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Legal Pluralism, Gender, and Access to Land in Ghana

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ARTICLES

LEGAL PLURALISM, GENDER, AND ACCESS TO LAND IN GHANA

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INTRODUCTION¹

Women in Ghana “form 52% of the agricultural work force, account for 70% of production of subsistence crops and form about 90% of the labour force in the marketing of farm produce,”² yet they

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1. The Leitner Center uses a field-work centered model for research, teaching, and advocacy in the area of international human rights. Over the past decade, we have conducted a number of projects, mostly centered on women’s rights that have involved to varying degrees aspects of African customary law. For example, we did a project in South Africa where we studied the pluralist structure of family law and the gender equality implications of the then-new Recognition of Customary Marriages Act. See Tracy E. Higgins, Jeanmarie Fenrich & Ziona Tanzer, *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT’L L.J. 1653 (2007). We also did a research project in Malawi concerning stigma and discrimination against women living with HIV/AIDS, which implicated issues of inheritance rights and the status of widows. See Chi Mgbako, Jeanmarie Fenrich & Tracy Higgins, *We Will Still Live: Confronting Stigma and Discrimination Against Women Living with HIV/AIDS in Malawi*, 31 FORDHAM INT’L L.J. 528, 576-78 (2008). Previously, we studied the impact of national legislation in Ghana concerning inheritance rights and gender. See Jeanmarie Fenrich & Tracy Higgins, *Promise Unfulfilled: Law, Culture, and Women’s Inheritance Rights in Ghana*, 25 FORDHAM INT’L L.J. 259 (2001).

2. SHEILA MINKAH-PREMO & CHRISTINE DOWUONA-HAMMOND, GHANA LAND ADMINISTRATION PROJECT, RECOMMENDATIONS FOR INTEGRATING GENDER ISSUES INTO THE LAND ADMINISTRATION PROJECT 1.0 (2005), <http://www.ghanalaw.gov.gh/privatecontent/File/recent%20files/gender.pdf>.

have limited access to and control over land and other resources necessary for economic development. This unequal access to productive resources has led to a feminization of poverty in Ghana, with studies revealing that women experience greater levels of poverty, lower literacy rates, less access to health and education services, and heavier time burdens in terms of labor both inside and outside the home.³ This Article explores the issue of gender and property rights in Ghana, focusing on the legal pluralism that characterizes access to land in Ghana and how it affects women's equality. The first part of this Article gives a very general overview of the situation in Ghana with respect to legal pluralism in land law. It then turns to the customary law of land and explores how access to land may differ for men and women, with an emphasis on commonalities across the various forms of customary law in Ghana. Next the Article lays out the move toward a proprietary model of land and its increasing importance, and asks whether this trend reinforces or undermines the gender hierarchy within customary law.

LAND LAW IN GHANA

Land ownership, access, and transfer are characterized by legal pluralism in Ghana.⁴ Article 11 of the 1992 Constitution provides that the laws of Ghana shall comprise the Constitution, statutes, orders, rules, and regulations, and the common law, which includes customary law.⁵ It thereby establishes a pluralist legal system without establishing a hierarchy among the various, potentially conflicting, sources of law. As an outsider, one might expect that land is governed either by customary law or by a combination of common law and statutes (lineage and family land by the former,

3. Wilbert Tengey, *Gender relations, rural women and land tenure in Ghana: A communication nightmare*, in LAND ACCESS IN RURAL AFRICA: STRATEGIES TO FIGHT GENDER INEQUALITY: FAO-DIMITRA WORKSHOP, 143 (Sept. 2008), <ftp://ftp.fao.org/docrep/fao/011/ak159e/ak159e.pdf>; CHRISTINE DOWUONA-HAMMOND, STATE LAND MANAGEMENT REGIME: IMPACT ON LAND RIGHTS OF WOMEN AND THE POOR IN GHANA 29 (May 2003).

4. MECHTHILD RUNGER, GOOD GOVERNANCE PROGRAMME GHANA, GOVERNANCE, LAND RIGHTS AND ACCESS TO LAND IN GHANA— A DEVELOPMENT PERSPECTIVE ON GENDER EQUITY 4 (2006), http://www.fig.net/pub/acra/papers/ts01/ts01_02_ruenger.pdf.

