



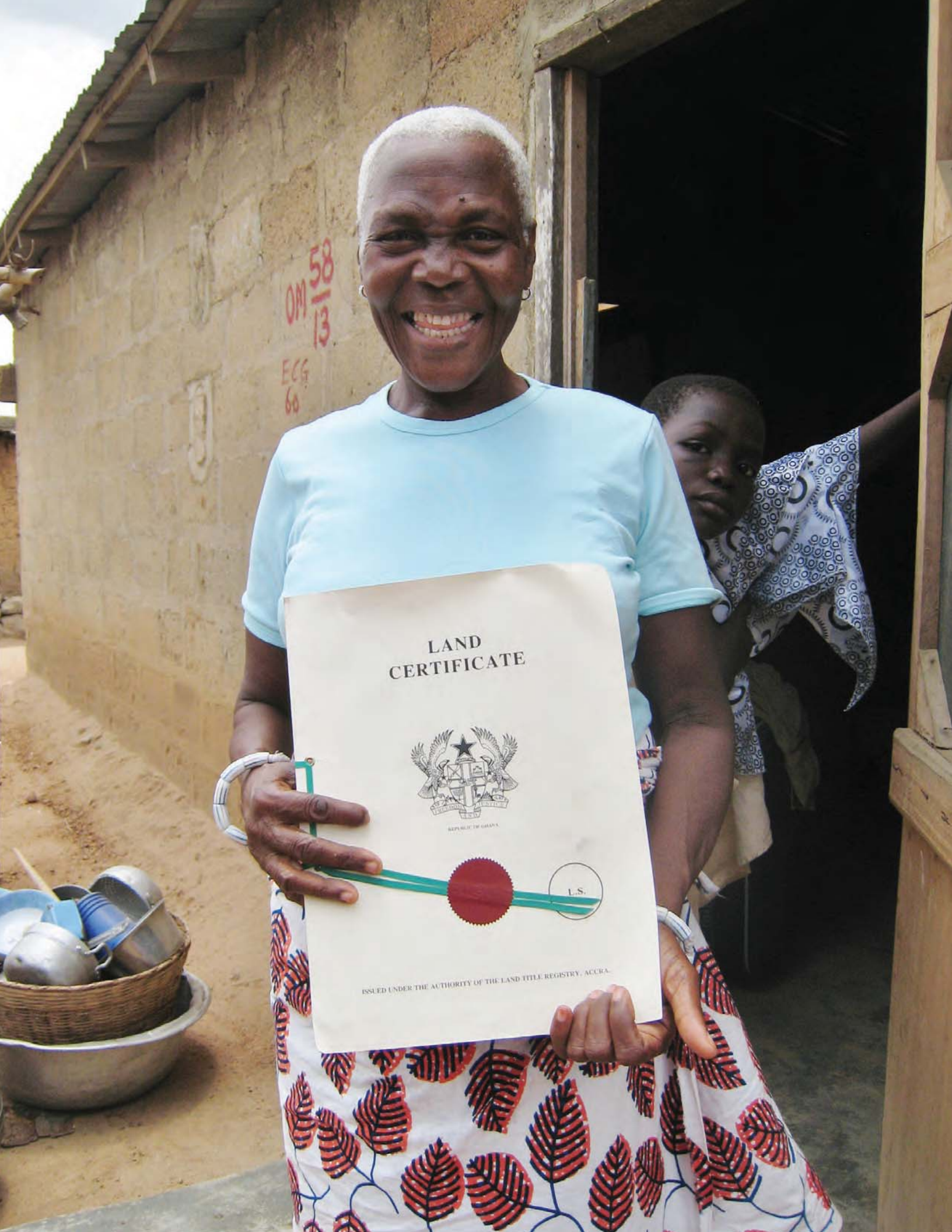
Landesa™  
Rural Development Institute

Center for Women's  
Land Rights



# GENDER *and* LAND

Good Practices and Lessons  
Learned from Four Millennium  
Challenge Corporation  
Compact-Funded Land Projects



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REPUBLIC OF GHANA



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## FOREWORD

THIS PAPER COMES OUT OF MILLENNIUM CHALLENGE CORPORATION'S TRADITION OF SHARING ITS LEARNING IN AN EFFORT TO MAKE DEVELOPMENT ASSISTANCE MORE EFFECTIVE.



Founded in 2004 to reduce global poverty through economic growth primarily by focusing on policy reforms and interventions that deliver tangible results, MCC has long recognized the key role both land and gender play in development.

Secure land rights are foundational for agricultural productivity and the social and economic empowerment of rural households in the developing world because land is typically their most important asset.<sup>1</sup> Secure rights to land allow families to increase their agricultural productivity and income and help alleviate poverty.<sup>2</sup> Smallholder farmers with secure land rights have greater incentive to make productivity-enhancing investments because they have greater confidence that they can recoup their investments over the medium and long term.<sup>3</sup>

A household's rights to land may determine if they adopt a particular conservation or innovative production technique, and as such, are critical to incorporating into development interventions.

Women's rights to, control over, and access to land, which are often less secure than men's, is of particular interest to the development community. While women perform, in many areas of the world, half of the agricultural labor, they are less likely to own or control land.

Women generally comprise less than 20 percent of agricultural landholders in the main developing regions.<sup>4</sup> This gender disparity leaves women and the households they manage economically and socially vulnerable. When men alone enjoy rights over land, women and their children may not be able to reap these benefits fully.<sup>5</sup>

When women have secure rights, it enhances their intra-household bargaining and decision-making power. This allows them to exert greater influence over household income and expenditures, in a manner that typically reduces household poverty and benefits their children.

Enhanced status derived from land rights can also empower women to participate more effectively and fully in community-level organizations, so that such institutions are more likely to respond to women's needs.<sup>6</sup> This improved status can also render women less vulnerable to domestic violence.<sup>7</sup>

Finally, secure rights to land can be particularly critical for women who become heads of households due to male

migration, divorce, or death. Land rights can mean the difference between a woman's dependence on her family or her husband's family and the ability "to form a viable, self-reliant female-headed household."<sup>8</sup>

Landesa launched the Landesa Center for Women's Land Rights (LCWLR) in 2009 in order to promote approaches to strengthen and secure women's land rights. Because of their strong leadership in this field, including their commitment to providing resources and training to professionals on this topic, MCC asked the LCWLR to evaluate four MCC land projects, in Mali, Benin, Lesotho, and Namibia. The goal of this work was to evaluate how the four projects had incorporated a gender lens in order to determine both best practices and lessons learned.

The LCWLR generously donated their time to this project. The evaluation consists of desk research, including interviews with MCC project leaders. Because of limitations on time and resources, the evaluation does not include any field research.

MCC would like to thank Landesa for their work on this report, and welcome the opportunity to learn from our work to ensure that the important cause of women's land rights continues to be advanced.

*Rick Gaynor*

Rick Gaynor

*Director, Property Rights & Land Policy  
Millennium Challenge Corporation*

1 FAO, *The State of Food and Agriculture 2010-2011: Women in Agriculture – Closing the Gender Gap for Development*, 23 (2011).

2 See generally K. Deininger, *Land Policies for Growth and Poverty Reduction* 38, 42-48 (World Bank 2003).

3 See generally Deininger, *supra* note 2, at 42-48.

4 FAO, *The State of Food and Agriculture*, *supra* note 1, at 25 (agricultural landholders are those "who exercise management control over an agricultural holding, which may be owned, rented, or allocated from common property resources and may be operated on a share-cropped basis).

5 L. Haddad, J. Haddinot, and H. Alderman, *Intra household resources allocation in developing countries: models, methods and policy* (1997).

6 World Bank, *Gender Issues and Best Practices in Land Administration Project* 5 (2005).

7 P. Panda and B. Agarwal, *Marital Violence, Human Development and Women's Property Status in India*, *World Development* 33(5): 823-850, at 839-842 (2005).

8 R. Giovarelli, *Gender and Land Tenure Reform*, in *ONE BILLION RISING* 196 (R. Prosterman, et al. eds., Leiden U. Press 2009).

## **EXECUTIVE SUMMARY**

THIS REPORT AIMS TO HELP ENSURE THAT EVERYONE IN A COMMUNITY TRULY PARTICIPATES IN AND BENEFITS FROM INVESTMENTS IN LAND TENURE REFORMS MADE BY THE MCC AND OTHERS, BY PROVIDING LESSONS AND RECOMMENDATIONS THAT CAN CONCRETELY GUIDE POLICY AND PROGRAMMING.



For the past ten years in the development field, there has been a growing consensus and greater emphasis on gender equality and as part of that women's land rights, as both an end in itself and as a means to economic growth and other development objectives. However, there is still much to learn about how to better consider gender in land projects, especially in the face of large-scale land-based investments, the trend towards recognizing and documenting community land rights, land scarcity and degradation, climate change, and other pressures on land. The reality is that there are still far too few practical examples of large land projects that seek gender equality, and even fewer cases documented and lessons shared with other land sector practitioners.

The Millennium Challenge Corporation (MCC) has made laudable efforts to take steps to integrate gender considerations into the projects it funds. This report is a synthesis of lessons and good practices gleaned from four case studies of MCC-funded projects in Benin, Lesotho, Mali, and Namibia. The case studies assess how each project applied gender analysis to its design and implementation, seeking to understand how each project approached gender issues and how that approach impacted results. Ultimately the case studies and this report aim to help practitioners understand what concrete steps might be taken towards closing the gender gap in land projects.

Gender matters in land projects. As this report and the case studies illustrate, gender matters in the formal and customary legal frameworks that form the basis of land tenure systems; it matters in the cultural and social dynamics that underpin, inform, and are influenced by land tenure systems and land tenure reforms; it matters in the ways communities and households are governed, in the division of labor, and in social power and inclusion; and gender matters in institutions, institutional policy, and governance.

**Legal and customary framework:** Formal laws and customary laws usually differ on women's land rights, and customary laws are usually more important and influential in rural and traditional communities than formal laws. Customary law regulating intra- and inter-household relationships must be understood and addressed in project design and implementation from the beginning of the project. When it comes to a legal and regulatory framework, broad statements of principle in the law are important but provide insufficient guidance to practitioners and may cause confusion when they conflict with other legal provisions. However, specific, progressive laws and regulations that support women's land rights can influence project outcomes in spite of customary law, especially if communication and education campaigns reach female and male beneficiaries, local authorities, and project implementers.

**Identifying property rights holders:** No matter the overarching objectives of the project, whether seeking to allocate land rights, regularize land holdings, distribute land titles, document customary rights, or implement a land law, it is critical that the project identify all different types of property rights and

all different property right holders, not only primary rights and primary rights holders. However, very often a community does not recognize the rights that women have to land as valid and to do so would require a cultural shift that may not be within the scope of the project. At the same time, cultural change requires time that is often beyond the typical lifespan of a development project.

**Outreach:** Communication, education, and training activities play a crucial role in achieving project objectives related to women's land rights because they help support activities and lay the ground work for behavioral change. Multi-touch, targeted, and adaptive outreach can help support project objectives that may lack social acceptance. Holding separate meetings for women and men makes it more likely that women will participate in and benefit from the project, and outreach focused on project staff and implementers helps to address potential gender blindness or biases in implementation as it plays out. Outreach efforts must, however, also reach men for efforts at behavioral change to be successful.

**Institutional support:** Donors, government, and civil society all play a key role in addressing gender inequalities between women and men in land rights. Government commitment and political will is an important starting place and plays a major role in setting national priorities and policies. Donors bring money to the table and also bring comparative experience and expertise. Donors can also integrate gender into their strategies, governance, metrics, organizational structure, and perhaps most importantly, budget. Indeed, budgeting resources towards gender-integrated programming has a significant bearing on whether, how deeply, and how consistently gender considerations are operationalized on a given project. Civil society, women's groups, and community organizations are all important actors, especially in projects that seek long-term, sustainable social or behavioral change through land tenure reforms. Not only do these institutions provide expertise and local knowledge, they help to support the change once the intervention has ended and help bridge the gap between normative change and social acceptance.

Supporting change in land tenure arrangements will certainly impact women and men and will likely impact women and men differently. This report aims to help ensure that everyone in a community truly participates in and benefits from investments in land tenure reforms made by the MCC and others, by providing lessons and recommendations that can concretely guide policy and programming.

# 1. Introduction and Methodology

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For the past ten years in the development field, increasing emphasis has been placed on gender equality and as part of that women's land rights as a means to economic growth. The 2012 World Development Report: Gender Equality and Development, published by the World Bank, states unequivocally that gender equality matters, both for development outcomes and policy making, because gender equality is a core development objective in its own right and is also smart economics, enhancing productivity and improving other development outcomes. Specifically the report asserts, "Markets, institutions, and households can also combine to limit progress. Gender gaps in productivity and earnings, for example, are pervasive. And they are driven by deep-seated gender differences in time use (reflecting social norms about house and care work), in rights of ownership and control over land and assets, and in the workings of markets and formal institutions, which work in ways that disadvantage women."<sup>1</sup> The Report concludes that "corrective policies that focus on persisting gender gaps are essential."<sup>2</sup>

One example of this increased focus on gender gaps is the World Bank Group's 2007 action plan to improve women's economic opportunity. The plan was developed because while health and education levels of women and girls in developing countries had improved significantly, similar progress had not been seen in economic opportunity.<sup>3</sup> The four-year, \$63 million plan, Gender Equality as Smart Economics (GAP), invested in the improvement of women's access to jobs, land rights, financial services, agricultural inputs, and infrastructure.<sup>4</sup> The GAP transition plan (2011–13) set out a proposal to improve the performance on gender and development by strengthening the implementation of the Bank's Gender Policy and placing special emphasis on improving attention to gender in Bank instruments (CASs).<sup>5</sup>

A second example of increased focus on gender is the March 2012 USAID document, "Gender Equality and Female Empowerment Policy."<sup>6</sup> Under this policy, USAID investments were aimed at three overarching outcomes:

- Reduce gender disparities in access to, control over, and benefits from resources, wealth, economic, social, political, and cultural opportunities;
- Reduce gender-based violence and mitigate its harmful effects on individuals and communities; and
- Increase the capability of women and girls to realize their rights, determine their life outcomes, and influence decision making in households, communities, and societies.<sup>7</sup>

The Millennium Challenge Corporation (MCC) developed a Gender Policy in 2006, which mandated that gender differences and inequalities be considered in the selection of eligible countries and integrated into the development and design of compact programs, assessment and implementation of projects, monitoring of program results, and evaluation of program impacts.

WE HAVE LEARNED THAT ENSURING THAT SOCIAL AND GENDER TECHNICAL EXPERTISE IS AVAILABLE FROM THE EARLIEST STAGES OF COMPACT DEVELOPMENT IS A KEY TO SUCCESSFUL GENDER INTEGRATION AND COMPACT OUTCOMES.

*MCC Gender Integration Guidelines, March 2011*

The Gender Policy was updated in 2011 to incorporate MCC's new Gender Integration Guidelines, a document that describes twenty-seven Gender Integration Milestones and Operational Procedures—specific steps to ensure social and gender integration in the compact development and implementation phases.<sup>8</sup> The guidelines are the enforcing document, and they apply retroactively to the extent possible. The requirements of the guidelines include (among others): (1) that the core team of the partner country has a social scientist with gender expertise on staff (prior to consultations); (2) that a senior social/gender specialist with gender competency is hired as key personnel; (3) that a Gender Integration Plan is developed by the Millennium Challenge Account (MCA) and approved by MCC; and (4) that

1 The World Bank, *World Development Report 2012. Gender Equality and Development* (2011), accessed at <http://siteresources.worldbank.org/INTWDR2012/Resourees/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf>.

2 *Id.*

3 The World Bank, *Gender Action Plan: Gender Equality as Smart Economics* (2011), accessed at <http://www.web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/o,contentMDK:21983335~pagePK:210058~piPK:210062~theSitePK:336868,00.html>.

4 *Id.*

5 The World Bank, *Applying Gender Action Plan Lessons: A Three-Year Road Map for Gender Mainstreaming (2010 - 2013)*, (2010), accessed at [http://siteresources.worldbank.org/INTGENDER/Resources/336003-1241561860207/GAPtransitionplan\\_may25.pdf](http://siteresources.worldbank.org/INTGENDER/Resources/336003-1241561860207/GAPtransitionplan_may25.pdf).

6 United States Agency for International Development, *Gender Equality and Female Empowerment Policy* (2012), accessed at [http://pdf.usaid.gov/pdf\\_docs/pdact200.pdf](http://pdf.usaid.gov/pdf_docs/pdact200.pdf).

7 *Id.*

8 Millennium Challenge Corporation, *MCC's Commitment to Gender Equality Fact Sheet*, March 8, 2012, MCC, Washington D.C., accessed at <http://www.mcc.gov/documents/press/factsheet-2010002010403-gender.pdf>.



the Gender Integration Plan is incorporated into program and project work plans.<sup>9</sup>

The high priority that MCC puts on gender integration in its projects, including its land projects, is impressive. There are far too few practical examples of large land projects that have worked toward gender equality throughout the project, and even fewer cases documented and shared with other land practitioners.

The objectives of this paper are to review four MCC-funded projects that have a land tenure component, each in a different African country; assess the intent and design related to gender integration; and review that project's results in light of the intent. It specifically asks: What did the project set out to do with regard to gender differences? What was the project able to execute in relation to gender differences? What changes needed to be made along the way? What lessons were learned and what good practices can be established? This paper is not comparing the four projects or evaluating them, and it is not an impact evaluation since data is not yet available to assess the true impacts of the projects being assessed. Each land project represented here is unique in terms of scope and objectives, each country context is unique, and MCC's level of effort on gender integration varied over time. The compacts reflected in these case studies were designed prior to MCC having operational procedures codified in the Gender Integration Guidelines. (It should be noted that the guidelines are embedded in later compacts in clearer agency requirements.)

Through a review of project documentation and interviews with project and MCC staff, this paper attempts to understand and document the circumstances surrounding an intervention that worked to effectively integrate gender or did not. In many cases MCC/MCA teams developed action plans based on what was considered "best practice." This paper seeks to review and collect what was learned in the practical application of some of these "best practice" recommendations.

The paper begins with a synthesis of findings and recommendations, organized around the legal, regulatory, and customary framework within which the projects took place; how the projects identified property owners or users and their rights to land; education, training, and communication; operationalizing gender integration in donor interventions; and lessons learned. It is followed by case studies of four MCC-funded projects, one each in Benin, Lesotho, Mali, and Namibia. Each case study provides a short background, describes the project's objectives with regard to gender and land, and analyzes the legal framework and the steps that were taken to incorporate gender considerations into the project. They each end with some analysis of how those steps related to the project results.



Photo courtesy of MCC

Progress in improving laws has been slowest in areas that regulate relations within households. Many programs and policies seem to stop at the household's doorstep and avoid interfering with relations within households. This resistance is also reflected in the reservations that countries make when signing up for the Convention to Eliminate All Forms of Discrimination against Women. Of the 187 countries that have ratified the convention, 29 have not fully endorsed article 16, which calls for the elimination of discrimination in all matters relating to marriage and family relations, including the right to enter marriage; the right to freely choose a spouse; equal rights in marriage and its dissolution; equal parental rights and rights over children; equal personal rights as spouses; and equal rights in ownership, acquisition management, and disposition of property.

<sup>9</sup> Millennium Challenge Corporation, *Gender Integration Guidelines* (2011), accessed at [www.mcc.gov/documents/guidance/guidance-2011001054001-genderintegration.pdf](http://www.mcc.gov/documents/guidance/guidance-2011001054001-genderintegration.pdf).

## 2. Gender and Land Issues, Good Practices and Lessons

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### 2.1 Legal, Regulatory, and Customary Land Tenure Framework

The legal and customary framework of a specific location creates the context for land rights. More often than not, formal and customary laws differ on women's land rights, and customary laws are usually more important and influential in rural and traditional communities than formal laws. One of the difficulties with closing the gender gap in land rights is that the customary land tenure system treats men and women differently, with men typically having primary rights to land and being the external and public face of the family. Most often men inherit land rights, women move to their husband's family's land after marriage, and men participate in community governance as representatives of the household.<sup>10</sup> Women tend to have lower social status and are often excluded from structures of power and influence. Although there are exceptions and a good deal of nuance involved in customary practice, these are among the most important factors that affect women's rights to land in practice. Still, there is much the formal law can do to close the gender gap in land rights.

#### 2.1.1 Broad Statements of Principle in the Formal Law are Positive and Should Be Encouraged but May Provide Insufficient Guidance or Protection

The legal and regulatory framework for women's land rights can have a direct bearing on the outcomes and sustainability of a project. But broad statements of principle without guidelines and institutional support for implementation can create conflict between formal laws and customary realities. For instance, if the law provides for gender equality and also recognizes customary land tenure, but the customary tenure system is based on inequality between men and women, which legal provisions govern? While statements in law that provide principles of gender equality or nondiscrimination are important for setting normative standards, they are insufficient to help guide interventions that seek to use the law in some way to bring about change.

<sup>10</sup> It should be noted that these are generalizations that may not apply to all societies. For instance, though not necessarily better for women, matrilineal societies may have different practices related to access to land and transfer and management of assets.

For example, in Benin, as in many other countries, the Constitution prohibits discrimination on the basis of sex and does not allow customary law to trump constitutional principles.<sup>11,12</sup> However, the land laws and the Person and Family Code do not establish the detailed provisions that would be required to achieve this. Critical questions not answered in the law include: What is the definition of secondary rights<sup>13</sup> (the rights most often held by women) in the Rural Land Holding Law, which requires registration of all primary and secondary rights over land and natural resources?<sup>14</sup> How can gender mainstreaming in all activities as required by the Rural Land Holding Law (Art. 2) be ensured when women in the community do not customarily participate in public meetings or express opinions in opposition to their spouses? The law allows for joint titling of marital property, but what rights should be documented for spouses living in polygamous households, especially households established before polygamy was outlawed in the Person and Family Code? What does it mean in the rural context to require documentation and witnesses to be considered "married" under the law—do women have practical ability to comply? When there are gaps in the statutory law such as these, and when an intervention seeks to use the law to support its implementation, the gaps are likely to be filled with customary laws or norms, often to the detriment of women's land rights.

In Lesotho, for example, the broad provision against sex discrimination in the Constitution did not in fact prohibit discrimination between men and women when it was left to the court to define discrimination.<sup>15</sup> In a 2013 case, the court ruled that the Chieftainship Act, which states that a daughter of a chief cannot inherit his chieftainship because she is female, is not discriminatory against women. The court reasoned that because the act has another provision permitting a woman—the senior wife of the chief—to inherit the title of chief as a caretaker if there are no living first-born males from any of the deceased's marriages, it cannot be said that the act discriminates against women generally.<sup>16</sup>

<sup>11</sup> Constitution of the Republic of Benin, 1990.

<sup>12</sup> *Id.*

<sup>13</sup> In this paper, "secondary rights" is being used to mean rights that are ancillary to the primary right to own land in fee simple. They include rights such as use rights and access rights.

<sup>14</sup> Law 2007-03, On Rural Landholding, 2007 (Benin).

<sup>15</sup> Constitution, 1993, sec. 18(4) (Kingdom of Lesotho).

<sup>16</sup> Hanibal Goitom, *Lesotho: Constitutional Court Denies Women the Right to Inherit Customary Titles*, Global Legal Monitor (2013), accessed at [http://www.loc.gov/lawweb/servlet/iloc\\_news?disp3\\_l205403597\\_text](http://www.loc.gov/lawweb/servlet/iloc_news?disp3_l205403597_text). Note that Lesotho is an interesting and perhaps complicated example because customary law has been written and harmonization between customary laws and formal laws is still underway.

## RECOMMENDATIONS:

- Identify gaps and inconsistencies in the laws and regulations that could have an impact on gender equality in project implementation.
- Analyze formal laws with a deep understanding of the cultural context so that seemingly gender-neutral provisions are not overlooked.
- Assess whether and how gaps and inconsistencies in the formal law can be addressed to help ensure that the laws provide appropriate guidance for project design and implementation and sufficient protection for all women.
- Develop programs and procedures that can alleviate uncertainty in the law where possible.
- Work with local and international lawyers, academics, and jurists to develop a legal case for reform, or to write legal opinions that have influence.

### 2.1.2 Laws and Regulations that Support Women's Land Rights Can Influence Project Outcomes in Spite of Customary Law

Ensuring that the legal and regulatory framework supports the program design helps to sustain the long-term legitimacy and enforceability of changes the program seeks. Starting a project with an understanding of the laws and regulations that will affect women's rights to land and their participation in the project is key to closing the gender gap.

In Namibia, the due diligence process included a review of relevant laws, secondary sources, and policies, including those laws that govern communal lands, the powers and responsibility of traditional authorities, and marital property rights. The project sought to register land rights and improve land administration on communal land in northern Namibia, in accordance with the Communal Land Reform Act (2002). That law requires landholders to apply for land rights on communal lands to either the traditional authorities or the communal lands board, depending on the right being sought. Traditional authorities and communal land boards ratify each other's decisions, and communal land boards register allocations. Land rights transfers require the consent of either the relevant traditional authority or the communal land board, depending on the type of right being transferred.

An MCC due diligence report recommended further assessment of the legal and regulatory framework, particularly in the area of spousal rights. The review flagged registration of joint rights for spouses as a key issue because the Communal Land Reform Act did not explicitly provide for joint registration for spouses, and its supporting regulations and application forms did not permit the spouse to be a coapplicant or a coholder of rights. To address this, the project included an activity to design and pilot a new application form and new procedures to apply for joint

registration of rights to communal land for spouses so that joint registration for spouses was more likely to occur.

Understanding how laws and regulations can influence custom is critical, but for practical reasons land projects cannot necessarily focus on all land issues that will have an impact on women and some prioritizing is needed to ensure that the most relevant and appropriate laws are applied. To make this prioritization requires a thorough understanding of the entire legal framework for women's land tenure. In Benin, one of the original objectives of the project—to ensure that the 2004 Code of Persons and Family was enforced broadly and to develop a gender strategy on measures that would provide guidelines for its implementation—did not remain one of the project's objectives. Although it was first thought that the Persons and Family Code, which officially outlawed polygamy, would impact how the land project was implemented, it was not a major factor in whether or not women's rights were documented. Rather, a focus on the Law on Rural Land Holding, which stated: “policies and programs for rural development, and especially agriculture, must integrate the application of gender mainstreaming in all activities of the sector; and the communication for behavior change among all stakeholders,” could have had a much greater impact on women's land rights *in the project*, where communication related to behavior change was very important to the documentation of women's rights. For any project, starting by ensuring that the critical components of the project are gender-inclusive and using the law to its best advantage are two important early steps.

The project in Lesotho was instrumental in requesting a very specific legal change to support women's land rights as a condition precedent to signing the compact. Although the Land Act of 1979 was nondiscriminatory in nature (men and women both had rights to acquire land, hold land in their own name, and inherit land), its implementation was based on a discriminatory legal instrument, the Deeds Registry Act of 1967. According to the Deeds Registry Act, no land could be registered in the name of a woman married in community of property (the default marital property regime). Moreover, a woman married in community of property was considered a minor, giving a husband marital power over the person and property of his wife.<sup>17</sup>

MCC's approach to equality in land rights was embedded in a larger effort to ensure there was basic gender equality in economic rights prior to signing a compact with the government of Lesotho. NGOs and some members of government had been working on this issue for years without success in translating recommendations in white papers into legislation presented to parliament. The minority legal status of women was noted early in MCC's assessment as a significant problem, during the same period that MCC was developing its Gender Policy.

