be members of the same lineage (Fenrich and Higgens 2001). In Uganda, one indigenous non-governmental organization used the slogan "Women Have No Home" to draw attention to the fact that women are not believed to be part of either their natal or their marital lineages and therefore have nowhere to go when facing domestic violence (Turner 2005).

Women's rights to movable property are also vulnerable. Under customary law women do not own, or even co-own the movable property in a household. In the case of divorce and sometimes in the case of the death of a spouse, women are left with only their clothing and jewelry. "Upon divorce a wife can keep her personal effects but everything else livestock, businesses, children - belongs to the husband" (Steinzor 2003: 8). If a woman buys a television set in her home with money she earns from wages or sale of agricultural products she must save her receipt to have any hope of keeping the television set in the case of a divorce, (in which event her husband could claim it as his

⁸ See Mamdani for a historical critique of the customary law and customary land holding institutions. (Mamdani 1996)

own) or in the case of his death (at which point the household property would all revert to his lineage).⁹

Even educated, urban women face problems of property ownership, though the barriers they face may be social and cultural rather than legal. In examining women's inheritance rights in Ghana, Fenrich and Higgens found that educated, urban women working on their project were reluctant to own property in their own names for fear of causing discord in their marriages (Fenrich and Higgens 2001). When I conducted research in Uganda I had a regional gender officer tell me that "Women can't own land and have stable marriages" (Muguisha 2006).

The Gendered Nature of HIV/AIDS in Africa

Africa is the continent most affected by HIV/AIDS. Eighty-one percent of the world's AIDS-related deaths occur in Sub-Saharan Africa (Economic Commission for Africa 2003). AIDS prevalence is higher in Sub-Saharan Africa than anywhere else in the world at 7.5-8.5% of the total population. An estimated 2.4 million adults and children died from AIDS in sub-Saharan Africa last year and 25.8 million are estimated to be living with HIV (UNAIDS/WHO 2005). Furthermore, most of the world's women suffering from the AIDS virus live in sub-Saharan Africa: a shocking 83% (Economic Commission for Africa 2003: 48).

⁹ The underlying justification for these inheritance patterns is the traditional belief that women are property themselves. In Uganda, those who oppose women's property rights use the aphorism 'Property cannot own property' to sum up the reasons for their lack of support. From the multiple perspectives of human rights, citizenship and human dignity this point of view is repugnant.

On the African continent, HIV infection rates are not similar in all the countries and all areas. The World Health Organization divides the continent up into regions; of these, Southern Africa suffers the most, with its prevalence rates rising from 20.3% in 1997-1998 to 25.7% in 2001-2002 (World Health Organization 2003: 19); this may be caused by the high levels of urbanization and labor migration patterns in Southern Africa. Eastern Africa's prevalence rate has gone down slightly, from 13.7% to 11.4%. HIV prevalence in West Africa has remained relatively stable at 4.3% from 1999-2002.¹⁰ Thus it is important to recognize that the findings detailed in this article have more import for Eastern and Southern Africa than for West Africa.¹¹

There is a gender bias in HIV transmission because women are twice as likely to contract the disease during sexual intercourse (European Study Group 1992).¹² However, Sub-Saharan Africa where 57% of adults and children living with HIV/AIDS are female, is the only region where women represent more than a third of HIV infections.¹³ Women's greater physiological vulnerability to HIV infection is compounded by risky sexual practices; and endemic poverty, which can lead to the exchange of sex for food or other basic needs (Dempster 2002; UNAIDS 2005; Mesko et al. 2003).

There is a gender bias in the stigma associated with HIV infection. Though in many communities AIDS education programs have effectively educated the population regarding the means of transmission of the HIV virus, AIDS is still seen as a women's

¹⁰ Côte d'Ivoire is the only exception with the highest infection rate in West Africa and one that is increasing.

¹¹ Women's property rights also tend to be better protected in West Africa, in part due to the fact that women are often able to maintain strong family ties with their natal kin after marriage, giving them greater security if a marriage disintegrates. See Muller pp. 27-29 for a discussion of other factors contributing to the regional differences in infection rates and livelihood options for women. (Muller 2005).

¹² Research identifies the risk of HIV transmission as much higher for both men and women during the first few weeks of HIV infection.