5. THE CONSTITUTION OF THE REPUBLIC OF GHANA, May 8, 1992, art. 11.

privately purchased and public land by the latter⁶). The reality is more complex, with overlapping claims, multiple systems of customary laws, boundary disputes, lack of written records, an inefficient registration system, no clear choice of law rules, and overlapping jurisdictions for dispute resolution.⁷

Approximately 80% of the land in Ghana is held under customary land tenure systems.⁸ In Ghana, as elsewhere, customary law varies significantly from ethnic group to ethnic group and even from community to community within a single ethnic group.⁹ Nevertheless, certain general principles emerge in the context of land law. First, the rules of customary law and land use are not based on contract and the demands of the market, which foster alienability of land and depend upon the clear demarcation of boundaries and rights.¹⁰ Rather, they are based on kinship and other social and political relationships, which foster a sometimes complex scheme of nevertheless clearly defined rights that may be transmitted from generation to generation.¹¹ Second, the types of rights in land that characterize customary law might not be readily translatable into the terms of civil or common law, as they are based on a combination of the ways that land is used and the social relationships among people using the land.¹² The third commonality among various customary

6. RUNGER, *supra* note 4, at 5.

7. See REBECCA SITTIE, INTERNATIONAL FEDERATION OF SURVEYORS, LAND TITLE REGISTRATION: THE GHANAIAAN EXPERIENCE, 8-9 (October 8-13, 2006), http://www.fig.net/pub/fig2006/papers/ps07/ps07_15_sittie_0848.pdf; George A. Sarpong, *Improving Tenure Security for the Rural Poor: Ghana – A Case Study 5* (U.N. F.A.O., Support to the Legal Empowerment of the Poor, Workshop for Sub-Saharan Africa Working Paper No. 2, 2006).

8. MINKAH-PREMO & DOWUONA-HAMMOND, *supra* note 2, at Executive Summary; see Janine Ubink, *Legalising Customary Land Tenure in Ghana: The Case of Peri-Uban Kumasi*, in LEGALISING LAND RIGHTS: LOCAL PRACTICES, STATE RESPONSES AND TENURE SECURITY IN AFRICA, ASIA AND LATIN AMERICA 163 (J.M. Ubink et al. eds., 2009).

9. ABDULMUMINI A. OBA, THE FUTURE OF CUSTOMARY LAW IN AFRICA IN THE FUTURE OF AFRICAN CUSTOMARY LAW 58, 60 (Jeanmarie Fenrich et al. eds., 2011).

10. Sarpong, *supra* note 7, at 5.

11. See Janine Ubink, *Chiefs and farmers: Social Capital and the Negotiability of Rights to Land in Ghana*, 3 RECHT DER WERKELIJKHEID 49, 50 (2009).

12. Sarpong, *supra* note 7, at 2-4.

law systems of land rights in Ghana is that women have had significantly less secure access to land than have men.¹³

In Ghana, rights to property under customary law do not necessarily equate with exclusive control and thus “ownership” in the sense that concept is used in the common law. Rather, different interests in land may be vested in different persons, with the underlying title remaining with the lineage.¹⁴ Because of the importance of lineage to structuring relationships within the community, customary systems often confer weaker rights on those outside the lineage that holds the underlying title to the land. As a general rule, this means that access to land by outsiders to the lineage (migrants, and importantly women) will depend upon the outsider’s ability to maintain a good relationship with the rights holder.¹⁵ For a woman, this often means her husband’s family.¹⁶

WOMEN AND ACCESS TO LAND IN GHANA

We began this study with a theory that women are generally at a disadvantage under customary law with respect to access to land, and with a desire to test the hypothesis that a move away from customary law by virtue of the increasing “privatization” or “commercialization” of land transactions might result in greater gender equality. Put differently, our idea was that the move from status to contract in land law would benefit women whose traditional status is a subordinate one. In researching this question, we found the reality on the ground more complex.