<sup>17</sup> United Nations Food and Agriculture Organization, *Gender and Land Rights Database, Country Report: Lesotho*, accessed at [http://www.fao.org/gender/landrights/home/report/en/\(select "Lesotho"\)](http://www.fao.org/gender/landrights/home/report/en/(select%20%22Lesotho%22)).

MCC's assessments included an analysis of the legal impediments and barriers to women's ability to own property and recommendations as to how those barriers could be removed.<sup>18</sup> The report found that married and widowed women in Lesotho had no true access to land and could not carry out significant business transactions due to restrictions in various laws, many of which were related to married women's legal status as minors and husbands' marital power over their wives' person and property. Such laws prohibited a woman who was married in community of property from registering property in her own name, serving as a director of a company unless her husband gave and registered his consent, inheriting on an equal basis with men, independently managing inherited property, or entering into contractual agreements without her husband's permission.

Based on input from NGOs, members of Lesotho's government, and others, the US government—through MCC—made the establishment of gender equality in economic rights a prerequisite to signing the compact.<sup>19</sup> MCC communicated this position in fall of 2006, and the government of Lesotho moved swiftly to enact the Legal Capacity of Married Persons Act in December 2006. The act removed the minority legal status of women married in community of property by repealing marital power and mandating that spouses married in community of property have equal power over joint assets.

Requiring that the law be changed in Lesotho helped to ensure that the project could achieve its objectives to regularize informal settlements in urban and peri-urban areas and assist community councils to improve the rural land allocation process and land management.<sup>20</sup> But it also had the effect of focusing the entire land project on women's land rights-related issues and gave the opportunity for the project to include specific activities, which emphasized the new law and women's new legal rights. In addition, the Lesotho Compact required the harmonization of other laws with the Legal Capacity Act and included funding for an activity for outreach and training on the law itself.

This success strengthened commitment to moving forward with gender equality within and outside the agency, especially when both the United States Senate and the House made formal resolutions commending the government of Lesotho and MCC for this progress. MCC's position that a \$360 million compact could not proceed without this legal change may also be the only example of a donor conditioning aid on gender equality.

18 David Greene, Moroosi Gertrude Tau-Thabane & Tankiso Hlaoli, *Lesotho Review of Civil Legal Systems: Final Report* (2006).

19 Virginia Seitz & Michelle Adato, *Principles into Practice: Gender Equality and Poverty Reduction through Growth* Millennium Challenge Corporation (2012), accessed at <http://www.mcc.gov/documents/reports/paper-2012001153101-principles-gender.pdf>.

20 Millennium Challenge Compact Between the United States of America Acting Through the Millennium Challenge Corporation and the Government of the Kingdom of Lesotho (2007).

## RECOMMENDATIONS:

- Begin projects with a thorough analysis of the extant laws that provide for women's land rights, including the land, land administration, land governance, marriage, family, inheritance, and personal laws and regulations.
- After an overview is conducted, focus on those laws that have a direct bearing on project activities and identify those that may require amendment or interpretation for the project to be legally supported in closing the gender gap in land rights.
- When the laws are positive for women, they can be used to inform principles of project design that seek gender equality.
- Ensure mechanisms for outreach and education on the law so that it may be implemented.

### 2.1.3 Customary Law Regulating Intra- and Inter-Household Relationships Will Impact the Gender Gap in Land Rights

Analysis of the formal legal framework must be complemented by desk and field-based analysis of the customary laws in the specific area where the intervention is taking place, identifying especially those customs that differ considerably from formal laws. Customary tenure systems can be highly contextual, sometimes changing between regions, subregions, tribes, or clans.

## SOCIAL NORMS SHAPE WOMEN'S AGENCY

SOCIAL NORMS ARE PARTICULARLY BINDING WHEN INCREASES IN WOMEN'S AGENCY WOULD DIRECTLY SHIFT POWER BALANCES IN THE HOUSEHOLD AND IN SOCIETY.

*World Development Report*

All of the MCC projects reviewed included at least an initial desk analysis of both formal law and customary law and how they affect women's land rights. In Namibia, gender issues identified in desk research were validated in the field. The field research helped to identify the priority gender issues, the gaps between law and practice, and how those gaps might feasibly be addressed through project activities. All of this information was used to inform project design so that it addressed the context-specific gender and land issues in the project area to focus the policy, legal, and regulatory reform activities and to identify the themes and materials for communication, education, and outreach activities.

Understanding the cultural context was a driver for land titling decisions in the MCC Alatona Irrigation Project in Mali. A

certain portion of irrigated land was set aside for groups of women farmers as market gardens. Market gardens for women were already a culturally accepted feature of land use in the area. Also, proceeds from market gardens were identified in the due diligence process as contributing significantly to the household's income and food supply.

With the move to private ownership of the newly irrigated land, market gardens needed to be documented in a way that protected women's long-term interests. At the same time it was important that the women had continued control over market gardens, that the market gardens had the same legal protection as other irrigated parcels, and that the benefits of the market gardens for women would not be lost after one generation in the face of patrilineal inheritance practices (which would see land rights passed to sons from both their mothers and fathers). To address this, the project decided that while the market gardens were demarcated and allocated to individual women (one parcel per household), they were managed and titled in the name of a women's association that was formed for that purpose. A Law on Associations was developed to help govern the associations' decision making and management.

In Benin, analysis of customary law played a major role in the outcome of the Rural Land Plan (PFR) activity. The activity began with socio-anthropological studies to determine local custom and vocabulary in order to contextualize the later land rights documentation. Also, forms, procedures, and trainings for conducting a landholding census incorporated mechanisms designed to ensure that women in male-headed households were consulted independently or alongside the men and that their representations of their status were accurately recorded.

However, the census of right holders was not entirely successful in identifying secondary rights holders (who were mostly women, nonsedentary livestock producers, migrants borrowing land from customary landholders, and youth). Under the customary system, secondary rights are seen as temporary or informal, whereas primary rights held by men are viewed as permanent and formal. Since the project sought to formalize rights, it is likely that census respondents did not identify secondary rights because to do so may have been seen as a threat to the primacy of the men's rights and position in the household. Women's use rights would not have been seen as a formal right that should be documented. A better result may have been achieved if additional measures were taken to explain the benefit of formalizing all land rights from the beginning and to help ensure that women felt safe and empowered to assert their (secondary) land rights.<sup>21</sup> In Lesotho, understanding the customary norms supported the legal change that was a condition precedent to the MCC Compact signing and led to better protection for the rights that women had exercised in practice. Traditionally men migrated as herders, and women were left to care for the household. Contemporary migration patterns see men continue to migrate to South African mines

for employment, again leaving women at home to manage the household and the household land. Especially in urban or semi-urban areas, women were used to having some agency within the household. Additionally, within the compact, the outreach and training activity on gender equality worked with customary law authorities to ensure their understanding of how this change in the civil legal system affected their determinations, and MCA staff continued to work with other government actors in Lesotho to harmonize the laws of Leretholi, the written customary law in Lesotho, with the Legal Capacity of Married Persons Act.

### RECOMMENDATIONS:

- Understand the customary laws and practices that dictate what rights women have to land and property in the specific location of the project activity and identify gaps and opportunities for change.
- Design projects based on this knowledge, accounting for social norms that affect women and men differently, and pursuing changes in social norms where necessary.
- Where gaps exist, work with the target communities to identify feasible options to address those gaps, accepting that in some instances full equality may not be possible.
- Actively communicate with and educate communities, private and public institutions, and customary authorities about the importance of women's land rights, the legal rules regarding these rights, and the need for a change in social norms that inhibit women's rights.

## 2.2 Identifying Property Rights and Rights Holders

Most land projects include some effort to identify and document who has what rights to land and property. Conceptually, it is common for property rights to be likened to a bundle of sticks, with each stick representing a different right—the right to access, transfer, control, lease, bequeath, exclude, receive income, own, use, or collect resources. And each different right that attaches to a given area of land can be held by someone different. For example, the clan may have the right to allocate land rights to married men, who then have the right to decide how the land is used by their wives, who have the right to use their husband's allocated land and who might allow other women the right of passage across their plot to gather water from a creek.

Modern registration systems are generally not well-suited to documenting secondary and overlapping rights based on customary practices, as it is difficult to capture rights that lack clear geographic boundaries. For example the right to collect wood or grazing rights might cross over multiple parcels of land. However, a land project that doesn't account for the different

<sup>21</sup> Kent Elbow, interview by MCC consultant, 2013.

rights, overlapping rights, and different right holders, but rather only recognizes one right (often ownership) or gives all the rights to one person or to one set of people, might have the unintended effect of harming the less powerful rights holders and could nullify the social protections for those rights. Thus, to protect rights that are not documented, the law needs to clearly state that where there is an overriding interest, the law protects land rights without documentation. For example, if the law states that spouses have a presumed right to land acquired after marriage, even if one of the spouses does not have her name on the document, she still has a legal right to land acquired after marriage. Projects need to ensure that all training and outreach efforts include education on the law's protection of these rights, whether or not those rights are documented.

No matter the overarching objectives of the project, whether seeking to allocate land rights, distribute land titles, document customary rights, or implement a land law, it is critical that the project identify all different types of property rights and all different property rights holders, not only primary rights and primary rights holders. In each of the four projects reviewed, identifying rights and rights holders was a central part of the project and an effort was made to ensure that women and women's rights were identified. However each project faced difficulty in doing so and there are important lessons that can be learned from their efforts and outcomes.

### 2.2.1 Members of a Household Will Have Distinct Rights to Land and Need to be Considered Separately Whether Documenting Individual, Household, Communal, or Community Rights

The project in Lesotho regularized urban and semi-urban land, providing documents to individual households. The project developed a reliable system for identifying and recording different property rights holders within a household, and one step in that process was to complete a census of who held what land. The form that was filled out by the land-census taker in the field became the basis of the documentation throughout the regularization process. The form required information on everyone in the household so that all members' rights were counted. The information collected included their marital status, their type of marriage (community property or a prenuptial agreement stating the marital property will not be community property), and their relationship to other members of the household. To avoid the frequent problem of women lacking identity or marriage documentation, the land-census process did not require documentation to prove identity or to prove marital status if the man and woman had the same last name, making it much more likely that marital status would be captured. Instead, the process relied on a system of public notice and comment to verify claims. The landholders' list was publically displayed for thirty days in the neighborhood alongside the parcel map, allowing the citizens to verify their land rights. It also contained the marital status and type of marriage

of applicants to help avoid fraudulent declarations regarding marriage.

The Benin Rural Land Plan (PFR) component had a much more difficult task of identifying property rights holders than the Lesotho project. In the case of Benin, land was communally held, not individually held, and the area of work was rural, not urban or peri-urban. The PFR component targeted recognition and certification of land held under customary tenure. The project mapped and defined rights in a Village Landholding Plan (PFR) in approximately three hundred villages and assisted with the issuance of individual rural landholding certificates.<sup>22</sup>

The PFR development process included parcel surveying, citizen landholder census, and household member interviews, displaying the maps and landholder lists for public witness and comment, recording of rights, and issuing certificates. The PFR documented customary rights and obligations and then transformed this record into three instruments—a village map with parcel boundaries, a list of landholders, and certificates of landholding to be issued upon application by each landholder and based on the mayor's authority to confirm and verify landholdings.

The project recognized midstream that the process might not be capturing the secondary land rights of three important groups—migrant farmers, transient pastoralists, and women. At that time, the project developed a supplementary form for the census, a checklist of the rights that were not being documented. The project also increased awareness-raising efforts and oversight by project managers.

Two possible explanations for the lack of documentation of secondary rights holders in rural areas have been put forth. First, documenting secondary rights was equated with elevating those rights to the level of primary rights and became more difficult politically, as this would go against custom and against the traditional power structure. Second, measures to deal with this perception and cultural shift, and with the fact that there was no mechanism or history of documenting these rights, did not start from the beginning of the process. To capture secondary rights, the legal instruments and procedures for protecting secondary land rights need to be in place, and operational methods for obtaining reliable and reasonably complete secondary land rights information need to be very well thought out.

Once it was clear that secondary rights were not being documented, MCC and MCA-Benin developed mitigating measures for some areas, including developing standardized contract forms to document secondary rights that were not captured in the rural plan and training local government officials to manage and enforce these contracts. A second step taken was

<sup>22</sup> Kent Elbow *et al.*, *Emerging Lessons from MCC/MCA-Sponsored Initiatives to Formalize Customary Land Rights and Local Land Management Practices in Benin, Burkina Faso and Senegal* (2012), accessed at [http://www.landandpoverty.com/agenda/pdfs/paper/elbow\\_full\\_paper.pdf](http://www.landandpoverty.com/agenda/pdfs/paper/elbow_full_paper.pdf).

to add paralegal professionals to the mayoral administrations in twenty communes to assist the citizens, including women's groups, to make effective use of the new landholding instruments and to negotiate and conclude agreements for use and occupancy of lands of the new proprietors or of the communal reserves. Perhaps most importantly, the communes who participated in the mitigating measures ensured that women and the community knew their rights, that the process was public, and that decisions negatively affecting women were publicized and criticized.

The project in Namibia also registered customary land rights. It took specific steps to ensure that the needs of women were adequately considered in the registration process. These included ensuring that the legal and regulatory framework supported women's rights; field testing a procedural approach that ensured spouses were listed on application forms; promoting use of the field-tested procedures through specific training and outreach to applicants, project staff, traditional authorities, and communal land boards; and identifying circumstances where women were denied rights through the process and adjusting the procedures and training accordingly. On the latter point, the Namibia project has been iterative from the beginning: project staff and staff from the Ministry of Lands and Resettlement discuss challenges, issues, and successes during periodic meetings, and action plans are devised to address known barriers or challenges. Also, the team meets regularly to discuss and address issues as they arose. This adaptive approach ensured there is room for innovation and adjustment where needed. For example, early on the project team realized they lacked information on how many women were in fact named on land titling documents, so they developed a mechanism to track those statistics.

### RECOMMENDATIONS:

- Recognize that the social and customary context of the land project will have an impact on the ease or difficulty of collecting information about primary and secondary rights holders and plan for an information and education campaign from the very beginning of the project, bringing the social issues of women's land rights out into the open.
- Understand the administrative, evidentiary, or other barriers that may have a gender dimension and how they relate to the procedures for documenting women's rights, and develop a system to work around these barriers.
- Before documenting any rights to land, ensure that the legal instruments and procedures for identifying and protecting secondary land rights are in place, and operational methods for obtaining reliable and reasonably complete secondary land rights information needs are well thought out.
- Assess all rights and obligations attached to land for women and men in baseline assessments, develop indicators for

tracking changes in the security of those rights, and evaluate project results based on those factors.

- When documenting women's land rights within a community, use an iterative process to ensure that the methodology fits the context of the community. Be willing to make adjustments as needed.

### 2.2.2 Criteria for Allocating Land Rights May Need to be Different for Men and Women to Help Ensure Equitable Results

Though only a small part of the project, 153 farms in the newly irrigated land in the Alatona Irrigation Project were distributed to people who were not among the communities resettled. This aspect of the project presented interesting design and implementation choices and challenges because the project sought qualified farmers to maximize potential agricultural success but realized that such qualifications may inadvertently weigh against women. To address these concerns, the project chose an innovative and promising two-stage approach: a minimum qualifications test with some preferential support for women, followed by a public lottery.

The minimum qualifications test required applicants for land to complete a form describing their qualifications, such as farming experience, education, availability of resources, and a current lack of access to irrigated land. Attributes were graded on a one hundred-point scale, and sixty points were needed for an applicant to pass the minimum qualifications and to be eligible to participate in the lottery. In addition, applicants who were women or youth (under forty years old) received ten extra points on their applications to increase their likelihood of obtaining land while still respecting the other qualifications. Advertising for the lottery specifically encouraged women to apply for land.

The lottery among applicants who met the sixty-point threshold was conducted in a public forum where tampering with the results would be difficult. It was intended that 10 percent of the 153 farms would be earmarked for women. However, because of an oversight, the accompanying advertising effort failed to mention the earmark, and the project team decided against implementing it out of concern that it might appear unfair since it was not mentioned at the outset.

The project evaluated 4,447 applications of which 799 (18 percent) were from women. Project implementers reported that the number of women applicants who met the minimum qualifications was increased by the ten bonus points awarded. In the end, twenty-four women, or 16 percent of the total, were selected in the random drawing to receive farms. This exceeded the project's minimum target (and the forgone earmark) of 10 percent for women. The participation of women in the lottery may have been higher than expected because applicants were not the extreme poor and women who applied may have had greater assets and agency. It cannot be known

what results would have been achieved if the earmark of 10 percent for women was pursued. By all accounts the lottery was properly conducted, fair, and free from fraud, and its results were accepted by both government officials and the general population.

### RECOMMENDATIONS:

When allocating land rights, it may be possible to include preferential treatment (weighted criteria, a quota, or a set aside) for women in a way that is socially accepted, provided that the overall process is also regarded as fair.

- Even with preferential treatment for women, it is important to support a program with communications and outreach that encourages women to apply and addresses any social pressure on women not to participate.
- Ensure that results of such approaches, especially when they are innovative or untested, are tracked and evaluated as part of monitoring and evaluation activities.

### 2.2.3 For Rights to Be Enforceable, They Must Be Socially Acceptable

Notwithstanding the positive example from Lesotho—a major change in land law—the practical reality of seeking change related to women’s land rights (i.e., from a customary system to a formal system) cautions a balance between what is socially feasible and what is desired programmatically. Whenever allocating or formalizing land rights, there is the potential to create winners and losers and much has been done over the last ten years in land sector reforms to understand and address the gender dimensions of household property rights and to help ensure that women are less likely to be among the losers. Less attention has been paid to the rights of women within a household, especially when the household is multigenerational or polygamous, and this may have some bearing on how well the longer-term potential outcomes of more secure land rights for women play out. Thus, finding the balance between desired change and feasible change—in the project’s lifespan—is an important, if often unstated, challenge for project designers and implementers. That being said, when such decisions are made it is important that the project is clear on its definition of a household, and that it tracks or measures how household-focused design decisions relate to the project results.

The way that the Alatona Irrigation Project in Mali addressed property rights holders in the household illustrates this. Analysis of the customary system in the project area identified that beneficiary households were typically arranged in compounds or concessions, where individuals exchange resources among multiple types of familial and social relationships, and households live in proximity to extended family within a common area enclosed by a wall. Polygamy is common in these households. Food preparation, sanitation, and maintenance may be performed jointly, and economies of scale in

production are exploited within the concession where a group of family members may work together on common familial lands.<sup>23</sup>

Since the majority of project beneficiaries were also project-affected people who were being resettled as a result of project activities, involuntary resettlement policies applied to the project, including to people living in these concessions, sometimes among multiple families. Consequently, there was an inventory of asset use and possession, but it is not clear whether this was done for the concession as a whole or for families or individuals within the compound. Such analysis would have some bearing on the project design and outcomes.

The project achieved good results for women in that more than one-third of the irrigated land was titled to women (either jointly with a spouse or as a member of a market garden association). To avoid social backlash, a conscious decision was made to allocate newly irrigated land rights to concessions (extended households) and let the beneficiaries make their own determination on how the rights would be allocated within the concession. This meant that one man and one woman from each concession (head of household and (in the case of polygamous households) a “responsible woman”) were named on joint titles even though there may have been other men and women who lived in the concession and who used the newly irrigated land. It also meant that only one woman per concession was allocated a market garden parcel and the allocation of rights for other women in the concession must flow through her.

The project chose to list one man and one woman on the title document for each concession. The project chose not to identify the rights of the other men and women in the concession who were not named on the title, for fear that doing so may cause conflict that could be detrimental to all. This decision did mean, however, that fewer women received market garden parcels than if the project had allocated market parcels to all women in a concession. It is therefore difficult to determine how this project decision affected all women in the project area.

Social acceptance requires a dedicated communication and education effort, community by community, because documenting all rights and all right holders might go against the social norm that men, as household heads, determine who within the household has which rights, with little decision-making authority given to their wives. It might also go against the customary understanding of the relationship among the men within an extended household. The messages for a communication and education campaign must be determined through gathering information as to the perceived legal rights

<sup>23</sup> See International Food Policy and Research Institute, Do Household Definitions Matter in Survey Design? Results from Randomized Survey Experiment in Mali, IFPRI Discussion Paper 01009 (2010), accessed at <http://www.ifpri.org/sites/default/files/publications/ifpridp01009.pdf>, at 2-3. With respect to food consumption, individuals live in households that share concessions where food production may be centralized, at least for certain meals. The division of labor is gender based, and women may have use rights over multiple granaries, including a household and central concession granary, from which they may draw grain to prepare common meals. Men may contribute to their own granaries and have obligations to contribute grain to communal granaries. With respect to production, a group of family members may work together on common familial lands, but the division of common plot harvests into individual granaries varies from family to family. Many families prepare their food separately out of these reserves, whereas some completely store and consume the harvest communally. See id.



and social norms of community members from the community itself. (See the next section for more on how change can be encouraged through the education and training function of a project.)

### RECOMMENDATIONS:

- Understand the social context of the project before beginning to identify right holders, and develop a communication strategy for talking about primary and secondary rights and the value of recognizing them.
- Be willing to listen to the community and push for change to the extent possible, understanding that closing the gender gap cannot always happen all at once. Understand the potential risks to forcing a social change that is not accepted within the community.
- Incorporate mechanisms for tracking changes in perception or belief in the target community that might shed light on positive or negative responses to project activities.

## 2.3 Education, Training, and Communication

Communication, education, and training activities play a crucial role in achieving project objectives related to women's land rights; each of the four projects emphasized that closing the gender gap required consistent and extensive communication with all stakeholders. Good results were achieved by considering the different needs and preferences of men and women when it came to duration of trainings, timing of sessions, speaking freely in public, and literacy, and when outreach activities were mandatory. Evaluating outreach effectiveness while it is taking place and adapting each session accordingly helped to ensure that the objectives of the outreach were being met in real time. Successful outreach also focused not just on project beneficiaries but also project staff, implementers, and local leaders and authorities; it involved two-way discussion and was adaptive, allowing for response to specific women's land rights-related challenges as they occurred.

### 2.3.1 Targeted Outreach is Crucial to Support Project Objectives That May Lack Social Acceptance

In the Alaton project in Mali there was some fear that mandating joint titling to beneficiary households would be socially unacceptable and could result in backlash, which would then affect the project's outcomes. Instead, the project made joint titling optional but was actively encouraged throughout the project. For example, land transfer contracts, translated into three local languages, included specific reference to co-ownership of land, and space was included to allow for recording co-owners' names and signatures. In addition, the project

required each resettled household that was allocated irrigated land to designate two household members,

the household head and the "responsible woman," to attend the project's training and outreach activities. This same requirement was not imposed on non-resettled beneficiaries who received irrigated land via the lottery mechanism.

The content of the outreach focused on increasing awareness of the benefits of joint titling and encouraging selection of that option when the time came. Sessions covered explanation of

- private ownership and joint titling;
- the process for gaining a land transfer contract in private ownership, with a co-owner;
- contents of land transfer contracts; and
- rules, rights, and obligations on irrigated land.

Women and men attended separate sessions at which they learned the same information. The sessions took place over five days and only for a few hours at a time so that women had time to care for children and engage in other household activities. In addition, the sessions underwent continuous daily monitoring to ensure effectiveness. In the end around 39 percent of beneficiaries who participated in the outreach activities decided to register as joint owners, as compared to 0 percent for those who received land via the lottery mechanism and did not participate in the outreach activities.

THE MOST IMPORTANT THING FOR WOMEN'S LAND RIGHTS IS THAT WOMEN, AND THE COMMUNITY, KNOW THEIR RIGHTS, THAT THE PROCESS IS PUBLIC, AND THAT DECISIONS WHICH NEGATIVELY AFFECT WOMEN ARE PUBLICIZED AND CRITICIZED.

*Kent Elbow, MCC consultant*

In Benin, the project objective of documenting rights and right holders of land customarily held by the community was risky for vulnerable people in the community, including women. Bringing awareness to the community about the consequences of documenting rights in the name of the customary holder and creating transferable rights helped leaders to understand the vulnerability of some of the key stakeholders. For example, women gardeners, who established a profitable business producing vegetables and marketing them, stood to lose their rights to use the land to the customary proprietors of the land. While the women's secondary claims were not extinguished, the proprietors' claims to the land were reinforced as a result of

implementation of the PFR, in anticipation of the rural land certificates that would be issued to the customary property rights holders.

The women were at risk of losing their access to gardening because one of the two primary landholders intended to sell the land since his right had been reinforced. The women, who produced vegetables on the landholder's area of the gardening zone, said they had no other livelihood options to replace the potential loss of access to the gardening plots. However, this risk was mitigated by the publicity and awareness-raising aspects of the social program, which had an impact at the level of the village chief (who is also president of the PFR village section), as well as officials in the Mayor's office. Authorities at both the village and commune levels declared their opposition to loss or reduction of the women's access to the gardening plots in the absence of other viable livelihood options.

The project provided the opportunity for communes to receive assistance for vulnerable groups, including women. For communes that participated, the project assisted in identifying and organizing women's groups to work with their communal administrations to develop local projects that identified land for use and organized women's support associations.<sup>24</sup>

In Lesotho, the project focused its public education on the significant changes to women's land rights generated by the newly passed legislation. In both the land regularization process and the improvement of the rural land allocation process, training and awareness raising regarding women's land rights was a critical part of the activity. From the beginning, the public outreach campaign, which included public meetings and trainings for various stakeholder groups, focused on changes brought about by the Legal Capacity of Married Persons Act, including women's right to land and joint titling of land rights.

### 2.3.2 Outreach and Training That Focuses on All Those Who Make Decisions on Land Rights Is Useful, Especially When It Is a Two-Way, Multi-Touch Process

In Namibia, training—based on field-based assessments of training needs—targeted men, traditional authorities, village-head men, village-head women, and communal land boards. The training included sessions and materials on vulnerability and women's land rights. At the same time, women beneficiaries were also targeted for training, and the training topics and materials were adapted for each audience.

Project staff also received training on the potential issues related to land rights facing project beneficiaries, and ongoing staff discussions—where staff shared challenges and field experiences related to women's land rights—supplemented the training. A gender integration workshop, held for all project staff, helped highlight the importance of gender considerations

to the project's success. Staff reported that the trainings, discussions, and workshop helped them continuously consider gender differences in their work and led to positive results.

In Benin, the project maintained a steady schedule of regional and communal workshops, training seminars for village and communal leadership, meetings with selected local groups, and general meetings with the citizens to explain the content and functioning of the new systems of rural and urban landholding. A module of this training and the public education curriculum covered equality of access to land, equal protection, and women's status as landholders.<sup>25</sup>

However, when the project recognized that three important groups were not having their secondary rights recorded, they increased awareness-raising efforts and oversight by project managers. The project trained local government officials to manage and enforce contracts that documented secondary rights not captured in the rural plan.

### 2.3.3 Holding Separate Meetings for Women and Men Makes It More Likely That Women Will Participate in and Benefit from the Project

In the Lesotho project, because the law governing women's land rights underwent significant change before the project began, public information and awareness was a critical part of the project from the onset. The staff held two types of general community gatherings in the areas of land regularization; the first, to mark the start of land regulation in a section, the second “unveiled” the outcome of the adjudication process in the form of a display name list and a map depicting successful claimants.

After each of these general community meetings, the staff held a separate women's meeting to provide a comfortable space for women to raise issues pertaining to their rights. Additionally, because of the personal nature of some of the issues, women were able to make individual appointments with the legal expert or legal reviewers when needed.<sup>26</sup> These separate meetings have been rare in land projects. In other places where they occurred (for example, Laos) the follow-up meetings specifically for women had a significant impact on the number of women who received land titles in their name or jointly in the name of their husband.