¹³ In North America women's infection rates are at 25%, Europe 28%, South-East Asia 26%, and Latin America 32% (Global Health Reporting 2006)

disease in many places and women are viewed to be the main transmitters of the virus (Drimie 2002; Muller 2005). This perception is assisted by the monitoring process in which "... countrywide prevalence rates are often based on sentinel surveillance of antenatal clinic attendants, and the fact that most families find out HIV is among them when a woman becomes pregnant and attends such health facilities" (Muller 2005: 37). Where the belief that HIV is transmitted by women is present, women will face greater stigma when contracting the disease and greater difficulty if their husbands die of AIDS, whether the wife is HIV positive or negative.

There is a gender bias in the affect that HIV/AIDS has on families. Women in Sub-Saharan Africa are responsible for the care of the sick. When someone in a family falls ill due to HIV/AIDS, it is the women in the family who have responsibility for caring for that person. Because women bear the additional responsibilities of fetching water and cultivating food crops, both of which may entail walking some distance from the family home, caring for a person with HIV/AIDS may place significant physical burdens on women. Some studies have shown that women caring for relatives with HIV/AIDS lose time spent on agricultural production (Drimie 2002; Africa Institutional Management Services 2003). Given the fact that in Sub-Saharan Africa women produce up to 80 percent of the food crops in Africa (FAO 2002: 11), this redirection of their labor is significant..

Women's Property Rights Insecurity

Insecure property rights pose a number of problems for women and their dependent children. Insecure property rights make women less able to cope with the

economic stresses of HIV/AIDS and exacerbates their vulnerability to the disease. Insecure property rights for women limit their ability to generate income, feed their families and use the collateral from property to take out loans. Poverty makes women more likely to engage in risky sexual behaviors either for survival or for exchange (Whiteside 2002; Drimie 2002). In this section of the paper we will focus on two areas in which insecure property rights affect women's abilities to cope with HIV/AIDS and increase their risk of poverty or the likelihood that they will remain impoverished. These areas are capital accumulation and inheritance.

Capital Accumulation

Across Africa women have insecure rights to both moveable and immovable property. This is unique, as in other areas of the developing world women's ability to use and control assets is not similarly impeded (Steinzor 2003).¹⁴ Insecurity of property rights to immovable property means that women are unable to reap the economic benefits of clear title to land such as the potential to mortgage, or lease their land. Literature suggests that they will also invest less in their land so as not to increase its value and risk appropriation by others (Dam 2006; World Bank 2004). With regard to moveable property, insecurity of women's rights has an effect on their ability to control the use of household assets such as livestock.

Women will also be less likely to rebound quickly from asset losses that come when a family member has AIDS because of the impediments to capital accumulation that they face under formal and customary law. Women's asset losses can come during

¹⁴ Women throughout Latin America have stronger statutory property rights, though these may not be consistently enforced.

the illness of someone in the family, if they lose customary rights to land based on their inability to farm or if they use assets to pay for medical expenses. They may also lose assets after the death of a family member from AIDS, if they lose usufruct rights to land due to the loss of the primary rights holder to the land they are farming or if it is their husband who dies and they lose their moveable household assets to his relatives.

Under customary law women's access to land is conditioned by her ability to farm it. A woman may lose access to land if her spouse or child has AIDS and she needs to provide nursing care, if she herself has AIDS and is unable to farm or if her spouse dies of AIDS and she has to sell household assets to cope with the expenses. In Namibia 20 percent of households that reduced the land they were cultivating reported that it was due to death or illness in the household. (Africa Institutional Management Services 2003: 12). In Tanzania, women whose husbands were sick due to AIDS spend 45% less time on agricultural activities due to their nursing responsibilities (UN Department of Economic and Social Affairs 2004: 63). A study in Ethiopia demonstrated that in households afflicted by AIDS only 11-16 hours per week were spent on agriculture, compared to 33.6 hours in non-afflicted households. We know then that nursing of someone with AIDS in the household has a significant impact on household agricultural labor. We also know that under customary law women have access to land based on their ability to farm it rather than autonomous property rights. There are few quantitative studies currently available on the linkages between labor losses due to AIDS and women's access to customary land, but given what we know of the allocation patterns in customary tenure

areas where land values rise, we can with some certainty argue that women who are unable to farm customary land that they have been allocated are more likely to lose it.¹⁵

When someone in a family is infected by HIV and begins to show signs of AIDS, the household typically begins to sell off assets or use savings in order to pay for the costs of medical care, transportation to and from the hospital, and to purchase food which cannot be grown due to the lost labor of the person who has become ill. Baylies notes,

It takes a long time to recover household equity when someone falls ill due to AIDS and if you have people falling ill one after another then even a household which was relatively prosperous quickly loses its ability to survive and certainly to continue with farming activities. Where clustering of deaths occurs the damage that occurs in a household is not necessarily repairable (Baylies 2002: 619).