Women in Ghana principally access land through their own lineage (as members of the community just like men), through marriage (where they have access to land from their husbands’ families) or through contractual arrangements.¹⁷ Although women indeed may be able to access land in these ways, it may not be on the same terms as men. With respect to lineage land, we heard from many sources, and with respect to several different ethnic groups, that women may be

13. See MINKAH-PREMO & DOWUONA-HAMMOND, *supra* note 2, at 12, 17; see also Sarpong, *supra* note 7, at 6.

14. See Sarpong, *supra* note 7, at 2-3.

15. See MINKAH-PREMO & DOWUONA-HAMMOND, *supra* note 2, at 24.

16. See *id.*; Sarpong, *supra* note 7, at 7.

17. See DOWUONA-HAMMOND, *supra* note 3, at 31.

given smaller parcels of land than men and also more marginal land.¹⁸ “[C]ustomarily the man is seen as the one who has the strength to clear forests and to work the land that is difficult to work. So the women will be given land that is worked over and over again – so it is less fertile. It is also perceived that she cannot do as much so she gets a smaller plot as compared to men.”¹⁹ Researchers have estimated that women farmers till land that is half the size of that cultivated by men in all agricultural areas in Ghana.²⁰ This is sometimes justified by the observation that men and women use the land for different purposes: women tend to grow short-term crops such as tomatoes, peppers, or groundnuts, whereas men produce cash crops such as palm oil or coca.²¹ For example, one individual noted that women are put on marginal lands not for discriminatory reasons but because “you cannot put a smaller plot in the midst of cash crops. Like you can’t grow tomatoes under cocoa trees. So naturally [women] get more marginal plots.”²² And yet this too is a result of cultural norms regarding the work that is appropriate for women versus men.

Women and men may also be given different kinds of interests in land.²³ For example, in many places, women are generally not

18. Interview with Judge Aduama-Osei, Appeal Court, in Accra, Ghana (Apr. 27, 2010) (on file with author); Interview with Judge Mensah-Datsa, Circuit Court, in Accra, Ghana (Apr. 28, 2010) (on file with author); Interview with Nana Ama Yirrah, Executive Director, COLANDEF, in Accra, Ghana (Apr. 19, 2010) (on file with author); WILDAF GHANA, GENDER, ACCESS TO AND CONTROL OVER LAND IN GA WEST AND DANGME EAST DISTRICTS IN THE GREATER-ACCRA REGION 29 (Oct. 2009) (on file with author).

19. Interview with Dr. Dzodzi Tsikata, ISSER, in Legon, Ghana (Apr. 14, 2010) (on file with author); Interview with Lilian Bruce & Samuel Quaye, CICOL, in Accra, Ghana (Apr. 9, 2010) (on file with author).

20. Nii Ashie Kotey & Dzodzi Tsikata, *Women and Land Rights in Ghana*, in WOMEN AND LAW IN WEST AFRICA: SITUATIONAL ANALYSIS OF SOME KEY ISSUES AFFECTING WOMEN 205 (Akua Kuenyehia ed., 1998) (“It is estimated that in all three major ecological areas of savanna, forest and coastal agricultural areas women farmers cultivate holdings about half the size of those cultivated by men.”).

21. Interview with Thomas Ansere, Social Development Specialist, Land Administration Project, in Accra, Ghana (Apr. 13, 2010) (on file with author); Interview with Yirrah, *supra* note 18.

22. Interview with Ansere, *supra* note 21.

23. Kotey & Tsikata, *supra* note 20, at 215-18; BEATRICE DUNCAN & CAROLINE BRANTS, ACCESS TO AND CONTROL OVER LAND FROM A GENDER

permitted to clear land, the traditional means of acquiring customary freehold.²⁴ Instead, women are more likely to have a shorter term claim on the land, at most a life estate but perhaps much less – limited rights to gather nuts or fallen fruit, or firewood, or to cultivate short term crops until the land is put to different use. As one woman noted, “as a woman you cannot grow cash crops. You can only grow vegetables (tomatoes, pepper, groundnuts) that come every three months. But cash crops are in the domain of the men. Gathering rights are also granted to women for nuts, fruit that have fallen For those things – women have access. But as for ownership, it’s in the domain of the men.”²⁵