As part of the ongoing training of the land administration personnel, the new laws were emphasized, including the fact that women now had land rights when married in community property.

<sup>24</sup> William Valletta, internal memo to MCC-Benin country team and MCC land team on gender equality in the Benin Access to Land Project, April 7, 2011, (on file with author).

<sup>25</sup> *Id.*

<sup>26</sup> Cowi-Orgut, Systematic Land Regularization in Lesotho Project: Implementation Phase, Final Report (2013).

### 2.3.4 Women Will Be a More Powerful Force in the Community If They Are Assisted to Form Women's Groups.

Where behavior change is involved, empowering women through development or strengthening of women's groups is a critical component. In Mali, newly irrigated land was allocated to women in market garden associations created by the project. In Benin, women's associations were supported to provide access to services such as training to improve cultivation or livestock husbandry, farm management and microcredit, and household management and child care and were assisted in becoming more effective participants in public affairs and management of collective resources. In Lesotho, women's groups received space and time to ask questions and understand the regularization process, and community organizations were formed to focus on women's needs and interests.

#### RECOMMENDATIONS:

- Messaging and approaches for communication, training, and education should align with specific project goals and objectives.
- Outreach efforts should be designed to reflect and address social norms, practices, and perceptions that might impact the project objectives, and the design should be adaptive so that participants move beyond just awareness and have the knowledge they need to make decisions.
- Identify everyone whose behavior, beliefs, perceptions, and actions could affect project outcomes, whether targeted by the project or not, and ensure that they are included in outreach efforts.
- Track changes in behavior, beliefs, perceptions, and actions targeted by outreach efforts to assess their effectiveness.
- Recognize the different social roles, power, interests, and division of labor between all men and women when designing outreach to ensure that everyone who is impacted is informed of and can participate in decisions that affect their lives and livelihoods.

## 2.4 Operationalizing Gender Integration

Donors, governments, and civil society all play a key role in closing the gender gap in rights to and control over land. The best situation, of course, is when all three are working toward the same end. Government commitment to protecting or promoting stronger land rights for women can vary; and even with that commitment, the process of legal change can be long and arduous. Still, when a donor and civil society identify a window of opportunity with a government and act on it, as happened in Lesotho, significant legal advances can be made.

The projects reviewed in this study illustrate the benefits of having a Gender Policy, and the importance of having clear organizational structures and responsibilities to ensure that such a policy is implemented. Project design and implementation in each of the four Compacts began at a time when MCC's gender procedures and policies were still under development. The MCC Gender Policy (2006) flagged gender as an issue to be considered during the project risk and impact assessment tasks; this analysis brought about pre-Compact activities and planning that resulted in important, positive gender outcomes.

Gender analysis is the starting point for integrating gender into donor interventions, but on its own is often not enough to ensure that projects have positive gender impacts. Gender outcomes are greatly improved where there is explicit institutional commitment to the gender strategy and systematic efforts to implement it. This requires organizational structures, institutional processes and accountabilities, and supported implementation through dedicated training and budget resources throughout a project.

**WE HAVE LEARNED THAT ENSURING THAT SOCIAL AND GENDER TECHNICAL EXPERTISE IS AVAILABLE FROM THE EARLIEST STAGES OF COMPACT DEVELOPMENT IS A KEY TO SUCCESSFUL GENDER INTEGRATION AND COMPACT OUTCOMES.**

*MCC Gender Integration Guidelines, 2011*

MCC adopted its Gender Policy in 2006 to ensure the effective integration of gender throughout the development and implementation of Compacts. The Gender Integration Guidelines and Gender Integration Milestones and Operational Procedures were released in 2011 "to provide operational guidance to MCC's country partners on their role integrating gender in all stages of Compact development and implementation in accordance with MCC's Gender Policy."<sup>27</sup>

The document lays out the roles and responsibilities of the social and gender assessment staff, which includes working with their country counterparts to identify the social and gender context and the constraints and opportunities these present to economic growth and poverty reduction. They are responsible for ensuring that gender integration is accomplished throughout compact development and implementation phases and that gender milestones are met. MCC requires that their

<sup>27</sup> Millennium Challenge Corporation, *Gender Integration Guidelines* (2011), accessed at <http://www.mcc.gov/documents/guidance/guidance-2011001054001-genderintegration.pdf>. The guidelines are now under review and revision.

partner countries have on their core team a person with social and gender analytical, design, and project management skills.

There are six phases to an MCC project, and each of these has guidelines for how to understand and respond to the gender context. Providing staff and resources to fully implement the guidelines will have a significant impact on closing the gender gap in MCC projects. A very brief summary of some of these guidelines follows:

*Start Up and Preliminary Analyses (Phase 1).* Provide guidance to the partner country prior to the design of the country's consultative process; ensure that the plan for consultations incorporates gender considerations and policy requirements; and conduct a desk review and targeted external and in-country consultations to identify legal, policy, institutional and socio-cultural constraints to gender equality.

*Project Definition (Phase 2).* Participate in the review of the Concept Papers (for preliminary selection of projects) in order to ensure that the necessary gender considerations were taken into account during the development of the Concept Papers and contribute to the project definition process.

*Project Development and Appraisal (Phase 3).* Once specific sector(s) or project(s) from the Concept Papers are selected, identify the specific gender issues, opportunities and constraints relevant to the specific sector and context, including the socio-cultural context. Gender assessment will be conducted independently and/or integrated into relevant ToRs and deliverables for feasibility, ESIA, and due diligence contracts. Gender will also be integrated into beneficiary analysis and monitoring and evaluation (M&E) work prior to Compact signing, including the design of baseline surveys

*Compact Negotiations and Compact Signing (Phase 4).* Ensure that the Compact language addresses gender considerations identified in Compact development and that relevant gender-related conditions are incorporated. The Compact budget will include resources to address gender integration, where appropriate.

*Pre-Entry Into Force Activities (Phase 5).* After the Compact is signed, the partner country will hire a Senior Social/Gender Specialist as key personnel of the MCA. Prior to the second compact disbursement, MCA's Senior Social/Gender Specialist will develop the Gender Integration Plan and it will be approved by MCC.

*Compact Implementation (Phase 6).* Gender integration will be a topic in the Implementation Workshop. Ensure that gender training is provided early on for all MCA staff, implementing partners, and any other relevant stakeholders. Review each project for gender integration performance quarterly. Integrate gender into all relevant Compact closure activities.

These guidelines give specific and concrete operational support to all those involved in the design and implementation of MCC

compact-funded projects. Most critically, the guidelines require the hiring of a staff person to specifically focus on integrating gender considerations into every aspect of the project. In both design and implementation, the guidelines expect projects to take responsibility for gender integration and stipulate the staff to do this.

## RECOMMENDATIONS:

- Donors should institutionalize a commitment to integrating gender considerations into all programs and closing the gap between men and women's land rights, and then hold themselves accountable to meaningful metrics that help show progress and evaluate results.
- Donors can prioritize and hold grantees and project implementers responsible and accountable for integrating specific steps in a project that aim to close the gap between men and women, especially when also stipulating staff to do this.
- Donors, governments and project implementers should work with civil society and women's groups to help with design and implementation and also so that project results can be sustained long term.

# 3. Summary of Lessons Learned and Recommendations

This section summarizes the lessons learned and recommendations and is organized in the order of the report.

## 3.1 Legal and Regulatory Framework

One underlying lesson from all four land projects is that broad principles in law are desirable but insufficient in the face of customary or religious law that does not recognize equitable property rights for men and women. Laws or regulations that specifically require that women's rights be recognized and protected are more useful and are correspondingly necessary.

The legal and regulatory framework for women's land rights can have a direct bearing on the outcomes and sustainability of a project. Laws and regulations that support women's land rights can influence project outcomes in spite of customary law. Ensuring that the legal and regulatory framework supports the program design helps to sustain the long-term legitimacy and enforceability of changes the program seeks. Starting a project with an understanding of the laws and regulations that will affect women's rights to land and their participation in the project is key to closing the gender gap. Similarly, understanding the customary tenure system for each specific project area is critical as customary systems can be highly contextual—sometimes changing between regions, subregions, tribes, or clans.

Land projects that identify property rights and rights holders will, in most instances, come up against cultural norms that discourage or exclude women from owning or having secure rights to land. For women's rights to count, women and men must be aware of women's rights, and women must feel empowered to exercise them. This highlights the need for community information and education of both men and women relative to the importance of women having documented and secure rights to land.

The main recommendations from this section include:

- Identify gaps in the laws and regulations that could inhibit gender equality in project implementation.
- Analyze formal laws with a deep understanding of the cultural context so that the actual impacts of seemingly gender-neutral provisions are not overlooked.

- Assess whether and how gaps in the formal law can be addressed to help ensure that the laws provide appropriate guidance for project design and implementation, and sufficient protection for all women.
- Develop programs and procedures that can alleviate uncertainty in the law where possible.
- Work with local and international lawyers, academics, and jurists to develop a legal case for reform, or to write legal opinions that have influence.
- Begin projects with a thorough analysis of the extant laws that provide for women's land rights, including the land, land administration, land governance, marriage, family, inheritance, and personal laws and regulations.
- After an overview is conducted, focus on those laws that have a direct bearing on project activities, and identify those that may require amendment or interpretation for the project to be legally supported in closing the gender gap in land rights.
- When the laws are positive for women, they can be used to inform principles of project design that seek gender equality.
- Ensure mechanisms for outreach and education on the law so that it may be implemented.
- Understand the customary laws and practices that dictate what rights women have to land and property in the specific location of the project activity, and identify gaps and opportunities for improvement.
- Design projects based on this knowledge, accounting for social norms that affect women and men differently, and pursuing changes in social norms where necessary.
- Where gaps exist, work with the target communities to identify feasible options to address those gaps, accepting that in some instances full equality may not be possible.
- Actively communicate with and educate communities, private and public institutions, and customary authorities about the importance of women's land rights, the legal rules regarding these rights, and the need for a change in social norms that inhibit women's rights.

## 3.2 Identification of Property Right Holders and Rights

No matter the overarching objectives of the project, whether seeking to allocate land rights, distribute land titles, document customary rights, or implement a land law, it is critical that the project identify all different types of property rights and all different property right holders, not only primary rights and primary rights holders. A land project that does not account for the different rights, overlapping rights, and different right holders but rather recognizes only one right (often ownership), or gives all the rights to one person or to one set of people, might have the unintended effect of harming the less powerful rights holders and could nullify the social protections for those rights. On the other hand, to protect rights that are not documented, the law needs to clearly state that land rights can exist without documentation, and citizens need to be sensitized to the law. For example, if the law states that spouses have a presumed right to land acquired after marriage, even if one of the spouses does not have her name on the document, she still has a legal right to land acquired after marriage.

For rights to be enforceable, they have to be socially accepted. The practical reality of seeking change related to women's land rights cautions a balance between what is socially feasible and what is desired programmatically.

The main recommendations from this section include:

- Recognize that the social and customary context of the land project will have an impact on the ease or difficulty of collecting information about primary and secondary rights holders and plan for an information and education campaign from the very beginning of the project, bringing the social issues of women's land rights into the open.
- Understand the administrative, evidentiary, or other barriers that may have a gender dimension and how they relate to the procedures for documenting women's rights, and develop a system to work around these barriers.
- Before documenting any rights to land, ensure that the legal instruments and procedures for identifying and protecting secondary land rights are in place, and operational methods for obtaining reliable and reasonably complete secondary land rights information are well thought out.
- Assess all rights and obligations attached to land for women and men in baseline assessments, develop indicators for tracking changes in the security of those rights, and evaluate project results based on those factors.
- When documenting women's land rights within a community, use an iterative process to ensure that the methodology fits the context of the community. Be willing to make adjustments as needed.
- When allocating land rights, it may be possible to include preferential treatment (weighted criteria, a quota, or a set aside) for women in a way that is socially accepted, provided that the overall process is also regarded as fair.
- Even with preferential treatment for women, it is important to support a program with communications and outreach that encourages women to apply and addresses any social pressure on women not to participate.
- Ensure that results of such approaches, especially when they are innovative or untested, are tracked and evaluated as part of monitoring and evaluation activities.

## 3.3 Education, Training, and Communication

Communication, education, and training play a crucial role in achieving project objectives related to women's land rights; each of the four projects emphasized that closing the gender gap required consistent and extensive communication with all stakeholders.

Targeted and adaptive outreach is crucial to support project objectives that may lack social acceptance. Successful outreach focused not just on project beneficiaries but also project staff, implementers, and local leaders and authorities; it involved two-way discussion and was adaptive, allowing for response to specific women's land-rights-related challenges as they occurred. Good results were achieved by considering the different needs and preferences of men and women, particularly the duration of trainings, timing of sessions, ability to speak freely in public, and literacy, and when outreach activities were mandatory.

The main recommendations from this section include:

- Messaging and approaches for communication, training, and education should align with specific project goals and objectives.
- Design outreach efforts to reflect and address social norms, practices, and perceptions that might impact the project objectives. The design should be adaptive so that participants move beyond just awareness and have the knowledge they need to make decisions.
- Identify everyone whose behavior, beliefs, perceptions, and actions could affect project outcomes, whether targeted by the project or not, and ensure that they are included in outreach efforts.
- Track changes in behavior, beliefs, perceptions, and actions that are targeted by outreach efforts to assess their effectiveness.

- Recognize the different social roles, power, interests, and division of labor between all men and women when designing outreach to ensure that everyone who is impacted is informed of and can participate in decisions that affect their lives and livelihoods.
- Understand the social context of the project before beginning to identify right holders, and develop a communication strategy for talking about primary and secondary rights and the value of recognizing them.
- Be willing to listen to the community and push for change to the extent possible, understanding that closing the gender gap cannot always happen all at once. Understand the potential risks to forcing a social change that is not accepted within the community.
- Incorporate mechanisms for tracking changes in perception or belief in the target community that might shed light on positive or negative responses to project activities.

## 3.4 Operationalizing Gender Integration

Donors, governments, and civil society all play a key role in closing the gender gap in rights to and control over land. The best situation is when all three are working toward the same end. Government commitment to closing the gender gap in land rights varies, but major legal changes related to women's land rights are uncommon.

Donors bring money to the table and comparative experience and expertise. Organizational structure and the amount of resources directed toward closing the gender gap have a bearing on whether, how deeply, and how consistently gender considerations are operationalized in a given project. But perhaps more critically, donors can be committed to design and implement projects that prioritize closing the gender gap, not just maintaining status quo.

The main recommendations from this section include:

- Donors should institutionalize a commitment to integrating gender considerations into all programs and closing the gap between men and women's land rights, and then hold themselves accountable to meaningful metrics that help show progress and evaluate results.
- Donors can prioritize and hold grantees and project implementers responsible and accountable for integrating specific steps in a project that aim to close the gap between men and women, especially when also stipulating staff to do this.
- Donors, governments, and project implementers should work with civil society and women's groups to help with design and implementation and also so that project results can be sustained long term.

# BENIN

## COUNTRY CASE STUDY 1



Photo courtesy of MCC



# I. Background

Benin is a country in West Africa that transitioned from a Marxist-Leninist state toward a pluralistic democracy in the 1990s. Rural poverty in the country has increased in recent years.<sup>28</sup> Benin's economy is dependent on cotton production, subsistence agriculture, and regional trade. In 2006, when Benin's MCC Country Compact was signed, "nearly 75 percent of Benin's 9 million people live[d] on less than \$2 a day."<sup>29</sup> Major issues in the country were "land insecurity, lack of access to capital, an inefficient judicial system, and inefficiency and security risks at the Port of Cotonou."<sup>30</sup>

Benin was made eligible for a Country Compact in 2005, and the compact entered into force in October 2006. The five-year, \$307,298,040 MCC Compact with Benin had four components: the Access to Markets Project, the Access to Financial Services Project, the Access to Land Project, and the Access to Justice Project. Together, they were designed to increase investment and private sector activity.<sup>31</sup> The compact close out date was October 2011.

The \$33.7 million Access to Land Project aimed to create secure land tenure and effective and transparent governance of land and property. It had five subcomponents: policy and legal reform; achieving formal property rights to land; improving land registration services and land information management; information, education, and communication; and supporting land program coordination.

These fell into four categories of activities:

- Decentralization of land registry services
- Establishment of rural landholding plans
- Urban land titles
- Technological improvements in land management systems

Broadly, the project sought to improve land administration and management, document property rights in rural and urban areas, decentralize land registration by establishing regional offices, and provide education on land policy.<sup>32</sup> Ultimately, the project worked in forty of Benin's seventy-seven communes.<sup>33</sup>

At the time of the compact signing, only 1 percent of urban households in Benin had title to land, almost all rural landholders held undocumented customary rights in land, and disputes were widespread. The plan encompassed working to support decentralization of land registry services to provide

faster and more convenient service—while establishing rural landholding plans and making it easier to obtain urban land titles—and improving both the rural and urban land management systems.<sup>34</sup>

Eventually, the project supported the opening of three regional offices of the state land registry and strengthened forty municipal land administration offices, established rural landholding plans in 294 rural communities, surveyed 31,100 land parcels, and introduced a new geodetic network, satellite surveys, GPS, and computer technology.

## A. Priority of Gender Concerns

At the time of the Benin Compact, MCC did not have a separate social and gender assessment (SGA) division; gender was housed under environmental and social protection concerns until 2010. MCC did have the Gender Policy, and as part of the due diligence process, the land project underwent a gender assessment and recommendations were made.<sup>35</sup>

Still, in the section on the Access to Land Project, the compact refers to gender considerations repeatedly and includes some specific activities for ensuring gender inclusiveness. For example, it describes the "support strategy activity," which was to "ensure coordination across the various project activities" to guarantee sites selected "will more readily experience near-term, economically meaningful results including for the poor and women."<sup>36</sup>

Other requirements<sup>37</sup> in the compact included: conducting an assessment to inform project implementation that would include an analysis of how to effectively improve women's access to land and the security of women's land tenure; having a gender expert on the steering group for the Land Project; strengthening women's land rights under the law and improving the enforcement of Benin's Family Code, Rural Code, and other legislation; and developing a gender strategy on policy, legal, administrative, and project implementation measures that would provide guidelines for its implementation. The compact required the government of Benin to provide "information on the population of the areas in which the Projects will be active, disaggregated by gender, income level and age."

Schedule 1 of Annex 1 says that the "Land Project will strengthen women's land rights under the law" and "work to ensure the new Family Code is practiced widely." Specifically, MCC funding was to support information, education, and communication (IEC) campaigns to create a broad awareness and understanding of the changing land policy regime and how it affects the rights of citizens, new processes and services,

28 Millennium Challenge Account Benin. *Program Summary* (2009), accessed at <http://www.mcabenin.bj/en/program-summary>.

29 Millennium Challenge Corporation. *Benin Compact: Laying the Groundwork for Increased Investment and Private Sector Activity* (2012), accessed at [http://www.mcc.gov/documents/reports/2012-002-1075-01-country\\_brief-benin-closeout.pdf](http://www.mcc.gov/documents/reports/2012-002-1075-01-country_brief-benin-closeout.pdf)

30 *Id.*

31 *Id.*

32 *Id.*

33 Millennium Challenge Account Benin, *supra* note 28, at 34.

34 Millennium Challenge Corporation, *supra* note 28, at 34.

35 Renee Giovarelli, Benin Country Proposal for MCA Funding: Gender and Land Issues (2006).

36 Millennium Challenge Compact, U.S.-Benin (2006).

37 NB: The term "requirements" here is not meant to imply a binding, contractual agreement. The purpose of setting out these requirements is to determine the initial aspirations the compact lays out regarding gender, so as to later determine if, how, or why they changed or were not carried out.

gender considerations, and land markets and access to credit. Among the key stakeholders designated to guide the project implementation planning and participate in the studies were women's groups.

Finally, in the project design, a two-stage process of assistance for vulnerable groups was defined in order to ensure that secondary rights holders also had their rights strengthened under the "Achieve Formal Property Rights to Land" activity. First, the project engaged the consultant Benin Consulting Group (BeCG), which worked within selected communes to identify vulnerable populations, determine their landholding needs, and formulate programs that addressed the needs. The consultant also worked to organize the vulnerable groups and effectively define their needs in dialogue with the communal officers and services. This led to programs that would take the form of social contracts, plans of spatial arrangement and regulation of land use, plans or rules for the management of common resources, or systematic recording of individual contracts of tenancy and land use.<sup>38</sup>

## II. Legal Framework

The Constitution of Benin states that: "[Any] person has the right to own property. No one may be deprived of his property except in the event of public necessity, subject to just compensation." Benin's Constitution and Civil Code make no explicit distinction between men and women with respect to land acquisition and all relevant transactions. The Constitution also prohibits discrimination on the basis of sex.<sup>39</sup>

The main law governing land now is the Code of Landholding and the Domain, which was adopted in January 2013 (after the project ended) and consolidated the elements of the nation's rural and urban land reform, including those assisted by the compact.<sup>40</sup>

During the implementation of the compact, this 2013 land law was still being shaped, in part with project support. Following the adoption of the Constitution of Benin in 1990, the government of Benin issued a series of policy declarations amending the country's land laws in various ways. Those laws were multifaceted, comprised primarily of customary law and various formal laws.<sup>41</sup> A draft rural land law, which established that customary law governs agricultural lands, had been adopted in 2005 but was not promulgated until 2007 (Law 2007-03, On Rural Landholding).<sup>42</sup>

The Rural Landholding Law introduced the land certificates (*certificat foncier*), which can be issued and registered as part

of or based on the Rural Land Plan (*Plan Foncier Rural* [PFR]). The PFR is a document that identifies the rural land and the registered rights on that land, as well as the right holders, in order to meet individual and collective needs for tenure security, land use planning, and investment. The PFR is a land use and tenure map that registers all primary and secondary rights over land and natural resources. Rights are to be validated in the presence of all land holders and users; common lands are also to be included in the map. Local governments play an important role in registration and are responsible for issuing certificates and updating land information.<sup>43</sup>

As Article 2 of the Rural Landholding Law states, policies and programs for rural development, and especially agriculture, must integrate the application of gender mainstreaming in all activities of the sector and the communication for behavior change among all stakeholders.

In addition to land laws, family law has an impact on whether or not women's rights to land are secure. At the time the compact was signed, family law in Benin was governed by the Code of Persons and Family, promulgated in 2004. Until 2002, there were two types of marriage in Benin—monogamous and customary. Monogamous marriages were governed by the French Civil Code of 1958 and customary marriages were governed by the 1931 *Coutumier du Dahomey* (CRR, 2002). The *Coutumier du Dahomey* is a description of the many customs related to marriage and family of the different tribes in Benin. Customary, polygamous marriages were the norm. In 1996, the Constitutional Court ruled that the *Coutumier du Dahomey* was no longer binding law; however customary law is still practiced. Finally, on June 7, 2002, the Persons and Family Code passed after much stalling by parliament. The 2002 code continued to allow polygamy, which the Constitutional Court then ruled was against the Constitution and international treaties in December 2002.<sup>44</sup>

On August 24, 2004, the president signed into law the 2002 Persons and Family Code, which states that only monogamous marriage will be legally recognized,<sup>45</sup> a change from earlier law (2002 and before). The practice of polygamy continues, however. In 2006, according to the Demographic and Health Survey, 42.3 percent of women aged fifteen to forty-nine reported that they were in a polygamous relationship. The status of marriages concluded prior to adoption of the Code of Persons and Family is unclear in the law, leaving all women in polygamous relationships with an unclear marital status, which may result in insecure land tenure. Thus, subsequent wives may not have the same legal protections as the first wife or the wife with whom the man is legally registered. Only marriages formalized by a registrar have legal effect.<sup>46</sup> Because formalizing marriage is a civil process requiring identification and several

<sup>38</sup> William Valletta, *Vulnerable Populations Strategy* (n.d.).

<sup>39</sup> Constitution of the Republic of Benin, 1990. See also Giovarelli, *supra* note 35, at 35.

<sup>40</sup> William Valletta & Victorien Koublenou, *Protecting the Rights of Urban and Peripheral Urban Landholders under the New Code of Land Tenure and the Domain of Benin of 2013* (2013), accessed at <http://www.mcc.gov/documents/reports/paper-2013001131901-world-bank-urban-landholders.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> LANDac, the IS Academy. *Benin Food Security and Land Governance Factsheet* (2012), accessed at <http://www.landgovernance.org/system/files/Benin%20Factsheet%20-%202012.pdf>.

<sup>44</sup> Giovarelli, *supra* note 35, at 35.

<sup>45</sup> Code of Persons and Family, art. 143 (Benin).

<sup>46</sup> Code of Persons and Family, art. 126 (Benin).

steps, many rural marriages are unlikely to be registered. Early marriages (younger than age eighteen) and polygamous marriages, which are both now illegal, will not be registered. Thus, the marital protections in the law will not apply.

Under the Persons and Family Code, without a marriage contract, the default regime is separate property,<sup>47</sup> meaning that the presumption in law is that both members of the couple have a separate individual right to land or property acquired during their union; that is, property acquired during the union does not automatically belong to both partners (community property). A marriage certificate is required for a marriage to be legal, but a marriage contract is optional. For couples married with a legal marriage contract, the default property regime is community property, meaning that property acquired or earned during the marriage belongs equally to both partners.<sup>48</sup>

Under the Code of Persons and Family, children of both sexes may inherit from their parents, and wives may inherit from their husbands. However, in general in Benin, most communities practice patrilineal inheritance practices, and land rights are inherited by men.<sup>49</sup>

### III. Nature and Scope of MCC Intervention

The Access to Land Project had five interlinked activities:

- Policy and legal reform
- Achieving formal property rights to land
- Improving land registration services and land information management
- Information, education, and communication
- Support land program coordination<sup>50</sup>

#### A. Policy and Legal Reform

The goal of the policy and legal reform portion of the project was to assist with the development and dissemination of a new land policy framework.<sup>51</sup> To that end, sixteen studies were conducted, feeding into the production of a land policy white paper (*«Livre blanc de politique foncière» - décret portant Déclaration de politique foncière et domaniale au Bénin*), which was validated in 2009 and approved in 2010. The aim of the policy is to secure rights, facilitate investment, and create a real estate market using land as an asset convertible to cash. The white paper discusses approaches for securing land rights and also the use of state land, land information systems,

efficient (decentralized) land administration, and women's access to land.<sup>52</sup> The white paper led to the development of the Code of Landholding and the Domain.<sup>53</sup>

#### B. Formalizing Property Rights and Improving Land Registration and Information Management

The activities related to formalizing property rights and improving land registration and information management were divided into urban formalization and rural documentation.<sup>54</sup> In urban areas, the project aimed to upgrade land occupancy certificates to full civil law titles, modernized the geodetic network, and established new systems for managing documents and training agency officials. Prior to the project, most urban landholders did not have standardized documents but rather held administrative law instruments of occupancy or use certificates, which were not registered.

In rural areas, the Rural Land Rights Mapping (PFR) component targeted recognition and certification of land held under customary tenure. The project mapped and defined rights in a Village Landholding Plan (PFR) in 294 villages and assisted with the issuance of individual rural landholding certificates.<sup>55</sup>

One stated goal of this portion of the project was to document secondary rights to land in addition to primary rights. To mitigate the risk of disenfranchisement of people who were vulnerable, the project also focused on developing contract forms and processes to document secondary rights and on identifying vulnerable groups and making a plan to protect and enhance their access to land.<sup>56</sup> This aspect of the PFR component was of particular importance to securing women's access to land, given that the land rights held by women under customary practices most often fit into the category of secondary rights.

