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WOMEN AND THE STATE IN AFRICA: MARRIAGE LAW, INHERITANCE, AND RESETTLEMENT*

By Jane I. Guyer

The confrontation between kinship and the state is one of the oldest and most persistent in political history. Although state power can be directly served either by undermining or by shoring up kinship authority, the relationship between the two sets of institutions cannot easily be reduced to state functions and interests. The state has been, and continues to be, a context for staking claims, a recourse for those who have experienced discrimination, and an arena for debate, as well as an arbitrary, inconsistent, or repressive authority. In possibly no case does the resultant panoply of measures that can be grouped into the category of family law form a logical whole, applying unambiguously and predictably to all eventualities. American family law may be as inconsistent and indeterminate over reproductive rights of various sorts (such as with surrogate mothers, or the rights of the embryo) as African family law at the state level is over the property rights of women.

It is with this possibility of gaps and inconsistencies in mind that one should look at the concern expressed over the apparent gradual erosion of, or in any case lack of improvement in, women's land rights in many different parts of the continent (Pala Okeyo 1980, Jacobs 1984; Okali 1983), and at measures for improving the situation. It *is* an important concern. It is not only basic considerations of welfare for the female population that are involved, but also considerations of general prosperity. Insecure access to the land for whatever reason makes certain kinds of long-range financial, investment and organizational commitment less attractive or even impossible if "ownership" of the land itself is a condition of making such commitments in the first place. But beyond the immediate policy concern with incentives for women farmers is the larger and crucial question of what sort of legal framework will provide a basis for the African small farm sector, since family law has provided that framework almost everywhere else in the world.

Various policy statements about women's farming point to the issue of women's land rights and some exhort policy changes to turn back the tide against women's apparently increased vulnerability to dispossession in Africa. What is somewhat lacking in this literature,

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however, is a sense of this wider framework of family law and practice, including (1) a comparative sense of the directions in which land tenure systems are shifting; (2) a sense of the relationship this bears to legal enactments and to the gaps and inconsistencies in the formal legal sphere; and (3) a sense of how this all relates to the "evolution" of African familial institutions. No intervention, for whatever motives and with whatever goals, can envisage predictable "outcomes" without attention to the intersection of these processes. For example, Goody's (1976) claim that a specifically African mode of inheritance is characterized by homogeneous devolution, where female property is inherited in the female line, cannot be counted on to "take over" if and when women acquire rights to a new category of property. This is simply not the case; as Chanock has pointed out (1985), precolonial law and current customary law are two entirely different things. Simons describes the situation in South Africa, where an African woman may become a registered owner of certain categories of land but it "must devolve on a male heir in accordance with the tribal rule of male primogeniture. . . . Land held by a woman in her own name cannot therefore devolve on her daughter" (1968:262). A grant of land rights to women therefore cannot revolutionize women's land access over time unless it is buttressed by provisions in the marriage and inheritance laws; the on-going result of redistribution cannot be deduced from the initial intervention.

The situation we need to look at more closely is this: A variety of sources converge in agreement that at the level of national law and state-backed customary law, the major intervention in the African family has been at marriage. Interventions with respect to what would be defined in Western legal terms as inheritance – that is, transmission of rights at death – has been minimal. Marriage has been transformed, in some cases practically re-invented; it has been a subject of passionate public debate and untold amounts of time spent in court. The relative silence on inheritance is deafening.

What makes this particularly fascinating for a comparativist is that other major cases of state or church intervention in family law have taken the two together. Goody's interpretation of changes in European marriage law in the Middle Ages revolves around interests in the devolution of property (1983). The separation of the two stages in the life cycle, with such marked differential intervention by the state, makes modern African a very particular case of the state/kinship relationship.

The following discussion first of all documents briefly this history of differential state intervention in marriage and inheritance. On the assumption that dilemmas are regularly posed by a situation in which one stage of the life cycle is covered by one set of constructions and another by a different set, the paper then explores possible strategies for researching how such dilemmas might be dealt with by the two sets of

"actors," namely local populations and the state. One might then get a sense of where the relevant struggles are, between whom, and the terms in which they are being waged. Although the paper does not get to this last agenda, it should be the ultimate aim.