Women may also be vulnerable to losing even these limited rights because they are unable to make consistent use of the land. With respect to lineage land, this may be because they have left their home community to live in the community of their husband’s family and/or because their other household obligations preclude this kind of work.²⁶ “A woman has to leave her lineage land behind when she marries, especially if her husband is from another sub-region or clan. She is no longer considered to be part of her own family after marriage. In the case of a man, however . . . even if he leaves town or the village . . . [he] is still the heir of the land.”²⁷

The second and main means of access to land for women is through marriage.²⁸ Marriage is a very significant source of land for

PERSPECTIVE: A STUDY CONDUCTED IN THE VOLTA REGION OF GHANA 19 (2004) (noting that “access rights of men and women were less equal than initially presumed as women’s rights were generally “‘secondary’ rights (i.e. rights obtained through others – mainly male relatives). As a result, women feared that they could be the first to lose their access rights due to growing population pressures, agricultural intensification and commercialization.”).

24. MINKAH-PREMO & DOWUONA-HAMMOND, *supra* note 2, at 23; Sarpong, *supra* note 7, at 8.

25. Interview with Yirrah, *supra* note 18.

26. MINKAH-PREMO & DOWUONA-HAMMOND, *supra* note 2, at 15-16; Interview with Academic, in Legon, Ghana (Apr. 14, 2010) (on file with author).

27. DUNCAN & BRANTS, *supra* note 23, at 21. This study found only 5% of women in the patrilineal communities studied were able to keep their lineage land after marriage. *Id.*

28. MINKAH-PREMO AND DOWUONA-HAMMOND, *supra* note 2, at 8, 14; WILDAF, *supra* note 18, at 37; Interview with NGO representative, Accra, Ghana (April 20, 2010) (on file with author).

women since it is the context within which men and women tend to live and work.²⁹ Studies have found that many women farm on land that is given to them by their husbands, particularly in patrilineal areas of Ghana.³⁰ Thus, women may be allotted a plot of land by their husbands on which they may grow tomatoes, peppers, groundnuts, crops that come in every three months, and those that are consumed by the family or sold in the market. Women's agricultural production on this type of land largely goes to support the needs of the family – food, school fees, etc.³¹ Women have an obligation to work on their husband's land as well.³² As a result, women of childbearing age – who have full responsibility for the household and the children as well as contributing labor on their husband's land – are at a great disadvantage relative to men in making productive use of any land that is allocated to them, reinforcing the bias against women's management of land resources.³³

Given the importance of marriage as a source of access to land for women, perhaps the most important problem facing women with respect to land rights is the lack of recognition of marital property. In Ghana, all property acquired during marriage is regarded as separate, belonging to either the man or the woman.³⁴ Certain presumptions (largely social but effectively legal) operate with respect to personal and real property, the latter being presumed the property of the husband for the reasons described above.³⁵ Upon divorce, the woman will have to prove the extent of her contribution over and above her expected marital obligation to work the land of her

29. Kotey & Tsikata, *supra* note 20, at 219.

30. *See id.* at 219; MINKAH-PREMO & DOWUONA-HAMMOND, *supra* note 2, at 14.

31. *See* Fenrich & Higgins, *Promise Unfulfilled*, 'supra note 1, at 277.

32. Interview with Tsikata, *supra* note 19; Fenrich & Higgins, *Promise Unfulfilled*, 'supra note 1, at 275.

33. Interview with Tsikata, *supra* note 19; *see* DOWUONA-HAMMOND, *supra* note 3, at 31-32.

34. Interview with Tsikata, *supra* note 19; Fenrich & Higgins, *Promise Unfulfilled*, 'supra note 1, at 276; Akua Kuenyehia & Esther Ofei-Aboagye, *Family Law in Ghana and its Implications for Women*, in *WOMEN AND LAW IN WEST AFRICA: SITUATIONAL ANALYSIS OF SOME KEY ISSUES AFFECTING WOMEN* 32 (Akua Kuenyehia ed., 1998).