#### C. Information and Education

The project had an information, education, and communication (IEC) goal that aimed to create awareness and understanding of land policy reform, including gender considerations.<sup>57</sup>

### IV. Gender-Specific Recommendations

A 2006 gender review of the project suggested that the most important steps toward not further disenfranchising women in the land mapping and titling process were to include knowledgeable and effective women in every aspect of the project; consider gender concerns from the beginning to the end,

47 Code of Persons and Family, art. 185 (Benin).

48 Code of Persons and Family, art. 191 (Benin).

49 Giovarelli, *supra* note 34, at 35.

50 MCC, *supra* note 36, at 35.

51 Millennium Challenge Account Benin, *Access to Land* (2009), accessed at <http://www.mcabenin.bj/en/project/land>

52 LANDac, *supra* note 43, at 37.

53 Millennium Challenge Corporation, *Tracking Results of MCC Investments in Property Rights and Land* (2012), accessed at [http://www.mcc.gov/documents/data/Chevron\\_-\\_Land\\_-\\_Dec\\_2012.pdf](http://www.mcc.gov/documents/data/Chevron_-_Land_-_Dec_2012.pdf).

54 MCA Benin, *supra* note 36, at 38.

55 Kent Elbow *et al.*, *supra* note 22, at 15.

56 *Id.*

57 MCA-Benin, *supra* note 28, at 34.

including the customary situation for women in each of the three regions; and identify all property rights holders within a household in both rural and urban areas and among various ethnic groups.<sup>58</sup>

In addition, the report strongly recommended the recording and registration of women's secondary rights to land, which include the right to use their husband's land and the right to harvest produced from communal land. The memo stated, "The importance of identifying property holders on the ground before starting a land administration program cannot be overstated." The report recommended that the customary obligation of husbands to provide land to wives be captured in an individualized certificate as a real, protected right to use the land, and other secondary rights, like communal rights to harvest, be captured in a PFR. The memo also recommended that the law and regulations, at a minimum, presume co-ownership of land between spouses and that a communication, education, and training plan be adopted.<sup>59</sup>

The white paper on landholding policy in 2007 made specific gender recommendations, including carrying out large-scale education and public awareness campaigns and enhancing the professionalism of women through promotion of women in decision-making bodies and in the real estate business with the support of technical and financial partners, investors, and the MCA.

MCA-Benin recognized that within the areas of the PFR program there would be groups of people with less power than other groups of people. These vulnerable groups included women, non-sedentary livestock producers, migrants borrowing land from customary landholders, and youth. The geodetic/topographical surveys, which also included a survey of rights holders, attempted to collect information on both secondary (delegated) rights and primary (management) rights to land.<sup>60</sup>

## V. Gender Review of Project Process and Outcomes

The basic policy of the government of Benin to ensure nondiscrimination in the application of all laws and government programs has been applied and elaborated in all MCA activities.<sup>61</sup> Still, there are many barriers to gender equality in Benin, and there are lessons to be learned from this project.

### A. Policy and Legal Reform

The Declaration of National Policy on Landholding and the Domain, adopted by the Council of Ministers in July 2010 and influenced by the MCA-Benin white paper on landholding policy, highlighted the goal of equality of women with men in

their access to land and in the protection of their landholding rights. However, while the Code on Landholding and the Domain (2013-01) expresses broad support for nondiscrimination and cross-references the Family Code in relation to equal rights for women, it does not have specific provisions on equal rights for women and men.<sup>62</sup>

As is always true with law and policy, the final decisions of what is included or not belong to the government. In the Benin land reform activity, there was a formal policy-making process underway (running parallel and somewhat in competition with the MCA project), led by the Ministry of Urban Development and Land Reform. Its main policies were published as the *Lettre de Cadrage on Land Reform* in 2010. Most of its provisions overlapped with the white paper, but there were significant differences of nuance and priority. The code may be regarded as a synthesis of the two policy processes. A third track of policy formation, led by the Ministry of Agriculture, added another level of nuance and balance of priorities.

The initial aims, of ensuring that the 2004 Code of Persons and Family was enforced broadly and developing a gender strategy on implementation measures that would provide guidelines for its implementation, were not a concentration in the project. Indeed, one of the questions of the Benin project is whether or not those were realistic objectives given the breadth of the main components of the project. While a focus on ensuring the enforcement of the Code of Persons and Family would have been good for women generally, it is not clear that such a focus would have had an impact on the PFR program.

### B. Formalizing Property Rights and Improving Land Registration and Information Management

The PFR program and project activities of parcel surveying, citizen-landholder census and household member interviews, displaying the maps and landholder lists for public witness and comment, recording of rights, and issuing certificates had the purpose of accurately recording the rights and obligations of the villagers from their point of view. The PFR documented customary rights and obligations and then transformed this record into three instruments: a village map with parcel boundaries; a list of landholders (named only as the villagers indicated); and certificates of landholding, issued upon application by each landholder and based on the mayor's authority to confirm and verify landholdings.

The PFR activity began with socioanthropological studies to determine local custom and vocabulary in order to contextualize the later land rights documentation.<sup>63</sup> Next, field teams that would carry out surveys and a census of landholding rights received training on the standard forms and methods to be used. The forms and methods incorporated mechanisms designed to ensure that the women in the household were

<sup>58</sup> Giovarelli, *supra* note 35, at 35.

<sup>59</sup> *Id.*

<sup>60</sup> Elbow, *supra* note 22, at 13.

<sup>61</sup> William Valletta. *Gender Equality in Benin Access to Land Project* (2011).

<sup>62</sup> Valletta, *supra* note 24, at 22.

<sup>63</sup> William Valletta. Lesotho/Benin Memo (2013) (unpublished memo) (on file with author).

consulted independently or alongside the men and their representations of their status were accurately recorded.<sup>64</sup>

Two kinds of rights were documented: administrative (primary) rights and operational rights (secondary).<sup>65</sup> However, the surveys of right holders were not entirely successful in identifying secondary rights holders. Both primary and secondary right holders were often reluctant to identify secondary rights to land.<sup>66</sup> Given the tendency to concentrate land rights in the hands of a single entity, better results may have been achieved if mitigating measures to ensure secondary rights were recognized had been included from the beginning.<sup>67</sup> It may have been that more mitigating measures were needed in rural villages in order to ensure that women's voices were heard, especially where there was not a tradition of women asserting their rights in public, if at all.

As might be predicted, anecdotal evidence suggests that in villages closer to urban centers more women asserted themselves as claimants of land rights; more men acquiesced to the family fields being recorded as separate fields with each brother and sister named as a landholder; more neighbors affirmed the status of female landholders; and more groups of women were joined as associations in control of orchards or common gardens. In villages that were more remote and "traditional," more land was described as consolidated family or clan holdings under control of a patriarch.<sup>68</sup>

Two possible explanations for the lack of documentation of secondary rights holders in rural areas have been put forth by MCC personnel. First, policymakers, administrators, and local populations tended to equate the land certificates anticipated following registration of parcels in the PFR with land titles, thus project intentions to register secondary rights along with primary rights were not well understood and became more difficult politically. There was no tradition of documenting secondary rights, and it had never been done before. Presumably, titling land in more than one name and listing secondary rights would have had permanent implications for continued control over the land, which may not have been politically feasible. The second explanation is that the procurement timelines and program priorities meant that the activities designed to address and reinforce secondary rights were largely concentrated in the final year of the compact.<sup>69</sup> The risk of disenfranchising women in the process of identifying rights is great, and one lesson learned from Benin is that mitigating measures should accompany the PFR activity from the beginning.<sup>70</sup> In Benin, addressing this issue from the beginning may have helped address any resistance encountered later.

One team member elaborated on this lesson. Operational methods for obtaining reliable and reasonably complete secondary land rights information needs to be very well thought out, and the legal instruments and procedures for protecting secondary land rights given copious attention, from or even before the beginning of the intervention. Furthermore, community titling is highly contextual, especially for women and vulnerable groups. Therefore, trying to implement one intervention throughout an entire, heterogeneous country without taking context into account resulted in highly variable work. It may be better to restrict community titling to one area.

The project recognized midstream that secondary rights were not recorded for three important groups—migrant farmers, transient pastoralists, and women. At that time, the project developed a supplementary form for the census, a checklist of the rights not being documented. The project also increased awareness-raising efforts and oversight by project managers. However, because this was recognized and implemented after commencement of the project and only in some communities, it was difficult to completely accomplish objectives within the given timeframe.<sup>71</sup>

MCA-Benin developed two socially oriented programs to mitigate the risk of disenfranchisement of vulnerable populations in the PFR activity.<sup>72</sup> However, both programs were limited in their geographic scope (less than half of the communes) and both took place after the PFR activity commenced, with limited time for implementation. Moreover, the programs were only available to communes that asked for assistance.

Of the two socially oriented programs, one developed standardized contract forms to document secondary rights (that were not captured in the rural plan) and trained local government officials to manage and enforce these contracts.

In addition, MCA-Benin added paralegal professionals to the mayoral administrations in twenty communes to assist the citizens, including women's groups, to make effective use of the new landholding instruments—certificates, contracts, titling—and to negotiate and conclude agreements for use and occupancy of lands of new proprietors or of communal reserves. Four of the twenty paralegals hired were women.<sup>73</sup>

The second program was implemented in 2010 in another sixteen of the forty communes. MCA-Benin hired Benin Consulting Group (BeCG) to identify vulnerable populations, determine their landholding needs, and formulate programs to encourage their inclusion in documentation of their land rights.<sup>74</sup> The goal of each report was to assist in the implementation of MCA social programs, specifically those improving land access for vulnerable groups in beneficiary communes, provide technical input—expertise, social diagnosis, and strategies—

64 *Id.*

65 Elbow, *supra* note 21, at 13.

66 *Id.*

67 *Id.*

68 Valletta, *supra* note 63, at 41.

69 Elbow, *supra* note 22, at 13.

70 *Id.*

71 *Id.*

72 *Id.*

73 Valletta, *supra* note 24, at 22.

74 Elbow, *supra* note 22, at 13.

to equip the communes with information and programming designed to help secure the land access rights of their vulnerable groups.

Through the report, strategies were provided—in the form of social programs—to (1) provide an alternative to traditional land management and (2) make course corrections in the implementation of Rural Land Plans, which have, in many instances, made the lands rights of vulnerable groups more insecure. These programs took the form of social contracts, spatial arrangement/land use regulation plans, plans for common resource management, and systematic recording of individual contracts of tenancy/land use. Each commune would choose one or two specific programs of the options recommended by BeCG to target vulnerable groups, with an emphasis on programs that would have commitment of communal resources and would be substantially completed within the life of the project.<sup>75</sup>

We reviewed the two available reports from BeCG on vulnerable populations in rural areas. The first report was from the commune of Gogounou. Five vulnerable groups were identified in this commune: women, youth, agricultural migrants, indigenous people, and landless farmers (from the Fulani ethnic group). Women and the Fulani (who are generally both landless and migrants) were ranked as the most vulnerable.

BeCG completed an analysis of women's vulnerability and found that women were in a disadvantaged position vis-à-vis their land rights relative to men because of the custom for male inheritance and exogamy. According to common practice, a woman resides in the marital home located on the community land of her husband's relatives. Women access land lent to them by their husbands, and that land is often very small (1/4 or 1/2 hectares). Given this social arrangement, Rural Land Plans identified land largely as the property of men, formalizing men as the official landowners and delegitimizing women's secondary rights to land accessed via the customary regime.

The report found when women were in the fortunate, though rare, position to have received primary rights to land as a gift from their biological parents it resulted from (1) the daughter having more superior qualities than the son or (2) the daughter being an only child; in such cases the Rural Land Plans clarified their land rights and made them into official landowners.<sup>76</sup> However, for women who were in the more common position of having insecure secondary rights to land, Rural Land Plans formalized these inequalities by failing to formally recognize and record them.<sup>77</sup>

BeCG recommended that MCA-Benin assist Gogounou to (1) secure contracts with large landowners to allow vulnerable groups to access land, (2) identify vulnerable people and then

establish/improve a representative body to speak for them, (3) increase legal literacy of the Rural Land Law, and (4) ensure that, following the survey of land (the step prior to registering land via the creation of the Rural Land Plan), all rights holders have read the content of the minutes.<sup>78</sup> It may have helped just to increase the visibility of the vulnerabilities of secondary rights holders.<sup>79</sup> One person from MCC involved in the project said, "The most important thing for women's land rights is that women, and the community, know their rights; that the process is public; and that decisions which negatively affect women are publicized and criticized." He believes that the more public these issues are, the more justice will be dispensed.

The second report provided a similar analysis of another commune, Zangnanado, in which BeCG also found five vulnerable groups: indigenous women, young indigenous people, landless indigenous people, Fulani, and migrants. BeCG found that women have poor access to land, precarious tenure rights (loans, leases, sharecropping, etc.), and access to land that is smaller in size and less fertile than land used by men. This study found that a few women took advantage of the Rural Land Plan activities to ask for their legal share of inheritance or to ask that their names be recorded on land they had purchased. However, these actions were not responded to positively by their families. Among other recommendations, BeCG suggested that MCA-Benin assist Zangnanado to create an agricultural cooperative with some jobs reserved for women and to raise awareness of the law regarding equal land inheritance.

In July of 2010, BeCG began a project to improve the conditions of access to land for the vulnerable in the city of Aboreny Calavi. Unlike in the two rural communes, the vulnerable groups identified in the urban context were customary land holders, purchasers of land, occupants of land in floodplains whose rights are precarious, the landless, and occupants of the reserves. Because gender was not identified as an issue, and women were not identified as a vulnerable group, this project did not have a gender-focused objective.

The MCA-Benin project provided the opportunity for communes to receive assistance for vulnerable groups, including women. In the seventeen rural communes and three urban communes that participated, the project assisted in identifying and organizing vulnerable groups to work with their communal administrations and define specific local projects, which included<sup>80</sup>

- Improved organization of women's garden associations and identification of new plots on which they can expand their production;
- Improved organization of women's support associations, which can provide access to services such as training to improve cultivation or livestock husbandry, farm

<sup>75</sup> *Id.*

<sup>76</sup> Benin Consulting Group. *Document de Programme Social Communal de Gogounou* (2010) (on file with author).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Kent Elbow, trip report, Jan-Feb 2011, (on file with author).

<sup>80</sup> Valletta Internal Memo, *supra* note 24, at 10.

management and microcredit, household management and child care;

- Improved organization of women's social and service organizations to make them more effective participants in public affairs and management of collective resources;
- Assistance in identifying and negotiating with proprietors who have lands that are underused and available for tenancy or sharecropping and assistance in creating the contractual agreements;
- Preparation of reserve lands under state or communal control for tenancy by women's producer groups, including several areas of swampy land to be prepared and irrigated (drained) for rice cultivation.<sup>81</sup>

In all forty rural communes, the new land administrative units at the local levels have at least two and as many as four women among their nine members.<sup>82</sup>

The major gender issue in the Access to Land Project appears to have been the limited number of women and other secondary land users whose rights were documented in the PFR, even though including them was a stated goal. Unfortunately, this may have resulted in women's security of land tenure being weakened rather than strengthened. MCC attempted to mitigate the damage by developing supplementary social programs, but for a variety of reasons these programs were not started until after the PFR was commenced in some areas and after it was completed in others.

Although the project took steps toward being gender inclusive, the lasting effects are unclear. The project leads are skeptical that documenting secondary rights will truly protect users, because the list of rights is hard to obtain and tribal leaders want to gain control over land rights and not distribute control. One person suggested that it may have worked better to simply document every person in the household on the certificates; since this did not happen there is a risk that secondary rights will be buried when the certificates are converted to private titles.

A 2011 memo on gender in the project noted that the major risk related to the gender-integration efforts is that there is little evidence that the agencies of the government of Benin and the municipal administrations have incorporated the methods and initiatives into their practice.<sup>83</sup> In fact, although the government adopted model contracts, they were not quickly put into operation and may not be used in the future since people found the idea of contracting within a family strange. In later compacts, MCC is more deliberate in addressing sustainability issues throughout compact implementation.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

## C. Information and Education

The project maintained a steady schedule of regional and communal workshops, training seminars for village and communal leadership, meetings of selected local groups, and general meetings of the citizens in order to explain the content and functioning of the new systems of rural and urban landholding. Equality of access to land, equal protection, and women's status as landholders was a module of this training and the public education curriculum.<sup>84</sup>

The need for and value of this component cannot be overemphasized. Social programs that raised awareness of the rights of vulnerable groups did mitigate the risk that PFR implementation had reduced the security of the use rights held by members of those groups.

The following example is from the village of Sédo, Ifangni Commune:<sup>85</sup>

Associations of women gardeners had established a profitable business producing vegetables and marketing them in nearby Nigeria. The lowlands (that is, adjacent to waterways, also referred to as *bas-fonds*) on which the women garden, were awarded to women's groups during the revolutionary period in Benin (approximately 1972–1990). Sometime following the revolutionary period, probably around 2000, the customary proprietors of the land used by the women for gardening gradually began to reassert their property claims by demanding that the women gardeners pay rent for use of the land. The claims and assertiveness of the customary proprietors were further reinforced as a result of implementation of the PFR and in anticipation of the rural land certificates that will be issued to the customary property rights holders.

At Ifangni we were informed by PISOL (social program subcontractor to BeCG) that the women were now at risk of losing their access to the gardening plots as a result of the intention of one of the two primary landholders to sell the land. During our visit to the village of Sédo and the gardening zone, the landholder confirmed his intention to sell. The women who produced vegetables on the landholder's area of the gardening zone declared that they had no other livelihood options to replace the potential loss of access to the gardening plots.

However, the publicity and awareness-raising aspects of the PISOL facilitated social program (although not yet in full implementation) was already having an impact at the level of the Sédo village chief (who is also president of the PFR village section, or SVGF) as well as officials in the Mayor's office. Thus authorities at both the village and commune levels declared their opposition to loss or reduction of the women's access to the gardening plots, or at least not in the

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<sup>84</sup> *Id.*

<sup>85</sup> Elbow trip report, *supra* note 79, at 44.

absence of viable livelihood options in case of loss of access. While the situation of the women gardeners of Sédo village continues to evolve, the presence of the social programs guarantees that, at the very least, it will resolve itself in the context of public scrutiny and engagement.

## VI. Conclusion

The monitoring and evaluation plan states that MCA project directors are responsible for submitting information on participants disaggregated by gender, age, and income level—to the extent they are individually identifiable—to the monitoring and evaluation director. However, much of the available evaluation data does not disaggregate by sex. The performance indicators focused on an increased perception of land tenure security, policy and legal reform, and the number of prefecture land registration offices opened. In the final status report, the projected long-term results focus on household-level benefits, both in numbers and in income increase.

If the Benin Compact were developed today, the context for gender integration in compact development would be different, as MCC now has requirements for gender integration, including operational procedures and milestones described in the agency's Gender Integration Guidelines.

Among them are requirements for (1) an analysis of the social inequality constraints to poverty reduction to inform early compact development decision making, (2) a senior-level social/gender expert on the partner country teams, and (3) the partner country to have an MCC-approved gender integration plan no later than the second quarter of compact implementation. If an analysis had been done early on, the late corrections that were done to try to include disenfranchised groups (especially women) may have been incorporated from the beginning, leading to better outcomes. Having a senior-level gender expert to push for these concerns may also have made a difference in when gender concerns were considered.





# LESOTHO

## COUNTRY CASE STUDY 2



Photo courtesy of MCC

# I. Background

Lesotho is a country with few resources apart from water, diamonds, the export of labor to South Africa, and a small but growing garment industry.<sup>86</sup> In 2011, remittances accounted for 27 percent of Lesotho's gross domestic product.<sup>87</sup> Lesotho is the only country with no land below 1,400 m above sea level, and in recent years the country's agriculture has been hard hit by both prolonged droughts and unseasonal torrential rain, which strips the thin topsoil from its steep slopes.<sup>88</sup> Of the country's total land area, only about ten percent is classified as arable.

About 70–80 percent of Lesotho's people live in rural areas, and more than three-quarters of these are engaged in agriculture which is mostly subsistence low input, low output, rain-fed cereal production and extensive animal grazing.<sup>89</sup> The majority of small-scale farmers live on what they can produce from cultivating an average of less than 1.5 ha of land or from herding livestock on grazing land that is increasingly and severely degraded<sup>90</sup> or on occasional income from other sources such as casual labor or remittances.<sup>91</sup> More than half of rural people in Lesotho are poor and more than one-quarter are extremely poor.<sup>92</sup>

Although many of Lesotho's people live in rural areas, urbanization is increasing. At independence in 1966, only 7 percent of Lesotho's population lived in towns. By 1976 it had grown to 11 percent; 14 percent in 1986, 19 percent in 1996 and 23 percent in 2006. UN-HABITAT estimated the level of urbanization at nearly 27 percent in 2010, growing to 34 percent in 2020 and to nearly 60 percent in 2050. In the subregional context, the level of urbanization in Lesotho is relatively low despite the rate of urbanization being acknowledged as one of the region's highest.<sup>93</sup>

Drivers of urbanization in Lesotho mainly consist of rural-urban migration, natural growth, and variations in settlement classification. Most internal migration surveys emphasize the importance of rural poverty as a push factor leading to migration to Maseru and secondary towns. Most rural-urban migrants and newly formed households settle in peri-urban neighborhoods, where, until 1980, local chiefs controlled land using customary land tenure rules. In peri-urban areas, land for housing is

relatively easy to buy informally or extra legally from subdivided fields and owing to scarcity of land supplied through formally planned plots, between 70–80 percent of urban development in Lesotho could now be occurring this way. The need to protect scarce arable land, the absence of formal land markets, issues of tenure security, and the disorderly and unclear residential layouts resulting from land subdivisions sanctioned by customary chiefs has motivated government to respond. Policy responses by the government have historically taken the form of legislation.<sup>94</sup>

Women in Lesotho have low status in society, although their status has been improving since the enactment of the Legal Capacity of Married Persons Act in 2006. There is a 30 percent quota for women's involvement in local government, and women are actually represented at a higher level of 42 percent. However, women are underrepresented in cabinet and parliament. Only 19 percent of cabinet ministers, 25 percent of parliamentarians, and 42 percent of the councilors are women. Further, although women are represented, their opinions do not appear to be reflected in decision making, leading to questions about their ability to engage effectively.<sup>95</sup>

The country has one of the highest literacy rates in Africa. Girls have benefited from investments in education more than boys, who are often kept out of school to work as herders.<sup>96</sup> In primary school, it is almost a 50/50 split in the numbers of male and female learners, with 50.5 percent male learners and 49.5 percent female learners. Lesotho has a considerably higher proportion of girls than boys in secondary school (56 percent girls) as a result of boys herding. Although education has benefited many women, there are large numbers of poor women, particularly in rural areas, who remain disadvantaged.<sup>97</sup>

More than half of all households in Lesotho are headed by women. Households headed by single mothers or women who are divorced, widowed, or abandoned by their husbands are among the households with the highest incidence of poverty. Women who are heads of poor households are likely to have lost the assets they once possessed when they were with their husbands and are less likely to own agricultural assets such as land and livestock. They have difficulty securing the cash they need to feed and provide for their families. But households headed by women whose spouses have migrated in search of wage employment and stay away from home for considerable amounts of time, tend to be better off than other female-headed households.<sup>98</sup>

The government of Lesotho submitted a proposal for MCC funding in 2004 after being selected as an MCC-eligible country. At the time, the Kingdom of Lesotho was classified as

86 Action Aid, *About Us in Lesotho*, accessed at <http://www.actionaidusa.org/where-work/africa/about-us-lesotho> (last visited Jan. 1, 2014).

87 Susanna Groves, *Remittances Hit \$534 Billion in 2012, Setting New Record*, International Diaspora Engagement Alliance (2012), accessed at <http://diasporaalliance.org/remittances-hit-a-record-high-of-534-billion-in-2012/>.

88 Action Aid, *supra* note 86, at 49.

89 The World Bank, *Lesotho Overview* (2013), accessed at <http://www.worldbank.org/en/country/lesotho/overview>.

90 MCC funded a wetlands-restoration project under the compact to conserve and restore wetlands through behavioral change in grazing practices. Given that Lesotho is a "cattle culture" and men in Maseru hold cattle in rural areas, this is extremely difficult.

91 IFAD, *Enabling Poor Rural People to Overcome Poverty in Lesotho* (2008), accessed at <http://www.ifad.org/operations/projects/regions/PI/factsheets/lesotho.pdf>.

92 *Id.*

93 Resetsemang Clement Leduka, "Privatising Land Rights in Pursuit of Poverty Reduction: Commentary on the 2010 Lesotho Land Reform Project." Paper presented at the Conference on Investing in Land and Strengthening Property Rights, Johannesburg, South Africa, Apr. 12-13, 2012, accessed at [http://www.urbanlandmark.org.za/conference/2012\\_presentations/clement\\_paper.pdf](http://www.urbanlandmark.org.za/conference/2012_presentations/clement_paper.pdf).

94 *Id.*

95 Southern African Development Community (SADC) Gender Protocol Barometer 2012, Gender and Governance, Chapter 2, accessed at <http://www.genderlinks.org.za/article/sadc-gender-protocol-2012-barometer---namibia-2012-12-07>

96 IFAD, *supra* note 91, at 49.

97 SADC Gender Protocol Barometer 2012 Education and Training Chapter 3

98 *Id.*

one of the least developed countries in the world.<sup>99</sup> Although the initial proposal was focused on infrastructure development, it also mentioned a commitment to policy reforms, including the need to review gender-biased laws, particularly the minority status of married women.<sup>100</sup>

The submittal of the initial proposal began a period of negotiation and assessment between MCC and Lesotho. This included a discussion about the specific policy reforms needed to promote economic growth and poverty reduction in Lesotho.<sup>101</sup> MCC determined that promoting economic growth and poverty reduction would require achieving gender equality in economic rights and that signing a compact with the government of Lesotho would depend on their willingness to remove the minority status of married women from their law. In December 2006, in response to conditionality from MCC to the signing of a compact, the Legal Capacity of Married Persons Act 9/2006 was passed, removing the minority status of married women. Because Lesotho had achieved legal gender equality in certain economic rights – the actual condition presented by MCC – compact development proceeded and gender equality concerns influenced the implementation of projects during the compact.

Lesotho's government identified land administration reform as a priority area, and MCC provided some preliminary support to assess the land administration situation and to propose areas for legal reform.<sup>102</sup> The reports undertaken during the assessment period reviewed the housing situation, the civil legal system, the draft Land Bill, and the land information and registration systems.<sup>103</sup>

Lesotho resubmitted a revised proposal for MCC funding in 2006. Based on the previous assessments, Lesotho included land reform in the proposal, and MCC added additional work in the area of land policy and legislative reform into the compact.<sup>104</sup>

In 2007, MCC signed a five-year compact with Lesotho for \$362.6 million, with an effective date of September 2008. The project ended September 2013. The MCC Compact with Lesotho includes three program components: (1) a water sector project, (2) a health sector project, and (3) a private sector development

project, all with the ultimate goal of achieving economic growth and poverty reduction.<sup>105</sup>

## A. Overview of the Land Reform Subcomponent

The \$21 million land reform subcomponent of the program falls under the private sector development (PSD) component, which includes improving land administration, modernizing the commercial legal system, strengthening payment and settlement systems, supporting the provision of credit bureau services, including assisting the rollout of a national identification scheme, and training and outreach to support gender equality in economic rights.<sup>106</sup>

The land administration subcomponent is the focus of this case study and consisted of four activities. Under the compact, these activities were described as:

### 1. Policy and Legal Reform

MCC funding was to support technical assistance to the government to revise land reform legislation currently in draft form and to develop its land policy, thereby promoting the use of land as an economic asset.