This problem is magnified if it is women in the household that are left after the deaths due to AIDS. If the household is dependent on the farming of customary land for their sustenance the women will have lost their link to the lineage with the death of a spouse and the household will either cease to exist as family members split up and join other households or face less secure access to customary land. If land is plentiful and a woman has strong social ties with her husband's family and/or older sons, she will likely be able to stay where she is. For those without social connections or sons, the situation will be more tenuous (Henrysson and Joireman 2007).

If a male head of household dies of AIDS, the household must pay for his funeral expenses and then try and manage with the loss of his labor. In a 2000 study by Namposya-Serpell on AIDS in Zambia, two-thirds of 333 households in which the male

¹⁵ Aliber, et.al have argued that it is women's social context combined with land pressure that determines whether or not they will lose their land if their husband has died of AIDS. This study, conducted in Kenya found that the death of a young married man is more likely to leave his widow insecure because of his lack of formal ownership of land which a wife can then inherit (Aliber et al. 2004).

head of household had died from AIDS, saw a decline in their monthly disposable income of 80 percent (Whiteside 2002: 322). In situations where monthly income plummets so drastically the likelihood of household asset sales increases.

The issue of women's control over property becomes particularly important when a husband dies as a household that has experienced one death from AIDS can anticipate others. If a women's husband dies of AIDS and she loses assets to his kin as a result of poorly protected property rights, she will be in dire straits if she or one of her children later falls ill. This leads us to the second issue pertaining to women's property rights and HIV/AIDS.

Inheritance

Under customary law, all movable property acquired by any wife will be considered the property of the husband and ultimately of the lineage,¹⁶ and there is no understanding of co-ownership of property by the husband and the wife.¹⁷ This is because under customary law, the woman herself is considered to be property rather than an independent economic actor. Moreover, under formal statute law this issue remains. Women

¹⁶ For a detailed assessment of this problem with examples from Kenya see (Human Rights Watch 2003; Nzioki 2007).

¹⁷ Although customary law itself is malleable, dependent upon the decisions of elders, chiefs and those designated as traditional authorities. In this regard customary law can be thought of as similar to common law. It is not immutable, it should and will change over time. However, to date the exclusionary practices regarding women's property rights have proved persistent over much of the continent. It is possible that change in the system of customary law will effectively recognize and protect women's property rights, but this has yet to become a pervasive or even frequent practice.

throughout Sub-Saharan Africa have no legal right to sole inheritance of marital property if their husband dies intestate.¹⁸

Given the legal impediments to control of property, both formal and customary, it is difficult for women to make plans for their own financial security in case of an anticipated death or divorce. It is socially unacceptable in both East and West Africa for women to buy land or other property in their own name (Bikaako and Ssenkumba 2003; Asimwe 2001; Fenrich and Higgens 2001; Human Rights Watch 2003; Muguisha 2006). Second, it is difficult for them to retain control over even their household goods if their husband passes away (Africa Institutional Management Services 2003; Tripp 2004; Strickland 2004; Human Rights Watch 2003). Non-governmental organizations have done an excellent job of documenting the situation of women whose husbands have died of AIDS and the struggle they often face with his brothers and other relatives if they want to stay in their home, keep the contents of the household and continue to farm the land (Africa Institutional Management Services 2003; Strickland 2004; Human Rights Watch 2003).

It is not unusual for women to lose both moveable and immovable household assets soon after the death of a spouse. In Uganda in the Luwero and Tororo areas 29% out of a total of 204 widows indicated that property was taken from them following the death of their husbands (Gilborn et al. 2001). In Northern Namibia, after the death of a husband ‘... all moveable items such as cattle, kitchen and farm equipment are taken by relatives, regardless of whether they are considered inherited or common

¹⁸ In Ghana PNDC Law 111 allowed women to inherit a portion of their husband’s property if he died intestate. In Kenya, the provision in the constitution for joint ownership of marital property is one of the issues that was thought to lead to the rejection of the constitution in a countrywide referendum in November of 2005.

property”(Mesko et al. 2003). In Zambia, where livestock represent one of the few household assets, it was found that from 1997-2002, 41% of female-headed households with orphans had lost all their cattle and 47% had lost all their pigs due to distress sales and property dispossession after the death of a spouse (Mesko et al. 2003). In Malawi, Ngwira noted that property grabbing of moveable assets by relatives happened after the death of a male spouse in 30% of the cases she surveyed, compared to 3% of the cases when there was a death of a female spouse (Ngwira 2003: 16).