35. Kuenyehia & Ofei-Aboagye, *supra* note 34, at 35.

husband.³⁶ This means that while the nuclear family may operate as an economic unity, customary law governing marriage does not recognize it as such.

Additionally, polygyny is quite common in many parts of Ghana, with men having no obligation either to obtain consent of an existing wife or to seek any kind of legal process.³⁷ When a husband takes an additional wife and land is scarce, the property to which the first wife has effectively contributed through her labor may then be reallocated to the benefit of the second wife without a partition of her share.³⁸ She may also be required to subdivide any land she has been allocated by her husband's family for the purpose of subsistence farming.³⁹

There is proposed legislation, the Property Rights of Spouses Bill, which has not yet been passed but would address many of the existing problems related to the lack of recognition of marital property. For example, section 23 of the draft bill would create a rebuttable presumption that any property acquired during the subsistence of a marriage is "joint property with the onus on the person who claims that the property is separate property to prove it is separate property."⁴⁰ It also specifically addresses the property rights of each spouse in a polygamous marriage⁴¹ and provides for the equitable distribution of property among spouses upon divorce.⁴²

Other customary arrangements exist through which persons with no or limited access to lineage land may acquire property. These involve trading labor for land access; essentially sharecropping.⁴³ Typically, this provides access to till the land and the tenant will then give a specified portion of the produce to the landlord at harvest.⁴⁴

36. *Id.* at 41-45.

37. G.K. NUKUNYA, TRADITION AND CHANGE IN GHANA 45 (2d ed. 2003); Fenrich & Higgins, *Promise Unfulfilled*, *supra* note 1, at 274; Kuenyehia & Ofei-Aboagye, *supra* note 34, at 25.

38. Tengey, *supra* note 3, at 145 (noting that a woman's access to land that has been obtained through marriage may change if her spouse "remarries under a polygamous arrangement.").

39. Interview with Tsikata, *supra* note 19.

40. Draft Property Rights of Spouses Bill (Ghana), §23(a).

41. *See id.* §20.

42. *See id.* §13.

43. Sarpong, *supra* note 7, at 3.

44. *Id.*

Such arrangements are common in some regions of the country and are well-recognized under customary law. They may give rise to long-term interests in the land depending on the nature of the crop being raised. Yet, for women, several problems exist with such arrangements. First, as we have mentioned, women are not perceived socially as farmers of cash crops such as palm oil or cocoa.⁴⁵ Second, women may have only limited time to devote to farming, given their other household responsibilities.⁴⁶ Thus, they are much more likely to have more limited contracts for short-term crops or perhaps weeding and maintenance. Third, even women without such constraints are perceived as less capable of making productive use of the land and thus not as secure a “bet” for the landowner in terms of the sharecropping arrangement.⁴⁷ Moreover, the verbal nature of these contractual arrangements often creates insecurity for women, who find that male landlords may arbitrarily change the terms of the arrangement and, increasingly, require tenants to turn over half of the crop rather than the one-third or one-fourth that had been standard practice.⁴⁸

Finally, before addressing the proprietary/commercial paradigm, we should mention the gender implications of dispute resolution mechanisms for property disputes under customary law. This paper omits discussion of formal legal procedures in state courts, which are typically too remote, complex and expensive for rural women to utilize.⁴⁹ At least two different ways of regulating and settling land disputes under customary law can be identified, each with its own advantages and disadvantages. At the local level, there is informal arbitration, where the procedures involve family or lineage elders, respected community leaders, religious leaders or special individuals agreed on by the disputing parties.⁵⁰ This form of arbitration is generally cheap and relatively easy to obtain, and the language, rules and procedures are well understood by ordinary people.⁵¹ However,

45. *See supra* notes 19-23 and accompanying text.

46. *See supra* notes 28-30 and accompanying text.

47. *Id.*

48. *See* Tengey, *supra* note 3, at 145.

49. *See* DOWUONA-HAMMOND, *supra* note 3, at 81.

50. *See* Interview Bruce & Quaye, *supra* note 19; Interview with Dr. Gertrude Owusu, in Legon, Ghana (Apr. 20, 2010) (on file with author).