### 2. Systematic Regularization of Land in Urban Areas and Improvement of Rural Land Allocation Processes

This activity focused on the systematic regularization and upgrading of informal settlements in urban and peri-urban areas, beginning in Maseru and extending to other cities and towns. Funding also assisted community councils to improve their records of rural land allocations and to support the government's efforts to train community councils and traditional authorities on the land allocation process.

### 3. Modernization and Improvement of Land Administration Services

This activity focused on the simplification of land administration procedures and the formation and establishment of a new Land Administration Authority.

### 4. Public Outreach and Training

This activity funded public outreach and awareness activities in support of all of the land administration reform activities.

## B. Gender Equality as a Priority

Gender considerations were included from the outset of the land-related portion of the project. For instance, MCC stated that the rights under the Legal Capacity of Married Person Act (LCMPA) of 2006 had to be guaranteed consistently in both civil and customary law so as to ensure that the judiciary could

99 The World Bank, *World Development Indicators* (2003).

100 Government of Lesotho, Proposed Millennium Challenge Account Investment Framework (2004).

101 See Thomas P. Briggs & Wesley Wilson (MCC), letter to Minister Thahane (Government of Lesotho), Nov. 23, 2004.

102 Millennium Challenge Corporation, Terms of Reference: Legal Consultancy for Improvement of Land Tenure Security and Land Administration in Lesotho (2008).

103 See Norfolk, Technical Directive #LTPR001 under Call Order #68 Report on Task 3 (May 30, 2007); Norfolk, Technical Directive #LTPR001 under Call Order #68 Report on Task 4 (May 30, 2007); David Greene, Moresi Gertrude Tau-Thabane & Tankiso Hlaoli, *Lesotho Review of Civil Legal Systems: Final Report* (2006); John W. Bruce, *Lesotho's Draft Land Act: Issues and Recommendations* (2007); Steven A. Bernstein, *The Housing and Housing Finance Market in the Kingdom of Lesotho* (Dec. 2005); Swedesurvey Consultants, *Lesotho Land Reform, Status of Land Information Systems and Land Registration Systems in Lesotho: Inception Report* (Apr. 2006); Swedesurvey Consultants, *Lesotho Land Reform, Status of Land Information Systems and Land Registration Systems in Lesotho: Recommendations for Land Administration Improvements* (2006). (All above documents on file with author).

104 Government of Lesotho, *Lesotho Country Proposal to the Millennium Challenge Corporation* (2006); see also MCC, Terms of Reference: Legal Consultancy for Improvement of Land Tenure Security and Land Administration in Lesotho (Apr. 2008).

105 Millennium Challenge Compact, U.S.-Kingdom of Lesotho, Jul. 2007; MCC, *Compact Summary for Lesotho* (2007).

106 Millennium Challenge Compact, U.S.-Kingdom of Lesotho, Jul. 2007.

apply the rights consistently, especially given the difficulty for poor women to initiate an appeal of a judicial decision based on conflicting laws.<sup>107</sup> A further condition in the Lesotho Compact to be achieved prior to entry-into-force was the harmonization of other laws with the LCMPA.

The compact also included provisions to ensure that gender equality was cross cutting and considered throughout the project. MCA-Lesotho was charged with drafting, implementing, and monitoring a program-wide Gender Integration Plan. The compact also provided that MCA-Lesotho employ a full-time social/gender specialist for the full term of the compact to ensure that social safeguards were fully included in the design, terms of reference, work plans, and monitoring and evaluation plans of the project and that each of these aspects complied with MCC's Gender Policy. Perhaps most significantly, the Gender Equality in Economic Rights activity created a deeper understanding of the relevance of achieving equal rights across all of the projects, including the land project. For example, the new law had an impact on how resettlement compensation, verification, and adjudication should be carried out. Ensuring awareness of women's new rights was important for MCC's management of the compact's infrastructure investments.

## II. Legal Framework

Britain colonized Lesotho in the late 1860s, but the land continued to be managed by the Basotho as before. Throughout the colonial period, Basotho and their chiefs warded off a number of attempts by Europeans to acquire land rights. In the period immediately after the country's independence in 1966, the postcolonial government instituted legislative reforms.<sup>108</sup>

Today, land rights in Lesotho are regulated by a dual legal system of (1) customary law, which is based on Basotho traditions and practices and codified in the Laws of Lerotoli, and (2) general law, which consists of Roman-Dutch law imported from the Cape, and Lesotho statutory law.<sup>109</sup> The Basotho make up 99 percent of the population of Lesotho. Both codified customary law and general law apply to all the land in Lesotho.

Under customary and formal law, all land belongs to the nation as a whole and is held in trust by the king. The king delegates his responsibilities to allocate and administer the land to the local government authorities. Chiefs are also involved in the process, verifying the applicant is a citizen, their marital status, etc. Women, single or married, have the right to apply for land allocation and to hold title in their own name without the approval of their spouse or male relative.

Polygamy is practiced in Lesotho, with each separate wife having her own household. Women are considered independent under law when they marry or attain the age of majority (twenty-one). Of course, real independence requires economic independence, which is rarely the case for young women. Under customary law, a woman is a perpetual minor and cannot validly contract without assistance from her guardian (i.e., father, husband, or husband's heir), but the passing of the LCMPA has changed this.

In the period immediately after the country's independence in 1966, the postcolonial government instituted legislative reforms in the land sector. These laws included the 1969 Land Husbandry Act, the 1973 Land Husbandry Act, and the 1973 Land Act. In 1979, the government again passed a Land Act that contained much of what could be found in the 1969 and 1973 legislation. With the passage of the 1979 Land Act, the government attempted to enhance landholders' security of tenure, with the aim of increasing agricultural production. Under this act, the customary system of tenure was modified. Whereas in the past chiefs had the power to reallocate land upon the death of a holder or to accommodate new households, under the 1979 law, reallocation was only to be enacted in cases of abuses or nonuse of the land. Although the Land Act of 1979 was nondiscriminatory in nature (men and women both had the rights to acquire land, hold land in their own name, and inherit land), its implementation was based on a discriminatory legal instrument, the Deeds Registry Act of 1967.

According to the Deeds Registry Act, no land could be registered in the name of a woman who was married in a community-of-property marital property regime. Moreover, a woman married in community of property (the default marital property regime) was considered a minor, giving husbands marital power over the person and property of his wife.<sup>110</sup>

At the time that the MCC project was designed, the 1979 Land Act regulated land rights in Lesotho.<sup>111</sup> MCC commissioned several assessments of Lesotho's land system, including assessments of the civil legal system. The assessment included an analysis of the legal impediments and barriers to women's ability to own property and recommendations as to how those barriers could be removed.<sup>112</sup> The report finds that married and widowed women in Lesotho have no true access to land and cannot carry out significant business transactions owing to restrictions in various laws, many of which were related to married women's legal status as minors and husbands' marital power in the Deeds Registry Act. Such laws prohibited a woman who was married in community of property from registering property in her own name, serving as a director of a company unless her husband gave and registered his consent, inheriting property on an equal basis with men, independently managing

<sup>107</sup> *Id.*

<sup>108</sup> FAO, Lesotho Full Country Report, accessed at <http://www.fao.org/gender/landrights/report/en/> (then select "Lesotho").

<sup>109</sup> U.N. Division for the Advancement of Women (DAW), *Women's Rights and Participation – Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho*, EGM/WPD-EE/2005/EP.3 (Oct. 28, 2005) (prepared by Keiso Matashane-Marite).

<sup>110</sup> FAO, *supra* note 108, at 52, accessed at <http://www.fao.org/docrep/004/ab589e/AB589E00.htm#TOC/>

<sup>111</sup> UN-DAW, *supra* note 109, at 53.

<sup>112</sup> David Greene, Moresi Gertrude Tau-Thabane, & Tankiso Hlaoli, Lesotho Review of Civil Legal Systems: Final Report (Report to MCC, May 2006).

inherited property (unless it was excluded from being part of the joint estate if married in community of property by an agreement with her spouse), or entering into contractual agreements without her husband's permission. The report included a set of recommendations for changing these laws to allow women to exercise their economic rights, including abolition of the marital power concept.

In 2003, the Legal Capacity of Married Persons Act (then called the Married Persons Equality Bill) was drafted and sent to Parliament for consideration but sent back several times for further consideration because it touched on customary issues.<sup>113</sup> The act removed the minority legal status of women married in community of property by repealing the marital power and mandating that spouses married in community of property have equal power over joint assets. Because the MCC compact was focused on economic growth and poverty reduction, it was critical that women not be excluded from independent property rights. Part of the consultative process involved NGOs and CSOs, which flagged their concerns. Based on input from the NGOs, members of Lesotho's government, and others, MCC made a "condition precedent" to signing the compact.<sup>114</sup> This was achieved with the passing of the Legal Capacity of Married Persons Act in December 2006, a year and a half before the compact was signed.

A review conducted before the compact of Lesotho's other laws made clear that provisions conflicting with the Legal Capacity of Married Persons Act remained.<sup>115</sup> MCC made disbursement of compact funds conditional on additional legal reforms to ensure that existing laws did not contradict the newly granted economic rights but instead consistently guaranteed the following economic rights among others to all, regardless of applicable law and gender:

The right to enter into a contract, including the right to incur indebtedness;

- The right to sue or be sued;
- The right to register immovable property in one's own name;
- The right to act as an executor of a decedent's estate;
- The right to act as a director of a company;
- The right to act as a trustee of an estate;
- The right to bind oneself as a surety; and
- The right to buy, sell, and use property as collateral for loans.<sup>116</sup>

<sup>113</sup> PIU, discussion, August 29, 2013.

<sup>114</sup> Virginia Seitz & Michelle Adato, *Gender Equality and Poverty Reduction through Growth*, in Millennium Challenge Corporation: Principles into Practice (2012), accessed at <http://www.mcc.gov/documents/reports/paper-2012001153101-principles-gender.pdf>.

<sup>115</sup> See Greene et al., *supra* note 112, at 54; Itumeleng Kimane, Sakoane P. Sakoane, 'Matora Ntimo-Makara & Ngoakoane Molise, Review and Content Analysis of Policies and Laws that Economically Discriminate and Violate the Economic Rights of Women in Lesotho (report to MCC, Apr. 16, 2007).

<sup>116</sup> Millennium Challenge Compact, U.S.-Kingdom of Lesotho, Jul. 2007.

In 2008, the 1979 Land Act was amended to provide for joint title to land for spouses married in community of property.<sup>117</sup> Then in 2010, the new Land Act passed and section 10 of the Land Act 2010 states:

1. Where persons are married in community of property, either under civil, customary, or any other law and irrespective of the date on which the marriage was entered in to, any title to immovable property allocated to or acquired by anyone of them shall be deemed to be allocated to or acquired by both partners, and any title to such property shall be held jointly by both.
2. Subsection (1) shall apply in the same manner in the case of polygamous marriages as if each household was a monogamous marriage.
3. Transactions in relation to land shall be conducted by both spouses in monogamous marriages in community of property jointly or with the consent of another spouse, and where any document requires a signature the document shall be signed by both spouses unless they agree in writing that one spouse shall represent and sign on behalf of the other.
4. Subsection (3) shall apply in the same manner in polygamous marriages and each of the multiple wives shall be responsible for land matters relating to her household.
5. Where any of the spouses is for any reason unable to sign or give consent or unreasonably withholds a signature or consent where such is required under this Act, the other spouse may apply to a District Land Court for leave to perform the act without the required consent or to sign alone.

### III. Nature and Scope of MCC Intervention

#### A. Land Administration (Subcomponent of Private Sector Development)

The land administration subcomponent consisted of four activities, and each will be discussed in turn.

##### 1. Policy and Legal Reform

The policy and legal reform activity sought to provide technical assistance to Lesotho's government to develop a land policy that promoted land as an economic asset, revise and enact the draft Land Bill, and draft other laws and implementing regulations as needed. This activity included a gender analysis to ensure that the draft Land Bill was consistent with gender equality reforms and principles as well as a gender rights education program

<sup>117</sup> PIU, telephone interview, August 29, 2013; U.N. General Assembly, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Lesotho*, A/HRC/WG.6/8/LSO/1 (2010), accessed at <http://www.upr-info.org/oen/review/Lesotho/Session-08---May-2010/National-report#top>

to disseminate information about the rights of women to own property.<sup>118</sup>

The most comprehensive reform under this activity was passage of the new Land Act in 2010, replacing the 1979 Land Act. Through technical assistance, MCC worked to ensure that the relevant elements of the Legal Capacity of Married Persons Act were incorporated into the new Land Act.<sup>119</sup> The 2010 Land Act took a different approach toward gender issues than the draft 2006 Land Bill by adopting gender neutral language throughout the act and including achieving gender balance in land dealings as an objective.<sup>120</sup> The Land Act establishes the presumption that unless a contract to the contrary exists, a marriage is in community of property, under any law and no matter when the marriage occurred (including before 2010), and therefore any title to immovable property allocated or acquired by either one shall be deemed to belong to both. All transactions have to be agreed to, in writing, by both spouses. If consent is unreasonably withheld, one spouse can apply to the District Land Court.<sup>121</sup> The presumption of joint property applies to polygamous marriages as well.<sup>122</sup>

The Land Act amends the Land Registry Act of 1967, which prohibited women from holding title to land. Additionally, for rural land, the act allows for a surviving spouse to remarry without extinguishing his or her claim to the deceased spouse's property but prevents that property from becoming joint property within the new marriage.<sup>123</sup>

## 2. Systematic Regularization of Land in Urban Areas and Improvement of Rural Land Allocation Processes

The second activity includes two main components: (1) regularizing, physical planning, and registration of informal settlements in urban and peri-urban areas and 2) assisting community councils to improve the process for rural land allocation and land management, including training community councils and traditional authorities on land allocation processes under the law, recording allocations, and maintaining records.<sup>124</sup>

The urban “regularization” zones were central and peripheral urban neighborhoods in the city of Maseru, a low density urban region. Almost all the land in the chosen zones was residential of a suburban style or the evolving “urbanization” of previous village-style housing. The legal transformation that the “regularization” project carried out involved the reformulation of the landholders’ rights from administrative occupancy permits to leaseholds under the state.

The land rights formalization processes were designed to increase gender equality through mandatory joint titling for married couples.<sup>125</sup> The instruments used to collect data on land holders were designed to capture marital status, and the information in the original census was used as a basis for project activities from that point onward. During the initial census, if a couple lived together with the same last name and claimed to be married, the presumption was that they were married, and they did not need to show proof. If the couple had different last names, proof of marriage was required in the form of either documentation of their civil marriage or parents’ letters or documentation of parents’ agreement in the case of a customary marriage. Polygamous marriages were to be captured as well, although in the urban area of the project, where the land regularization occurred, there were no examples of polygamous marriages. Men, who often migrate for work, are largely absent from the residential neighborhoods. When the census takers arrived on any weekday, it was often the women who provided the information and who handled the legal and administrative affairs.

Because the Legal Capacity of Married Persons Act passed before the start of the project, the project focused its public education on the significant changes to women’s land rights brought on by the newly passed legislation. In both the land regularization process and the improvement of the rural land allocation process, training and raising awareness regarding women’s land rights was a critical part of the activity. From the beginning, the public outreach campaign focused on women’s rights to land and joint titling of land rights. When public meetings were held, there were always two meetings: one meeting for both men and women describing the project and the process and the legal rights of men and women and a second meeting for only women that emphasized the women’s new rights, ensured their ability to ask questions, and confirmed that they understood their rights fully.

Under the regularization process, thirty-nine people were displaced: seventeen men and twenty-two women. As part of resettlement planning, communities around the projects were informed about the likely impacts. Once project-affected households were identified, meetings were held with them in their homes and at times that were convenient to them. Couples married in community of property were consulted together so that they could reach a joint decision. Once people decided to give their land to the project, agreement forms were designed and signed. Spouses married in community of property jointly signed the agreement. All people affected by the project were provided with information on different forms of compensation, but the majority (90 percent) opted for cash compensation. Even though there was training for PAPs on investment and income generating opportunities to mitigate squandering of compensation funds, some used their money within a short period of time and became impoverished. Furthermore, only one spouse’s name was reflected on the check, in most (possibly

118 Millennium Challenge Corporation, Detailed Description of Land Administration Reform Activity (n.d.).

119 Seitz & Adato, *supra* note 114 at 55.

120 Government Notice No. 45 of 2010, Statement of Objects and Reasons of the Land Act, 2010, sec. 3(h)(Lesotho).

121 Land Act of 2010, sec. 10 (Lesotho).

122 *Id.* sec. 10(2), (4).

123 *Id.* sec. 15(4).

124 Millennium Challenge Compact, U.S.-Kingdom of Lesotho, Jul. 2007.

125 *Id.*

all) cases the male.<sup>126</sup> However, spouses were encouraged to open joint bank accounts to create some accountability and ensure consultation regarding the use of funds.

### 3. Modernize and Improve Land Administration Services

The activity to modernize and improve land administration services created a unified Land Administration Authority (LAA). The LAA is an autonomous, self-sustaining, and professionally managed and operated agency that provides services to the public and land information users (including the poor) and is responsible for updating the land information system.<sup>127</sup> The LAA measures additional progress in terms of the number of parcels corrected or incorporated into the land information system, the number of secondary land transactions recorded, and the time it takes to process leases and other land transactions.<sup>128</sup>

The land administration reform component also included activities for public outreach and training in support of the above activities. This included conducting training programs on the new land policy, laws, regulations, and processes for land administration staff, community councils, and traditional authorities for the implementation of the reforms as well as public outreach to develop a wide understanding and awareness of new land policy.<sup>129</sup> The new land policy's inclusion of joint titling and registration of women and men's rights to land was emphasized in the outreach and training of land administration workers. In addition, as the land recording system changed from paper to a computerized system, the information collected reflected the documents used in the initial census. This activity was largely monitored based on the number of stakeholders trained, an indicator that was modified during project implementation to start collecting sex-disaggregated data; however, the end-of-project target remained aggregated.<sup>130</sup>

### 4. Public Outreach and Training

Public outreach and awareness activities supported all of the land administration reform activities as described above.

## IV. Gender-Specific Recommendations and Interventions

Gender equality was a high priority within the MCC-Lesotho Compact. Both the government of Lesotho and MCC recognized

gender inequality as a barrier to economic growth and poverty reduction (the ultimate goal of the compact), and expected the compact activities to extend full economic rights to the women of Lesotho.<sup>131</sup> Certain gender equality reform measures were a precondition of funding. Gender equality is both a cross cutting issue across all sectors of the project as well as a specific activity for public outreach and awareness raising of gender equality for economic rights.

As discussed above, MCC identified gender differences in economic rights in Lesotho during its initial assessments of Lesotho's land policy and civil legal system. Because of the dual legal system in Lesotho, the assessment of the civil legal system included a look at gender differences in customary law as well as in general law.

On gender issues, MCC commissioned three sets of recommendations. The first set was part of a gender analysis of Lesotho's 2006 proposal for MCC funding. The second was part of the 2006 assessment of the civil legal system in Lesotho. The third was part of a 2007 gender analysis of Lesotho's laws and policies.

After receiving Lesotho's revised proposal for funding in 2006, MCC funded a gender assessment of Lesotho's proposal.<sup>132</sup> The assessment looked at the proposal in its entirety and made a gender analysis and recommendations for each of the project's sectors. With regard to the private sector development (PSD) project, the reviewer made the following recommendations:

Conduct field research focused on understanding more fully women's land rights both under the formal law and under customary law and the interactions between the two.

- In designing the land administration program, conduct field research to identify all property rights holders within a household.
- Ensure that rules regarding titling and registration allow more than one property rights holder on the registration forms, and that the forms themselves facilitate including women.
- In monitoring the project, collect and analyze gender-disaggregated data to be able to measure what the project has achieved and adjust methodologies and targets accordingly.
- Integrate gender issues into the project so they are not seen as a separate piece or the responsibility of only female staff or women's organizations.
- Consider special issues that may act as barriers to women's full participation in the land regularization activities.
- Coordinate titling efforts with credit and training services to ensure the maximum benefits.

<sup>126</sup> Mahlao Diaho & Lira Molapo, "Resettlement implementation – Practical lessons learned from Lesotho." Paper presented at the 32nd Annual Meeting of the International Association for Impact Assessment, Porto, Portugal, 27 May–1 June 2012.

<sup>127</sup> Millennium Challenge Compact, U.S.-Kingdom of Lesotho (2007).

<sup>128</sup> Millennium Challenge Corporation, Indicator Tracking Table: Lesotho: Private Sector Development (2012); MCA-Lesotho, Monitoring and Evaluation Plan for Lesotho Compact, 2008/09 – 2012/2013, 2nd Amendment (2012).

<sup>129</sup> Millennium Challenge Compact, U.S.-Kingdom of Lesotho, Jul. 2007.

<sup>130</sup> Millennium Challenge Account-Lesotho, Monitoring and Evaluation Plan for Lesotho Compact, 2008/09 – 2012/2013, 2nd Amendment (2012).

<sup>131</sup> Millennium Challenge Corporation, Compact Summary for Lesotho (2007).

<sup>132</sup> Millennium Challenge Corporation, Amendment of Solicitation/Modification of Contract No. MCC-05-0173-CFO Call 11 (Aug. 25, 2006).



- Develop a plan to communicate to different target audiences the importance of gender issues from the early project design phase.
- Include both men and women in any training but also allow for separate women-oriented sessions to create a neutral environment.
- Utilize local expertise (i.e., NGOs, other ministries, universities) for communications about the project and community training.
- In communicating about the project, use a variety of media and messages to include all potential beneficiaries.
- Help to establish community organizations focused on women's needs and interests.<sup>133</sup>
- Abolishing the common law concept of marital power to enable married women to enter into contracts, obtain credit from banks and to bind themselves as sureties undeterred.
- Abolishing the common law principle that a wife takes her husband's domicile, instead allowing married women to choose her domicile.
- Reviewing and revising the customary laws codified in the Laws of Lerotoli.
- Implementing efforts to raise awareness among the general population of laws favorable to women.<sup>135</sup>

Most of these recommendations were followed in the design and subsequent implementation of the land-related activities of the PSD project. The compact establishes gender as a cross cutting issue for all compact-related activities. In the activities to formalize land rights, the land allocation process requires joint titling of land rights for married couples. Although the public outreach and training activities aim to train both women and men, the compact specifically requires gender-responsive approaches for training such as separate meetings and training sessions. In monitoring, some indicators for the land administration reform activities, including the number of households for which land rights have been formalized and the number of stakeholders trained, were modified to include the collection of gender-disaggregated data.

In 2006, MCC funded an assessment of Lesotho's civil legal system, which included an assessment of both customary and general laws that prevent women from fully participating in the economy.<sup>134</sup> The authors made several recommendations for amendments to the laws of Lesotho that would allow women to more fully enjoy their human and legal rights. The recommendations for legal amendments included the following:

- Repealing the provision of the Constitution that allows discrimination in furtherance of customary principles.
- Amending the Deeds Registry Act to allow married women to own land and register immovable property in their own name.
- Amending the Companies Act to allow married women to be appointed directors without requiring her husband's permission.
- Amending the Administration of Estates and Intestate Proclamations so that women may administer estates in a manner equal to men.

The Legal Capacity of Married Persons Act amended the Deeds Registry Act and the Administration of Estates and Intestate Proclamations and abolished the concept of marital power. Following the passage of the Legal Capacity of Married Persons Act, MCC funded and the government implemented a gender-specific review of Lesotho's laws and policies to ensure full implementation of the new law.<sup>136</sup> The assessment also points out laws that otherwise limit women's ability to participate fully in the economy, such as the lack of paid maternity leave or social security for women on maternity leave and legal barriers to women exercising equal health rights.<sup>137</sup>

## V. Analysis of Land Administration Subactivity from a Gender Perspective

The MCC-Lesotho Compact has three objectives, with the third being to stimulate investment by improving access to credit, reducing transaction costs, and increasing the participation of women in the economy. Raising women's participation in the economy to the level of one of three objectives in a compact worth over \$300 million had to have an impact on every activity in the project, and most especially to the activities related to the private sector development component.

The land administration subcomponent had four activities, and each activity had some focus on ensuring that women, as well as men, had legal and practical rights to land.

### A. Role of Women in Society

When considering women's land rights, a critical question is: what is the starting place for women in this society? Traditionally men often left homesteads for long periods seeking pasture for the animals they herded, and women were left to care for the household. In more recent times, men migrate to South Africa to work in the mines, again leaving

<sup>135</sup> *Id.*

<sup>136</sup> Millennium Challenge Corporation, Terms of Reference for the Review of All Discriminatory Laws and Policies in Lesotho (2007).

<sup>137</sup> Itumeleng Kimane, Sakoane P. Sakoane, 'Matora Ntimo-Makara, & Ngoakoane Molise, Review and Content Analysis of Policies and Laws that Economically Discriminate and Violate the Economic Rights of Women in Lesotho (Report to MCC, Apr. 16, 2007) (on file with the author).

<sup>133</sup> Renée Giovarelli, Lesotho Draft Land Law (2006): Gender Issues (Report to MCC, Feb. 2007).

<sup>134</sup> Greene et al, *supra* note 112, at 54.

women at home to manage the household and the household land.

At the same time, married women were considered minors under customary and statutory law, leading to many restrictions on their economic activities. There had been a push for change in women's legal status by NGOs in Lesotho. Considering the policy and legal change related to married women's status as a condition precedent of the MCC Compact tipped the scale, and the Legal Capacity of Married Persons Act was passed. MCC and Lesotho's government recognized the importance of women as well as men participating in economic development.

## B. Policy and Legal Reform

Many of the gender-related achievements on this project flowed from the passage of the Legal Capacity of Married Persons Act in 2006 before the compact was signed. The Land Act of 2010 goes beyond most other countries' laws related to marital property by mandating that all marital property be jointly titled unless a contract between the parties states otherwise.

## C. Regularizing Informal Settlements

The results under the land regularizing component were excellent. For example, in one area, 50 kilometers from the city center, 51 percent of the land was titled jointly. Of the 49 percent that were not jointly titled (786 parcels), only 12 parcels were titled in the name of a single man, and the rest were titled in the name of a single woman.<sup>138</sup>

Because the law changed in such a major way, from the very beginning of the project there was a major push to educate and inform the public, both men and women, about their rights, including rights to land under the law. The compact included an activity to conduct training and outreach across the country to a wide variety of stakeholders on the legislation itself and what it meant for the Basotho people. Stakeholders trained included traditional leaders, traditional court judges, men and women in all ten districts, government officials, the banking sector, the religious communities, and many others. A variety of media outlets were also used to build public understanding of the changes achieved by the law.

Training specific to the land regularization project in Maseru's peri-urban areas included two types of general community gatherings; the first, to mark the start of land regulation in a section, the second "unveiled" the outcome of the adjudication process in the form of a display name list and a map depicting successful claimants.

After each of these general community meetings a separate women's meeting was held to provide a nonthreatening space for women to raise issues pertaining to their rights. Additionally, because of the personal nature of some of the issues, women were able to make individual appointments with

the legal expert or legal reviewers when needed.<sup>139</sup> Separate meetings for women have been rare in land projects, but where they have happened in other contexts, they had a significant impact on the number of women who received land titles (either individually or jointly).

In addition, the procedures and evidence required to gain a title were helpful for women. The form that is completed by the land-census taker in the field and becomes the basis of the documentation throughout the regularization process requires information on everyone in the household—their marital status, their type of marriage (community property or a prenuptial agreement stating the marital property will not be community property), and their relationship to other members of the household. Even the landholders' list that is displayed for thirty days in the neighborhood alongside the parcel map, allowing the citizens to verify their land rights, contains the marital status and type of marriage of applicants.

