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Gender-Related Legal Reform and Access to Economic Resources in Eastern Africa

Gita Gopal

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Gita Gopal

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FOREWORD

In the past four years, the Eastern African Gender and Law Program has generated significant thinking in the area of gender and law in selected African countries and within the region. Initiated as a small program, it has been broadened and enlarged and today finances activities in a number of countries, mostly through small grants. It also has made a modest beginning in coordinating and recording knowledge on important issues in the area of gender and law.

One of the more attractive aspects of this program is that it has been shaped by stakeholders in the client countries; the Bank merely facilitates activities that are identified as priorities by the country stakeholders. For example, the program financed a participatory land appraisal to identify and examine gender and land issues after the Ministry of Community Development and Women in Tanzania identified the need for additional information on customary land practices. The findings of the appraisal fed into the debate on the Land Bill in Tanzania, which was recently passed. In Uganda, the Local Government Act of 1997 has reserved 33 percent of the seats on local councils for women. The Ministry of Gender, however, identified lack of gender sensitivity and legal literacy among both men and women as a significant constraint to the effective functioning of these newly elected councilors. The program therefore arranged for an Institutional Development Fund grant to develop and implement a gender-sensitive curriculum on legal literacy for newly elected men and women councilors. The activities financed by the program may be small, but their potential impact is significant.

This paper reflects some thoughts that are emerging from work that is being done in the area of gender and legal reform. Although these ideas are still evolving and do not necessarily reflect the views of the Bank, the paper represents an important contribution to thinking in the area of gender and law issues in Africa. It is hoped that periodical pieces such as this one will not only generate debate and discussion on topical subjects in many African countries, but will also help contribute to the accretion of knowledge in this area.

James W. Adams

Country Director for Tanzania and Uganda

ABSTRACT

One critical assumption has pervaded all efforts at legal reform of personal laws in colonial and post-colonial Africa, and that is that customary laws and practices are constraints to progress and development. Legal reform of these traditional and indigenous legal systems, based on the above assumption, has been largely unsuccessful, however. Formal legal frameworks that have been introduced to replace the traditional systems of personal law in many eastern African countries have not adequately protected both men and women, and in particular, women have become relatively more vulnerable. There is increasing recognition that change is urgently needed in the legal framework.

The impetus for this change is coming primarily from African women themselves, as they respond to their personal and practical experiences of the law. Top-down imposition of norms has not worked; if legal reform is to lead to sustainable equity for women, the voices of these women must be heard. There is therefore an urgent need for the development of the tools that will ensure the participation of both men and women in the determination of appropriate legal norms. Positive changes are taking place in many African countries, and they must be supported.

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I would like to acknowledge the tremendous contribution made by the African women with whom I have come into contact through the Eastern African Gender and Law Program. Their views and thoughts led to many of the ideas that evolved into this technical note. I have mainly relied on the country papers they have prepared, which were published by the World Bank in 1998, in describing the present situation in eastern Africa.

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EXECUTIVE SUMMARY

Conventional legal reform targeting personal relationships in African countries has been based on the assumption that it is imperative to counter customary practices governing personal or family relationships because such practices and rules severely constrain women's participation in social and economic activities. The formal legal system has therefore been perceived and used as a tool to combat and change these customary traditions.

Legal reform based on the above assumptions, however, has been largely unsuccessful. The formal legal framework governing personal laws, which was intended to replace or complement the traditional systems in many eastern African countries, has not adequately safeguarded women's interests. On the contrary, this paper argues that women have been adversely impacted by insensitive, untimely, and piecemeal legal reform, reform that has led to the imposition of alien norms that reflect a vision not shared by society as a whole. New laws that have been implemented through centralized legal institutions have further exacerbated the exclusion of women. The net result is that most women continue to be governed by customary or religious laws and practices which are stagnant, outdated, and constraining.

The paradigm underlying legal reform needs to shift, if law is to be used as an instrument for facilitating sustainable and equitable change for women. Legal reform, in the area of personal relationships, must move away from an approach that involves the top-down imposition of norms considered beneficial for progress (a norms-based approach), and shift toward a more participatory approach that will support a process whereby men and women can have a say in the choice of applicable norms (a process-based approach).

This is not a radical proposition. Different forms of process-based approach are already emerging in some of the eastern African countries. Ethiopia's Federal Constitution (1995) provides an impressive illustration of this emerging approach. It overturns the dictates of the Civil Code of 1960, which invalidated customary laws, and permits once again the application of customary laws to personal matters. Although the Constitution articulates the standards for gender justice in conventional terms of gender equality, it permits litigants to settle personal disputes by applying customary laws, provided all parties agree. A wife may thus agree to settle a dispute with her husband under customary laws, or may seek to settle the dispute under the Civil Code if she believes those laws to be unfavorable. Where the parties are unable to agree, the provisions of the Civil Code apply. This process-based approach permits a range of norms to be applied to the dispute, and is focused on ensuring that both parties participate in the selection of these norms. It permits women to participate meaningfully in the resolution of their own disputes, and allows them to choose the option that is least costly or damaging in terms of personal status and standing within the community.

Through this innovative procedure, the Ethiopian legal system is responding to different women's interests. Most eastern African women live in rural areas and are not necessarily ready to or capable of asserting equality with their male counterparts in any meaningful way; for them, the

social costs may simply be too high. Economically independent women, however, may be ready to assert their equality in matters related to the home. The innovative legal mechanism introduced by the Ethiopian Constitution provides a way of protecting the interests of both sets of women.

A process-based approach to reform is not without risks, and may not always produce outcomes or norms that are considered beneficial or equitable. There may be a need to define broad principles, based on a shared understanding, within the parameters of which people can establish a range of norms they consider appropriate. There are also legitimate concerns about the degree of women's participation that is realistically possible in such an approach. However, although it may be slow or risky to implement, such an approach may ultimately prove effective because it is more realistic than one that imposes alien norms and complex foreign institutional and regulatory models in an African environment.

In any case, the norm-based approach has proved ineffective. It is time to test another.

INTRODUCTION

“When the missionaries and explorers and developers and health workers looked at Africa and saw ignorance, the ignorance they saw was their own . . .”

—*The Washington Post Book Review on The Poisonwood Bible* by Barbara Kingsolver (October 11, 1998, p. 14).

BACKGROUND

In the past 150 years, outstanding efforts have been made to modernize Africa’s legal and judicial systems and to ensure gender equity in the laws governing personal relationships. These efforts started with colonial rulers in most countries, and have continued in post-colonial Africa. The reforms have however not always been consistent with or based on customary systems governing personal relationships. The colonial regimes in Kenya, Uganda, Tanzania, and Zimbabwe, and the modern state in Ethiopia, for example, imposed centralized forms of governance and norms different from those practiced by communities in their personal or family relationships.

In colonial and post-colonial Africa, one critical principle guided all efforts at legal reform: that the customary laws and practices that governed the lives of the vast majority of the continent’s people were severe constraints to modern notions of progress and development. This modernist attitude is encapsulated in the statement of a chief justice of Zimbabwe (see Box

Box 1: A Modernist Attitude Toward Customary Law

“Africa must release women from the burdens imposed on them by custom and tradition. Africa must free women so that they can enter into competition with men in every field of human endeavor. Women have great potential.” (Chief Justice of Zimbabwe, WILDAF, 17).

1). Progress required a move away from unwritten customary laws—Africa’s authorities therefore attempted to bring change to interpersonal relationships by using norms and legal tools that had catalyzed and supported progress in other socioeconomic contexts.

A striking example of this approach is evident in Ethiopia. In 1960, Emperor Haile Selassie introduced a new civil code that radically challenged gender relations under customary laws and ushered in a new legal

regime governing personal relationships. Underlying this legal reform was a modernist approach

that sought to revise customary laws and impose norms considered universally beneficial and conducive to economic and social development. The new formal legal system attempted to sweep away, with the stroke of an emperor's pen, the complex system of customary laws that had governed the personal lives and relationships of Ethiopians for many centuries.

In the other eastern African countries, the colonial powers had hesitated to impose such broad-ranging revisions to customary laws.¹ Nevertheless, they irrevocably and significantly affected gender relationships and customary institutions by regulating access to the most important household resource—land. The role of land was inextricably embedded in the social and economic lives of most communities in these countries, and was radically different from the role it played in the West. Even Emperor Haile Selassie's direct challenge to customary institutions through the civil code was unable to truly influence customary laws in the way that intervention in land-administration matters did in some other countries.²

Far-reaching changes in personal laws derived from the introduction of new centralized systems, which replaced the authority of lineages and other similar communal enclaves with the authority of a state-controlled agency. With the advent of colonialism, legal constitutions gradually introduced new norms, centralized legislatures promulgated laws, external authorities such as the police enforced the law, and impersonal agencies such as judges and magistrates interpreted and applied the law.

IMPACT OF LEGAL REFORM ON WOMEN

The legal reform included measures specifically designed to reform the personal laws governing gender relations. These efforts have not been very successful in Africa, however. Their failure is demonstrated by the problems, issues, and concerns that confront both men and women, and that are identified by a variety of stakeholders in these countries.

In October 1997, the World Bank and the Economic Commission for Africa organized a conference in Addis Ababa, Ethiopia, on gender and law in eastern Africa. Six countries—Ethiopia, Eritrea, Kenya, Tanzania, Uganda, and Zimbabwe—participated in this conference, which was called “Gender and Law: Eastern Africa Speaks.” All six countries presented papers on the gender and law issues identified as priorities through a process of debate and discussion within each country. Sixty-one African women and men, including seven government ministers and three high court judges, participated in the conference.

Conference participants told many enlightening stories of unjustified discrimination against women. In all of these countries, formal and customary systems of law continue to exist side by side, creating a complex web of rules and laws that govern the personal lives of their people. The participants spoke of women not holding or owning land because of the land laws initiated by the colonial rulers; of widows unable to inherit property because of customary laws;

and of women's vulnerability and dependence in the event of divorce or widowhood, a result of the weakening of protection under customary laws and the failure of new formal laws to provide adequate protection.

In all of these countries, participants spoke of provisions in the formal laws that perpetuate discrimination against women in a number of important areas. Where legal reform sought gender justice, it did so through piecemeal imposition of new norms that were based on a vision of personal relationships very different from the reality of the situation. At the same time, implementation of even the few beneficial norms was difficult. The state should have, but did not, take simultaneous steps to ensure that women could enforce their newly found rights (Gopal and Salim 1998). For most women, the formal reforms were of little use.

At the same time, indigenous systems and customary laws lost their exclusivity, and the protection afforded to women by these systems weakened. Customary laws were sometimes codified to bring them within the new formal system, or were interpreted by an external judiciary to ensure predictability through the establishment of precedents. This diminished their flexibility, introducing a rigidity to customary laws that prevented them being modified to suit evolving conditions, even if communities so desired. Traditional rule makers and dispute arbitrators also lost their unquestioned authority. People had recourse to alternate systems, and in the case of men, recourse to a system that was often patriarchal and better supportive of their individual rights.

This mix of circumstances has left women in the unenviable position of being unprotected under either legal system. Consequently, women operate for the most part in a realm where they are continuously subject to rules and practices that are discriminatory, especially when applied in the present-day socioeconomic context. Women are in the unenviable situation of increased vulnerability under either system.

Clearly, this situation is unacceptable. Women, who are significant contributors to the economies of these countries, are denied substantive and equitable justice. African men and women at the conference underscored the need for change in laws related to personal matters—as have their governments, in many cases. All participants described movements in their countries for legal reform that would compel the change that past attempts had failed to bring, or that would rectify discrimination in the present legal framework.