51. *See* Interview with Tsikata, *supra* note 19.

enforcement of decisions or agreements reached as well as the perception that agreements may be involuntary, especially in situations where the social or economic power of the contesting parties is unequal (as often happens in cases of conflict between allodial land holders and strangers), are some of the problems of this form of arbitration.⁵²

A second more formal method is through chiefs applying local customary law.⁵³ Even though chiefs in Ghana no longer have legally recognized courts, chiefs from the village level right up to paramountcies⁵⁴ still play a crucial role in settling land disputes, using well-established institutions to apply rules that have adapted and changed over time to the new circumstances of land use. For example, in 1999, the Asantehene (King of the Ashanti people) authorized all land disputes in formal courts in the Kumasi Traditional Council area to be moved to traditional courts in the area.⁵⁵ Within a month of the order, all such disputes had been moved and several protracted disputes had been settled.⁵⁶ Again, under this more formal customary system, certain groups such as stranger farmers and women may be disadvantaged by the principles of customary law.⁵⁷

52. See, e.g., Gordon R. Woodman, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 9, 12-15 (Jeanmarie Fenrich et al. eds., 2011) (discussing how customary laws sustain inequality in communities and may be difficult to enforce).

53. WILDAF, *supra* note 18, at 54.

54. According to the Ghanaian Constitution, a paramount chief is “a person who has been nominated elected and installed as a paramount chief in accordance with customary law and usage.” *THE CONSTITUTION OF THE REPUBLIC OF GHANA*, May 8, 1992, art. 295. Another working definition of a paramountcy is “a stool which was not subordinate to any other stool.” Carol Lentz and Paul Nugent, *ETHNICITY IN GHANA: THE LIMITS OF INVENTION* 178 (2000).

55. KASIM KASANGA & NII ASHIE KOTEY, *LAND MANAGEMENT IN GHANA: BUILDING ON TRADITION AND MODERNITY* 26 (2001).

56. *Id.*

57. See, e.g., INTERNATIONAL FINANCE CORPORATION, WORLD BANK GROUP, *GENDER AND ECONOMIC GROWTH ASSESSMENT FOR GHANA 2007* 18 (“In dispensing justice according to customary law, women have often been subjected to unfair treatment especially in communities with gender discriminatory practices. . . . In northern Ghana for example . . . [w]ith no gender balance in these panels adjudicating justice, the women’s perspective is not appreciated and thus creates

IMPACT OF COMMERCIALIZATION ON WOMEN'S ACCESS TO LAND

Although a majority of land in Ghana is still family or lineage land where customary law and kinship dictate and constrain access, the proportion of land that is traded in the market is increasing. Studies have documented the impact of rapid urbanization and emerging land markets in peri-urban areas in Ghana.⁵⁸ Given the problems discussed above with respect to women's access to land under customary law, one theory is that this move toward market alienability is also a move toward greater gender equality in land access.⁵⁹ In Ghana, women face no formal legal impediment to acquiring land in the market place. If they have the resources, they may purchase or lease land.⁶⁰ For this reason, some have argued that the increasing privatization favors women who are no longer constrained by traditional norms and assumptions about women's ability to acquire and manage land.⁶¹

Here again, the reality is somewhat more complex, and it is important to look at the practice, not simply the legal norms. In theory, women with the financial means may legally be able to access land through the market to the same degree that men can. That said, even women with means and the knowledge to do so face considerable social stigma when entering a land transaction. We were told repeatedly that social norms disfavor women owning land in their own right. Rather, they must acquire land in the name of a

the likelihood of entrenching the practices that brought the woman to court in the first place.”).

58. See, e.g., Janine Ubink & Julian Quan, *How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana*, 25 LAND USE POLICY 198 (2008) (discussing increased commoditization and attendant land struggles in peri-urban areas in Ghana); KASANGA & KOTEY, *supra* note 55, at 16-18 (documenting the changes in land tenure in the Ashanti Region).