Marriage and the Transmission of Rights in Law and Practice

Marriage and inter-generational transmission are intrinsically related as phases in the life cycle and as links in the chain of property devolution (cf. Goody 1983). In African legal history the provisions of indigenous marriage have been the subject of legal intervention to a greater extent than inheritance. As far as I know, every African country recognizes the devolution of "real property" through customary law or practice. The alternative legal mode of wills does exist but is not much used, even by the wealthy. The Cameroonian legal reforms of 1966 serve as an example of attention to marriage without attention to inheritance; the conditions of marriage (such as consent, means of contracting, and grounds for divorce) were all redefined, but the implications for the next generation were not, and deliberately so because of the massive social revolution such a change would have implied (Melone 1972). Although the gains of the new law with respect to women's legal status cannot be understated, the effects of a law which leaves inheritance undefined must remain limited when one of the main "functions" of family law has been to regulate the transmission of wealth, status, rights and obligations from one generation to the next. One of the most sweeping changes in land law, the Nigerian Land Use Decree of 1978 also retains the legitimacy of customary tenure, subject to revocation by local government (Francis 1984). Political and administrative pragmatism and expediency have dominated where inheritance is concerned.

For marriage, by contrast, legal intervention has often been justified on general principles, on moral and political rather than pragmatic grounds. In countries with quite different general policies and agendas, the principle used to justify selective intervention in indigenous family law has been whether its provisions transgressed "principles of public policy and natural justice" (Simons 1968:64, with respect to the Transkei Constitution Act), or "the notion of public order" (Melone 1972:77, with respect to Cameroon), or the discrimination clause in the Constitution (May 1983:100, with respect to Zimbabwe). In general, intervention has concentrated above all on eliminating those aspects of indigenous practice which either (1) permitted the transfer or rights in people without their consent, such as the betrothal or marriage of minors, the inheritance of widows and the pledge of minors against a debt – that is, those which left a continuum of status gradations between "marriage"

and "slavery," rather than a qualitative, definitional distinction; (2) gave women wide leeway for what was seen as capricious choice in marriage, sexual relations, divorce and residence (see Chanock 1985); or (3) aroused European moral repugnance. An example of the last is given in Mary Douglas's note on what she terms the institution of the "village wife" among the Lele of the Kasai (1958:128-129). A legal order passed by the Belgian colonial government in 1947 states: "Amongst the forms of polygamy for which the Colonial Charter of the Governor gives him the duty of encouraging progressive abandonment, the least compatible with the notion of public order and sound morality (*bonnes moeurs*), the most disastrous also for the populations given to it, is incontestably polyandry. . . . It compromises natality and reduces to nothing the effects of our civilizing actions."

In most places, both British and French colonial legal practice increasingly favored marriage by bridewealth, which combined the features of being associated with marital stability and limiting women's ability to be "capricious," with male authority and with a clear inter-family public contract marking the relationship. Bridewealth rights, however, are heritable rights; in bridewealth systems a woman is always linked to a "guardian" who receives the bridewealth on behalf of her family. His right in her is a heritable right in a person which is realizable as real property. Arising, then, is a particular configuration of legal elements: the elimination of the transfer or inheritance of rights in people without their consent, alongside both non-intervention in (in the case of inheritance or real property) and actual reinforcement of (in the case of bridewealth) property transactions which mutually implicated rights in property and rights in people. As Chanock has written: "law came to persons first and then to property" (1985:233), but with respect to bridewealth, the two are intrinsically linked. The transactions of marriage increasingly formalized under customary law necessarily reach their influence forward into the transmission process later on in life, a process hardly envisaged in the formal legal sphere.

This seems to me the context in which to understand a local dynamic in many parts of Africa which has so far evaded any general understanding, namely the development, persistence, and in some cases inflation in marriage payments. Questions raised earlier (Guyer 1981) have continued to be puzzling. There is a long history of predicting the downfall of bridewealth as an anachronism, but this has not happened. Whether new studies point out new "functions" or uses people can make of this institution, such as redistribution of migrants' remittances in the Southern African periphery (Murray 1977), or continue to demonstrate the "few apparent material benefits" to be derived from marriage payments (Burman 1984:135), it has certainly not died out as predicted. Some point out the incorporation of measures from "custom," such as

bridewealth, into the formal state legal structure (Chanock 1984), while in other arguments, the past weighs heavy on the people themselves, such that "Men and women cannot easily free themselves from the network of kinship claims, inherited debts and recurring obligations attached to the lobolo institution. It is because of this entanglement, as much as its legal significance in tribal marriage, that lobolo has persisted beyond its span of useful life" (Simons 1968:94). In some countries legal measures have even been taken against bridewealth payment, apparently without much effect on the practice itself (Guyer ms).