OBJECTIVE OF THIS PAPER

Given that previous efforts to ensure greater equity in personal laws have not been fully successful in eastern African countries, any new legal initiatives must not repeat the mistakes of the past. Law must not again merely remain on the books as a legitimizing tool that reinforces or supports gender discrimination, but must actively protect and guard the interests of both men

and women. This paper attempts to draw out some possible lessons from past experience to inform new efforts at legal reform in these countries. It examines the laws related to allocation of economic resources within households in the broader historical, social, and cultural context in some of these countries, and examines the effectiveness of these laws in challenging gender relationships.

Within this context, Chapter 2 describes the legal framework governing personal relationships in Ethiopia and discusses the top-down intervention of the Emperor in his use of the law as a tool for progress. Chapter 3 examines land issues, mainly in Kenya and Ethiopia, and the gender-based impact of the new land-tenure systems on African households. The chapter contrasts and compares the treatment of land tenure in Ethiopia to illustrate the gender issues in Kenya. Together, these chapters are intended to demonstrate the failure of the legal system as a whole to improve gender relationships within the household and the failure to ensure greater equity in the allocation of resources.

Chapter 4 builds on the discussions of the preceding two chapters to crystallize the emerging lessons from these past experiences. Chapter 5 describes some of the alternate approaches to legal reform that are emerging in some of these countries, and Chapter 6 deliberates on the elements, risks, and implications of these approaches to legal reform. The paper concludes that the old modernist approach has failed and that, although at some risk, it is perhaps time to test a new approach.

It must be reiterated that this paper recognizes the need and advances an argument for social change in the personal laws affecting men and women in eastern African countries. Illuminating the limitations of the present situation, it contends that an alternate approach to legal reform is necessary and urgent if the law is to provide a framework for sustainable and equitable development for the majority.

PERSONAL LAWS AND CHANGE IN ETHIOPIA

The use of law as a tool for social development is nowhere as clear as in the attempts of Emperor Haile Selassie, described in the Civil Code as “Conquering Lion of the Tribe of Judah, Elect of God.” Driven by an urge to modernize his people, he promulgated the Civil Code of Ethiopia in 1960, which attempted to harmonize laws and provide a uniform system of administration.³ His foreword to the Civil Code explains:

The progress achieved by Ethiopia requires the modernization of the legal framework of Ethiopia’s social structure so as to keep pace with the changing circumstances. To consolidate the progress already achieved and to facilitate yet further growth and development, precise detailed rules must be laid down . . .

The intention was laudable. Before the 1960 Civil Code, each of the diverse ethnic groups within Ethiopia applied its own laws to its own people. Muslims administered the provisions of the *Sharia*; Christians applied the traditional legal code, or the *Feteha Negaast* (Pankhurst 1992, p. 23). In Gambella, Beninshanghul, and the southern regions, large numbers of groups practiced customs and traditions different from those of Muslims or Christians.

The Civil Code adopted a rigid view of customary laws with the intent of harmonizing the diverse and mostly unwritten customary rules into a set of predictable and written legal provisions. It invalidated customary and religious laws as far as they related to personal matters governed by the Civil Code, and introduced far-reaching changes by imposing norms that were heretofore alien to large sections of the population.⁴

Ethiopia’s reform went further than in other countries. It adopted a uniform code of personal laws for all Ethiopians, ignoring differences in religious practices.⁵ This type of legal reform has eluded many governments, including those in Kenya, Tanzania, or India.

In matters related to gender, the Civil Code maintained an interesting dichotomy. On one hand, it gave women economic rights that were far greater than those enjoyed by women in industrialized countries in the 1960s. On the other hand, it preserved the social status of Ethiopian wives as subordinate to their husbands.

The Civil Code tried to ensure greater equity in the allocation of economic resources within the typical household. For example, both sons and daughters inherited the property of their parents equally when there was no valid testament. Married women also obtained significant rights to and control over household property. The concept of “common property” was introduced, covering all property that was obtained by either spouse during the marriage.

All property was presumed to be common unless one of the spouses proved that he or she was the sole owner.⁶ Salaries of either spouse were also declared to be part of common property, and the wage-earning spouse was obliged to account for its use to the other,⁷ providing considerable advantage to women in a context in which men were the primary wage earners. The Code gave spouses equal rights to common property both during and at the termination of a valid marriage.⁸

Despite these progressive provisions, the Civil Code explicitly conferred the status of head of the household on the husband.⁹ The husband was presumed to be the primary manager or administrator of common household assets and resources.¹⁰ This latter norm is traced to St. Paul's injunction (see box 2), perhaps explaining the fundamental nature and pervasive acceptance of this view in rural and urban Ethiopia (Pankhurst 1992, p. 69). The Civil Code also formally reiterated the culturally ascribed, gender-based division of household labor, requiring women to perform all household duties when the husband could not afford servants.

It is interesting to note that some of the above-mentioned norms were not necessarily inconsistent with codified laws of the time in other countries. In 1961 in the United States, the Iowa Supreme Court ruled that a wife is obliged to perform household duties (see Baer 1991, p. 125, citing *Youngberg v. Holstorn*, 252, Iowa 815, 108 N.W. 2d 498 [1961]). The decision was later reversed by a federal court. Even as late as 1971, Article 2404 of the Louisiana Civil Code continued to state that the "husband is the head and master of the partnership, he administers its effects, disposes of the revenues which they may produce, and may alienate them by an onerous title, without the consent and permission of his wife."

Although the 1960 Civil Code changed a number of discriminatory provisions in Ethiopia's customary laws, dispute-resolution processes were surprisingly kept decentralized and traditional as far as they applied to personal matters. Disputes continued to be settled through the traditional form of arbitration arranged at the request of the disputants, and the Civil Code maintained this mechanism. Each party to the dispute could select his or her arbitrator (*shimagele*), and the decision was provided jointly by the arbitrators, along with a third neutral

Box 2: Husband as Head of Household

"Wives, submit yourselves unto your husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the Church."
(Ephesians 5: 22-24)

arbitrator. In the case of marriage-related disputes, the witnesses to the marriage were expected to act as arbitrators. Where this was not possible, respected elders in the communities were requested to settle personal disputes consistent with customary laws. Because of the close personal relationships between the disputants and the arbitrators, there was no customary practice of payment for performing such tasks. Appeals against the arbitrators'

decision were possible in limited cases. This preservation of the traditional process of dispute resolution ensured that men and women continued to have access to a wide range of methods for resolving their disputes.

Maintenance of the traditional dispute-resolution system made implementation of the Civil Code more difficult, however. Although well-intentioned, arbitrators in the traditional system were not trained in law and often had little or no knowledge of Civil Code provisions. They continued to apply customary rules to settle disputes, although these were invalid after 1960. In addition, these arbitrators traditionally were respected men who tended to perpetuate customary practices and customs because they were ignorant of or did not appreciate the new norms. The lack of legal literacy among women also meant that women were unable to enforce or enjoy their newly conferred rights. In fact, even at the formal level, there seems to have been an informal understanding of the applicable law. If a case was brought to the *Sharia* courts first (which had authority to settle disputes among members of the Islamic community), the dispute was settled according to the *Sharia*. If the case was brought before the Civil Courts, Civil Code provisions were applied (World Bank 1997, p. 14).

In conclusion, before 1960, each ethnic or religious group applied its own customary laws to personal relationships; after 1960, customary laws were invalid, but for the most part communities continued to apply the same customs and traditions to personal relationships. Participatory rural appraisals and other assessments demonstrate that 40 years of the Civil Code, although it revolutionized the economic status of women within their households, had little affect on women's lives. Except for a small minority of elite or urban women who were able to exercise and enjoy some of their newly instituted rights, women operated outside the formal legal system. However progressive the legal reform of the 1960s may have been, it failed to achieve its objectives. The Ethiopian Civil Code in fact demonstrates the weakness of conventional top-down legal reform in changing the lives of the majority of men and women in these countries.¹¹

The Ethiopian experience raises critical issues that future legal reformers must consider. It questions the effectiveness of a centralized legal system to provoke change in personal relationships in contexts where social relationships are not under the control of external authorities. It raises serious doubts about the suitability of imposing norms that are based on a vision of society not shared by those affected by the law, unless preceded by a participatory consensus-building process or accompanied by committed and, perhaps, high-handed methods of implementation. It also demonstrates what has been the experience of many other countries—that addressing selected aspects of substantive discrimination in the law without addressing issues related to the structural aspects of law enforcement and dispute resolution is an ineffective means to legal reform. These lessons are further discussed in Chapter IV.

TABLE A: COMPARATIVE TABLE OF SELECTED CUSTOMARY PRACTICES IN FIVE REGIONS

	AMHARA	AFAR	GAMBELLA	OROMIYA	SOUTH
RIGHTS UPON MARRIAGE	There is no clear rule. Among the Christian communities, the bride price is not the norm, and both families provide gifts to the couple upon marriage. Among Muslims, gifts are provided by the bridegroom's family, mainly clothes and jewelry. In both cases, children in better-off homes are married earlier. In N. Wollo, land is provided by the bride's parents as dowry. In Wolleh, both families provide gifts. In Worreb, wedding gifts (<i>macha</i>) should be exchanged equally. The bridegroom's parents provide cash for the engagement (<i>ejmensha</i>), if it is a marriage accepted by the parents.	Daughter may take two cows, 10 goats/sheep, and occasionally a male camel. If not enough, she can take additional livestock (not camels). She receives cooking utensils and furniture. Sometimes, she dismantles the house, carries the materials, and constructs it in her husband's village. Husband also gives her a " <i>nikah</i> " gift and some livestock, and produce, which she controls.	Polygyny is common. Wives mostly live near the same place, and all children eat together. It is customary for the groom to pay a bride price to her parents. Among the Agnuaks, this usually involves cash, forcing many young men to take up wage employment. Among the Nuers, it is usually livestock.	Bride price, mostly in the form of livestock and clothing, is practiced in some communities. In Fogie Kombolcha, along with the bride price, the bridegroom has to give clothes to the bride and her parents. In Gabra Borena, the girl receives Birr 200 for clothes. In Arsi, gifts are provided by both families: the bride's parents provide the bride with some cattle, and the bridegroom's family gives her five cows (including one milking and one pregnant) as <i>nikah</i> .	Polygyny is practiced by richer men in some zones. Bride price is paid by the bridegroom's family to the bride's parents and is negotiated by elders. In South Omo, it may include: Birr 2,000, four goats, bullets, gun, two pots of honey, clothes, and jewelry. In Konso: Birr 200–700, clothes. In North Omo, polygyny is common, and usually Birr 20 to the bride's relatives. In Sidama, Korate: Birr 200–300, along with jewelry and clothes.
RIGHTS WITHIN HOUSEHOLD (UNDER CIVIL CODE: 50 PERCENT OF ALL COMMON HOUSEHOLD PROPERTY AND FULL RIGHTS OVER PERSONAL PROPERTY)	Christian women own half the common property, but PRA indicates that married women control only crops (except in one community), livestock products, chicken, eggs, and some garden trees. Muslim women have greater ownership rights, albeit over limited household property.	Utensils, furniture, and all items related to milk/food; ornaments such as neck and wrist ties; the house, because she collects materials, constructs, and dismantles homes.	Legal ownership of property by women is rare. Women share the produce of the land that they help to till; they have some control over chicken, eggs, fruits, and vegetables, and sometimes over sheep and goats.	Any animal or livestock she brings upon marriage and utensils; part of the land's product, which her husband will allocate to her; any produce from any land that she happens to cultivate.	All land is held by men. Even female heads of household own land nominally. In South Omo, Arkisha village, women do not own any property. In Korate Sidama, women own trinkets such as combs, enset scraper, and their clothes. In Zale, North Omo, women own some livestock. In Gahi Konso, "women belong to men, and their properties consist of their children and clothes."