Children

Insecure formal and customary rights to property in Africa for women have a tangible effects on the children for whom they are responsible. Children suffer in several ways: 1) loss of nutrition if their mother loses access to land; 2) early marriage for girls; 3) risk of abandonment if mother dies; 4) no inheritance of mother’s property or resources acquired during her marriage. These risks in turn leave the children themselves more vulnerable to HIV infection.

As noted earlier, in families where land access is conditioned upon the ability to farm, a woman who contracts HIV and falls ill or who is caring for a family member who is ill will not have the same ability to farm as a healthy women. As a result, a family may face food insecurity because of the loss of a woman’s income and labor in the fields.¹⁹ If

¹⁹ The cumulative effect of many women dying of AIDS in many households across a country and the attendant loss of agricultural labor that their deaths bring has led to some predictions of new-variant famine. “Agricultural output, the cornerstone of production in agrarian economies, is decreasing as a result of increased mortality in the workforce, resulting in what has been termed "new-variant famine" (Coovadia and Hadingham 2005). In some African countries where infection rates are particularly high, it is predicted

there are older children, particularly girls, they may take over the responsibilities of the woman in the fields and prevent food insecurity within the family. However, this means that they will not be able to attend school and therefore bear the burden of insecure property rights in a different way.

In households where someone is sick with HIV/AIDS the need for money to cover medical expenses may lead to the early marriage of daughters. The practice of bride price, widespread through most of Sub-Saharan Africa, requires men to pay the family of the woman they marry. They are paying the family for the lost labor of the woman and for the acquisition of her labor and reproductive capacity for their lineage. This system is beneficial in some ways for the family of the woman, and has led to a popular aphorism in West Africa “A rich man has four daughters.”²⁰ If a family is in need of extra income because someone in the household has contracted HIV and is manifesting the symptoms of AIDS, it may be an incentive to marry off daughters who would otherwise be left in school or not married for several more years. Within polygamous households the children of a woman who dies of AIDS may find themselves

that the agricultural workforce will decline by 10–26% by 2020 (UN Department of Economic and Social Affairs 2004).

²⁰ It is extremely important to note that there are other consequences of bride price that are detrimental to both women and men. It is a practice that undergirds the problems of gender inequality across the African continent and it impedes women’s ability to negotiate safe sexual practices within their marriage, because of the view that they have been purchased. Some would argue that it is also detrimental for men as they cannot marry when they would choose, they are dependent of their families and lineages for the provision of bride price and the need to work to be able to pay bride price may interfere with their schooling.

with decreased access to household resources in terms of food and money for school fees. Children may even be abandoned if it is feared that they are infected with HIV.

Unless a woman has taken explicit measures to purchase and title land in the name of her children or to establish a bank account in their name, it will be very difficult for her to pass her capital on to her children when she dies. Under customary law, a woman's possessions will revert to her husband and/or her husband's family upon her death. If the society is matrilineal, the woman's possessions will go to her brothers. In both cases it falls upon the lineage to provide for the children. In the best possible scenario the children will have their inheritance kept for them or used to provide their school fees and adequate food and medical care as they grow up. Yet, in circumstances where there are insufficient resources extended families are not always able to absorb and provide for orphaned children.

Once orphaned as a result of AIDS in the family, children fall into the highest risk group for HIV infection in Africa. Gilborn notes that

Youth aged 15 to 24 years now account for 50% of new cases of HIV infection in high-prevalence areas, with girls becoming infected at younger ages. Orphaned youth tend to begin sexual activity earlier than their peers and are especially vulnerable to coercive and transactional sex, unwanted pregnancy, and infection with HIV and other sexually transmitted infections. Orphaned girls can be pushed into early marriage to alleviate the burden on relatives to provide for them. Lacking adult protection, girls, street children, and those in child-headed households are particularly vulnerable to exploitation (Gilborn 2002: 14).

A death in a household from AIDS is difficult to negotiate. Family members are affected differently by a death depending on who has died and their relationship to that person. Men and women experience spousal deaths from AIDS very differently and male and female children orphaned due to AIDS also face different challenges.