One of the lines of enquiry about bridewealth — or marriage payments more broadly — which has not yet been systematically explored is their implications for intergenerational access to resources within the changing legal frameworks set up by the state. The question with respect to state intervention in family law is not only what has been done, but also what has not, and how the two are brought into consonance over the life cycle by those whose livelihood is crucially framed by the provisions.

In all customary systems, bridewealth rights in a woman are heritable and realizable in the material sense, and also have fundamental implications for legitimation and the intergenerational transfer of property. A young woman's guardian holds bridewealth rights in her by virtue of inheritance, regardless of whether she has freedom of choice in her marriage. Possibly because bridewealth rights do not necessarily infringe heavily on a woman's rights of choice and consent (at least at the initial marriage, though not perhaps in case of divorce), and because bridewealth was taken by colonial governments as the indication of a legitimate customary marriage, these payments have been treated as if they were a customary property right and not a transferable right in a person, to be judged contrary to "public order." In fact, even in those few cases where a woman may have some say in who her guardian (i.e., the holder of bridewealth rights in her) is to be, she cannot choose *not* to have a guardian at all, except possibly by migration and evasion of any pursuing kin. Since marriage payments mobilize and implicate claims on property, it seems a useful line of enquiry to ask how they become a focus of interests and concerns which may center far more on marriage as a phase in intergenerational resource transfers than on marriage per se.

Before illustrating different processes whereby marriage payments and inheritance are drawn together into a sequence defining devolutionary claims, let me just note that this issue is not relevant to the peasant sector alone. In the early 1980s one of the key figures in recent Cameroonian political history died, leaving a very valuable estate comprising, among other wealth, real estate rights in the capital city which — it was said — included the land on which the American

ambassador's residence was built. The widow whom he had married in civil, religious monogamous law was childless. He had other wives married through bridewealth and customary practice, who, in the strict letter of the law, were his "fiancées." Their children, his heirs in customary expectation, held ambiguous rights, if any, in his property since the current marriage law does not recognize bridewealth ("la dot") as the sign of a legitimate marriage, and I am not sure whether it is possible, once married under monogamous law, to legitimate individual children born to otherunions. The actual distribution of the property had been left, when last I knew, in the hands of the larger "family," who undoubtedly would have recourse to some version of customary practice. All property, and not just the land rights of the poor, is potentially subject to links forged between legitimate marriage and inheritance.

Three kinds of links between marriage payments and claims on property emerge from the literature surveyed so far. First, there are areas particularly in Southern Africa, where land is redistributed and where the landholding unit is the married man (see Simons 1968; Poulter 1977; Spiegel 1980). In this kind of system bridewealth payment is directly instrumental in resource control, and not only a means of legitimating its transfer to the next generation. Although I have not been able to trace this out yet, it seems logical that some aspect of bridewealth payment should directly reflect the demand for land. For example, the outsider to Southern African studies is puzzled by the coexistence of a processual payment of bridewealth over a time period of up to ten or more years before the marriage is sealed (with respect, at least, to the legitimacy of the children) and the apparently exigent stipulation that one had to be married to own land. In the event, a man may in fact be able to allocate his land rights to sons before his death, thus circumventing the marriage requirement, but it is not yet clear to me how this might work. The one dimension worth noting is that the situation seems ripe for improvisations in which bridewealth may figure in an influential way.

Second, wherever marriage payments are permitted or recognized as an aspect of customary marriage, their heritability supports the claims of the customary heir to bridewealth rights in the widow and her daughters on the estate against any claim the widow might be able to mobilize on other legal grounds. The recognition of customary inheritance is powerfully supported by the marriage payment system in which the wife, widow, and girl-orphan are always conceptualized as under the guardianship of a man who inherits bridewealth rights and concomitant responsibilities with respect to them. Even if these rights are not themselves very valuable in real terms, they symbolize his pre-eminent right to make claims on the rest of the property. According to May, Zimbabwean family law can function to leave a widow not only without access to her husband's farm or business which she may have

helped to establish and run, but also to such formal sector assets as his life insurance and widow's pension written into formal sector employment contracts (1983:92-99).