REGION	AMHARA	AFAR	GAMBELLA	OROMIYA	SOUTH
RIGHTS UPON DIVORCE (50 PERCENT OF ALL COMMON HOUSEHOLD PROPERTY AND PERSONAL PROPERTY)	Among Muslims, women normally may take their clothes and wedding gifts. They receive the <i>nikah</i> . In the Christian communities, property is equally shared. Women were not entitled to land in all four communities.	When divorce is by agreement, she takes property that belongs to her. When divorce is at woman's request, she takes what she brought; has no right to the <i>nikah</i> ; sometimes she pays the husband a "moral" payment determined by the elders.	Upon divorce, all bride price received by the parents must be returned.	Part of the grain in the granary; part of the cash if the husband has any; sometimes cattle.	Women seem to have little or no rights to property upon divorce. The number of female heads of households in the sites were 41, and 32 were landless.
RIGHTS UPON WIDOWHOOD (AS ABOVE, HUSBAND'S PERSONAL PROPERTY AND 50 PERCENT OF COMMON PROPERTY IS INHERITED BY THE DESCENDANTS.)	Among the Christians, women cannot usually inherit the property of their husbands when there are other blood relatives.	She marries another cousin. Her family will need to return the <i>nikah</i> , if she chooses to return to her clan.	She is inherited by the husband's brother. If the widow refuses, her parents return the bride price and the widow and children return to her parent's home. If nobody inherits the widow, the parents need not return the bride price; she is looked after by her husband's relatives. The widow controls livestock products, but cannot sell livestock without the permission of the male head of family.	If she has children, her brother-in-law inherits his brother's property, wife, and children. If she has a grown son, she can keep the land for her son. If no children, she is expected to return to her village.	Customary approach is for the widow and her small children, if any, to be inherited by a male member of the deceased spouse's clan. Where she has no children, the elderly relatives will determine who should inherit her.
INHERITANCE RIGHTS (EQUALLY INHERITED BY DAUGHTERS AND SONS)	Women inherit land only if there are no brothers or parents. For Christians, children inherit property equally; parents may reserve property for any child. For Muslims, women enjoy half as much property as men. Wives inherit only an eighth of livestock and products. Adoption of widows by their brothers-in-law is practiced.	Under Abukratie law, women have no inheritance rights; under <i>Sharia</i> law, an eighth of the property is divided among spouses and a sixth by the man's parents; the remainder is divided among the children, with the male offspring getting twice that of the female.	Among Agnuaks, women inherit property, including the right to use land, only if there are no sons, if she is too old to remarry, or if a son is not old enough to take control. She retains property inherited from her husband.	A daughter cannot inherit her parent's property because her wealth is at her husband's home. She cannot inherit her husband's property because it belongs to the clan.	Women have no inheritance rights. In rare cases, women inherit land, but hold it nominally for sons; in North Omo, women own livestock acknowledged by the deceased husband to have belonged to her.

Source: World Bank, 1997, p. 15-16

REFORM OF LAND LAWS AND INDIGENOUS INSTITUTIONS

Most women in the eastern African countries under discussion live in rural areas, where they constitute more than 80 percent of the agricultural-sector labor force. Land is a critical economic resource in generating household income, sustaining cattle, obtaining credit, securing membership in agricultural cooperatives, and receiving extension and other services. Land is perhaps the single most important asset, and sophisticated customary laws previously governed its administration and transfer. By amending customary laws of land administration, colonial leaders affected personal relationships, allocation of resources, and local indigenous institutions in a complex and irrevocable manner.

Kenya. The treatment of land in Kenya provides an illustration of the inability of modern legal systems to safeguard women's interests. Despite the high levels of women's participation in the agricultural sector, the Kenyan legal system governing land and related resources does not effectively facilitate women's access to, control of, or use of land.

A study of 406 households in the Nyeri and Kakemega districts in Kenya identified that 41 of these households were headed by women. Forty-two, or roughly 10 percent, of the land parcels were controlled by these women. However, a much lower percentage had actual ownership rights: 3.3 percent had purchased the land; 3.6 percent had inherited the land, and 6.7 percent had been allocated the land holdings. Others acquired the right to use land through their husbands or fathers (Bruce and Migot-Adholla 1994, p. 127). Random appraisals conducted in four other districts in 1994 and 1995 by *Women and Law in East Africa* confirm that most women do not own immovable property (World Bank 1997, p. 23).

Before the advent of colonialism, groups such as clans or tribes controlled the allocation and use of land. Tenure systems were varied and complex. The concept of individual ownership was alien. Common features—birth, marriage, ritual adoption, or incorporation—defined access to land (Bruce and Migot-Adholla 1994). Households held usufructuary rights, and in many cases, this interest was passed on to successors. Within the household, the heads, who were invariably male, allocated land. However, because women were in control of subsistence agriculture, they obtained significant access to and control over use of this land within this general customary framework (Obiora 1993, p. 229; World Bank 1982 and 1989).

In these traditional systems, women “negotiated” with their husbands or fathers for land: bargaining took place within the familiar context of their household, where mutual obligations and responsibilities bound members and supported women in the process. In some communities, widows and divorced daughters returned home if marriages failed and obtained land to cultivate for themselves and their children, if any. Single women often had access to land, depending on the rules within the community.

Within the context of the land use prevailing at the time, both men and women perceived these rules as fair. Land did not have any value other than for subsistence farming or for pastoral use; neither women nor men could alienate it. Land was also abundant, and women had equitable access to it under this system (World Bank 1998, p. 93). In addition, all dispute resolution took place within the clan or village through processes that were familiar, accessible, and perceived as equitable for the community as a whole.

With the arrival of the British toward the beginning of the twentieth century, private ownership of land was gradually introduced—a norm that was alien to the indigenous people of Kenya. To secure colonial interests for building railways for easy transportation of natural resources and for access to their colonies in the interior, regulation of land became an important matter for the British in these countries (Bragdon 1992, p. 88). “The colonial administration alienated large tracts of land through political, legal, and military maneuvers,” thereby crowding natives on to “native reserves” (Bragdon 1992, p. 28). To the confiscated lands, the British applied systems of individual tenure, land titling, and registration. In the native reserves, they allowed the continuation of customary practices, with one important difference.

To reinforce political control of the native reserves, the British strengthened clan chieftains or established puppet chiefs, creating a new form of customary authority with jurisdiction over all local matters, except criminal justice, in their reserves. Control over land and all matters was vested in these chieftains. The chieftains were then able to introduce land-allocation practices that were not customary (Ayltley 1991, p. 388; Bruce and Migot-Adholla 1994; Gopal and Salim 1998, p. 94).

In Kenya, overcrowding on native reserves created discontent. Although the native population had been growing, the indigenous peoples had adequate land for expansion before the Europeans arrived; suddenly, they were confined to “reserves” and their grazing lands limited. Through the Native Land Registration Ordinance in the early 1950s, the British introduced the system of individual titling to native reserves as well, arguing that indigenous systems of tenure constrained the increase of output (Bruce and Migot-Adholla 1994). Because customary authorities were perceived to be male and women were seen to have only secondary usufruct rights, land under these new systems came to be registered in the names of the predominantly male heads of households (Gopal and Salim 1998, p. 94). Judicial

precedents perpetuated this misinterpretation of customary land arrangements (World Bank 1997, p. 95).

The practice of land ownership and registration had far-reaching implications for women's access to land and related resources. Under the new system, control of land came to be vested entirely in the male head of the household. As the legal owner, he could alienate or transfer it at will. He could not only distribute it as he wished among members of his household, but could also sell it to the highest bidder, although there were some restrictions on its transfer in the earlier stages in Kenya (Bruce and Migot-Adholla 1994). As resources became scarce and complex socioeconomic changes set in, these ownership rights significantly reduced women's access to and control of land.

In traditional communities, any produce from the land had previously been under the control of the person providing the labor and products. Under the new system, the registered owner was entitled to receive the surplus obtained from his or her land, irrespective of who provided the labor. While women continued to provide labor for subsistence agriculture, they therefore lost the customarily accepted control over the distribution of proceeds generated by their services. The gradual emergence of a market also meant that control over products became more important.

Another subtle but critical change was the resulting reduction in the availability of common property resources such as grazing areas and community forests. The new system provided disincentives for managing these common property resources, which naturally eroded as a result. This also affected women who had relied on common property resources for their livestock, fuel, and other sources of petty income. Furthermore, traditional development interventions exacerbated the disparity because they did not focus on gender-based roles and access to resources. Access to credit facilities, membership in agricultural or rural associations and cooperatives, and access to extension services were all linked to land holdings, and women gradually lost the support of these services.

In conclusion, the new regulatory framework for land strengthened patriarchal practices, as opposed to communal practices. It brought about an unintended exclusion of women that was far greater than that under the customary systems.

The new legal framework did not adequately replace the safeguards inherent in the customary system, and thereby increased women's economic vulnerability in resource-scarce environments (World Bank 1989, p. 6). Customary laws had provided women with access to parcels of land for subsistence farming, and control over any resources generated thereby. Under the new regime, an interest in land could mainly be obtained only through two modes: inheritance or gift, and purchase; women were excluded from both.

Inheritance rules resulted from a traditional system in which land was utilized mainly for cultivation and grazing, and brides always moved to the husband's clan to live on his land. Women were provided alternate forms of protection in the communities to which they moved. Inheritance rights to the property of their parents were not perceived as necessary for women's protection, except when women remained unmarried or were divorced and had to return home in certain circumstances. These rules of inheritance continued unchanged and excluded women for the most part. At the same time, women had little or no opportunity to purchase land, the other predominant mode of acquiring land.

The new land-tenure rules reflected the failure of the colonial rulers to understand the system of land allocation among community members. Viewed from a perspective of a traditional rights-based analysis, it was natural that the colonial leaders did so. Since women were not allowed land rights as primary right holders, and acquired only temporary usufruct within the lineage system through their husbands or male patrikin, those trained in English law refused to recognize women's access at a formal level (Gopal and Salim 1998, p. 93). This was consistent with English law, because it was only by 1882 that the Married Women's Property Act permitted married women in England to retain and acquire assets. Until then, married women had little or no control over any property. Seen through the prism of late-nineteenth century English legal norms, the allocation rights of men were equated with ownership rights. What they failed to appreciate was that male members were obliged to provide women with this temporary usufruct, and that a formal system of registration would deprive women of this access. This failure, it is opined, reduced women to an agrarian proletariat.

There is no doubt that security of land access and availability of land for use by women was far greater in traditional systems. Economic expansion, changes in styles of production, and the establishment of individual and corporate interests means that land reform has become a highly sensitive and complex issue. Land reform on the grounds of gender equity will be a difficult, painful, and perhaps unacceptable task.

Ethiopia. Ethiopia's present land-tenure system presents an interesting comparison to the Kenyan experience. In 1996, out of an estimated 8.7 million landholders, 82 percent were male. Eighteen percent were female, a significantly higher proportion than in Kenya. It would seem that Ethiopia's land reform has generated better results for women than the legislative reform of land ownership in Kenya. A better understanding of the treatment of land ownership in Ethiopia may, therefore, be useful.

In 1975, the Provisional Military Administrative Council of Ethiopia abolished private ownership of land as enshrined in the 1960 Civil Code, and made land the collective property of the Ethiopian people. The Public Ownership of Rural Lands Proclamation (No. 31 of 1975) abolished all forms of land tenure and restricted the size of land holdings. Peasant associations were established in rural areas to redistribute the land with the assistance of the Ministry of Agriculture. The proclamation provided for the allocation of sufficient land for any person and his household, irrespective of gender, who was willing to cultivate the land.

Individual households only had usufruct rights over the land they tilled, and these rights could not be transferred by sale, lease, or mortgage. The land could be reallocated periodically by peasant associations to rectify any inequalities or to accommodate new claims (Bruce, Hoben, and Rahmato 1993). The proclamation provided that land be given to the household head irrespective of gender. The resulting redistribution of land by peasant associations seems to have given women some access to land, as illustrated in table B.