The specific effort to determine marital status and the acceptance of the marital status of men and women with the same last name, without requiring specific documentation, streamlines the process and makes it much more likely that marital status will be captured. Publically displaying the names and marital status of community members also assists in avoiding fraudulent declarations regarding marriage.

## D. Modernize and Improve Land Administration Services

As mentioned above, improving and modernizing the land administration services included documenting women's land rights. As part of the ongoing training of the land administration personnel, the new laws are emphasized, including the fact that women now have land rights when married in community of property. In addition, the lease forms (titles) that are being registered are based on the Land Act of 2010, which is directly stated on the form.

138 William Valetta, discussion, Aug. 30, 2013.

139 Cowi-Orgut, Systematic Land Regularization in Lesotho Project: Implementation Phase, Final Report (August 2013).



**MALI**

# COUNTRY CASE STUDY 3



# I. Background

Mali is a landlocked country of 1.24 million square kilometers that shares a border with seven West African countries. One of the world's poorest countries, Mali ranks 182 out of 186 on the United Nations Development Program's Human Development Index,<sup>140</sup> with low levels of literacy and life expectancy of 51.9 years.<sup>141</sup> 43 percent of Mali's approximate 16 million people live below the national poverty line.<sup>142</sup>

MCC signed a five-year, \$461 million compact with the government of Mali in 2006. The compact aimed at increasing agricultural production and productivity and expanding Mali's access to markets and trade. The compact was intended to serve as a catalyst for sustainable economic growth and poverty reduction through key infrastructure investments that capitalize on two of Mali's major assets: the Bamako-Sénou International Airport, gateway for regional and international trade, and the Niger River, for irrigated agriculture.<sup>143</sup> The compact entered into force on September 17, 2007, and was scheduled to conclude on September 17, 2012, but was terminated early in August 2012 because of a military coup in Mali.<sup>144</sup>

The proposal from Mali's government to MCC had three main components: development of the Bamako-Sénou Airport, irrigation of the dry Alatona zone, and development of an industrial park in the airport zone. The industrial park component was canceled. This case study will focus on the Alatona Irrigation Project, which had land tenure-related activities.

## A. The Alatona Zone Project Overview

The Alatona zone is located in the Office du Niger.<sup>145</sup> Office du Niger comprises one

million hectares of inland delta with rich soils that can be irrigated from the Niger River, the largest river in West Africa. Recognized as an agricultural zone with high potential, the French colonial administration established an extensive hydrological network of diversions, canals, and drains in the 1930s. Rice production has been the dominant agricultural activity since 1970, with some counter-season horticultural production.<sup>146</sup>

The majority of people in the Alatona area are from the Peul (or Fulani) ethnic group.<sup>147</sup> The Peul are seminomadic people who practice polygamy and live in male-headed extended family households where women do not have independent rights to land under custom.<sup>148</sup>

The Alatona Irrigation Project budget was \$234,880,000 and was initially estimated to reach 649,592 beneficiaries, irrigating 15,000 hectares of land.<sup>149</sup> It projected an increase in per capita income from irrigated agricultural production in the Alatona zone by \$725 and aimed to increase production and productivity, improve land tenure security, modernize irrigated production systems, and mitigate the uncertainty from subsistence rain-fed agriculture. The project was comprised of six component activities: (1) upgrading of Niono-Goma Coura Road (2) irrigation infrastructure development, (3) resettlement, social infrastructure, and social services (4) land allocation (5) agricultural services, and (6) financial services.<sup>150</sup> The irrigation, infrastructure, resettlement, and land allocation components are most relevant to this case study because they addressed land tenure and gender-related matters.

## 1. Irrigation Infrastructure

Under this activity, large canals were dredged and 15,000 hectares of irrigated land were to be developed.<sup>151</sup> This amount was reduced to 4,940 hectares due to the complexity, timeline, and costs of implementation.<sup>152</sup>

## 2. Resettlement

The original area subject to irrigation development was home to around 8,000 people (around 800 households) in several villages. Under this activity, those people who would be displaced by other project activities would be resettled within the Alatona zone, compensated for loss of livelihood, and otherwise made whole.<sup>153</sup> In addition, new villages were to be constructed with housing, schools, medical facilities, and other amenities. The project moved the displaced households to new villages within the project area and provided them with 2 hectares of irrigated land for no cost as compensation and the option to purchase an additional 3 hectares with low-interest loans.<sup>154</sup>

## 3. Land Allocation

After irrigation infrastructure construction was complete, the irrigated area was divided into parcels, boundaries were demarcated, and legal descriptions created. The proposal had

140 See United Nations Development Programme, *Human Development Index*, accessed at <http://hdr.undp.org/en/2013-report>

141 United Nations Development Programme *Human Development Report 2013. The Rise of the South: Human Progress in a Diverse World. Mali*, accessed at <http://hdr.undp.org/sites/default/files/Country-Profiles/MLI.pdf>

142 The World Bank. *World Development Indicators. Mali*, accessed at <http://data.worldbank.org/country/mali>

143 Millennium Challenge Corporation, *Millennium Challenge Compact between The United States of America, acting through the Millennium Challenge Corporation and The Government of the People of Mali*, (hereinafter "Compact") accessed at <http://www.mcc.gov/pages/countries/program/mali-compact>

144 See Afua Hirsch, "Mali Coup: Soldiers Loot Presidential Palace after Seizing Power," *The Guardian*, March 22, 2012, accessed at <http://www.theguardian.com/world/2012/mar/22/mali-coup-soldiers-loot-palace>

145 The term Office du Niger (or "ON") refers both to the geographical zone and the authority charged with the management of water resources and agricultural support in the zone.

146 Compact, *supra* note 144, Schedule 3 to Annex I.

147 Leonard L. Rolfes and Virginia Seitz, *Providing Farmland Ownership Rights to Women in Rural Mali: The MCC Experience, Millennium Challenge Corporation*, 5(2013) (hereinafter "Rolfes and Seitz").

148 The project labeled these male-headed polygamous extended family households as "concessions." See *id* at 5

149 See Compact, *supra* note 145.

150 Rolfes and Seitz, *supra* note 149 at 3.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

initially sought to divide the 15,000 hectares of irrigated land into parcels of different sizes—5 and 10 (“small”), 30 and 60 (“medium”), and 90 and 120 (“large”) hectares—focusing on different categories of farmers, as well as some land to be put aside for market gardens for women. The land would be allocated to households in private ownership (at the time of project design, land rights had been held by the state).

In the proposal, around 15 percent of the newly irrigated land was to be earmarked for households who would be displaced by the irrigation development and the majority of the remainder for other farmers. Applicants for this land had to meet different criteria depending on the size of the parcel: for small parcels applicants had to have some agricultural training and experience; for medium parcels applicants had to have at least five years of agricultural experience on irrigated land and employ a person with a high degree of education; and applicants for large parcels had to employ agricultural and financial personnel, have demonstrated financial capacity, and have prepared a feasibility assessment on farm management.

The implementation of this activity saw some major changes, mostly due to the sizeable reduction in total irrigated land from 15,000 hectares to 4,940 hectares. The newly irrigated land was allocated in private ownership to farmers, but most of the irrigated land was allocated to those who had been displaced by the irrigation project. In addition, a smaller portion was allocated by lottery to farmers from elsewhere in the Office du Niger and another small portion was allocated for market gardening for use by women (in associations). Also, the small, medium, and large parcel designation was omitted.

In addition, the rural population of the Alatona zone was educated about private ownership, land titles were processed and registered, land parcels were allocated and titles of ownership were issued, and systems were put in place to manage land-related revenue.

## B. Gender Equality in Project Planning and Design

In the government of Mali’s proposal for Millennium Challenge Account funds, women and youth were targeted as beneficiaries, and program objectives included “improvement of women’s business capacity, the creation of jobs for young people and women, and the promotion of women as participants in the development process.” The proposal acknowledged women’s contributions to agriculture and the severe constraints that keep many rural women in poverty.<sup>155</sup>

In the compact, gender equality was not noted as a priority; however, there were a number of activities mentioned in the compact document specifically directed toward women, or where women were identified:

- In the land allocation program, some land was set aside specifically for year-round market gardens for exclusive use by women.
- For land parcels allocated to resettled households, joint titling between spouses was encouraged through outreach and communications activities.
- For the land parcels not allocated to those who had to be resettled, a selection commission consisting of both men and women was established, and the criteria for selection included special consideration for women.
- Under the agricultural services component, special mention was made of women-specific farmer training.

The Mali Compact was developed before MCC had formally adopted its operational procedures through the Gender Integration Guidelines (2011). That being so, during implementation and with MCC’s guidance, the Malian government entity charged with implementing the compact employed a Malian social scientist with gender expertise, based in Mali for the duration of the compact. This gender expert played a significant role in design and implementation. Also, a member of the MCC social and gender assessment team, created in 2010, provided oversight and support including technical advice and implementation oversight on gender integration from that time forward.<sup>156</sup>

## II. Legal Framework Analysis by the Project

The Land Law was analyzed as part of land tenure due diligence, focusing on the existing land rights in the Office du Niger and making a proposal for the type of land rights that should be attached to the newly irrigated land in the Alatona zone. At the time the project began, very little agricultural land was held in private ownership, though the law allowed for it.<sup>157</sup> The Malian government proposed to allocate the newly irrigated agricultural land in the Alatona zone to private ownership. This was a departure from existing practice in the Office du Niger, which allocated only use rights to agricultural land to farmers, via contract and lease (annual contracts, leases for thirty years, and emphyteutic leases for fifty years).<sup>158</sup> Also, a first step in the resettlement action plan was an inventory of all the assets possessed and used by the people who would be displaced by the project so that the irrigation infrastructure could be built.

According to the due diligence report, this meant that once the land in the Alatona zone was irrigated, it would need to be transferred from state-owned agricultural land to private ownership. Malian law provides two mechanisms for

<sup>156</sup> Leonard Rolfes Jr., *Mali: Land Tenure Due Diligence Final Report*, MCC, 2 (2005).

<sup>157</sup> *Id.* at 2, *see also* Land and Public Domain Code, Ordinance No. 00-027/P-RM, 2000 (Republic of Mali)

<sup>158</sup> *Id.*

<sup>155</sup> *See* Megan McGlinchy, *Increasing the Impact of MCC Funds on Women in the Office du Niger* 2 (2005), (hereinafter McGlinchy).

transferring state-owned agricultural land to private ownership. First is the rural concession, a legal instrument that allows the concession holder access to a land parcel and requires the holder to develop the land and fulfill other conditions in the concession. The concession is also considered by law to be a “provisional title” that the concession holder can convert into a full title if the conditions on the concession agreement and the law are fulfilled.<sup>159</sup> The second is the lease contract for ten years with the right of purchase if the lessee meets certain conditions.<sup>160</sup> MCA-Mali’s outside legal counsel recommended using the rural concession instrument for land allocation and privatization in the Alatona zone.<sup>161</sup>

The due diligence report also considered customary land tenure in Mali, which it stated is relevant to the project because villagers and herders use the Alatona zone and their rights are not recorded or registered but are protected by law.<sup>162</sup> The Land and Public Domain Code (“Land Code”)<sup>163</sup> and the Pastoral Charter of Mali<sup>164</sup> address customary land tenure in their provisions. The Land Code validates customary land rights, gives them priority over other claims to the land, and forbids the taking of these rights for public purposes without fair and prior compensation.<sup>165</sup> The Pastoral Charter recognizes the rights of pastoralists to access grazing land but at the same time balances this right with development needs.

Finally, the due diligence report briefly covered women’s land rights in Mali. It states that Malian law does not discriminate between men and women regarding land rights,<sup>166</sup> and that the Family Code permits joint titling of land rights for husbands and wives.<sup>167</sup> It goes on to state that in practice within the family context, customary rules allocate land rights to the household head (who is almost always a male) and that husbands exercise control over use of land and income generated from land.<sup>168</sup>

Although there was not a specific review of the Marriage and Guardianship Code (replaced in 2011 by the Family Code) and laws governing joint property rights by MCC for the project, MCA-Mali’s lawyer reviewed the draft land transfer contracts to ensure they conformed to Malian law. The project drafted all its own forms for land transfers and titling. A land titling procedures assessment was scheduled but had to be canceled because of the coup d’état in March 2012.

159 *Id.* citing Decree on Determining the Forms and Conditions for Granting Lands Belonging to State Property, No. 01-040/P-RM, 2001 (Republic of Mali).

160 *Id.*

161 Rolfes *supra* note 158 at 2.

162 *Id.*

163 Land and Public Domain Code, Ordinance No. 00-027/P-RM, 2000 (Republic of Mali).

164 Pastoral Charter of Mali, Law No. 01-004, 2001 (Republic of Mali).

165 Land and Public Domain Code, Ordinance No. 00-027/P-RM, arts. 34,43,37, 2000 (Republic of Mali); *see also* Rolfes at 3

166 Rolfes, *supra* note 158, at 5, *citing* Megan McGlinchy, *Increasing the Impact of MCC Funds on Women in the Office du Niger 2* (2005).

167 Rolfes *supra* note 158 at 5.

168 *Id.*

### III. Nature and Scope of Gender Recommendations

There were a number of points during the design phase where gender analysis was performed: after the proposal was submitted by the Government of Mali, during the due diligence process, and after the due diligence process. During the five years of implementation, gender specialists at MCA-Mali and MCC provided technical input on measures necessary to reach gender equality in the project.

#### A. Gender Analysis of the Government of Mali Proposal

After the proposal from the government of Mali was submitted and before the compact was signed, there was a short assessment and report done for the whole Mali Compact proposal to “provide information that will help guide program design to better target women and maximize their benefits.”<sup>169</sup>

This report outlined the following constraints faced by women, many of which were relevant for the land tenure portions of the project:

- Law prevents discrimination between men and women when it comes to land rights, but ownership is customarily controlled by the household head, almost always a man. Under custom, plots can be assigned to women’s groups for market gardening, but women tend to work their areas individually. With regard to inputs and credit, women have limited access to agricultural equipment, seeds, labor, fertilizers, and agrochemicals, meaning they can only cultivate small plots of land.
- Because of gendered distribution of labor, extension services targeted at the tasks men perform are of limited utility to women.
- Movement of product and product loss have a gendered impact, negatively affecting women more than men (such factors as bad roads, high cost, and lack of storage mean that women have to sell to monopolistic buyers for low prices).
- Women’s low social status could have an effect on the project achieving its results. The principle that women submit to men means that men continue to dominate decisions related to agricultural production and community development. Furthermore, women do not participate because they do not want to, have other obligations, or do not feel capable to participate even if they do want to.<sup>170</sup>

Based on these findings, the report made the following recommendations to improve the overall proposal made by Mali’s government to MCC and to ensure that the eventual project would effectively target women:

169 *See* McGlinchy *supra* note 157.

170 *See id.*

- To target women effectively, focus on market gardening. Market gardening is a socially acceptable activity, highly demanded by women, more profitable than rice cultivation, and operates on a different seasonal schedule and therefore will not interfere with the present production system.
  - Before this, conduct a demand study to confirm ability of the market to absorb additional produce. In addition, the marketing chain, value added process must be examined.
- Also consider collective rice plots for women as a complement or alternative to market gardens to target women. Collective plots are more feasible and socially acceptable than individual plots for women and could increase the rice acreage available to women. Women's working groups who are already performing transplanting and harvesting duties for rice cultivation on farms allocated to their husbands could potentially produce additional rice in women's collective farms without much additional effort, but with some economic benefits.
- In addition to market gardens and collective rice plots for women, encourage and give preferential treatment to women with the resources and motivation to farm their own land. There are benefits to women holding title of "chief holder" on individual plots from which women are customarily excluded. For example, access to certain agricultural information is only available to those who hold land.
- Dedicated group market gardens should be considered for women. Labor can be pooled during peak labor seasons and economies found for purchasing other inputs and may encourage female adoption of technology. Groups can also be formed around marketing and processing to help reduce transaction costs and balance the current imbalance between buyers and sellers.
- Consider designating at least one permanent market garden per village. Size might depend on the number of women who will use the market gardens, though it may range between 2–5 hectares per village (current range) to 0.5–0.75 hectares per woman (estimated range). A community garden should be close to the village to address the women's other obligations and to ensure their placement close to a water source.
- If market gardening opportunities are to be promoted and expanded in Office du Niger, complementary services will be needed, which could include extension, appropriate technology, capacity building, access to credit, seed and input supply, improved infrastructure, or improved information). This might be addressed by creating agribusiness development centers, partially staffed by women and focused on outreach to female farmers. Also, a percentage of planned training should focus on women and women's horticultural activities.

- Disaggregate "women and youth" in project design and language of compact.<sup>171</sup>

## B. Land Tenure Due Diligence Reports

Subsequently, the land tenure due diligence report presented issues, recommendations, and outstanding questions related to land tenure that arose in the Mali due diligence plan and in a report that identified land tenure issues.<sup>172</sup> In May of 2005, an MCC consultant visited Mali and assembled an initial list of topics for due diligence examination. In September 2005, an MCC land tenure expert conducted an in-depth field examination of the issues raised by the consultant and identified further issues requiring attention in the due diligence process. The first due diligence report dedicated a section to "Status of Women and Land Rights in the Alatorna Zone" and also made recommendations related to women and women's market gardening throughout.

The due diligence follow-up report, completed after a field mission in Mali, made final design recommendations on a number of issues, including those with gender implications such as procedures for allocating irrigated land and size and allocation of market garden plots (to women).<sup>173</sup> In January 2006, the government of Mali submitted a revised proposal to the MCC for consideration.<sup>174</sup>

The land tenure due diligence report included a number of recommendations that were relevant to women, had gender-related implications, or appeared to have derived from the recommendations made in the gender report mentioned above.

The first relevant recommendation related to the allocation of land rights to the newly irrigated farmland. The proposal had required that those classified as "privileged" beneficiaries receive 15 percent of the irrigated land and that the 15 percent should be set aside for former residents who could show agricultural experience with land parcels of that size (five hectares). This approach does not specifically call out women but had implications for women, because of the unlikelihood that women would have experience farming such a large area. The due diligence report recommended that the only qualification beneficiaries should need to be eligible to receive irrigated land is their residence on the project site and that any deficiency of experience with irrigated agriculture would be addressed by the proposal's plans to provide beneficiaries with agricultural training along with credit needed for input supply, equipment, and other production necessities.<sup>175</sup>

The second relevant recommendation in the land tenure due diligence report related directly to women who were targeted in

<sup>171</sup> McGlinchy, *supra* note 156, at 6–7.

<sup>172</sup> See Rolfes *supra* note 158; see also Yazon Gnoumou, *Land Tenure Issues of the Millennium Challenge Project in Mali (Final Report)* (2005).

<sup>173</sup> See Leonard Rolfes Jr. and Benjamin Linkow, *Mali Land Tenure Due Diligence: A Followup Report* (2006).

<sup>174</sup> *Id.* at 2.

<sup>175</sup> Rolfes and Linkow, *supra* note 175, at 11.



the proposal to receive some land rights for market gardening. Market gardens were proposed as one proactive way to ensure that displaced women would benefit from the newly irrigated land. Market gardening was already performed by women in the target area, and this activity would ensure that it could continue in some way and that women could also benefit from the irrigation infrastructure. The proposal provided that some newly irrigated land should be set aside for market gardens for women who were among the displaced. But it did not provide detail on how that would be done. The land tenure due diligence report recommended that the market garden program should be strengthened in the following ways:

- The proposal should guarantee that each working-age woman currently residing in the Alatona zone receive a market garden plot of at least 0.2 hectares.
- The proposal should expand the market garden program to provide plots to some of the women living in villages nearby the Alatona zone. Approximately 3,820 women live in these villages, a number probably too large to accommodate in full. Perhaps 400 hectares could be allocated to these women, which would represent only 3.5 percent of the irrigated land to be allocated to nondisplaced beneficiaries. This would accommodate 2,000 women at 0.2 hectares each, or even more if each person's market garden size was reduced.
- Because the proposal envisions that there will be at least some payment for land that is allocated to displaced people, provisions need to be developed to manage how the land for market gardens will be paid. Also, because land rights to market gardens are proposed to be allocated to individuals, but managed and titled as groups, provisions should be made to ensure that individual women's rights to market garden land will be retained in the event that the group to which the title is issued dissolves.<sup>176</sup>

Finally, the land tenure due diligence report recommended that an education strategy should be developed that was mindful of how to effectively reach the different groups of people slated to receive land through the project (including women). Different educational techniques will be needed for these different groups. In addition, MCA-Mali should consider whether attendance at land education trainings should be required for land recipients in order to receive their titles.

### C. Post Due Diligence Women's Land Tenure Issues Paper

The final point during the design phase where gender-related considerations were made was in a report that reviewed issues affecting women's land tenure in the Alatona Irrigation Project.<sup>177</sup> This paper drew from the extant literature and presented findings related to women's role in the family and

community, women and irrigation projects, women and market gardening, and women and local governance. It then provided a summary of analysis and recommendations.

A summary of the main issues coming from the report that impact women's land tenure and have direct bearing on the project design is provided below:

- Women have few if any personal assets with which to purchase the newly irrigated farmland and are therefore unlikely to be among those that must purchase to gain rights to the land.
- Because it is not customary for women to own land in the Alatona communities, their husbands and village leaders may need education and training as to the economic and social value of women's ownership of land.
- Mechanisms need to be in place so that it will be less likely for the land to revert back to men through traditional practices, especially those that relate to inheritance, which by custom is along the male blood line.
- The women who may gain land rights through the project may never have been in a position to have decision-making authority or control over land and may need a different kind of education and training than those women and men who have had that experience.
- Any activity that requires women's time away from home will have to be held at a time and place convenient and permissible (by their husbands) for them to attend.
- Women's labor requirements on the newly irrigated and larger family farms may increase, and they may have less opportunity to raise food for their families. This prospect should be monitored and discussed with women as the design is developed.<sup>178</sup>

The main recommendation in this report was to meaningfully include women in all aspects of the project. It suggested, for example, that rather than focus on market garden plots in the Alatona Irrigation Project as the only way to reach women, the project should consider designing other ways for women to be involved in the purchase of the larger plots of land, which will most likely be used for rice or other high value crops. Other suggestions included that women play an active role in the development of the compensation and resettlement planning and execution and most importantly, that the project actively solicit input from women on all design issues and specifically target project communications to women as well as men.<sup>179</sup>

The report also recommended that the project conduct rapid rural appraisal of women by women in the Alatona zone aimed at gaining an understanding and appreciation of complex social and cultural factors that affect both men and women in the

<sup>176</sup> *Id.* at 29.

<sup>177</sup> See Renée Giovarelli, *Mali Land Tenure: Review of Issues Affecting Women*, June 29, 2006.

<sup>178</sup> *Id.* at 11.

<sup>179</sup> *Id.* at 14.

project area and that will have a bearing on design of the project in terms of delivery and substance. Some examples of the unanswered design issues related to project delivery included the following:

- Gender sensitization and training needs of all staff as well as men and women farmers.
- How to organize women into farmer associations or similar groups.
- How to address the attitude, needs, and potential obstacles posed by traditional leaders and husbands.
- Best ways to involve women NGOs in the project activities, if at all.
- The possibilities of giving preferential treatment to women farmers in the allocation of newly irrigated land.
- The development of and promotion of women's participation in water-use associations.
- The most effective approaches to including women in all decision making and management processes and how to conduct gender-integrated village-level consultation with women and women's groups on community development activities related to key decisions that affect the whole village.
- The incentives that might be needed to ensure land administrators title land for married couples or those living in consensual unions and that subsequent unions are captured.<sup>180</sup>

Some examples of the design questions related to substance identified in the report include the following:

- What role do women currently play in food production for the family? Has this changed over the last decade? Were the changes positive or negative?
- How much time do women spend working per day (household, farming, gardening, outside employment)?
- Which women have personal assets, if any (elderly women, first wives)?
- If women own land, will their husband/marriage be threatened? (In Uganda, men were extremely opposed to wives owning land because it gave them the power to leave the relationship.)
- Have any women ever borrowed money? What is the level of knowledge regarding borrowing money?
- Will women be able to earn enough money from the garden plots to pay off the debt for the land and still make a profit?

- Will women's labor requirements increase with irrigated crops?
- What is required for women to actively participate in group meetings and decisions (training of women, training of men, approval from elders)?<sup>181</sup>

The report then went on to make a few specific recommendations related to joint titling such as:

- Review the Marriage and Guardianship Code and any regulations related to marriage, divorce, and death of a spouse to identify all issues related to joint titling. Is polygamy legal? What happens to property in the event of a divorce? What documentation is required to prove marriage? Do the rules regarding titling and registration allow for indicating more than one property rights holder on the registration forms and do the forms themselves facilitate inclusion of women?
- Talk to women who will be affected by joint titling to gauge their perceptions of joint titling—are they positive, negative, or indifferent about it? What are their land-related concerns, if not joint titling? For example, maybe the biggest problem is not within the marriage but upon death of the household head. Or maybe the problem is sale (or lease) of land without the permission of the spouse. What rights are women willing to push or “fight” for? Many issues could be handled with joint titling, but there would be other legislative ways to assist as well. (One to two weeks of field research should be sufficient.)
- Develop a plan for communicating the importance of gender issues.
- Educate both men and women, once a decision is made regarding titling, about the titling procedures, the value of land titling, and the procedure for titling, including whether titling is mandatory or not. Allow for separate women-oriented sessions. Design the plan to address different levels of target audiences (for example, senior administrators, technical assistants, project implementers) with appropriate messages and formats.
- Use local expertise in project communication and community training.
- Use a variety of media and messages to ensure that all potential beneficiaries are included, especially considering constraints of literacy, language, and access to mass media.
- Assist women in establishing community organizations focused on their needs and interests.<sup>182</sup>

With regard to land allocation, the report suggested that an option for ensuring women would have access to the land allocated to those not displaced by the project is the obtainment

<sup>180</sup> *Id.* at 15.

<sup>181</sup> *Id.* at 14.

<sup>182</sup> *Id.* at 12.

of a very specific commitment from the government of Mali on a particular procedure conducted prior to compact signing. Options for such a weighted procedure might include:

- A portion of the land could be reserved for female-headed households, households where men have migrated, and female entrepreneurs; women who applied could be screened to ensure their capability to farm the land (if the necessary training is provided).
- The land could be tendered and applicants scored on various criteria with land allocated to the highest scoring applicants. Female applicants would receive extra points.<sup>183</sup>

## IV. Final Project as Implemented<sup>184</sup>

Because of cost escalation and time constraints, the final project design changed dramatically. Parcels were created for a total of 954 farms of five hectares, totaling 4,940 irrigated hectares rather than 15,000 hectares. Most of the newly irrigated land was made available to the project-affected people in the Alatona region in 5-hectare farms consisting of multiple parcels. The people who had been resettled from the newly irrigated area received two hectares at no charge and were able to purchase an additional 3 hectares at low cost. They received 801 of the 954 farms, and the remaining 153 5-hectare farms were awarded by lottery to prequalified farmers from the Office du Niger (see below for lottery details). An additional 55 hectares were provided to women's associations for market gardening (see below). The remaining 113 hectares were sold to farmers in adjacent plots to supplement their existing holdings.<sup>185</sup>

The project had determined that it was important to include women among beneficiaries of land allocation, but it recognized there were significant sociocultural obstacles that it would need to overcome to do so. It decided to identify approaches that would maximize the chances for women to receive land rights without imposing specific outcomes because an imposed outcome might be less socially acceptable and result in an unintended backlash.<sup>186</sup> The involuntary resettlement work done on Alatona contributed greatly to the understanding of the social dynamics and needs of the people affected and to those people becoming the primary beneficiaries of the project. With this in mind, the project designers sought to:

- Allocate land rights to women directly using approaches already acceptable in the society.
- Develop approaches to allocating land generally to the beneficiaries that would not force but would encourage inclusion of women.