59. See Susie Jacobs, *Land Reform: Still a Goal Worth Pursuing for Rural Women?*, 14 J. INT'L. DEV. 887, 892-93 (2002).

60. See RUNGER, *supra* note 4, at 6.

61. See Interview Bruce & Quaye, *supra* note 19 (noting that women in urban areas who have money are now empowered to purchase land and will it to their children); Interview with Aduama-Osei, *supra* note 18 (describing how women are gaining financial independence and so able to access land in similar ways to men).

man, their husband, brother, or father.⁶² “Sometimes cultural prejudices affect a woman’s ability to acquire land through the market. Some people are not happy to sell to women so they have to get a male to formally acquire the land. That’s also another source of insecurity” because the land is in the man’s name.⁶³

Moreover, and more importantly, women make up a disproportionate share of Ghana’s poorest citizens.⁶⁴ They are simply less likely than men to have the resources to purchase land.⁶⁵ As noted by one individual working on land administration issues in Ghana, “If you look at household surveys and income surveys you find that women are among the poorest in Ghana so I can’t see how they are liberated by having to purchase land, which is also becoming more expensive.”⁶⁶ The increasing privatization of land affects these poor women in complex ways. Traditionally, family land was valuable to the extent that it could be put to productive agricultural use. Thus, women had access to parcels of family land (or perhaps through their husband’s family) if they were capable and willing to farm it. Granted, the crops they were expected to farm were not cash crops, which in turn affected the types and amounts of land they were given, but they did have access.⁶⁷ When the value of land increases

62. See Interview with Tsikata, *supra* note 19; Interview with Ansere, *supra* note 21 (in rural areas, especially in Northern Ghana, “a woman cannot go and buy land herself. She has to go with a male relative to speak to the landlord. So to some extent that limits women’s access to land because it has to be done through a male intermediary.”).

63. See Interview with Tsikata, *supra* note 19; Interview with Aduama-Osei, *supra* note 18 (describing how cultural pressure on women leads them to put property they acquire independently in the name of their husband and when a dispute arises, the man “will want to exploit the situation and claim the property for himself.”).

64. See Tengey, *supra* note 3, at 143; DOWUONA-HAMMOND, *supra* note 3, at 29.

65. See RUNGER, *supra* note 4, at 6; Interview with Sheila Minkah-Premo, NGO Representative, APEX Consulting, in Accra, Ghana (Apr. 20, 2010) (on file with author) (“[W]omen, especially rural women, are disadvantaged because they don’t have as much cash to buy” land.); Interview with Yirrah, *supra* note 18 (noting that “most women engage in very low level economic activity like on a subsistence basis just to feed the family and not capable of allowing them to acquire property”).

66. Interview with Ansere, *supra* note 21.

67. *Id.*

because of its potential for commercial development, traditional decision-makers may be more reluctant to allocate land to members of the community and instead seek to sell or lease it.⁶⁸ This has led to a number of conflicts between community members and their traditional leaders in Ghana.⁶⁹ It has also led to increased displacement and landlessness in peri-urban areas.⁷⁰ When this happens, it tends to put pressure on the weakest members of the community, often women, migrants, and young people, making it more difficult for them to obtain land allotments.⁷¹

In addition, when land is transferred for commercial purposes by purchase or lease, a number of different types of claims to the land might exist. The customary freeholder may seek to transfer his “title” to the land without necessarily recognizing other types of rights held by others – sharecropping arrangements, for example, or the right to gather.⁷² Cash crop production is more valued in terms of compensation “but the women engage in small production like tomatoes and cassava, which are considered insignificant in terms of valuing for compensation.”⁷³ Thus, the sale or lease might be transacted without compensating other kinds of claimants to the land, their claims being more difficult to document and to value. As explained by one NGO working on land issues, “the rural communities in Ghana are the target of investors to acquire large concessions and use it for production. Women wake up overnight and see their land taken by some investors. And they don’t have any

68. Janine Ubink, *Land, Chiefs and Custom in Peri-Urban Ghana*, ISS Conference, *Land, Poverty, Social Justice & Development*, The Hague (Jan. 9-14, 2006), at 3; MINKAH-PREMO & DOWUONA-HAMMOND, *supra* note 2, at 21.