In July 1997, the Federal Government issued the Ethiopian proclamation on rural land administration, conferring the responsibility to administer land on the regional states. The law provides directions for administration of rural land by regional governments. It adopts a process-based approach to land allocation, as opposed to other land distribution acts that provide detailed norms for land allocation and eligibility. It also requires that regional land laws should be free from gender discrimination, clearly reiterating the stated public policy of gender equality. It mandates that women should be permitted to hire workers or to cultivate their holdings as they see fit. It also requires that the system of allocation of land-holding rights should be transparent, fair, and participatory, and mandates the participation of peasants, especially women, in the allocation of land.

In 1997, Amhara, one of the largest regions in Ethiopia, issued a land proclamation that was intended to achieve a single and final redistribution of land.¹² The proclamation provides broad norms, establishes processes for the allocation of land, and empowers communities to allocate land based on their collective needs and priorities. Under this law, the peasant associations would provide each new landowner with a legal certificate of land

Table B: Data from the Ethiopian Government Crop Land Utilization Survey

	Total Number of Holders	Male	Percentage	Female	Percentage
Amhara	2,583,810	2,139,600	83	444,200	17
Tigray	580,420	439,470	76	140,960	24
Oromiya	3,312,930	2,751,100	83	561,830	17
Gambella	23,870	18,700	78	5,170	22
Southern Regions	1,960,410	1,615,800	82	344,610	18

Source: Central Statistical Authority (1996)

**Box 3: SOCIAL STATUS OF
LANDHOLDING WOMEN IN ETHIOPIA**

Participatory rural assessments conducted in Ethiopia indicate the close connection between land ownership and the social status of women. Women, who had stable rights to hold land, as opposed to those derived through a male member, were perceived as having a higher social status in the community.

Source: World Bank (1997)

ownership. The proclamation defines the right to possess land as including the right to use, rent, sell, exchange, or bequeath property. Article 4 restricts entitlement to possess land to members of peasant associations. The criteria for distribution of land are left to the determination of committees formed at the peasant association level, and are based on the needs and priorities of the affected community. *Kebele* (village) elders are vested with the authority to settle all disputes related to land held by the kebele, and such decisions are final.

Some may argue that this is a risky trend, because it is often at the local levels that traditions are strongest, and that such a situation would not necessarily generate a positive outcome for women. In Amhara, however, larger numbers of women have gained access to land. According to the regional Women's Affairs Bureau and the Amhara Council, a total of 554,889 family heads have received rights to land, of which 129,677 or about 23 percent are women, up 5 percent from the 1996 census. The more flexible eligibility provisions seem to have benefited women, but more detailed inquiry would be needed to confirm this tentative conclusion.

Tanzania. The Tanzanian debate that preceded its land reform bill articulates a dilemma that faces legal reformers of land ownership and access. All land in Tanzania is public land, and is held in trust by the President for the whole nation (Rwebangira 1996). A 1991 Presidential Commission of Inquiry, established to study land tenure structures, reported that women have less access to land due to custom, culture, and certain religious practices. The commission, therefore, made three suggestions:

- Land control should be vested in the village assembly, as opposed to the clan
- Land should be registered in the names of both spouses
- The allocating authority must ensure, before disposing of any land, that the wife and children are not left without any means of subsistence, and that the wife has given her consent to the proposed disposition.

Some women have criticized the commission's approach as one that is intended to maintain women's status quo (Gopal and Salim 1998, p. 34). The Tanzanian delegation to the conference articulated this dilemma as "the security of community rights," which guarantees women usufruct land rights, but not individual rights, which "would present an opportunity for women . . . to own such land free of customary discrimination." Those who argue for customary rights feel that women cannot be guaranteed equitable access to land in a legal framework that supports individual rights unless broader questions of democratization

of tenure and the production system are tackled. Final recommendations by the delegation included the continued vesting of land in the President in trust for the whole nation, and individual titling and registration to provide women with title to land to help them obtain credit and to reduce conflict in polygynous households. The Land Bill was approved as this paper goes to publication.

LESSONS FROM THE PAST

As nation states emerged through the establishment of artificial borders, as complex changes set in through the introduction of market economies and land ownership, and as the practice of Islam and Christianity became widespread, customary practices were unable to provide adequate guidance in these new situations. Gradually, the system of customary laws, however entrenched, weakened with the new and fundamental legal changes that were sweeping across communities (Obiora 1995, p. 581). When change was sought through such top-down legal reform, two things happened.

First, these external authorities imposed legal norms that arose from a different vision of society, one based on the norms of individual rights and liberty that underlie social organization in the West. A classic example is the Ethiopian experience as described in Chapter 2. Such intervention weakened the important principle underlying most customary laws—"communal" harmony and focus on obligations—without providing adequate security under the new system, particularly for women. In addition, it subverted the natural, albeit slow, evolution of customary practices. In many cases, it introduced rigidity and stagnation to what had been an evolving process for centuries (Obiora 1995, p. 5822).

Second, the formal system of law that was introduced in many of these African countries also resulted in centralizing what was previously a highly decentralized customary legal system. The agency of normative authority in many areas, particularly in the case of land, was shifted from the clan or clan elders to an external state authority. In Ethiopia, for example, the principles governing personal relationships were stated in the Civil Code of 1960. Legislative authority shifted to an external ruler, such as the colonial rulers who ruled through their nominated chieftains and leaders; or in post-colonial Africa, to a central entity, often the national legislature. The duty or obligation to implement or enforce the laws was also shifted from the authority of the clan or elders to unfamiliar units such as the police or other commissions, who derived authority from the state. The formal system also centralized the dispute-resolution institutions in many cases. Disputes were now adjudicated by external authorities, involving judges who were trained in the English systems. Where disputes continued to be settled by local authorities as in Ethiopia, lack of capacity and knowledge among male arbitrators reiterated invalidated customary practices.

External interference—whether by the colonial powers or post-colonial leaders—ultimately weakened the indigenous or traditional systems, reducing the effectiveness of their rules and sanctions and depriving them of the participatory processes by which they organized themselves and managed resources. These centralized systems of legislation, implementation, and dispute resolution were so unfamiliar, complex, and costly to enforce that together they not

only failed to protect the interests of women, but in many cases adversely affected them, weakening even the protection they had enjoyed under the customary framework.

At least two broad lessons emerge from this experience, and these must be studied and understood as African countries move on to further reform their personal laws. They are formulated below as questions, and are discussed in detail in this chapter:

- What is the basis for change?
- What are the legal tools for change?

BASIS FOR CHANGE

The newly introduced legal frameworks in these countries significantly affected the lives of men and women, at least on the books, despite initial attempts in some countries to exempt indigenous communities from drastic changes in personal laws. In all cases, men and women affected by these changes had no say in determining the nature of the changes imposed on them. They had no opportunity to determine whether these changes were suitable or required, given their world view. Consequently, progress meant for them the imposition of externally driven norms, established and determined by unfamiliar institutions.

Even in Ethiopia, where a native government introduced the new legal system, the basis for the new rules was as alien as the systems imposed by the colonial regimes in the other eastern African countries. In effect, they introduced a vision of personal relationships that was and is not fully shared or appreciated by the majority of Ethiopians.

In all countries under discussion here, customary rules and traditions evolved that were intended to ensure social harmony and maintain equilibrium, perpetuate the lineage of the tribe or clan, and protect members from external forces (Woodman and Obilade 1995). African communities did not see this social equilibrium as resting on a fine balance of individual rights, but rather as focusing on the tribe or the clan as a whole. "It was not the gladiatorial law of the kind associated with the individual-rights-centered, Graeco-Roman inheritance" (Woodman and Obilade 1995, p. 369). Ilumoka reiterates this view of the concept of rights in the context of gender equality:

The discourse of rights has had little resonance for the majority of the African women, and the national and international rules and procedures for enforcement of rights have rarely been their arenas of struggle. . . This may partly be because women have generally not seen themselves as organizing in opposition to men, but for social justice. In this sense, although many women see their rights as unquestionably human, they do not define themselves solely in relation to men.

Kinship was the articulating principle of social organization (Ayltley 1991; Holleman, 1995). The interests of the individual were subordinate to those of the group. Although the degree to which the "we" or the "I" was defined varied from group to group, the definitions were

a collective decision of the group as a whole in most traditional African communities. This affiliation with the group was important for both men and women, providing an identity, reputation, and pride. A complex set of social and traditional obligations protected members of a larger group, a clan, or a tribe. As Ayltley argues, the emphasis on collective ownership of resources was valued. The clan or tribe held critical resources collectively and allocated their use to different households.

Concepts of justice were also perceived differently. In western traditions, justice was seen as the rejection of inequality (Woodman and Obilade 1995, p. 22) and the application of notional or formal equality. In African communities, this was not so. As Woodman points out, the best-articulated form of justice was one of “distributive justice,” in which age, title, and relationships are important factors. Within a polygynous household, for example, seniority, which was determined by the date of marriage, was a critical factor; among children, it was determined by sex and age. Treating all wives equally would not have been just in the eyes of many households.

Misconceptions of the underlying principles of many customary norms have also been the basis of many legal reforms, resulting in the formulation of misconceived solutions to problems confronting women. For example, to ensure the survivability of a group, many African communities demonstrated a tendency to lay claim to both women and children, and to guard the reproductive capabilities of women. In addition, in patrilocal communities, a woman, once she married, was not considered a member of the community of her birth. The custom of bride price thus evolved, reflecting partly the value that was placed on a woman’s reproductivity. Also, as Obiora argues, “customary-law marriage is a contract or an alliance between the families of the spouses; only in a secondary sense is it a union of the spouses as individuals” (Obiora 1993, p. 222). When a woman was widowed, therefore, she was absorbed into the household of her husband’s brother. Once the brother-in-law claimed her, the clan or tribe was obliged to maintain and ensure her safety and needs. In some cases, it appears that she could choose to live with someone else, in which event she or her kin would have to return the bride price that was paid to her family upon marriage. If the group did not wish to claim her, she was free to return to her native village and retain the bride price (World Bank, 1997).

Scholars argue that viewing this practice as the right of the deceased’s brother to inherit the widow is misleading, and is based on ignorance of the norms that underlie the practice (Woodman and Obilade 1995, p. 369; Ayltley 1991). Then, the obvious solution would be to seek the immediate abolition of the system. If, however, the practice is correctly characterized as an action that stresses the need to ensure the perpetuity of the tribe and to protect the widow and her offspring, however, the legal solution would not be simply to ban the perceived practice of the “inheritance of widows”, but to do so only after providing alternative safeguards to protect their economic and social interests. As Obiora says, in cases like this, “rather than probing the indigenous justification and function of the practice, [they] decontextualized and

situated it in an incongruous frame of reference” (Obiora 1995, p. 589), thereby finding highly inappropriate solutions to address the issue.

Experience from other developing countries reiterates the important lesson that legal solutions not moored in the cultural context of the communities to which they are applicable are often ineffective or costly to enforce. The treatment of the “dowry”¹³ system in India illustrates the dangers of laying down norms inconsistent with general goals and aspirations. *Stridhana* (from which the concept of dowry evolved) was the only property that a woman could own. It came to signify her share in family property; when she received it (usually at the time of marriage), she also lost any further claim to the family property (Shastri 1959). With increasing scarcity of resources, coupled with the woman’s inability to generate any new household resources, dowry became something that was bartered and demanded by the bridegroom’s family or offered as an incentive for marriage by the bride (see Obiora 1993, p. 221 on the issue of bride price in Africa).

When the practice of *Stridhana* was seen to result in the harassment and even murder of brides unable to provide adequate dowry, the Indian government intervened with the 1961 Dowry Prohibition Act, which prohibited the asking for, taking of, or giving of a dowry in relation to a marriage.¹⁴ This was considered just and fair to women following the 1957 codification of Hindu personal laws that provided women with equal rights of inheritance to all but ancestral property of joint families.¹⁵

According to a report issued to the Indian Parliament, however, dowry deaths increased from 186 during 1985 and 1987 to 922 in 1988. Some of this increase may be attributed to the fact that they are increasingly reported because the perpetrators can be punished more easily, but it is clear that the law has not successfully tackled the issue.