- Identify multiple avenues for allocating land rights to women to avoid a single point of failure.<sup>187</sup>

Thus, the MCC interventions that targeted women's land rights were:

- Market gardens for women who were displaced and resettled in the Alatona zone, providing women in the Alatona zone with land for a market garden.
- Joint titling of irrigated land allocated to households displaced and resettled by the irrigation development; this was not a requirement, but households were given a choice on how to title land after a robust and gender-integrated outreach effort.
- Promoting allocation to women applicants of 5-hectare farms designated for non-resettled people.

### A. Women's Market Gardens on Irrigated Land

Market gardening by women was an existing practice in the Alatona zone and thus a socially acceptable way to ensure that at least some irrigated land benefitted women in the area. One market garden plot was allocated to each resettled family that received a 5-hectare farm. The size of the market garden plots, 500 square meters, was based on an understanding that this would be a manageable area for women, who have other labor responsibilities, yet large enough to generate potential income. These parcels were provided free of charge.

Market garden land was owned and managed by women's associations rather than by individual women, even though the plots were allocated to individuals. This decision was made to avoid a situation where land rights intended for women's benefit in the project would eventually be transferred to men via traditional inheritance practices or other means.

The women's associations were legal entities established under Malian law. MCA/MCC helped establish the associations and ensure they had legal standing. Individual women would join the association as members, and one of the benefits of membership would be access to a 500-square meter parcel of market garden land. The women's associations each had around twenty beneficiary households and were established by articles of incorporation, bylaws, and standardized agreements between the association and members. Once established, the associations received titles. Market gardens used around 50 hectares of the 4,940 hectares of irrigated land.

### B. Joint Titling with Targeted Outreach

Another way the project attempted to make land rights available to women was via joint titling of the 5-hectare household farms. The 801 farms allocated to resettled households (referred to as concessions) were not titled to individual women, because

<sup>183</sup> *Id.* at 13.

<sup>184</sup> This section is taken from Rolfe and Seitz, *supra* note 149.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 5.

<sup>187</sup> *Id.* at 5-6.

there was some fear that individual titling for women would be socially unacceptable and might trigger backlash, harming the project's outcomes.

In keeping with the principles of design mentioned above, joint titling was not a requirement for recipient households, but it was presented as an option through project outreach and in the land rights documentation to the household members, who then made the decision for themselves. The question of how to deal with joint titling in a polygamous household (i.e., which wife was named on the joint title) was left to beneficiaries to determine for themselves and was not tracked or assessed by the project team.

The land transfer contracts<sup>188</sup> included specific references to co-ownership of the land, a blank space to insert each co-owner's name, and space on the signature page for each co-owner's signature. The project then translated the contracts, and related documents, into the three local languages used by the land recipients.

Each resettled household had to designate two household members to participate in the project's outreach—the head of the concession<sup>189</sup> and the concession's "responsible woman." To increase the likelihood that households would choose joint titling, significant effort was made to increase land allocation beneficiaries' awareness of joint titling. This consisted of five outreach sessions: explanation of ownership and joint titling; explanation of the contents of the notification letter sent to each beneficiary concession describing what they were to receive; explanation of the contents of the contracts; explanation of the contents of the *cahier des charges*, a document describing the rules that had to be followed when using irrigated land; and evaluation of the education's impact; and contract signature. Each session also included a review of the information learned in the prior session to reinforce its retention and provide the project affected people with an opportunity to ask follow-up questions.

Separate sessions were held for men and women so that the latter could freely participate. Both sessions presented the same information, including information on the benefits of joint titling. The information was presented over a four- to six-day period, with two to three hours of instruction per day, intended to give women time to care for their children and engage in other household tasks and making their participation possible. The sessions were continuously evaluated for their effectiveness in the delivery of information and its retention by the participants. These evaluations were used to improve upcoming sessions.

In the final assessment, 795 men and 799 women participated in the outreach activities. For the men who participated, 70 percent fully completed the training, 26 percent partially

completed it, and the remainder did not complete it. For the women who participated, 62 percent fully completed the training, 32 percent partially completed it, and the remainder did not complete it. About 40 percent of the beneficiaries decided to title their farmland in the names of the husband and wife, a figure that far exceeded project expectations of 10 to 20 percent. In these cases, both spouses signed the land transfer contract, and both were registered as owners at the local property registration office. By contrast, joint titling was rarely selected for farms allocated through the lottery system (see below), and for whom outreach was not as robust.

### C. Promote Allocation of 5-Hectare Farms to Women Not From the Resettled Group

Traditionally, men are expected to be landholders, yet because of the potential economic gains that irrigated farmland can provide, the project aimed to find a socially acceptable way to allocate to women some of the 5-hectare farms designated for non-resettled people.

The Alatona Irrigation Project developed 954 farms. Out of this number, 801 farms had to be provided to those households displaced and resettled as a result of the irrigation project so as to meet MCC's obligations under resettlement policies. The remaining 153 farms were available for distribution to others, and this was done by a two-stage process: a minimum qualifications test and then a public lottery. These mechanisms were chosen to ensure that qualified farmers received the 153 farms to help maximize the chances of agricultural gains, to ensure that people with limited or no direct access to land had a good chance to receive an irrigated farm, and to ensure that the process was fair to all applications and not subject to corrupt actions.

The minimum qualifications test required applicants for land to complete a form with the following information, with different points assigned to each qualification:

- Access to land: applicants with little or no access to land could receive up to twenty points on their applications.
- Farming experience: applicants with experience in irrigated agriculture could receive up to thirty points on their applications.
- Farming education: applicants with some farming education could receive five points on their applications.
- Proof of water fee payment: applicants who could prove they had paid water fees in the past could receive five points on their applications.
- Collaboration: applicants who had participated in an association or cooperative in the past could receive ten points on their applications.

<sup>188</sup> These were transfer contracts, because technically the land rights were being transferred from the state to the beneficiaries in private ownership.

<sup>189</sup> See Rolfes and Seitz, *supra* note 149, page 5 for a definition of "concession".

- Resources: Applicants who had basic farming equipment, draft animals, equivalent cash, or proof of access to credit could receive twenty points on their applications.
- Women and youth: Applicants who were women or men under forty years old would receive ten points on their applications as a way to increase their participation while still respecting the other qualifications.<sup>190</sup>

Attributes were graded on a one hundred-point scale, and sixty points were needed for an applicant to pass the minimum qualifications and be eligible to participate in the lottery.

The second step in the process was a public lottery, through which the beneficiaries would be selected. A lottery was used for two complementary reasons. First, the lottery was conducted in a public forum where tampering with the results would be difficult. Second, the project designers did not know how many women would apply for land but wanted to ensure that women would receive some land, so ten percent of the land available for allocation through the lottery was set aside for women in the project design. Women could receive more than ten percent of the land through the lottery but not less.

Advertising for the lottery specifically encouraged women to apply for land. However, due to an implementation oversight, the advertising effort failed to mention that at least ten percent of the land was earmarked for women. Corrective action was considered when this was discovered, but concerns were raised that informing the public on the day of the lottery about the set aside would be seen as a last-minute change in the rules and thus not transparent. Consequently, the project decided against implementing the set aside and hoped that at least ten percent of the land would go to women without it.

<sup>190</sup> Rolfes and Seitz, *supra* note 149, at 7.

In the final accounting, 7,561 people submitted applications. Of these submissions, the project rejected 3,114 applications before technical evaluation for a number of reasons, such as failure to supply required information or the applicant was not a Malian citizen. This left 4,447 applications to evaluate, out of which 799 (18 percent) were from women. The project then reviewed and scored the remaining 4,447 applications, and 3,391 farmers met minimum qualifications required to participate in the lottery. Women comprised 578 of these, or 17 percent of the total. Project implementers reported that the number of women applicants who met the minimum qualifications was helped by the ten bonus points awarded.

Twenty-four women were selected in the random lottery to receive farms, or 16 percent of the total. By all accounts the lottery was properly conducted, was free from fraud, and its results were accepted by both government officials and the general population.

In summary, 18 percent of the applications for land to be allocated to non-resettled persons came from women, 17 percent of the applications that met the minimum qualifications came from women, and 16 percent of the five-hectare farms that were awarded through the lottery went to women. This exceeded the project's minimum target of 10 percent.

## V. Results

In the Alatona Irrigation Project, 4,940 hectares of land were irrigated, parceled, and ownership transferred to Malian farmers. 37 percent of the land is owned in the name of women, either as joint owners with their husbands or as members of women's associations.<sup>191</sup>

<sup>191</sup> *Id.* at 12

### Irrigated Land Allocated to Women through the Alatona Irrigation Project\*

Type of land allocated	Amount of land title (ha)	Amount of land titled to women (ha)	
		Titled jointly to husbands and wives	Titled to women only
Market gardens	54	0	54 (associations)
Five-hectare farms allocated to resettled people	4,121	1,648	0
Five-hectare farms allocated via lottery	765	0	120
Subtotal		1,648	174
<b>Total</b>	<b>4,940</b>	<b>1,822</b>	

\*Taken from Rolfes and Seitz at 42

# NAMIBIA

## COUNTRY CASE STUDY 4



Photo courtesy of MCC

Homens e Mulheres vamos  
trabalhar e crescer!

# I. Background

Namibia is the most arid country in sub-Saharan Africa and is among the least densely populated countries on earth, with just over 2.1 million people spread across a total land area of 824,292 square kilometers.<sup>192</sup> According to the 2011 National Census, 68 percent of Namibia's population is rural and approximately 51 percent of the population lives in the north.<sup>193</sup> Communal land tenure areas—predominantly in the north—constitute an estimated 38 percent of the country's total land area.<sup>194</sup> Subsistence farmers and livestock herders account for 70 percent of Namibia's population, yet farming contributes no cash income to most households.<sup>195</sup> About 27 percent of households in rural areas are poor, and 14 percent are extremely poor, compared to 9 percent and 4 percent respectively in urban areas.<sup>196</sup> Economic inequality in Namibia is among the highest in the world, and the vast majority of poor households are located rural areas in the north.<sup>197</sup>

The Northern Communal Areas (NCA) targeted in the MCA-Namibia communal land support subactivity comprise six regions: Kunene North, Omusati, Oshana, Oshikoto, Ohangwena, and Kavango.<sup>198</sup> The NCA experienced little development under South African colonial administration (which ended at independence in 1990), under which the area was designated a “police zone,” and was effectively segregated and cordoned off from central Namibia.<sup>199</sup> Agropastoralism is the predominant use of land in the NCA.<sup>200</sup> In the years since independence, the government of Namibia has been making strides to promote development in the region, particularly through intensification and diversification of agriculture, decentralization and land-reform programs, and the development of the tourism sector.

Supportive of these aims, the MCA-Namibia Compact was signed in July 2008 to reduce poverty in Namibia through economic growth.<sup>201</sup> The compact is composed of three projects: Agriculture, Tourism, and Education. The Agriculture Project supports investments “aimed at achieving a sustainable

increase in the economic performance of the agricultural sector,” including activities that strengthen land tenure systems in the NCA.<sup>202</sup> Within the Agriculture Project, the land access and management activity is intended to “improve rangeland management and provide more equitable access to land in the Northern Communal Areas,” and comprises two subactivities: the communal land support (CLS) subactivity, which aims to improve the administration and management of communal lands, and the community-based rangeland management (CBRLM) subactivity, which focuses on introducing effective community-based rangeland management practices. This review focuses on the CLS subactivity, which, at the time of writing, was in year four of its five-year implementation; the subactivity ends in September 2014.

## A. Overview of the CLS Project

The CLS subactivity was initiated in 2009 with the aim of providing support to the Ministry of Lands and Resettlement (MLR) as it implements the provisions of the Communal Land Reform Act 2002 (CLRA), which governs communal lands throughout Namibia and provides for the registration and administration of land rights on communal lands.<sup>203</sup> This support was identified as a priority by the government of Namibia in light of the population's general lack of awareness of the new law and the institutions it provided for, especially the new communal land boards (CLB), which were created by the CLRA and charged with ratifying the allocation and cancellation of customary land rights by traditional leaders.<sup>204</sup> Before the MCC compact, limited funding support to these institutions, as well as capacity constraints on the part of the MLR, impeded the implementation and enforcement of the CLRA's provisions. Progress in registering land rights had been very slow: as of 2008, only four thousand of some seventy thousand applications submitted since 2003 had been approved.<sup>205</sup> MCA-Namibia identified difficulties of land governance, including this incomplete implementation of the CLRA, as a barrier to investment and economic growth in the NCA.

The CLS subactivity is being implemented “to improve the administration and management of communal lands, with an

192 Namibia National Planning Commission, 2011 Population and Housing Census Preliminary Results (2012), accessed at <http://www.nsa.org.na/microdata1/index.php/catalog/19>

193 *Id.*

194 John Mendelsohn, Louise Shixwameni & Uda Nakamhela, *An Overview of Communal Land Tenure in Namibia: Unlocking its Economic Potential*. Paper submitted to the Bank of Namibia Annual Symposium (Sep. 27, 2012), accessed at <https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/d2/d2d1748a-1e9f-4b9a-8291-94c8589e52d7.pdf>.

195 African Development Bank, *Namibia Country Strategy Paper 2009-2013* viii (2009); FAO *Aquastat: Namibia. Water Report* No. 29 (2005), accessed at [http://www.fao.org/nr/water/aquastat/countries\\_regions/namibia/index.stm](http://www.fao.org/nr/water/aquastat/countries_regions/namibia/index.stm).

196 Namibia Statistics Agency, *Namibia Household Income and Expenditure Survey 2009/2010* (2012).

197 *Id.* According to the 2009/2010 NHIES, the GINI coefficient for Namibia is 0.5971.

198 A seventh region, Caprivi, though predominantly communal and located on the north-eastern border of Namibia, was not included in the overall MCA-Namibia Agriculture Project because of difficulties in achieving disease-free status for livestock and, therefore, was not included in this project.

199 Wade Pendleton and Bruce Frayne, *Migration as a Population Dynamic in Namibia, in Population-Development-Environment in Namibia: Background Readings* 273 (Bruce Fuller and Isolde Prommer, eds., 2000).

200 MCA-Namibia, *Communal Land Support Policy Review* at 8 (2011). [*hereinafter* “CLS Policy Review”]

201 Millennium Challenge Compact, U.S.-Namibia, sec. 1.2, Jul. 28, 2008. [*hereinafter* “Compact”]

202 *Id.*, Annex I, at 12.

203 MCA-Namibia, *Communal Land Support Sub-Activity Final Inception Report* WBS16000, Apr. 12, 2013. [*hereinafter* “Inception Report”]

204 Communal Land Reform Act No. 5 of 2002 sec. 3 (Namibia), [*hereinafter* “CLRA”]

205 John Mendelsohn, *Customary and Legislative aspects of Land Registration and Management on Communal Land in Namibia* (Report prepared for the Ministry of Lands and Resettlement), 28 (2008).

emphasis on the Northern Communal Areas.”<sup>206</sup> The CLS subactivity’s specific objectives are to<sup>207</sup>

- improve the climate for investment in and use of communal lands for economic growth;
- support traditional authorities (TAs), communal land boards (CLBs), the MLR, and local residents in their ability to protect and manage commonage<sup>208</sup>; and
- increase landholders’ tenure security over their individually allocated properties and communities’ tenure security over the commonage in the NCAs.

CLS project implementation has occurred in two phases with two different contractors. Implementation originally began in March 2010 under contract with Gesellschaft für Internationale Zusammenarbeit (GIZ). The project’s objective was to support the MLR’s efforts to regularize land tenure in the NCA, and the project activities included supporting land rights registration.

CLS Project Timeline	
MCA-N compact signed	July 2008
Due diligence and Planning	July 2008-April 2009
Phase 1	April 2009-July 2012
Bridging Period	July-December 2012
Phase 2	Dec 2012-July 2014
End of Compact	September 2014

MCA-Namibia and GIZ amicably parted ways in July 2012, bringing an end to “phase one” of the project. Work continued with many of the same staff members through a temporary “bridging period” that ended when the current implementing contractor, Orgut-Cowi, was selected to manage implementation of the CLS subactivity in December 2012. “Phase two” began in December 2012 under the Orgut-Cowi team and will continue through the final eighteen months of the project.<sup>209</sup>

Phase two continues to support land rights registration but also furthers the project’s commitment to communication; community mobilization and institutional support; improving policies, forms, and procedures; and supporting broad dialogue.

<sup>206</sup> Lump-Sum Contract for Consultant Services for the Implementation of the Communal Land Support Sub-Activity between MCA-Namibia and Orgut-Cowi, Dec. 12, 2012 [hereinafter Orgut-Cowi TOR], Appendix A: Description of Services, page 32.

<sup>207</sup> *Id.* It should be noted here that these objectives differ somewhat from those stated in the 2009 CLS activity description, which states that the CLS Project was designed to “support the agenda of the Ministry of Lands and Resettlement (MLR) to regularize land tenure in the Northern Communal Areas.” This early planning document describes the project’s aims as being: to develop and support a system for identifying, verifying, and registering *de facto* land holdings in the NCA according to the terms of the Communal Land Reform Act (CLRA); and to provide capacity support to the Traditional Authorities and CLBs in the adjudication, allocation, and administration of formal land rights in the NCA. (MCA-Namibia Land Activity Description, Apr. 7, 2009 at 1.) The objectives stated in the Orgut-Cowi TOR reflect evolution and refinement of the CLS subactivity during the initial years of implementation.

<sup>208</sup> For the purposes of the CLS project, commonage is defined in the Orgut-Cowi TOR as “communal land that has not been allocated either by customary right or leasehold to an individual or legal entity and thus remains available to communal use according to the Communal Land Reform Act.” Orgut-Cowi TOR, *supra* note 209, at 32.

<sup>209</sup> Inception Report, *supra* note 206, at 12.

The major components of the CLS project were: policy, procedures, and capacity building; communication and civic education; support to verification, registration, and investigation; coordination and planning and administration; and monitoring and evaluation.<sup>210</sup> This report describes and assesses the gender dimensions of the assessment, planning, and implementation of the CLS project.

## B. Gender as a Project Priority

The compact states that all MCA-Namibia projects are to be implemented with MCC’s guidance on gender integration as provided in the MCC Gender Policy, and that “gender integration plans will be developed to provide design recommendations and to ensure women’s participation throughout implementation for all Activities with a particular focus on including women in land and natural resources management decision making.”<sup>211</sup>

Within the CLS subactivity, gender was considered a cross cutting theme, and gender considerations were especially prominent in the communications and policy, procedural review, and capacity-building components. Communications-planning documents identify women as a target audience from the outset, and women’s particular land-related challenges were among the key issues singled out to be addressed. Within the policy component, the policy-review activity explicitly considered gender and specified certain gender-related issues to be addressed by the policy review, an emphasis that informed planning for implementation throughout the other CLS components. Women’s issues were also identified as priority content for training modules.<sup>212</sup>

## C. Review of Preliminary Recommendations Related to Gender

Gender-specific issues were identified during due diligence through interviews with land officials and experts in Namibia; a review of relevant legislation and of applicable literature, including a report entitled *Protection for Women in Namibia’s Communal Land Reform Act: Is It Working* by Wolfgang Werner; and follow-up discussions with the report’s author and other experts in Namibia. This preliminary review helped to identify priority issues during the project design stage, particularly regarding the need to prioritize gender issues in the policy review, and in the project’s training and communications materials and activities. During the initial phase of project implementation, a capacity assessment assessed awareness of women’s land rights and gender issues to inform ongoing public outreach and training needs.

MCC’s 2006 Gender Policy was in place at the time of MCA-Namibia project design. This policy mandates that compact countries carry out an analysis of gender differences

<sup>210</sup> Orgut-Cowi TOR, *supra* note 209; see also Inception Report, *Id.* at 10.

<sup>211</sup> Compact, *supra* note 204, Annex I-15.

<sup>212</sup> Contract for Consultant Services for the Communal Land Support Sub-Activity between MCA-Namibia and GTZ, Mar. 1, 2009, Appendix A – Description of services. [hereinafter “GTZ TOR”], at 45; Orgut-Cowi TOR, *supra* note 209, at 53.



and inequalities to inform the development, design, implementation, and monitoring of MCC-funded programs. The policy further states that compact countries must “analyze the impact of investments on beneficiary groups and refine projects, as needed, to ensure that gender differences and inequalities that limit economic growth and poverty reduction are addressed in project design.”<sup>213</sup> Before MCC operational requirements were formally adopted, MCC worked with MCA-Namibia to develop a Gender and Social Integration Strategy (GSIS) to address any gender inequalities that limit individuals’ opportunities to participate in or benefit from projects, and to enhance the benefits of the MCA-Namibia project for women and vulnerable groups. The GSIS was initially developed and disseminated among the CLS team in 2010 after the project was already underway,<sup>214</sup> and a required revision of the GSIS was completed in 2013.

The process for operationalizing recommendations for gender integration made during the design stage, and in the GSIS itself, was not clearly defined in the 2010 GSIS. However, most of these recommendations have been taken up by the project and operationalization is now included in the updated version of the GSIS (2013). The initial GSIS plan provided that it would be distributed by the director of the environmental and social assessment (ESA) team to all MCA-Namibia staff, who were to be trained on gender and social inclusion analysis and integration, while the CLS Director was to be responsible for ensuring that gender concerns highlighted in the GSIS be integrated into CLS activities. Teams responsible for each component of the project incorporated gender when developing their respective strategic plans, though it is unclear whether and in what manner there was any oversight or coordination of the implementation of gender aspects of each plan by MCA-Namibia. Similarly, MCC did not have a staff member assigned to ensure social and gender integration during a critical period of implementation.

Team meetings appear to have been a principal means by which the project addressed the gender integration requirement, though the extent to which individuals responsible for each project component took on the task of integrating the recommendations of the GSIS seems to have varied considerably among the project components. This variability indicates that gender considerations were not operationalized systematically throughout the project and suggests that individual project staff’s interest and understanding of the importance of gender were the stronger drivers of gender integration.

#### **D. Oversight and Responsibility for Gender Planning and Integration**

In the early stages of compact implementation, prior to MCC’s formation of its social and gender assessment (SGA) division, compact-wide oversight on how gender differences

were handled was the responsibility of MCC’s environmental and social assessment unit. In late 2011, MCC’s SGA division assumed responsibility for MCC oversight and monitoring of gender integration across all compact activities, and a consultant was assigned by the SGA Senior Director to assess and provide support for social inclusion and gender equality in the compact. Within MCA-Namibia, these tasks remained with the ESA team. The MCA-Namibia ESA director was responsible for disseminating and conducting annual revisions of the GSIS; guiding MCA-Namibia project staff in the integration of gender into project activities; ensuring that staff received orientation on gender mainstreaming; reporting to the CEO on progress toward integrating gender into MCA-Namibia project; and managing the work of a “gender and social mainstreaming consultant” who was mostly not available for work on the compact as time progressed.<sup>215</sup> Since there was no specific expertise on the MCA ESA team, MCA Namibia agreed to hire a gender and social inclusion consultant. This was done in July 2013 and she continues to work within the ESA directorate.

According to the GSIS, the CLS director was responsible for ensuring that vulnerable groups impacted by the CLS subactivity were identified, and indicators developed to track their participation in and benefit from activities; the director also monitored CLS project components to ensure gender was integrated into work plans, contracts, reports, and IEC materials.<sup>216</sup>

Project documentation indicates, and interviews with key informants confirm, that responsibility for gender integration in the CLS project was shared among all CLS team members, with the expectation that gender would be integrated into each person’s work and into each component’s approach to respective activities. The gender consultant, as well as MCC personnel, provided guidance and recommendations throughout the project. Staff training also included sessions on women’s land issues and was reinforced through staff discussion meetings that focused on women’s land rights issues encountered through the project.

## **II. Legal Framework**

### **A. Relevant Laws at the Time of Project Design and Implementation**

Following independence in 1990, Namibia undertook a series of legislative and constitutional reforms, including an ambitious land-reform program aiming to bring about more equitable land distribution and access to land, to reduce poverty and promote economic growth, and to lower income inequalities. Reforming administration of communal land is a primary focus of these reform efforts. Efforts are underway to revise and harmonize the two existing Land Acts (the Communal Land Reform Act and the Commercial Land Act) so that one law will govern land allocation and administration for all current forms of tenure.<sup>217</sup>

<sup>213</sup> Millennium Challenge Corporation, *Fiscal Year 2007 Guidance for Compact Eligible Countries*, Chapter 14: Gender Policy, 5 (2007).

<sup>214</sup> MCA-Namibia, *Gender and Social Integration Strategy 2010*, 10. [hereinafter “GSIS 2010”]

<sup>215</sup> *Id.* at 19. Verified by Gender consultant in interview.

<sup>216</sup> *Id.*

<sup>217</sup> Orgut-Cowi TOR, *supra* note 209, at 48.

The GSIS made specific recommendations, which it called “mitigation and enhancement requirements,” that were to be integrated throughout the CLS components:

GSIS Mitigation and Enhancement Requirements [source: GSIS 2010]	CLS project implementation activities	Ongoing and additional plans (per updated SGA review 2013)
Review where customary land rights for women conflict with both the Communal Land Reform Act and the Constitution of Namibia, and ensure policies are harmonized around fundamental rights and principles related to ensuring women’s access and security of land tenure.	Policy review and recommendations to the MLR (in overall CLS policy review as well as specific submission to the MLR regarding spousal rights)	Consult with Parliamentarians committee on policy reform.  Hold gender and vulnerable stakeholders’ workshop to identify gaps in the current legislation; share lessons; and facilitate and encourage the inclusion of joint ownership of land rights in the draft bill.
Remove ambiguities and uncertainties that may weaken the land and resource rights of poor people and women of all social classes, as more powerful and well-connected male elites exploit these ambiguities.	Policy review (as above)  Training and communications activities	As above.
Increase policymakers’ awareness of possible inequalities with regard to inheritance practices affecting women and orphans; and mechanisms to address these (e.g., loss of farming assets by widows).	Policy Review  Training and communications activities	As above.  Collect relevant information from CLBs on transfer of land rights to widow/widowers and create awareness of the situation (scheduled Dec 2013–March 2014).
Ensure equal participation in public review of land verification and tenure verification, and note percentage of women-owned land.	Verification activities  Monitoring and evaluation indicator	Develop field guidelines to ensure information on the vulnerable is collected during verification and attached to applications.
Disseminate information to women, the poor, and other vulnerable groups on the Communal Land Reform Act.	Training and communications activities	Ongoing (training, community, and outreach events).
Conduct training on gender and understanding of land rights and the implementation of these for women and vulnerable groups for TAs, CLBs, and village headmen.	Training and communications activities	Ongoing training events.
Train women in leadership positions to facilitate their full participation in CLBs and other fora.	Training and communications activities	Assess number of women occupying leadership positions in TA structures.  (by end of October 2013)
Assess that enacted gender balance is maintained on CLBs: “The Act prescribes that at least four members of the Land Boards – which are typically constituted by at least 12 members – have to be women.”	Support to registration and verification	(Unclear)
Ensure resource use and management and benefit-distribution plans are conducted with gender awareness and that the capacity to do so is built.	Support to registration and verification;  Training and communications	

In Namibia, land is classified as either freehold, customary, or state land. Freehold tenure applies in urban areas and on commercial farms, while customary tenure applies on communal land, all of which is rural. All communal land is owned by the state and is held in trust for the benefit of the traditional communities residing on that land and for the economic and social development of all Namibians.<sup>218</sup> About 38 percent of Namibia is designated communal land. The remaining land is made up of freehold farmland (44 percent), national parks (17 percent), and declared urban areas (1 percent).<sup>219</sup> Individual use rights to communal land, including customary land rights and leases, are administered by TAs and land boards. Communal land cannot be sold and transfers of use rights and leases must be approved by the TAs and land boards.<sup>220</sup> Leasehold rights for commercial use of communal land can be granted by CLBs with the consent of TAs for up to ninety-nine years and may be transferred, inherited, renewed, and mortgaged.<sup>221</sup>

Under the CLRA, the primary power to allocate or revoke customary land rights is vested in the chief or TA of the particular community. Rights allocated or revoked by TAs require ratification by the CLBs to become formal legal rights. CLBs are responsible for ratifying and registering allocations in the name of the land-right holder, and for ensuring that such allocations comply with regulations and national policies. Once these steps are taken, the CLBs issue a certificate of registration.