69. *See* Ubink, *Land, Chiefs and Custom*, *supra* note 68, at 6.

70. *See* KASANGA & KOTEY, *supra* note 55, at 18.

71. *See id.* at 18; Susana Lastarria-Cornhiel, *Women’s Role in Agriculture and in Rural Welfare: Access to Land and Resources*, U.N. Doc. EGM/BPFA-MDG/2009/EP.1 (Nov. 4, 2009) (“An examination of the privatization process in a number of regions reveals that where previously different rights to land were distributed among different groups and individuals, privatization tends to concentrate most of these land rights in the hand of a minority. Because of economic and cultural factors and the influence of powerholders, this minority tends to exclude women.”).

72. *See* NII ASHIE KOTEY & MARK OWUSU YEBOAH, *REPORT OF A STUDY ON PERI-URBANISM, LAND RELATIONS AND WOMEN IN GHANA* 16, 28 (May 2003).

73. Interview with Yirrah, *supra* note 18.

say because there is no documentation of any interest that they may have had in the land.”⁷⁴

CONCLUSIONS

Legal pluralism itself is not the problem in terms of women’s land access. Rather, it complicates a system that lacks transparency, a system of recording, consistency in definition, clear choice of law rules, and jurisdictional boundaries for the resolution of disputes. All this complexity and information asymmetry benefits the powerful, most of whom are not women. At the same time, one can imagine a system by which customary law governs certain transactions and statutory law governs others, so long as the boundaries are clearly demarcated and the process by which lineage land is conveyed across that legal line is clearly defined. The entire range of rights allocated under customary law could then be respected and compensated upon transfer.

Yet, solving the problem of information asymmetry and reducing the complexity and confusion is still not going to solve the underlying problem of women’s inequality with respect to access to land. Women face discrimination in land access under both customary law *and* common law, discrimination that stems from broad cultural assumptions about women’s labor and their relationship to the land.

Simply put, the labor that women typically engage in does not translate into property rights. Rather, it is uncompensated caregiving for men and children. It is already owed to the husband as part of the marriage contract. Or, it is the type of work on the land that simply is defined as not conferring rights. Consider the work that men do: clearing land, growing cash crops, and mining, all of which give rise to long term interests in land. Women grow seasonal crops, engage in maintenance work (weeding, gathering), all of which yield at best short term interests. Further, should women overcome the odds and marshal the resources to purchase or lease land on her own, she faces cultural taboos in doing so. Couple these problems with the lineage based concept of family, a virilocal system

74. *Id.*

of marital residence, and the lack of a notion of marital property, and women's access to land becomes much more tenuous than men's.

Better information and clarity regarding land ownership and transfer at all stages will benefit women, but this does not necessarily move away from traditional forms of access to land. Recall the importance of customary forms of access for many poor women. Even though these traditional forms of access may be inferior to men's access and less secure, for women who have them, it may be all they have.

Instead, what needs to happen is a move towards greater recognition of women's economic labor by changing rules such that this labor can be translated into enforceable rights.⁷⁵ To this end, the single most important legal change would be enacting the Property Rights of Spouses Bill, which would create a legal presumption in favor of community of property in marriage. Consequently, women's economic contributions to the family will be recognized and enforced upon divorce or death of the husband.

Such a change would have the affect not simply of securing women's access to land but would also alter the balance of power within marriage such that the woman's access to land, which is often her livelihood, is not dependent on the good will or whim of her husband's family. Under such a regime, women would be much more capable of negotiating joint decisions within marriage. Improving the bargaining power of women has been shown to have indirect benefits as well, including improved economic growth for the household and, where systemic gender-based obstacles to economic development are removed, GDP growth.⁷⁶

75. Note that in the United States, this type of change took place in the 1970s and 1980s in divorce law reform. Women who worked within the home, cared for their husband and supported his career were entitled to alimony, support until they remarried, not a property right *per se*. Today in most states these forms of economic contribution are regarded as giving rise to a property right for women. Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 46 (2011) (discussing the rise and fall of alimony in the United States).

76. See INTERNATIONAL FINANCE CORPORATION, *supra* note 57, at 26-28.