Despite the well-intentioned legal reforms, the top-down replacement of traditional practices with alien norms has added to the disempowerment of women. Male heirs continued to inherit family property in predominantly patriarchal communities. At the same time, the ancient and accepted obligation to provide the bride with a share of the family property has been considerably weakened. Where women are unable to exercise their newly found rights, their economic vulnerabilities seem to have been actually increased by the law.

Experience in industrialized countries supports the lesson that where legal reform of personal relationships has been effective, it has been because that reform has acknowledged changing public opinion and has been closely linked with underlying social and economic interests. Dicey, the famous English jurist, opines that the English legal system owes its effectiveness to the fact that it developed on “empirical approaches that stud[ied] . . . beliefs, convictions, sentiments, accepted principles, [and] firmly rooted prejudices, which, taken together, make up the public opinion of a public era.” Dicey argues that a legal framework can

be sustainable only when the “law will reflect local reality [and] local reality will no longer have to adapt to law”—the latter, he says, being “a main reason for the malfunctioning of the legal systems” (Gopal 1995, p. 16). Writers such as Walzer have also supported the view that the rights of men and women “do not follow from common humanity; they follow from shared conceptions of social goods; they are local and particular in character” (Okin 1989, p. 62). Although these arguments continue to be contested, in the opinion of this writer, they are clearly valid, even when one considers the emergence of women’s rights in the West.

For example, the doctrine of individual liberty that pervades family law in England has its roots in the *Magna Carta* of 1215 AD, which represents a critical point in and the basis for the development of this concept in common law. The *Magna Carta* represented an assertion of individual liberty and the rule of law against the tyranny of King John, albeit for a selected few at that time. This doctrine of individual liberty provided the impetus for the concepts of equality that lent themselves to the theories of social contracts in family law. Social contract theories permit family members to deal with each other on terms and conditions determined by the individuals themselves. Individual rights are thus the basis of many norms that underlie family law in common-law countries.

However, despite the early emergence of the concept of individual liberty in England, it was not until the Married Women’s Acts of 1870 and 1882 that married women were permitted to even own and hold property. Not until 1964, for example, were wives given equal shares in any income generated from housekeeping allowances provided by the husband. Fewer children, the availability of household appliances, growth of the service sectors, and a number of other such factors increased the number and variety of jobs for women, providing women with greater opportunities to be economically self-reliant. This then provided the impetus for them to demand real change in the laws that affected their access to economic resources. In this, they were encouraged by the feminist movement across the Atlantic.

In the United States, changes in personal matters came as a direct result of changing public opinion. It was only after 1960 that gender biases were increasingly addressed through revision of laws (Boneparth 1982, p. 2).¹⁶ Policies that protected the rights of women within their homes reflected shifts in public opinion that occurred as women moved in large numbers into the employment market—the result of greater education, inflation pressures that created the need for a second household income, and significant growth in demand for women workers. The increase in divorce rates, urbanization of communities and changes in demographic profiles, the introduction of labor-saving devices, and the lack of support for women who were single parents contributed to this growing change in public attitudes. The emergence of strong women’s lobbies and representative groups also played an instrumental role in the change of attitude toward women’s rights.

Despite this progress, it was only in 1981 that the U.S. courts interpreted the U.S. Constitution as prohibiting laws based on the notion that the husband was the head of the

household (*Kinchberg v. Feenstra*, 450 U.S. 455 [1981]). Laws were not immediately expunged from the books, but could no longer be enforced; it was only in the 1990s that such principles were laid to rest at law (Baer 1991, p. 128).

In conclusion, in Africa, the colonial rulers and their successors introduced personal laws based on concepts of individual rights, supporting a vision of personal relationships that bore little connection to the reality in these countries (Chanock 1989, p. 83). Laws and judicial cases intervened in critical stages of a woman's life—birth, matrimony, divorce, custody, and inheritance—introducing new norms that governed the allocation of resources at these important junctures. The concepts of equal rights to inheritance and equitable division of property may have been appropriate for a minority of urban women living in nuclear families outside their clan and tribes, and for whom there were no other safeguards. But prevailing conditions were and continue to be very different for the vast majority of the rural population.

For most women, there exist none of the social and economic conditions that had galvanized gender-sensitive legal reform in industrialized countries. The majority of women continue to be part of rural households.

Socially, women live within clans and tribes that are strongly committed to patrilocal traditions. They do so in some cases out of choice, and in other cases out of lack of choice. Their mobility is highly restricted, and their ability to live outside their clans or tribes, except through commonly accepted arrangements such as marriage, is virtually non-existent. The division of labor has not changed, and women have little leisure time and little or no access to other economic opportunities.

Economically, women remain highly dependent on others, usually the male members in their households. They undertake subsistence farming, but they are not yet a part of the formal labor force. In many of these communities, women depend on the surrounding environment for their livelihood, for brewing liquor and gathering firewood and raw materials for handicrafts, and so on. Degradation of the environment and, in some cases, legislation of forest and community lands have significantly weakened this safety net.

In this socioeconomic context, a simple rights-based approach to the allocation of economic resources cannot provide an efficient or equitable solution. Given the high levels of inequality of opportunity between men and women and the relatively greater vulnerability of women, a rights-based system often affects women adversely. For example, where grounds for divorce are similar, women often suffer because they are more likely to be the economic victims of liberal divorce rules.

As Rhodes says, the “law’s traditional focus on equal treatment cannot cope with situations where the sexes are not equally situated” (Rhode 1989, p. 319). In the context of tribes

and clans that lived on land possessed for generations by their forefathers and that strongly maintained patrilocal traditions, such laws destabilized tradition and weakened the checks and balances that protected women under traditional systems. The emergence of new ways of life also strengthened this weakening of customary laws and practices. At the same time, the new legal framework did not adequately support women and could not protect their interests. Most women found that their social and economic vulnerability increased significantly. The protective traditional socioeconomic groupings eroded, but they were not able to exercise their newly found rights in a manner similar to that of men.

LEGAL TOOLS FOR CHANGE

The legal tools used to seek change are another important factor that contributes to the overall achievement of any legal reform process. In the eastern African countries under discussion, it was equally important in the failure of the legal frameworks that the tools used to usher in change were imported and implanted from other countries. They involved highly centralized mechanisms of legislation, implementation, and adjudication, alien to communities that were used to decentralized and local systems of rule-making, implementation, and dispute resolution.

Existing research provides some evidence of the traditional legal systems that existed in Africa. Research suggests that among African tribes and clans, respected leaders and elders made the laws. Although these law-makers were mostly men, it seems that older women and grandmothers also played an important role; however, they did not have a formal role in the application of the rules in some of these patriarchal communities.

Another important characteristic of traditional systems was that customary laws were based on religious beliefs and were considered blessed by ancestors. As Ebo states, the “spiritualization of law and its sanctional sources and, indeed, of life in general, operates to surround law and its procedures with an aura of sanctity and to endow it with the instantaneous ability to evoke voluntary compliance with its dictates as an exalted religious obligation” (Woodman and Obilade 1995). These systems and procedures provided a far more powerful type of sanction—such as being disgraced before the clan or tribe (Batten 1954, p. 146).

Customary laws were also flexible and expected to evolve with changing situations. Customary courts, therefore, did not follow the principle of judicial precedents. Rules and laws were collectively decided. They could be discarded if found irrelevant or unsuitable to evolving situations (Aylltey 1991, p. 62). This gave the process a flexibility that was necessary to resolve cases in a manner contributing to social harmony, and one not necessarily available within a stable set of predictable rules.

Separation between rule-making and dispute resolution was not as marked as in western systems. Often, the same elders who made the laws were invested with the authority to settle disputes. The two processes were closely integrated and allocated to the same institutional authority. In most cases, the stakeholders perceived the system as fair in its dispensation of justice.

Dispute resolution was not always an arbitrary process reflecting patriarchal authority, but often involved decisions arrived at through discussion and consultation with members of the household (Ayltley 1991, p. 41). The process was decentralized and participatory, reflecting to varying degrees a pluralistic vision for the clan or the tribe as a whole. “The . . . system of control of conflict by the peaceful settlement of disputes was an extraordinary achievement. It was a complex system of interdependent parts of much ingenuity and sophistication” (Ayltley, quoting Carlston 1991, p. 42).

There is also evidence to show that in many cases, disputes were resolved by discussion and deliberation. For example, among the Tiriki of western Kenya and likely also among many other tribal groups, both adult men and elderly women were free to seek permission to interrupt or ask any man or woman to provide testimony during a judicial proceeding. It was also common to provide an opportunity for an aggrieved party to appeal a decision at the first level (Ayltley 1991, pp. 42–49; World Bank 1997, p. 62).

Adjudication was always by impartial elder members who would have the interests of the whole group in mind. Fairness was a critical principle, and the focus of the resolution was on relationships, not on punishment. Wrongdoing was usually punished through payment of compensation by the wrongdoer, except in extreme cases such as murder. This was important because, after the dispute, it was imperative that the disputants could return to living together harmoniously, believing that justice had been done (see opposite view in Chanock 1989, p. 79, and 1995, p. 39).

Newly introduced legal systems and institutions were very different. They were centralized and resembled institutions that had evolved to suit the needs of emerging market economies in largely industrialized countries. These institutions were characterized by a rule of law that was formulated not on the principle of consensus, but on the process of majority rule. These rules derived their authority not from tribal or clan authority, but from sanction of the state.

The newly introduced dispute-resolution systems were also more formal, and enabled easy access only to a minority. Complex procedural rules, court fees, attorney fees, and protracted delays in settling litigation together formed significant barriers that constrained the poor, particularly women, from seeking justice through the formal systems. Unlike earlier systems, the formal systems did not take account of the fact that few men or women were

literate. A legal system of enforceable and registrable rights, based on written laws and records, was perhaps not appropriate for the majority of the people.

Under the new systems, disputes were settled by external authorities who were different from the rule-makers. The dispute settlers, judges, or magistrates were agents of the state and were not perceived as having any religious sanction, thereby reducing the sanctity of these institutions. The credibility of the process was also diluted because arbitrators or judges were not accountable to the disputants under the new system, but were appointed and monitored by an external authority.

The new system of dispute resolution was no longer a participatory process of resolving disputes. Judges were expected to resolve disputes impartially, consistent with the stated law or with other judicial precedents. Punishing the offender was an important principle; the focus was not on ensuring harmonious relationships as in traditional systems. The imported systems had evolved in conditions where urbanization and industrialization ensured that even disputing members of a family would not be forced to live in the same area and remain in contact with each other. The social relationship between the parties was therefore not a critical factor underlying the formal method of dispute resolution, which was again another important difference.

The new dispute-resolution system, therefore, did not serve the interests of the majority. It assisted in protecting the interests of colonial and other rulers in resources they had claimed from the indigenous communities, and permitted the collection of taxes and duties levied to maintain the colonial apparatus (Ayltley 1991, p. 398).

Given the cultural and social traditions, women were relatively more alienated from these dispute-resolution mechanisms, which were controlled by outsiders with whom women themselves would not choose to have contact. Also, it would be more difficult now to take a dispute to these external dispute-settlers, have it settled in an adversarial fashion, and then return and live within the same community.