Finally, wherever inheritance is left in customary law, the transfer of marriage payments — typically a collective and ceremonial occasion, with distributional rules for the participants — is an occasion on which allegiance and membership are demonstrated, thereby defining primary and reversionary rights in real property. On the basis of a history of marriage payments in Southern Cameroon, I have argued that the level of payment, and its distribution between the central payment to the bride's father and the "ancillary" payments to her kin, have shifted over time in consonance with the basis of power and wealth in the regional system. In the early part of the century, the central payment dominated and was high, a configuration I associate with recourse to marriage as a personal clientship strategy by the indigenous chiefs and influential "capitas" who made the colonial administrative hierarchy function at the lower levels. Since the development of the small-holder cocoa economy, the ancillary payments to other patrilineal kin beyond the girl's immediate senior kinsmen have become much more important, a trend which I interpret to be associated with the politics and economics of the increased importance of descent groups. At a wedding, punctilious attention is paid to every single participant's receipt of something given by the groom, if only a cigarette and a box of matches; the whole occasion defines and restates kin-based claims (see Guyer ms). It is important to note that women increasingly figure as *recipients* of marriage payments. In particular, the daughters of the patrilineage, including the bride, are very concerned to be recognized as lineage members, a concern which is perhaps related to the increased phenomenon of late marriage for women, separation and divorce, all of which leave women dependent on their ability to mobilize land rights and other resources through their natal lineages, rather than solely through their husbands as in the past.

Bridewealth, in summary, is an accepted institution which, because of its intrinsic relationship to claims on property, lends itself to "capture" by a variety of different interests and for shifting purposes as people work out, with little direct legal intervention, the meaning of "customary" inheritance in a changing resource structure. In some systems, such as the Zimbabwe case, a woman's submission to the bridewealth system may ensure her use rights in land for the duration of her marriage, but leaves her extremely vulnerable at the death of her husband. In the Beti case, women seem to have elaborated their role not just as the object of marriage transactions, but as recipients, thus building up a set of claims which may need to be activated in case of divorce or death. The specific dynamics between marriage payments and devolution are varied; the

common theme I want to stress is that this process of linking is improvisational and therefore likely to involve struggles over the indeterminacies.

Those of us concerned about women's access to productive resources should pay close attention to the life cycle implications of legal interventions in any particular system to follow through the observation that any change in rights necessarily requires changes in transmission, which — in most African rural societies — deeply implicates the accumulated debts, credits, and interests of the marriage payment system.

This situation is quite fascinating in a comparative context, leading back to the question of what state interests and capabilities have been with respect to land. Unlike the church and state in European history, African states have so far not intervened in a coercive fashion to produce private ownership and narrow lineal inheritance, possibly because (to extrapolate from Goody's argument, 1983) there are no interests in land accumulation to be served by such a slow and gradual route toward dispossession. Where dispossession is implemented by the authorities in Africa, it is achieved quickly through relocation. The policy link between family law and accumulation is likely to be quite different in the two cases, the one in which the state (or the church in the Middle Ages) has an interest in maintaining a stable productive base and only slowly accumulating land through the operation of a more consistently restructured family law, and the other in which the productive base is of less importance (as in modern mineral economies) and where land accumulation can be achieved by outright dispossession. It seemed to me, then, that resettlement was a prime topic through which to address the way in which the state in Africa, by contrast and comparison with local populations, has structured the legal cycle of the family. First of all, resettlement is in some sense an analog of medieval intervention in inheritance law; and second, it is a moment at which some kind of consistent theory or model of the relationship between family and property has to be enunciated, whether the specific legislation exists to do so or not. The moment at relocation, then, when coercive models of family and property *are* mobilized by the state, may be a moment through which to illuminate the other side of the dynamic — namely, state policies.

The Family and the State in Resettlement

One can start with the assumption that moving people by force requires some concept of the organizations to be moved — an idea of their size and structure at the very least. In principle, state rubrics for resettlement should reveal what kind of family is envisioned, perhaps

more starkly than the tangle of legal provisions and precedents themselves. Again in principle, the on-going development of property control after resettlement should reveal how these rubrics and the dynamics outlined in the first section intersect with one another and with what results.

This section of the paper is rather schematic. For strategic purposes I looked at two totally different forced resettlements which I though would be documented in detail: the Gwembe Tonga removal in 1957 and 1958 for the construction of the Kariba Dam, and the recent forced removals in South Africa. In neither case, unfortunately, has the formal legal framework and the government plan been drawn out clearly in the literature and my own reading has not been detailed enough so far to do this.

