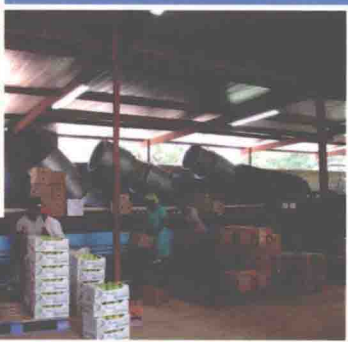
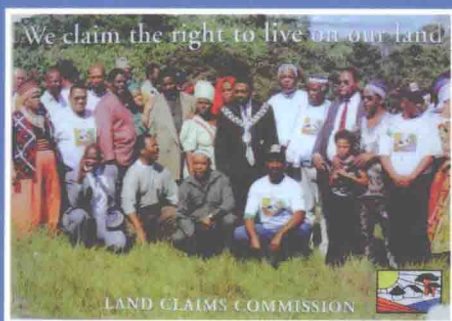


Worlds of Human Rights

AFRIKA-STUDIECENTRUM SERIES

The Ambiguities
of Rights Claiming
in Africa



Edited by
Bill Derman
Anne Hllum
Kristin Bergtora Sandvik

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Worlds of Human Rights



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

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CHAPTER ONE

ETHNOGRAPHIC AND HISTORICAL PERSPECTIVES ON RIGHTS CLAIMING ON THE AFRICAN CONTINENT

Bill Derman, Anne Hellum and Kristin Bergtora Sandvik

1. *Introduction*

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

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

¹ Commission p. 2.

refugees and internally displaced persons, and indigenous peoples,”² its ambitious goal is to initiate “a process of systemic change through which the poor and excluded become able to use the law, the legal system and legal services to protect and advance their interests as citizens and economic actors.”³ The Commission’s simplistic outlook on the transformative capacity of human rights combined with critiques of a human rights based approach (Banik 2011) has prompted the editors of this book to present a collection of ethnographic studies from Sub-Saharan Africa that highlight the complex legal pluralities of claims-making processes from the perspectives of individuals and groups who are using human rights to frame their agendas.

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

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

² Commission p. 6.

³ Commission p. 3.

changing property relations, growing land scarcity and the demand for more effective land use. Land struggles and land rights are central to virtually all debates about how to overcome the poverty that characterizes so many rural areas in Africa. While access to land is not an established international human right, it is essential for the exercise of other rights, among others, the right to housing and livelihood, and women's rights to equality. In opposition to market-based policies, intensified privatization and commodification are human rights-based approaches which view land as central to livelihoods, to status in society, to identity and in general to what constitutes a dignified life in the contemporary world (Ikdahl et al. 2005). Land struggles were at the core of anti-colonial struggles and later in the liberation wars of southern Africa. While much land has been regained from the former colonial powers, much has remained in white hands in the large scale commercial farming sector following independence. However, as Zimbabwe, Namibia and South Africa have attempted land reforms, they have been constrained by international financial institutions and donors to opt for market-led ones rather than rights-based reforms. In addition, African states are aiming at unified legal systems, while rural Africa is primarily governed by a plurality of norms and institutions.

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

Human rights are also central for the victims of humanitarian emergencies, who are affected either by large scale displacements caused by repression, conflict or natural/man-made disasters, or by the more individualized tragedies caused by the HIV/AIDS epidemic. The quest for legal identity and for social and cultural membership rights in a community remains central to the fulfilment of basic rights and lives led in dignity. These rights require gendering since domestic duties often place women at risk of rape and other forms of violence. In Part III, case studies from Uganda, Eritrea

and Malawi untangle the transformation of political agency and rights claiming that occurs when individuals become the object of humanitarian 'interventions' and when international humanitarian actors become targets of such claims, in addition to, or to the exclusion of, the African state.

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

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

2. *The Globalization of Human Rights*

While economics-based discourses had dominated international development initiatives since the 1950s, the human rights framework began to

gain purchase in development circles in the late 1980s. This led to a renewed and expanded argument for the importance of human rights in development at the United Nations. Emphasizing the link between development, democracy, good governance and rule of law, the good governance matrix, which formerly gave prominence only to core liberal values embedded in the civil and political human rights, was expanded to include socio-economic rights. As part of these considerations, the United Nations attempted a synthetic Right to Development⁴—an integrated version of social, economic, cultural, civil, and political rights. Seeking to overcome development strategies which didn't include women, children and other socially marginalized and vulnerable segments of the population, the human rights based approach to development (HRBA) was adopted by the United Nations in 1986.⁵ While the right to development itself has been sidelined, the emphases upon the inter-connection among the array of civil, political, social and economic human rights has increased (Andreassen and Marks 2006; Musembi and Cornwall 2004). This trend is reflected in a rapidly growing body of human rights literature dealing with the right to a livelihood without discrimination in terms of land, food and water (Ik Dahl et al. 2005; Eide and Kracht 2009; Langford and Russell 2013; Hellum and Sinding Aasen 2013).

As HRBA was adopted as a guiding framework for states and international organizations, a new set of possibilities for social action was raised linking non-governmental organizations and development ones.⁶ The broadening of human rights into these new arenas and the use of socio-economic rights in addition to civil and political rights produces new contestations (Crawford and Andreassen 2013). State parties in most parts of the world have been reluctant to incorporate social and economic rights into national law although there are important exceptions (Liebenberg 2010; Viljoen and Louw 2007; Andrews 2008). In spite of state resistance there is an increasing body of social rights jurisprudence in most countries which demonstrates how human rights principles are being integrated in

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

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

⁶ The HRBA has been adopted in Norwegian, Dutch and English development policies. The United States government and the World Bank have resisted using HRBA.