It must also be generally noted that the experiences of women who turned to formal institutions were also not positive (Stewart 1990, p. 167). The judiciary acted in a limited and conservative manner, applying laws as they perceived them and where they were not repugnant to their morality and principles of justice.¹⁷ Given the legal concepts of judicial precedents and *stare decisis*, the courts also ignored the flexibility of customary laws and their ability to adapt to conditions. They failed to recognize that by privatizing land, the new laws changed social conditions in a fundamentally radical manner, and ignored the differences between access, control, and ownership. On the contrary, the courts cast an air of permanence on customary laws that had evolved under different socioeconomic conditions, inhibiting the strongest characteristic of customary laws—their inherent ability to evolve. They also ignored the

diversity of customary practices, interpreting the laws and practices conservatively and emphasizing principles that were consistent with patriarchal principles familiar to an English judiciary.

For example, until early 1998, the Zimbabweans had valid judicial precedents that recognized women as working for their husbands; therefore, all property they acquired belonged to their husbands, except for gifts or personal income earned through services rendered as a midwife or herbalist. In *Jenna v. Nyemba*, the court declared that “property acquired during a marriage becomes the husband’s property whether acquired by him or his wife” (Gopal and Salim 1998, p. 95). In *Khoza v. Khoza*, a divorced woman was denied access to communal lands and matrimonial homes, which had been built entirely due to her efforts, on the grounds that she would need to return to her parents’ home for residence (Gopal and Salim 1998, p. 97). Even in customary marriages, however, the law has since 1985 provided some rights to the children of such marriages, and has provided minimal support to the wives. When a marriage ends by death, there was no provision for allocation of property. It was only in 1997 that the customary law was amended to permit women to inherit property from parents or spouses. Until then, African women had no rights to their husband’s property.

It was no different in Kenya. In *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo and Omolo Siranga*,¹⁸ a wife sought a declaration from the court that she had the legal right to the remains of her deceased husband under English law. The respondents, a brother and a cousin of the deceased, based their case on customary laws. The Court of Appeal held that African customary law was applicable to a person such as the deceased and granted the right to the brother and the cousin. Earlier in *Re Ogola’s Estate*,¹⁹ the same court had held that a customary wife could not claim her deceased husband’s estate when he had a statutorily married widow—in so doing, failing to recognize the validity of a customary marriage. In another example, the court held that a father, possessing land registered in his name, had absolute ownership over the land. Even his sons, who had held it jointly with him prior to registration, had no rights to the land. The courts ignored customary law perhaps because it was necessary to preserve the integrity of registered titles for their own administrative and economic purposes.²⁰

This is not to say that all indigenous institutions and systems need to be preserved. The Ethiopian experience demonstrates the need to adapt indigenous institutions and processes to modern times, because in their pristine forms customary or traditional mechanisms may no longer be suitable. A survey conducted among divorced women in Addis Ababa revealed problems with the traditional system of dispute settlement, as described in Chapter 2.

In Addis Ababa as in many other urban areas, couples were living outside their traditional groupings and could not turn to elders within their communities to settle disputes. Arbitrators were, therefore, randomly picked from near the courts in Addis Ababa. First, they were strangers. This clearly was a departure from the traditional *shimagele*, who was accountable to the clan or tribe and whose first priority was maintaining the harmony and

interest of the group. Second, shimageles now needed to be paid for delivery of service. Because payment was often linked to the length of time that the arbitration involved, shimageles tried to prolong disputes, taking a longer time to settle them, even though the Civil Code prescribes a time within which disputes must be settled. Third, the women interviewed complained that the arbitrators continued to be men, who were better able to socialize with their male spouses and were therefore more sympathetic to them. Many women therefore argued for the abolition of the shimagele system. Others, however, argue that experience in other countries demonstrates that women have less access to a formal dispute-resolution process, given the complexity of procedure, the costs, and the time delays that invariably surround such processes. The challenge before the Ethiopians is daunting, but they have generated a participatory debate on the future of the dispute resolution system. They hope that a process of participatory dialogue will increase the likelihood that the final product will be acceptable and in line with the desires of both men and women.

In general, the legal tools used reflected a structure or process that had little in common with previous customary systems. The new systems significantly constrained the meaningful participation of communities in determining the norms that governed them. They effectively converted what was a bottom-up approach into a top-down approach.

In both systems, men were in the controlling position and participation in legal institutions was predominantly male. Although the outcome from a gender perspective was perhaps only marginally different, it must be said that women had greater capacity to be heard in the previous customary system than they did within the formal system that replaced it. Except for a small minority, the majority of women were alienated from the new and formal systems, which remained largely ineffective.

THE CHALLENGE FOR AFRICAN LEADERS

Although the new legal norms based on the concept of individual rights and the formal structures were first introduced by colonial rulers, they were equally acceptable to post-colonial and often very nationalistic leaders. This is perhaps because many of them were educated in Western universities and Western thought, and these approaches represented a vision of society consistent with the doctrines of freedom and liberty that were the underlying themes of many of the independence movements (Obiroa, 1995, p. 576). Having been schooled in Western liberal traditions, thoughts, and languages, many of these leaders would also have perceived a return to traditional mechanisms and norms as a step backward. The rejection of customary practices in fact came to be seen as progressive and modern, and by those terms desirable.

African leaders need to free themselves from this modernist approach to legal reform, as it is one that understands progress or freedom largely in universalist terms (Grenz 1996, p. 4). They must move toward a post-modernist approach that recognizes the historical and cultural

basis of effective legal systems. "In Africa, as elsewhere, much of life is lived outside of the law and involves values and patterns of behavior which are different from those enshrined in the state's legal system. In these patterns may be found a repository of customary values which provide better building blocks than those which were legitimized by the colonial state" (Chanock 1989, p. 87).

This recognition will underscore the need to find solutions, in terms of both norms and systems, to specific problems. These solutions should focus on the historical, social, and economic contexts of the particular problems, rather than on unimportant and abstract norms or imported systems. The challenge before African men and women is how to lobby for change in personal laws in a manner that will create less alienating and more enduring solutions to their problems (Ilumoka 1994).

The traditional or customary systems are clearly inadequate, and romanticizing the traditional vision on which these customary laws were based cannot lead to an equitable solution for women in the modern context. In fact, nor would it lead to a just solution for the community as a whole. Turning back is not a solution. At the same time, the so-called modern vision that replaced the customary system with a formal legal system based on a universalist approach has proved equally if not more ineffective in protecting the interests of women.

Any new legal system or tools will need to protect the interests of both the minority elite of educated women and the majority of poor rural women. For the former, the concept of rights and the vision held by the formal system could be a liberating force; for the latter, it may reinforce their dependency for decades to come.

This leads to perhaps the single most important lesson to emerge from analysis of past attempts at legal reform in these countries. A single universalist vision may be too constraining in the search for gender justice. To insist on committing to or finding a single vision of gender justice may prove mistaken in the context of these eastern African countries. In fact, some legal scholars have strongly opposed the view that law can be based on a "shared understanding," because they argue that there is no shared understanding on gender issues, even among women (Okin 1989, p. 67). The new approach to legal reform should avoid trying to impose a vision of an ideal society, because any such ideal would inevitably become outdated with time.

What then could be the basis for a new approach? It is submitted that the new approach should discard the search for a universal conceptual framework, whether it is traditional, modern, or a combination of the two. Instead, it should focus on a contextual analysis of the problems that constrain women's choices and limit their access to and control over economic resources (Rhodes 1989, p. 316, Obiora 1995, p. 589). It should help to ground the analysis of problems facing women within the existing socioeconomic context, and should facilitate a process that would allow men and women themselves to find solutions to addressing their

problems, solutions that are practical and shorn of any ideology as African countries increasingly integrate with the world economy.

Such an approach would focus on and encourage a legal process that permits people to settle their own problems by applying their own norms through a fair and transparent process. As Rhodes states, “detailed blueprints of the ideal structure are less important than strategies to engage more participation in the reconstructive process” (Rhodes 1989, p. 317). In the long term, these processes will enable people to participate in establishing a vision for a system of justice. A new model of justice must evolve in a truly participatory and bottom-up manner, and if the vision that emerges is one that is truly owned and acceptable to the large majority of people, it is irrelevant whether it bases itself on customary or on modern constructs. Such a process-based and participatory approach may ultimately prove a more effective approach to legal reform in the long term. The beginnings of such an approach have perhaps emerged in Ethiopia and Uganda, at least at one level, and are described in the next chapter.

AN ALTERNATE APPROACH

Ethiopia and Uganda appear to have moved forward in what may be considered a process-based approach to legal reform of personal relations. The examples they provide are worth examining for other countries considering gender-based legal reform, as they provide possible alternatives to solving the intractable problems that confront women in all these countries.

In Ethiopia, the law seems to have stepped away from a centralized legal framework in personal matters, an approach that was evident in the 1960 Ethiopian Civil Code and one that characterized the colonial and post-colonial era in other eastern African countries. The new approach complements the ambitious decentralization of administrative, legislative, and executive powers being implemented in these countries, and is in line with traditional legal institutions and processes. A second characteristic is a movement away from the imposition of norms in personal matters and a greater recognition of the validity of differing norms in personal laws.²¹ Within this framework exists a clearly discernible shift toward greater emphasis and deliberation on the processes rather than on the norms. The focus seems to be on providing transparent and participatory processes through which both men and women can be involved in determining the applicable norms, rather than the prescription of norms by some external authority. These mechanisms are discussed below as examples of the new approach to legal reform and change.

Ethiopia's Federal Constitution (1995) takes a step away from the 1960 Civil Code that invalidated the application of customary laws to personal matters. Although this has been considered a step in the wrong direction, it is actually a tribute to the participatory and consultative process that preceded the drafting of the new Constitution. Given the difficult and emotionally charged debates on the issue of customary and religious law, the government chose to adopt a process-based approach. It articulated a broad paradigm for gender justice in conventional terms of gender equality. In recognition of religious and cultural diversity, however, the Constitution also adopted a process-based approach to dealing with personal laws.

This approach permits parties to settle a dispute related to personal matters by applying customary or personal laws, provided all parties agree. For example, a wife could agree to settle a dispute under customary laws, or she could seek to settle the dispute under the principles of the Civil Code if those customary laws appear unfavorable. This process thus provides a range of

options for consideration according to the situation and context within which the disputants reside. It permits women to choose the least-costly option in terms of personal status and standing within the community, and also caters to both the educated elite and to poor rural women.

Anecdotal information suggests that this process may be working well. Reportedly, in a recent case in which a Muslim woman agreed to take a dispute to the Shariat courts, the court handed down a ruling that was fair to both spouses, despite the fact that the woman not entitled to any compensation under her personal laws.²² The new procedure of settling disputes may even prove a disincentive to the Shariat courts to deal with women's issues in a traditional manner, lest they force Muslim women to approach the civil courts for equity. In addition, in a process-based system such as this, the inequitable and unacceptable situation described in box 3 could not happen without the explicit agreement of the woman bringing the dispute to the court.

The Constitution, however, requires that enabling legislation establish the details of the process. This is still being awaited. The essential issue is whether litigants can choose to apply customary laws that are gender-biased when the Constitution invalidates all laws that discriminate on the basis of gender. Only the enabling legislation from the Federal Government will clarify the matter. A norm-based approach would not permit the application of discriminatory customary practices. A process-based approach would allow the affected parties to make the choice, provided that both men and women were given the relevant and necessary information that would enable them to make an informed choice. Supporters of a norm-based approach would object to a situation where discriminatory norms may be applied. However, proponents of the process-based approach would argue that, if women knowingly choose the

Box 3: Tale of a Woman in Zimbabwe

When soft-spoken Vennia Magaya was evicted from her deceased father's house, her TV set and oven thrown out into the yard after her, she thought it wasn't right. So she sued her half-brother for evicting her. She had a compelling case. The nation's constitution, a separate law enforcing women's rights, and several international human rights treaties that Zimbabwe had signed all backed her claim as heir to her father's estate. But, in a stunning reversal of fortune for Zimbabwean women in particular—and African women in general—the nation's Supreme Court overruled or challenged almost every law relating to women's rights in Zimbabwe and gave the house to her half brother. In a landmark 5–0 decision, the court said the “nature of African society” dictates that women are not equal to men, especially in family relationships. The court said centuries-old African cultural norms, which are not written down, say women should never be considered adults within the family, but only as a “junior male,” or teenager. Experts say the ruling, quietly handed down last month, strips Zimbabwe's women of almost all the rights they had gained since the nation broke free of colonial rule 20 years ago.