A Note on Discourse

Women's property rights, and the inequalities women face in inheritance law have been addressed by human rights groups and women lawyers across the African continent. There has been an outpouring of activism targeted at getting new laws written that will provide the legal framework for the protection and enforcement of more secure property rights for women, particularly upon the death of a spouse. These efforts have been situated within the human rights movement and discourse. Many women's organizations felt empowered by the passage of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) to hold their governments accountable for redressing inequalities in the law. Current laws across much of the African continent do not provide the same citizenship rights to women as they do to men. This fundamental inequality needs to be addressed in both constitutions and statutory law.

Women's property rights need to be a fundamental part of two other extant discourses; 1) HIV/AIDS prevention and 2) economic development. Women's ability to own and control household possession and land are critical to their ability to respond effectively to HIV/AIDS when it affects their households and prevent themselves from contracting HIV. Women who are left with no assets and no means to provide food for themselves or their children after the death of a husband are far more likely to engage in risky sexual behavior such as exchanging sex for food.

Secure property rights for women are also critical to economic development. Economists, Hernando de Soto among them, have argued that the definition and defense of the property rights of the poor worldwide will increase their well-being and allow them

access to new business and educational opportunities (De Soto 2000). Articulating property rights in law will facilitate economic growth by creating what De Soto calls ‘meta’ property – the paper trail of title and mortgage which can free the surplus value of assets and provide the necessary capital for economic growth and development. Without this legal framework of property rights people can effectively do business only with those that know them or their family.²¹ Wider economic opportunities remain restricted due to the absence of contracts and law that would enable individuals to mortgage their property and use the funds for investment. De Soto’s argument follows on other work that suggests security of land title leads to greater investment and is linked to productivity (Platteau 1996; Demsetz 1967; Feder and Noronha 1987; Libecap 2003).

Women deserve particular consideration when it comes to issues of property rights because in areas where customary law determines the allocation of land, women do not own land and are able to farm land only as a result of secondary use rights they obtain through marriage. Yet, their labor is crucial to both subsistence food production and the farming of cash crops. There is a significant discrepancy between the amount of labor that women put into the production and storage of both food and cash crops and their control over decision-making with regard to resource use within the household. Women farm and they need secure access to land in order to gain from investment in the land and to realize the benefits that mortgaging it might bring.

De Soto argues that for poverty alleviation to occur there needs to be a formalization of the informal property rights that exist on the ground. However, in many African contexts where customary law regulates the access to land, formalizing existing

²¹ This idea is echoed in (Demsetz 2002).

property rights will only further alienate women from access to capital. This was precisely what occurred in the titling of land in Kenya. When land becomes titled it is not titled in their names, so they may lose any access to land they may have had when those who have title decide to sell or mortgage that land or use it for different purposes. Under customary tenure Kenyan women had use rights and 'considerable management control over plots allocated to them by household heads'. When land was registered in the name of the male household head they lost that control (Ensminger 1997). As long as land is untitled women have usufruct rights that are unlikely to be alienated except upon the death of a husband or divorce. With increasing HIV infection rates in Africa, spousal deaths have become more common and the dispossession of property due to the death of a spouse has become more likely.

Unquestionably women's property rights are an important human rights issue on the African continent, but they are critical to more than just the women themselves. They are a necessary consideration for anyone concerned about the spread of HIV in Africa and also to those interested in economic development on the continent. They are of great consequence to children whose nutrition and education are dependent upon the physical and economic well-being of their mothers and fathers and they are important to communities which will benefit from women's economic contributions and civic engagement. The linkages between poverty and HIV infection are strong. Any action to increase women's economic wellbeing will decrease their risk of HIV infection in the long run as well as equipping them to deal with the effects of HIV on their households.

Moving Forward

Insecure property rights, HIV/AIDS and poverty contribute to difficult lives and troubled livelihoods for women in Africa, yet the situation is not completely without hope. Some innovative strategies have already attempted to tackle these issues with positive results in Sub-Saharan Africa. Looking to the future there are several changes that could be made in discourse, in law and in education to make women's property rights more secure and thus enable women to take on the challenges of HIV/AIDS and poverty.