One cannot help, however, but be struck by the apparent relative lack of legal attention to the settlement phase over the removal phase. In Gwembe, individual household heads, the number of dependents, and certain kinds of property were censused and compensated for (Scudder and Colson 1972:47). On the principle that chiefly authority should not be eroded, the actual relocation, rehousing and re-establishment of fields was undertaken by people themselves, with their own forms of organization, drawing on the cash compensation paid to finance the move. Certain categories of the population clearly gained: chiefs claimed the most desirable upland farms, and women lost rights relative to men (Colson 1971:197, 127). The shift from intensive riverine farming to extensive upland farming implied a regular need to clear new land, and women were unable to mobilize the necessary male labor. Colson argued in 1980 that matriliny has persisted, but it remains somewhat unclear how farm transmission works. The unit of removal (from the point of view of the government and for the purposes of compensation) was the family, while the unit of resettlement seems to have been the chieftaincy. Once people were removed, there seems to have been very little state interest in regulating land access.

A similar elaboration of the law with respect to removal by contrast with the law of settlement is the case in South Africa. The series published under the Surplus People Project includes detailed discussion of the legal process of getting people off the land, and reveals — more or less by its absence — the desultory attention to the legal status of the "settlers." Rights in land and whatever construction there may be are hardly mentioned, although a legal definition of "dependents," and therefore of the family, does exist for the purpose of defining urban Section 10 rights. Dependents are defined as "a wife or one female partner in a customary union, dependent and unmarried children, disabled and dependent children, parents and grandparents who are dependent of the urban resident" (SPP 1984:1, 113). A large proportion of

those removed seem to be actually renting in the Homelands, rather than owning anything, although renting from whom is a question still (in my less than thorough reading) unclear. People apparently try to establish their own rights, but this process is controlled by the local authorities, acting under rubrics which have included the "one man, one lot" provision of "tribal" distribution. In other words, the Southern African situation allows the state to avoid closing the legal circle of the familial life cycle by shifting the entire definition of the transmission of rights into the "customary law" operative in the Homelands.

As Sandra Burman writes of urban South Africa (rather than the Homelands) the marriage and divorce provisions may interact with apartheid administrative controls "to produce effects not contemplated in the logic of either system" (1984:134). In fact, her own work and that of others on South African family law and resettlement suggests a vast confusion of Catch-22s. This produces a situation in which there must be equally vast "play" at the implementational level, for all kinds of local agendas to find expression, and for anything resembling "family law" to be an improvisation in which the claims established through the marriage transactions of lobolo must figure prominently.

The two cases are suggestive for comparative purposes with other times and other places: the state engaged with the family only to move people out but not to define devolution and on-going functioning. South African policy seems to have developed this to a high level of deliberate sophistication, where "certain tribal elements, which were readily available, were being retained and manipulated in order to form a basis on which the new structures of disorganization could be built" (SPP 1984:1:40). But whether with such deliberation, through the inability or unwillingness to do otherwise, or through conviction that customary inheritance ought to be the basis for resource control, the pattern seems to be much more general than the obviously repressive cases: initial state intervention through resettlement without projection of the predictable legal implications over people's lifetimes.

It becomes important, then, to look at cases where more than shifting people out of the way was at stake, where the state had an on-going interest in the operation of family law. The villagization program in Tanzania presents such a case, as would the recent relocation of people on former white farms in Zimbabwe. The entire gains of such programs in terms of structural change in agriculture and in political organization would depend on resource transmission *not* reverting over time to the multiple layers of rights of "communal" tenure, nor to the acute indeterminacies and struggles of a mixed legal framework.

Let me close with one or two conclusions and suggestions. First of all, it seems helpful to interpret all current family and land law in the

context of governmental processes, even if these are conspicuously absent rather than robustly present. All interventions from above and innovations from below form part of the process whereby resource access is shifting for women. Second, it seems to me that there can be no state-level intervention of behalf of women's property rights -- except, of course, to counteract previously discriminatory law -- without attention to devolution and transmission as it is developing on the ground.

In terms of research, property transmission in present-day situations needs to be looked at in a life cycle perspective, including institutions such as marriage payments as an intrinsic part of that devolution, rather than seeing such apparent "persistences from the past" as somehow unrelated to state interventions in family law and to people's own innovations with respect to property transmission.

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