Source: Sarah Jane Poole/Knight-Ridder News Service, The Salt Lake Tribune, April 14, 1999.

application of customary laws, the costs of such a choice would presumably be less burdensome socially than those incurred through the application of the more equitable civil code provisions.

The advantages of such a process are not immediately apparent, but become clear on reviewing the recent incident in Zimbabwe (box 3). In a recent decision, the Zimbabwean Supreme Court bench unanimously ruled that women are minors, and not equal to men, in Zimbabwe, creating widespread controversy and agony among all who seek justice for women. This is not necessarily a surprise, given precedents like *Jenna v. Nyemba* and *Khoza v. Khoza*, discussed earlier. The absolute lack of concordance with modern concepts of gender equity, even at the level of Supreme Court Justices, cannot but be disappointing, however. One also wonders how the Supreme Court bench could have interpreted customary laws in such a rigid manner, ignoring the underlying protective principles of these laws. Not only did the decision fail to protect women, it matched or even surpassed the judgements of past colonial courts that “decontextualized” and thereby made a mockery of customary rules.

Perhaps most importantly, it should also be understood that this reversal of trends is only possible because of the absolute lack of participation of women in the process—except of course as the aggrieved plaintiff. This situation would never arise under the newly introduced Ethiopian process-based approach, where women themselves have some control or participation in the determination of the norms applicable to the dispute. Inequitable elements of customary law can be applied to disputes involving women only with their consent. In contrast to Zimbabwe, if a woman in Ethiopia chooses not to apply customary laws, the court would find it difficult to impose such an inequitable decision against her. The law provides much better protection, and at the same time leaves the final decision to the plaintiff.

The Land Proclamation in the Amhara region in Ethiopia also demonstrates the potential for problem-solving inherent in a system that makes people responsible for addressing the difficulties that confront them. The Federal Government’s legislation lays down only broad guidelines, as does the regional government proclamation. It does, however, clearly prohibit discrimination on the basis of sex, and provides guidance for such situations. For example, the proclamation does not use the term “family” or “household,” at least in the English translation. It is replaced with the term “social institution,” and is defined as a unit that is run under the responsibility of a man or woman. The concept of a “family administrator” is introduced, as opposed to the “head of household,” to overcome legal difficulties encountered because of the Civil Code definition of the husband as the head of the household. If land were to be registered with the head of the household, it would be in the name of the husband, unless and until the Civil Code is amended. The new concept of a family administrator means that land may be registered in the names of women who control it, although traditionally they may not be perceived as the heads of their household. This new usage would also permit a village to allocate land to wives who live in separate units but belong to a polygynous household.

Having thus defined the broad principles, the Land Proclamation left it to each village to decide how land should be allocated. As stated earlier, after the legislation was implemented, the land holdings of women increased by 28 percent. Given the continued prevalence of patrilocal traditions, the statute did not require the registration of household land in the names of both spouses, which in some circumstances create difficulties. At the same time, it did not forbid a village from incorporating such a rule, in case the community member could jointly determine that this would be a realistic provision should its community members elect to do so.

In Uganda, the 1995 Constitution has also adopted a less obvious process-based approach to gender justice. Article 33 accords women “full and equal dignity of the person with men,” and guarantees women equal treatment with men. Article 33(6) prohibits “laws, cultures, customs, or traditions which are against the dignity, welfare, or interest of women or which undermine their status.” In matters related to family laws and land, the latter is a critical clause. Some in Uganda see this as a failure to establish clear norms of equality (Gopal and Salim 1998, p. 182). Others argue, as Dicey might have, that this permits authorities to settle disputes in a manner that reflects the majority opinion. In any case, this process is not as satisfactory as the process adopted in Ethiopia, because women do not have control over the norms that are applied. The determination of these is left to an external third party.

Uganda’s 1998 Land Act also seems to maintain some aspects of this process-based approach in dealing with land issues. The act recognizes four types of land tenure systems; for the purposes of this paper, the two relevant ones are customary and freehold. The law provides any person, family, clan, or tribe the choice to hold land either under customary tenure or as freehold property. If the group wishes to hold it under customary tenure, it may seek certification of this fact through the Land Board established under the act. Such land is then held in accordance with the customs, traditions, and practices of the community. Most important, however, the act clearly states that any decision that provides women, children, or persons with “disability access” to ownership, occupation, or use of any land, or that violates constitutional principles, shall be invalid. Again, the statute uses the term “disability access,” but fails to define it. It is left to the communities to establish equitable provisions for land allocation and to the courts to establish standards to determine the validity of laws that do not treat both men and women equitably.

The ability to enforce legal rights is an important issue that will help women to protect their interests. Consistent with general decentralization in Uganda and Ethiopia, there is a trend to invest local authorities with important legislative and judicial powers. Dispute-resolution mechanisms are increasingly decentralized, thereby becoming procedurally simpler, less costly, and more informal—in line with African traditions and practices.

In Uganda, for example, the Local Government Act of 1997 gives local administrative units responsibility for adjudicating minor disputes involving land, marriage, debts, assaults, conversion of property, and paternity at the level of the village or parish councils. Disputants

have the choice of approaching the magistrate courts—the lowest court in the formal judicial system—or local councils, for which filing fees are kept low. Procedural requirements for local councils are also simplified, and they are permitted to settle disputes without strict adherence to technical rules of procedure or evidence. This does not mean that the councils are exempt from applying the law, rather that they are able to resolve disputes more expeditiously than if the disputants approached the more formal court system, the lowest of which is the magistrate's court. Also, judges are council members who have been elected to these positions by the disputants themselves; which system enables the process to retain some of the values of the traditional dispute-settlement process.

The Uganda Land Act also permits traditional authorities to resolve matters related to customary land tenure through mediation by land tribunals. Interestingly, the land tribunals may also determine when a case is better settled through mediation, a process more in line with customary traditions in Uganda. In Ethiopia, too, village-level committees hear and resolve land disputes. Their decisions are final and disputants have no recourse for appeal.

In 1981, Zimbabwe had established “customary law and primary courts” to provide for the application of customary law in civil cases.²³ These courts, which are the principal judicial fora for family disputes, were given the authority to choose the applicable law, based on the context (Schuler 1986, p. 301; Stewart 1990, p.169). A survey conducted in 1983 revealed that 18 percent of 206 men thought that the community courts were actually women's courts, because they perceived the courts as favoring women—in reality, only 17 out of the 160 presiding officers were women. The same survey showed that women constituted about 25 percent of the total number of litigants in an eight-month period, which would seem to indicate that community courts can play a significant role in enforcing women's rights. These courts, however, tended to apply customary laws which, through years of interpretation, had either been documented as or converted into inflexible, gender-biased judicial precedents. Such application naturally worked against the interests of women (Stewart 1990, p. 169). In Uganda and Ethiopia, in contrast, the constitutional provisions provide a broad framework of gender equity and equality. Within this framework, the primary courts are required to apply customary laws to personal matters, thereby enabling them to make a positive impact on women.

The Ugandan government has also institutionalized affirmative action, in accordance with the Constitution, to ensure that women's voices are heard in the process. The Local Government Act of 1997 reserves one-third of the membership of local government councils for women, in addition to the 39 seats reserved for women in the National Resistance Council (Parliament).²⁴ The Land Act also has an affirmative action clause that establishes a land tribunal in each subcounty, comprising three persons, at least one of whom should be a woman. This clause means that women themselves can hope to participate meaningfully in the processes that determine norms and rules, and resist those that they perceive as being against their dignity, welfare, or interests.

In general, governments are increasingly convinced of the need to involve women in this movement for change, and this trend is evident in many of their ongoing efforts. For example, in Kenya, a task force constituted by the Attorney General's Office, headed by a woman justice and including a number of women members, is identifying and evaluating the legal provisions that need to be changed. Their mandate goes far beyond that of personal laws. In Ethiopia, the Women's Affairs Office is spearheading efforts to involve women in dialogue and discussions for legal reform, and is examining the 1960 Civil Code to identify provisions that discriminate on the basis of gender and that are in violation of the principles of gender equality as enshrined in the 1995 Constitution. This type of increased participation will go a long way toward bringing in a new vision—provided the women participants are able to incorporate ideas that are shared by the majority of the women in their countries.

IMPLEMENTING THE APPROACH

The process-based decentralized approach has risks, some of which need to be addressed up front to prevent this approach generating its own gender inequities.

RISKS OF A PROCESS-BASED APPROACH

Lack of Control Over Norms. A purely process-oriented approach would ideally have little influence over the final norms that are selected. The selected norms may therefore not be consistent with the popularly accepted tenets of gender justice (see table C). As post-modern scholars believe, a ground rule that facilitates well-being, in the view of the affected community, would be valid. On the other hand, if one believes that “the movement of progressive societies . . . is distinguished by the gradual dissolution of family dependency and the growth of individual obligation” (Aubert 1997, p. 31), a final outcome based on the larger good of the community may not be satisfactory. For example, if monogamy is the accepted norm, a case that recognizes wives of polygynous relationships would be unacceptable. Or, if individual ownership of land is considered critical, the new Ethiopian land promulgation, which vests responsibility for land control in the state, may not be a desired outcome. In Ethiopia again, a peasant association that determines criteria for allocation of land could well decide that nonfarming women get smaller parcels of land than men, because women are unable to utilize large tracts of land productively. Although this may be against accepted concepts of equality and external notions of justice, it

TABLE C: COMMUNITY WELL-BEING: WOMEN’S PERCEPTIONS IN THREE ETHIOPIAN COMMUNITIES

Fogie Kombolcha	Bulchana	Mugayo
<ul style="list-style-type: none"> • Harmonious household relationships • Fair treatment of all wives and children, especially sons • Less workload than currently • Access to more <i>iqub</i> savings for security in divorce/widowhood • Access to safe delivery of children 	<ul style="list-style-type: none"> • Improved roads/ transportation • Markets closer to home to reduce burden of carrying <i>enset</i> (staple food) • A good school 	<ul style="list-style-type: none"> • More livestock • Sons to inherit and take over family responsibilities • Daughters to help mother and to be married off in exchange for bride price • Access to safe delivery of children

Source: World Bank (1997)

may be consistent with a position that treats all households equally.

Failure to Hear Women's Voices. A process-based approach, as in Uganda or Ethiopia, can be gender-sensitive only if women's voices can be heard in the process. Social, historical, and other extraneous factors often discourage the participation of women in these processes—particularly rural women. In addition, communities or countries are no longer homogenous groups of tribes or clans that have shared centuries of history and culture. The fear is that the dominant voices will be those of men and that a process-based approach may be used to legitimize a failure to protect women's interests. These risks arise from the fact that women's interests are often not identified or considered in preparing laws. In addition, few groups can represent women, in particular, poor women, effectively. Those that presume to often articulate their interests based on their experiences in other countries, or consistent with the desires of the few elite women in the developing countries. As Okin says, "the free, the educated, the wealthy, and men . . . are much more likely to shape them than are the unfree, the uneducated, the poor, and women" (Okin 1989, p. 69).

Lack of Access to Relevant Information. Access to information and knowledge is a critical aspect of the process-based approach; all participants must make informed choices based on an understanding of the relevant information. When women in Ethiopia agree to be subject to the application of more discriminatory customary laws and provisions, for example, they should do so with full knowledge of their options. If the process-based approach to customary laws is to succeed effectively and equitably, both men and women need to be fully informed of their choices under Ethiopian law in determining which norms should apply to them. Similarly, in Uganda, women should participate in deciding what is against their welfare or dignity. Men alone should not make such critical decisions. In many of these countries, a process-based approach may entail the risk of not providing women with proper access to relevant information, thereby constraining their search for equity.