First, it is important to discuss women's property rights not just within the human rights narrative, but as a critical factor in economic development and in enabling communities to respond constructively to HIV/AIDS. Let me emphasize that there is nothing lacking within the human rights discourse on women's property rights. Rather, an equality of ownership opportunities for women and men under the law is a critical human right. Moreover, much has been done by legal scholars and African women lawyers to move these issues to the table for both governments and international financial institutions to take note. However, women's property rights are also important to economic development and to the response to and prevention of HIV/AIDS. They should therefore be an issue of interest to public health officials, development specialists and government officials as well as African lawyers. Women's property rights should be a key part of the Poverty Reduction Strategy Papers of all Sub-Saharan African countries for all of these reasons.

Second, where laws do not exist to enable married women to jointly own the immovable and moveable property acquired during a marriage, they must be created.

This has to be done with some sensitivity to the nature of households in Sub-Saharan Africa. The Ghanaian case provides a good example of inheritance law that manages to create as many problems as it solves. The Ghanaian government passed Law 111 in 1985 because of problems in providing for widows and orphans under customary law. However, the law they passed did not take into account that up to 30% of Ghanaian households were polygamous. The law ensured that if a man died intestate, a percentage of his assets would go to his widow(s) and children, but there was no provision for polygamous relationships, leading to a plethora of legal battles and disputes (Dowuona-Hammond 1998).²²

Third, where appropriate inheritance and joint ownership laws exist they must be enforced. This is not always easy given the limited nature of state resources in Sub-Saharan African countries and the fact that secure property rights for women go against cultural and traditional practice.²³ As a result it is essential that any changes in law be accompanied by sensitization campaigns. However, to the extent that new laws contradict cultural norms, even sensitization campaigns may be ineffective in the short

²² For example, under Law 111, if a man has several houses his wife and children get one house and its contents and any other houses or household contents become part of the estate which is divided between spouse, children and patrilineal kin according to a formula. If a man has 3 wives and they all have children by him, then all three wives and their children get one house to share or (as is more likely) to sell and split the proceeds from the sale. In cases of polygamy then, wives and children are not as well provided for as was intended under the law.

²³ Both Catherine Boone and Jeffrey Herbst have addressed the problems of weak states in Africa, the limited reach of the state and the uneven enforcement of law. (Herbst 2000; Boone 2003)

run. Our expectations of the length of time it takes to implement a major cultural change need to be reasonable.

Fourth, it is important for states and both national and international non-governmental organizations to engage in educational action targeted at men and traditional leaders. Two critical issues need to be addressed: the causes and transmission of HIV/AIDS and the importance of protecting women's property rights. To the extent that HIV/AIDS is viewed as a women's disease and women are seen as the transmitters of the virus, the fight against HIV transmission will be damaged and the struggle for secure women's property rights very difficult to achieve. Men must be accountable for their sexual behavior and acknowledge that they too are carriers of the virus in order for effective behavioral change to occur. Traditional leaders and men also need to be assisted to understand the importance of women's property rights for the well-being of their households, their descendants, and their communities. Localized efforts in South Africa have achieved this on a small scale through community meetings and educational campaigns. In Lesotho traditional leaders have acted to interpret customary law in such a way as to protect women's property after the death of a spouse from AIDS. "By invoking compassion to relax the binding force of the law in the face of the prevalence of HIV/AIDS, the chiefs have not only strengthened their authority but also ensured that land management at the community level provides a relatively secure means of livelihood for the HIV/AIDS affected households"(Mphale et al. 2002: 4). The great benefit to change that happens from the community level up is that it is far more effective and less expensive to enforce than attempts to impose change in property rights institutions from the top down.

Conclusion

The vast majority of women infected by HIV live on the African continent, where virtually all women struggle with poverty and insecure property rights. HIV/AIDS in Africa is primarily spread through heterosexual contact and it is often seen as a women's disease because women are often the first in the household to test positive for HIV when they attend prenatal clinics. The HIV crisis in Africa takes place in a context in which women's ability to control property is severely limited by customary law. Women in Sub-Saharan Africa face insecurity in their property rights to both moveable and immovable goods. They have secondary rights to access farm land and often to houses and other immovable property. They are rarely able to maintain control over moveable household property in the case of death or divorce. Women's insecure rights to property in Africa have made them both more vulnerable to HIV/AIDS, because they are more likely to find themselves in extreme poverty if their husband dies or they are divorced. They are also less able to cope with the consequences of HIV/AIDS if others in their household should become infected because they may lose access to land if they are not able to farm it due to their care responsibilities for the person or persons sick in the household. There is a nexus between HIV/AIDS, poverty and women's property rights. More secure women's property rights should decrease their economic vulnerability and increase their ability to both prevent HIV infection and cope with AIDS if it affects their households.

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