Costs of a Process-Based Approach. The costs of ensuring equitable participation of both men and women is another issue, although many may argue that questions of cost are out of place when tackling deep-seated inequities. The preliminary issue, however, is whether economists are able to quantify meaningfully the costs of the inefficiencies generated by gender bias in existing legal systems. Without reliable data, concerns over the cost of a process-based system cannot be used as justification to continue with the norms-based approach to gender justice, which has failed in a number of countries.

MITIGATION OF RISKS

Steps must be taken to mitigate some of the above risks. Some state intervention may be necessary, given that we do not function in an ideal world, to fix the boundaries for a process-based approach. As in Uganda and Ethiopia, the state may choose to enshrine some of its

cherished principles through the Constitution. The choice at local levels would have to take place by necessity within these parameters and paradigms, or at least move toward them in some distant future. This may satisfy or reduce the fears of traditional norm-based legal reformers, although within a truly participatory process-based approach such fears would not be valid.

Policymakers need to encourage policies and incentives that strengthen awareness of the economic impact of gender discrimination and build consensus on gender issues. Communities need to be aware that gender discrimination has not only social implications, but also serious economic implications for individual households. Simultaneously, legal literacy must be enhanced and awareness increased as much as possible about how the law can protect women's rights. Suitable information, education, and communication (IEC) campaigns should be developed and implemented. This is especially true for countries in which women's participation in education is low and many are illiterate.

Strengthening institutional capacity at the regional and subregional levels could provide a significant impetus to engendering participation, and needs to be carefully monitored. Ensuring that local authorities are required to provide women with equal opportunities to participate in the process and to determine norms can minimize risks. At the community level, it is also likely that proper economic and other incentives can discourage the control of these local institutions by the more powerful local elite. This also needs to be closely monitored.

Policies should support and strengthen those local groups or lobbies that speak for poor women. If a process-based approach is to succeed, effective and functioning women's groups that can lobby or represent women's concerns and views will be necessary. National groups currently exist in all the eastern African countries discussed here, but they are not enough—regional and subregional groups are also important to bring the varied concerns of different groups to the table. Existing groups need resources and capacity to function properly, and new grassroots groups need to be encouraged or initiated. Decentralized processes that are transparent and fair would give impetus to such consultation and dialogue, but at the same time, state machinery and policies need to encourage the emergence of grassroots organizations. Affirmative action that recognizes the inequitable situation and that provides women with an opportunity to participate in decision-making is important in a process-based approach. This is the approach taken by Uganda.

Constant monitoring is needed so that women are not only heard but are also brought into positions of responsibility in which decisions are made on important matters. Empirical research and collection of data becomes important for any monitoring and advocacy purposes that may be necessary. The process has risks, but if transparent and open processes are established for women's participation, it is likely they will ensure that women's voices are heard.

CONCLUSION

Clearly, reform of laws dealing with the personal lives of men and women is a highly complex and sensitive area, posing a greater challenge than the conventional norm-based approach to gender and law. The limitations of a law as a tool to modify behavior within the home cannot, therefore, be overemphasized. Law can only be a catalyst to expedite the process of change. Its ability to force change is limited in the arena of the household. In seeking change, public policy should focus on increasing educational opportunities for women. Equitable policies that will increase opportunities for capacity-building, facilitate entry into informal labor markets, provide support through child-care centers, enhance access to credit and labor-saving technology, and encourage participation in informal and formal savings groups, will go a long way toward elevating the economic status of women. In fact, it may only be when women are themselves educated or at least economically independent that they will be able to cast aside inequitable practices or laws, fight violence in their homes, and support the preservation of those practices they believe to be useful. In this fight for gender equity, the legal framework must support change in the status of women, instead of being, as it is, one of the primary constraints against change.

It must also be underscored that in societies with inadequate resources to implement laws effectively, the law in its existing form may not be an appropriate tool to address some widely accepted practices. It is therefore important to differentiate between those issues that can be effectively addressed by law alone and those that cannot. Female genital mutilation (FGM) is one such issue that may not be effectively dealt with by law, as this would risk driving the violence behind closed doors, as happened in the Indian case of dowry.²⁵ In the case of FGM, even when communities are aware of the harm it causes, they are reluctant to stop the practice because they fear social ostracism for their daughters. In such a situation, if the underlying problem is not solved, laws cannot be effective. Some nongovernmental organizations (NGOs) have developed innovative and nonlegal mechanisms, anchored in local cultures and traditions, that address the fundamental concerns of the community.²⁶ Through consultation and participation, NGOs have developed and encouraged the substitution of the violent act of mutilation by a symbolic gesture. In addition, along with powerful information, education, and communication messages, communities are encouraged to celebrate the underlying positive aspects of the ceremony—protection of the child's interests. This non-legal tool provides a more sustainable solution than a prohibitive law, which would ultimately punish the mothers and grandmothers who carry out FGM in the mistaken belief that it is in the best interests of their daughters. If a legal solution is sought, it is submitted that the problem should not be cast as a gender issue, but as one related to violence, to avoid mirroring the problem in issues of culture and tradition. It is easier to find a solution on a shared understanding that any form of violence is unacceptable, whatever the presumed justification. Most people, irrespective of cultural or traditional backgrounds, will hesitate to disagree with such a principle. The same people might argue the case on grounds of culture and tradition when it is cast as a gender issue.

In areas where the law is used as a tool to encourage gender equity, however, the process-based approach may be more effective in protecting women's interests. One still does not know if the process-based approach will prove more successful in ushering in change; only time can tell. However, decades of experience have demonstrated the failure of the norm-based approach to bring change for the majority of women. Developing countries are strewn with the epitaphs of irrelevant laws that proposed norms that were unacceptable to those affected by the law. It is clearly time to test another approach. A process-based approach may seem slower, but "adopting a gradual approach to the development of . . . institutions, rather than introducing complex foreign institutional and regulatory models" may be more effective in the long term (Lovei and Weiss 1997).

Whatever approach is adopted, change will be slow and tedious. Patience is critical; change in this area can come only "like a drop of water that changes the shape of a stone, drop by drop."²⁷

In conclusion, two voices can be heard from Africa. One is Emperor Haile Selassie's in the foreword to the Ethiopian Civil Code, which shaped the approach to legal reform adopted by many governments after independence—an approach that determined the goals for society, imposed preconceived norms on people, and challenged customary beliefs and traditions. The other voice emanates from African men and women and seeks to involve women in formulating legal norms as reflected in legal provisions and policies. They seek change: they do not accept or support unfair traditions merely because they are customary, but at the same time, they are not willing to abandon those aspects of their culture and tradition that have sustained their social cohesion for centuries. They demand a voice in the process of legal reform—one that will permit them to talk of their aspirations and allow them to determine the applicable norms. Which voice should one listen to?

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NOTES

¹ The courts did influence the evolution of customary laws by establishing precedents and documenting customary laws as they saw them; however, the impact of these actions on gender relations was marginal.

² While rules related to land ownership were also changed, they were reversed by the succeeding government as early as 1975.

³ Ethiopia, with its present boundaries, came into existence less than a century ago. The process of centralization had been initiated by Emperor Tewodorus, strengthened by Emperor Yohannes IV, consolidated by Emperor Menelik II, and completed by Emperor Haile Selassie. It was a movement from “parcelized sovereignties to centralized sovereignty” (Tiberu 1995, p. 3). The conquest of the Ormos and the defeat of Gojjam laid the foundation for the birth of modern Ethiopia. In 1886 and 1887, the Arsi and the Harraris became part of the Ethiopian empire; in 1894 the Walayta forces succumbed; and Beninshanghul and Gambella were annexed around 1895. Emperor Haile Selassie found himself emperor of a country with large groups of Orthodox Christians and Muslims, in addition to large numbers of people who did not practice either religion and were governed by other customary rules.

⁴ Article 3347.

⁵ See Tanzania or India, where applicable personal laws are determined in most cases based on the religious or tribal affiliation of the person.

⁶ Article 653.

⁷ Article 654.

⁸ Article 652.

⁹ Article 646.

¹⁰ Article 654.

¹¹ From participatory rural appraisals conducted in five regions and two urban areas in 1997 as part of World Bank gender work in Ethiopia.

¹² The National Regional Realotment of Rural Land, Proclamation No. 89/1997.

¹³ Consideration paid by the bride’s parents to the bridegroom or his family in return for marriage.

¹⁴ Presents made at the time of the marriage that were not unduly extravagant, given the status of the families, and that were made voluntarily were excluded from the definition of the term “dowry.” The government also reduced procedural constraints to register cases. The offenses are cognizable, nonbailable, and noncompoundable. A court can take cognizance of an offense under the act upon its own knowledge, a police report, a complaint made by an aggrieved party, or by a recognized welfare institution or organization. Prior permission of the government, which was earlier required, is no longer required. Furthermore, the burden of proof has been shifted to the accused. A new offense—dowry death—has been introduced; when a woman suffers an unnatural death within seven years of her marriage, the law will presume that the husband or his relatives have caused such death (Sarkar 1994, p. 117–119)

¹⁵ Note that in India Hindus, Muslims, and Christians continue to be covered by their personal laws or codification of such personal laws.

¹⁶ Passage of the Equal Pay Act of 1963, Title VII of the 1964 Civil Rights Act, the signing of the Executive Order 11375 extending affirmative action for women in 1967, the passage of Title IX of the Education Amendments in 1972.

¹⁷ The Judicature Act, Section 3(2).

¹⁸ Kenya Court of Appeal, Civ. App. No. 12 of 1982 (unrep.) (see Woodman and Obilade 1995, p. 520).

¹⁹ *Kenya Law Review* 18 (1978). See also Woodman and Obilade (1995).

²⁰ *Esiroyo v. Esiroyo* (1973) E.A. 388

²¹ It is too early to tell how courts will apply these interesting provisions, given that both constitutions uphold the principles of gender equality.

²² Conversation with Mme. Tadelech, head, Women’s Affairs Office.

²³ Law No.6, 1981, as amended by Act 21/1982.

²⁴ In 1997 the national percentage of female federal judges collectively was 17.8 percent. Gender Fairness Task Force, U.S. Courts, Eight Circuit, September 1997.

²⁵ Africa News Service, *Alternative Rite to Female Circumcision Spreading in Kenya* by Malik Stan Reaves November 1997: “That became clear recently after Kenyan President Daniel Arap Moi declared his

intent to abolish the practice. "It led to a terrific backlash," she said, "including circumcisions in the middle of the night and a rush to circumcise girls at a younger-than-usual age, in an effort to beat the ban."

²⁶ Africa News Service, *Alternative Rite to Female Circumcision Spreading in Kenya* by Malik Stan Reaves November 1997: "The new rite is known as 'Ntanira na Mugambo' or 'Circumcision Through Words'. It uses a week-long program of counseling, capped by community celebration and affirmation, in place of the widely criticized practice also known as female genital mutilation (FGM). Next month, residents of some 13 villages in central Kenya will celebrate the fourth installment of this increasingly popular alternative rite of passage for young females. ... Circumcision Through Words grows out of collaborations between rural families and the Kenyan national women's group, Maendeleo ya Wanawake Organization (MYWO), which is committed to ending FGM in Kenya. ... It follows years of research and discussion with villagers by MYWO field workers with the close cooperation of the Program for Appropriate Technology in Health (PATH), a nonprofit, nongovernmental, international organization which seeks to improve the health of women and children. Headquartered in Seattle, PATH has served as technical facilitator for MYWO's FGM program, providing the methodologies and other inputs to help carry it forward."

²⁷ Professor Gayatri Spivak, Columbia University, in a talk she gave at the World Bank on April 12, 1999 to the Gender and Law Thematic Group.

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