A second function of the CLBs under the CLRA is to improve the security of tenure of customary right holders through establishing and maintaining a customary land rights registry.<sup>222</sup>

Section 23 of the CLRA gives the MLR the power to prescribe limits on the size of customary land parcels. Regulations established by the minister have set that limit at 20 hectares. According to the Orgut-Cowi terms of reference, “there is considerable confusion regarding this 20-hectare limit. Confusion stems from a number of questions, including: (1) whether it applies to land rights that pre-date the Act, and, if so, how, (2) the type and definition of farmland that may be registered, and (3) the number of parcels that can be registered by one rights holder. In addition, the MLR lacks clear procedures for how ministerial approval will be granted in cases when it is required.”<sup>223</sup>

## 1. Constitutional Protections for Women’s Land Rights

Namibia’s Constitution guarantees equality and freedom from discrimination and sets out a legal basis for affirmative action to redress historical discrimination against women. Article 10(1) provides that “all persons are equal before the law,” and

prohibits discrimination on the basis of sex (Article 10(2)). Article 23 prohibits the practice of racial discrimination and provides further that it “shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation” (Article 23(3)).<sup>224</sup> Article 95(a) of the Constitution commits the state “to ensure equality of opportunity for women.”

The Constitution establishes broad property rights protections in Article 16, which states: “All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees.” It also explicitly recognizes customary law. Article 66(1) provides that both customary law and the common law applicable at the date of independence shall remain valid, provided it does not conflict with the Constitution or statutory law.

## 2. Married Persons Equality Act 1996

The Married Persons Equality Act 1996 (MPEA) provides important protections for women’s personal and property rights in civil marriages. However the act does not protect all women; it explicitly states that the majority of its provisions do not apply to customary marriages, which follow the norms and rules of a customary community.<sup>225</sup> According to the 2011 National Population and Housing Census, about 11 percent of respondents in the NCA were married under customary law, with a higher concentration in the Caprivi and Kavango regions (34 and 20 percent, respectively). By comparison, the rate of customary marriages in the south averages 4 percent, with a national average of 8 percent.<sup>226</sup>

The MPEA prohibits sexual discrimination from civil marriages as required by the Namibian Constitution, which says that “Men and women...shall be entitled to equal rights as to marriage, during marriage and at its dissolution.” Section 2(1)(a) of the Act repeals the common law rule granting a husband marital power over the person and property of his wife upon marriage. The Act also affirms the legal capacity of a wife to enter into contracts and litigate on her own behalf. Section 3(b) abolishes the common law presumption that the husband is the head of the family.

Community of property is the default matrimonial property regime applicable to most civil marriages; a formal prenuptial contract is required for couples who want to want to select

<sup>218</sup> CLRA sec 17(1).

<sup>219</sup> Mendelsohn et al, *supra* note 197.

<sup>220</sup> CLRA, sec. 38.

<sup>221</sup> CLRA, sec. 30(4).

<sup>222</sup> CLRA sec. 3(c).

<sup>223</sup> Orgut-Cowi TOR, *supra* note 209, at 48.

<sup>224</sup> Constitution of the Republic of Namibia, 1990.

<sup>225</sup> Married Persons Equality Act, 1996, sec. 16 (Namibia).

<sup>226</sup> Namibia Statistics Agency, 2011 Population and Housing Census Indicators, *accessed at* <http://www.nsa.org.na/microdata1/index.php/catalog/19>

an alternate to community of property.<sup>227</sup> The community of property regime permits spouses equal access to and control over shared marital property, and if the marriage ends, either by divorce or death, each spouse is entitled to half the shared marital property. Section 5 provides that “a husband and a wife married in community of property have equal capacity (a) to dispose of the assets of the joint estate; (b) to contract debts for which the joint estate is liable; (c) to administer the joint estate.”

The Act also requires spousal consent to alienate, burden, mortgage, cede, or contract to alienate any immovable property, investment, livestock and other movable assets jointly held (including furniture), or receive money due to the spouse by way of inheritance (section 7(i)(iii)). This consent can be given orally or in writing, except that consent given concerning the registration, execution, or attestation of a deed or other document in a deed registry must be in writing (section 7(2)(j)).

### 3. Relevant Provisions of the Estates and Succession Amendment Act 15 of 2005 (Succession Act)

The Succession Act repeals certain provisions of discriminatory colonial-era laws that established different systems of dealing with the administration of estates based on race or ethnic origin and provides that the Administration of Estates Act 1965 governs the administration of the liquidation and distribution of all estates, whether testate or intestate. The act stipulates that husbands and wives have equal rights to make wills and have no duty to leave any part of their estate to the surviving spouse or to the children of the marriage.

### 4. Relevant Provisions of Customary Law

Throughout the north-central regions, including the NCA, many traditional groups follow matrilineal rules for inheritance. Traditionally, under these matrilineal rules, ownership rights to property were vested in the extended maternal family: when a male died, male relatives from his mother’s side had the right to inherit his property, and his widow and children did not. The result was that, under customary law, widows would be evicted from their land and would have to return to their natal families.<sup>228</sup> These traditional rules have changed somewhat as a result of a weakening matrilineal system and the development of a neo-local system, in which land shortages cause young men

to strike out from their family land after marriage, seeking their own land in a new locality.<sup>229</sup>

In the context of these changing settlement patterns and increasing land scarcity, TAs in the north-central regions devised revised rules governing widows’ access to land, adopting the revised Laws of Ondonga in 1993. These changes provided protections for widows, guaranteeing their right to stay on the land of their deceased husbands without paying a fee. Similar protections for widows’ rights were codified in the CLRA.<sup>230</sup>

In practice, however, inheritance practices vary widely in the NCA, and a widow’s chances of inheriting her deceased husband’s property depends to a large extent on her relationship with her extended family, children, and others in the community.<sup>231</sup>

### 5. Communal Lands Reform Act 2002 (CLRA)

On its face, the CLRA is gender neutral, and contains no provisions dealing specifically with the land rights of women. Women are specifically referred to only once in the entire text of the CLRA; this is in section 4, which establishes a minimum for representation of women on the CLBs. As discussed above, the CLRA provides for the registration of communal rights and designates responsibility to the CLBs and TAs for the administration and adjudication of those rights.<sup>232</sup> The CLRA does not differentiate women’s and men’s rights: under the CLRA, both men and women (single, widowed, or married) may apply for land in their respective communal area. The CLRA also provides that upon the death of the land-rights holder, “the land reverts to the Chief or Traditional Authority for re-allocation forthwith to the surviving spouse . . . if such spouse consents to such allocation; or in the absence of a surviving spouse” to a child of the deceased person.<sup>233</sup> Though the formal and customary rules stipulate that widows are not required to pay for this reallocation, various sources report that the practice of forcing widows to pay for the continued use of land is common.<sup>234</sup> There are also instances in which widows never receive the reallocation.

The CLRA assigns traditional leaders responsibility for allocating and administering customary land rights, while also mandating that they allocate land rights to spouses. Certain provisions of the Traditional Authorities Act are in conflict with the CLRA and affect its interpretation and implementation. Under the Traditional Authorities Act, traditional authorities are responsible for the administration of customary laws in their respective communities and must “uphold, promote, protect and preserve the culture, language, tradition and

227 See *Brummund v Brummund's Estate* 1993 (2) SA 494 (HC) (Namib.) (“In the absence of an antenuptial contract providing otherwise, marriage creates community of property and of profit and loss . . . every marriage [south of the Police Line] is presumed to be in community until the contrary is proved.”) (quoted in Legal Assistance Center, *Supplementary Submission to the Committee on the Elimination of Racial Discrimination: Supplementing Namibia's 2007 Country Report*, Memorandum (2008). Section 17(6) of the Native Administration Proclamation of 1928, still in effect as of July 2012, provides that all civil marriages between “natives” north of the old “police zone” are automatically out of community of property, unless a prenuptial declaration establishes otherwise. According to a 2008 report by OHCHR, “There remain two systems for civil marriages depending on which side of the police line they occur. This is a vestige of section 17(6) of the Native Administration Proclamation 1930.” The report says that though the police line was abolished in 1990, there remains a *de facto* division in how marital presumptions are treated by the courts.

228 Wolfgang Werner, *Protection for Women in Namibia's Communal Land Reform Act: Is it working?* Legal Assistance Center, 25 (2008), accessed at <http://www.lac.org.na/projects/lead/Pdf/womencommlandra.pdf>.

229 *Id.*

230 *Id.*

231 *Id.*

232 CLRA sec. 3.

233 CLRA sec. 26(2)(a)

234 Werner, *supra* note 228, at 24.

traditional values” of these communities.<sup>235</sup> Traditional authorities are also responsible for settling disputes among community members in accordance with customary laws.<sup>236</sup> Traditional authorities must also comply with constitutional affirmative action principles, “in particular by promoting gender equality with regard to positions of leadership” (article 4).<sup>237</sup>

These inconsistencies between the CLRA and the Traditional Authorities Act can give rise to tensions in the allocation of women’s land rights, particularly regarding a widow after the death of a spouse. Under custom, this allocation is subject to power relationships that are dependent on the widow’s relationships and on traditional gender roles. Under matrilineal inheritance rules applied in customary law, relatives of a deceased husband have a legitimate claim to the deceased husband’s property. In contrast, the CLRA provides explicit protections for a widow to inherit her deceased husband’s allocation of customary land. Article 26 of the CLRA provides that upon the death of the customary right holder, the right reverts to the TA for reallocation to the surviving spouse.<sup>238</sup> In practice, however, TAs tend to apply customary principles, and the formal protections for women are disregarded.<sup>239</sup>

## B. MCC Legal Assessment and Project Design

During the due diligence process, MCC conducted a review of the relevant legal and policy context, including local customs having a potential impact on the project aims. This review flagged issues relevant to the design of the CLS subactivity, and specifically called out the need to analyze and address women’s land rights issues under the CLRA.<sup>240</sup> The resulting project design, as described in the contractor terms of reference for phase one, included a CLS legal and policy review designed to broadly assess constraints to tenure security under the legal and policy framework, including barriers to tenure security of women and vulnerable groups.

This review was conducted and completed in November 2011 to assess existing barriers to tenure security and to inform the development of improved policies and procedures regarding land tenure. The review included a discussion of land laws and policies and examined seven priority areas of concern, including an analysis of the rights of women and other vulnerable groups.<sup>241</sup> The contractor terms of reference described the impetus for including a review of gender considerations as follows:

<sup>235</sup> Traditional Authorities Act 25 of 2000, sec. 3; Constitution of the Republic of Namibia, secs. 3 & 7.

<sup>236</sup> Traditional Authorities Act 25 of 2000, sec. 12.

<sup>237</sup> Werner, *supra* note 231.

<sup>238</sup> CLRA art 26.

<sup>239</sup> *Id.*

<sup>240</sup> GTZ TOR, *supra* note 215, at 43.

<sup>241</sup> According to the legal and policy review (page 6), the terms of reference listed the following seven issues as requiring review: (a) group tenure; (b) properties larger than 20 hectares; (c) properties larger than 50 hectares and/or to be leased for more than 10 years; (d) the rights of vulnerable people; (e) processing of leaseholds in conservancies; (f) rentals on leaseholds and (g) transfers and assignments for properties.

The Communal Land Reform Act is gender neutral in terms of registration of land rights. Under customary law, however, men tend to apply for customary rights upon marriage and to be considered as the rights holders. Moreover, the Act does not explicitly provide for the registration of rights jointly in the name of both the husband and wife, so the husband’s name tends to appear on the registration application form. The Regulations supporting implementation of the Act, however, require that the name of the applicant’s spouse also appear on the form, although this does not always occur in practice. Also in practice, some TAs believe that applications can only be signed by male heads of household; if husbands are not present, their wives cannot sign. Where land is registered in the name of a married woman, she needs the consent of her husband to sign the application form, whereas single women can sign the forms on their own. In addition to these difficulties related to application of the Act, studies have shown that women tend to be unaware of their rights under the Act.<sup>242</sup>

The legal review did not make specific recommendations regarding the marriage or family law but did refer to relevant provisions in the Constitution (arts 23 and 95(a)) and in the Traditional Authorities Act (sec 3(1)(g)).

## III. Nature and Scope of MCC Intervention

The following section discusses the design and implementation of CLS project activities and integration of gender considerations throughout the intervention. This section will review the overall process for integrating gender throughout the CLS intervention, followed by discussions of the gender dimensions of each of the CLS project components (assessment and identification; policy review, procedural development, and capacity building; communication; support to verification; and support to registration and investigation).

### A. Gender Considerations in Project Design and Implementation

Consistent with the project’s integrated approach to gender, the phase two inception report emphasizes that project components “are interrelated and have influence on each other.”<sup>243</sup> This integrated approach is relevant to the current gender review because, in principle, activities that explicitly consider or focus on gender may inform and influence later activities, even though this focus may not feature prominently in the planning and design documentation. This section describes each of the five CLS components’ approach to gender, noting where recommendations or considerations touch on other components.

<sup>242</sup> GTZ TOR, *supra* note 215, at 43.

<sup>243</sup> Inception Report, *supra* note 206, at 10.

Project documentation indicates—and interviews with various staff members and consultants confirm—that gender considerations were mentioned in project documents and gender was integrated throughout the project primarily through the contractor terms of reference.

## 1. Policy, Procedural Development, and Capacity-Building Component

The objective of the policy, procedures, and capacity-building component is “to ensure that there is an appropriate policy and procedural framework and capacity in place for the achievement of the objectives of the CLS Sub-Activity.”<sup>244</sup> It consists of the completion and support to implementation of recommendations made in a policy review; the development and refinement of systems and procedures for verification, adjudication, and registration of land rights; and capacity building and training of CLBs, TAs, village heads, and other land administration authorities.

### Policy Review

MCC’s planning and due diligence process included a review of the 2008 Werner report,<sup>245</sup> as well as follow-on meetings with the author and other experts.<sup>246</sup> This helped flag gender issues as a key aspect of the policy component and largely accounts for the requirement that the CLS policy review address the gender issues listed in the terms of reference. Under this review, the CLS team analyzed the current application of the CLRA and recommended measures to be incorporated in its verification and registration procedures, as well as in the operations manual and forms, “to ensure that women and other vulnerable groups are not disadvantaged by the verification and registration work under this project.”<sup>247</sup> These considerations were incorporated into the policy- and procedures-planning process, resulting in the inclusion of gender-specific activities, including the submission to the MLR of legal options to strengthen customary and leasehold rights of spouses and the development of recommendations on requirements regarding parcel transfers.<sup>248</sup>

The aim of the CLS policy review with respect to gender was to analyze the impact of the CLRA as implemented and to recommend measures to ensure that women and other vulnerable groups are not disadvantaged by the registration and verification activities undertaken through the CLS project.<sup>249</sup> The gender elements of the policy review can be found in chapter six: safeguards, governance, and public awareness, which makes several recommendations for improving women’s land rights protections under the law.<sup>250</sup> Recommendations to the MLR were included in the review, and a separate set of recommendations was later submitted to MLR regarding application

forms providing for spouses to apply for joint registration of customary land rights. Specifically, the CLS policy review discusses the following issues and recommendations:

### Strengthen Widows’ Rights to Inheritance under Customary Land Administration

In spite of formal protections for widows’ inheritance rights in the CLRA, customary practices regulating inheritance often disadvantage women, who may not have rights to automatically inherit the land under custom. As noted above, women’s right to inherit land held by a deceased spouse is not uniformly realized in practice. Many traditional authorities do not reallocate land to widows as required by the CLRA and instead contend that wives have the right to live in and use property only while they live there with their husbands, and that property must be returned to the husband’s relatives when he dies.

To address this challenge, the CLS policy review recommends that registered properties “should proceed according to statutory and civil law in terms of the deceased’s will or the laws of intestate succession (without a will). Land rights therefore remain the property of the estate, and should not be returned to traditional authorities.”<sup>251</sup> The CLS policy review also cites section 14 of the Traditional Authorities Act, which limits the powers of TAs to those in accordance with rights guaranteed under the Constitution. Specifically, the recommendation was to enforce section 14 of the Traditional Authorities Act, stating that: “In the exercise of the powers or the performance of the duties and functions referred to in section 3 by a traditional authority or a member thereof: (a) any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, or which prejudices the national interest, *shall cease to apply.*”

### Amend the CLRA to Provide for Joint Registration by Spouses

The policy review also recommends that sections 25 and 26 of the CLRA should be amended to expressly allow for joint registration of customary land rights in the names of both spouses. It should be noted that nothing in the CLRA prohibits joint registration and, in fact, joint registration is being accomplished through changes to the regulations and application forms without the need to amend the CLRA.

### Add Antidiscrimination Clauses to Land Legislation

The policy review recommends the addition of antidiscrimination clauses in the land legislation that expressly provides for equal tenure security and land rights and benefits for men and women, regardless of their marital status, and that invalidates any law, regulation, practice, or usage that discriminates against any person on the ground of the sex or marital status.<sup>252</sup> The policy review also recommends that the MLR promote public

244 Orgut-Cowi TOR, *supra* note 209, at 48.

245 Werner, *supra* note 231.

246 Rick Gaynor, email correspondence (on file with the author).

247 MCA-Namibia, CLS Registration Strategy and Implementation Plan, 26 (Dec. 2010).

248 MCA-Namibia, Bridging Period Final Close Out Report, 7 (Dec 2012).

249 *Id.*

250 CLS Policy Review, *supra* note 203, at 29.

251 *Id.* at 31.

252 *Id.* at 32.

awareness to the effect that, under antidiscrimination provisions of article 10 of the Constitution, regardless of their marital status, men and women are entitled to the same legally secure tenure rights and benefits from land.

### **Add Affirmative Action Provisions to Land Legislation**

The policy review recommends that land legislation should require that TAs and CLBs “apply affirmative action for women to ensure that women and men have comparable access to communal land.”

### **Strengthen Provisions in the Draft National Land Tenure Policy that Limit the Discretion of Family Heads Regarding the Alienation of Family Lands**

The policy review recommends that the draft National Land Tenure Policy strengthen its proposal “that legal rights over land continue to be held by the head of the family in trust for the rest of the family but with provisions to ensure that heads of household may not dispose of or subdivide land rights without the consent of the spouses, irrespective of whether the rights belong to each spouse individually or as common property.”

The above recommendations were included in the submission to the MLR and served as a basis for setting project aims and priorities. Revising and supporting the implementation of new registration application forms and certificates was identified as a first priority and supporting amendments to the CLRA to provide for direct transfer of rights to the spouse of a deceased landholder (without reversion to the chief or TA) was targeted for action in January 2014.

To inform and help to guide activities related to policy and legal review, a CLS gender stakeholders workshop was scheduled for October 2013, with the purpose of identifying “gaps” in the laws and proposing ways forward. The workshop was attended by both the MLR and the Law Review Commission; it included a presentation by the MCA-Lesotho gender manager, who presented lessons learned and MCA-Lesotho’s experiences with the harmonization of laws in that country.

### **Procedural Development**

CLS developed and piloted a new application form and procedures that provided for spouses to apply jointly for registration of their land rights. As discussed above, registration of joint rights was flagged as a key issue during the due diligence process, and was a principal focus of the project from an early stage and continuing through the CLS policy review. These early analyses found that although the CLRA does not prohibit the registration of rights jointly in the name of the husband and wife, it also fails to explicitly provide for it, which results, more often than not, in the husband’s name appearing on the registration application form. Though regulations supporting implementation of the CLRA do require that the name of the applicant’s spouse also appear on the form, this does not always occur in practice. Furthermore, the presence of a spouse’s name on an application form or certificate was treated as providing

information only: the spouse was not treated as a coapplicant or a coholder of the right. Confusion on the part of TAs also was identified as a barrier to realizing the CLRA’s protections for women’s joint rights, as some TAs believe that applications can only be signed by male heads of household.

The CLS team field designed and tested these new forms and supported their use with a communication campaign in communities where registration was being done by the project to raise public—and particularly women’s—awareness of the joint registration provision and the fact that women have the same rights as men to register land.<sup>253</sup> This remains a prioritized element of the land policy and procedures activity, a focus that resulted from early-stage review and identification of key barriers to women’s land tenure security under the CLRA.

### **Capacity Building**

Training priorities for the CLS project were developed out of the due diligence planning stage and findings from the capacity assessment activity. The TOR specified that content for capacity building should include issues affecting women and vulnerable groups with respect to land rights and land tenure security, particularly regarding registration of land rights.<sup>254</sup> Though the capacity assessment does not reflect a targeted inquiry into gender-specific provisions in the CLRA, its conclusions and recommendations do specify that “gender policy” is an identified training area in need of attention.<sup>255</sup>

GSIS reinforced these priorities with specific recommendations that training of CLBs, TAs, and the MLR under the subactivity “must include the legislated safeguards for women and the identification of any unequal practices,”<sup>256</sup> and that “the training offered must be accessible by women and the vulnerable groups, and any exclusionary practices must be identified and addressed through both training and application of the relevant legislation.”<sup>257</sup> The GSIS goes on to list specific considerations that should factor into training planning and logistics and stipulates that indicators on training must be gender disaggregated.<sup>258</sup>

The training component addressed gender concerns through trainings that targeted women, as well as trainings for the MLR and TAs that discussed vulnerability and the challenges that women face with respect to land in the NCA.<sup>259</sup> Training Module Two: Gender and Protection of Vulnerable Groups was developed to introduce participants (TAs and CLBs) to issues pertaining to gender and protection of vulnerable groups within their jurisdictions. This module set out to ensure that participants recognized the relevance of women’s and vulnerable groups’ land-related challenges to their daily working activities,

253 MCA-Namibia, CLS Registration Strategy and Implementation Plan 2010.

254 GTZ TOR, *supra* note 215 Appendix A, at 45.

255 MCA-Namibia, CLS Capacity Assessment Report, Oct. 29, 2010.

256 GSIS 2010, *supra* note 217, at 14.

257 *Id.*

258 *Id.*

259 The Training Strategy and Implementation Plan (2010) targeted training of MLR, TAs, and other stakeholders, and included a focus on women and vulnerable groups.

with a view to providing participants with practical information that they could understand and apply to their work.

The module introduces women's land rights in the context of their relationship to land, and the impact of land conflict and tenure insecurity on women and communities; defines and clarifies terminology; identifies vulnerable groups and socio-economic and sociocultural factors leading to vulnerability; highlights legal provisions relevant to WLR; and suggests strategies, practices, and actions to be undertaken by TAs and CLBs in ensuring land rights for vulnerable groups.

Course content for module two included

- definitions of terms and concepts on vulnerability, gender, sex, discrimination, and gender mainstreaming;
- identification of various forms of vulnerability in the context of communal land;
- strategies and methods to address discrimination based on sex, ethnic minority, and HIV and AIDS; and
- articulation and application of Communal Land Reform Act, Traditional Authority Act, and Community-Based Natural Resource Management to ensure protection of vulnerable communities.

This training module was included as part of the training curriculum presented to TAs and CLBs, as well as other stakeholders, and contributed significantly to the project's efforts to ensure that women and vulnerable groups benefitted equally from the CLS project, and from the implementation of the CLRA.

## 2. Communication and Civic-Education Component

The overall aim of the communication and civic-education component is to prepare and facilitate effective implementation of the CLS Project. Communications and civic-outreach activities were undertaken in support of the communications objectives, which were to<sup>260</sup>

- raise awareness and educate all landholders about their land rights and land tenure system;
- motivate landholders to register for their land rights, including women and vulnerable groups;
- build confidence and trust in and credibility of the land administrators and the CLS Project among relevant stakeholders; and
- capture feedback and lessons learnt to provide inputs into the policy-review process and project rollout.

As the explicit inclusion of women in the objectives for this component indicates, gender was a principal focus of the

communications component from the outset of the CLS subactivity, an emphasis that is reflected in the inclusion of a sex-disaggregated indicator to track the number of male and female stakeholders trained through the implementation of communications activities.<sup>261</sup>

This emphasis on women's considerations in the communications component is bolstered by the GSIS, which identifies the need to include "information and training interventions for Communal Land Boards (CLB), traditional leaders and community members, and . . . include the legislated safeguards for women and the identification of any unequal practices," which are to be "identified and addressed through both training and application of the relevant legislation."<sup>262</sup>

The communications component intended to provide information "about the benefits of registration of land rights and land-rights protection (with a particular focus on the rights of women and other vulnerable groups)."<sup>263</sup> The capacity assessment study assessed awareness of the provisions of the CLRA and identified challenges and gaps to be addressed under project activities. This assessment found that only 15 percent of the NCA public and 25 percent of TA leaders were aware of land rights and registration procedures established by the CLRA.

Following this capacity assessment and the development of the Communications Strategy and Implementation Plan (CSIP) and Communications Dissemination Plan (CDP), both of which were completed during phase one of the project, the communications and training advisor for the project developed an updated CDP to address these issues in phase two. The updated CDP took target audiences' education, cultural practices, and societal status into account in determining target audiences and planning appropriate dissemination activities.<sup>264</sup>

The CDP outlined specific activities and approaches to address traditional practices that discriminated against women. The updated CDP strengthened the focus on women in communications activities<sup>265</sup> and identified barriers to women's land rights rooted in traditional beliefs and practices and not in compliance with the CLRA: for example, the continuing practice by Traditional Authorities of charging widows a fee for allocating land when their spouses or parents die.<sup>266</sup>

The updated CDP also emphasized that communications tools aimed at changing behavior would specifically target women in social marketing and tools "to ensure that they have a clear and comprehensive understanding of their land rights, the Communal Land Reform Act and other relevant laws."<sup>267</sup> As the CDP notes, though this objective was included in the communications strategy from the outset, it was promoted in the revised

<sup>261</sup> MCA-Namibia, Monitoring and Evaluation Plan, Oct. 4, 2012.

<sup>262</sup> GSIS 2010, *supra* note 217, at 14.

<sup>263</sup> MCA-Namibia Land Activity Description, at 8.

<sup>264</sup> CDP, *supra* note 263, at 12.

<sup>265</sup> *Id.*

<sup>266</sup> CDP, *supra* note 263, at 10.

<sup>267</sup> *Id.* at 7.

<sup>260</sup> MCA-Namibia, CLS Final Communications and Dissemination Plan 2013 at 7. [*hereinafter* "CDP"]



CDP as a stand-alone objective “to reflect the strong focus on this matter during the remaining project period.”<sup>268</sup>

Materials created specifically to raise awareness on women’s issues included a publication in the form of a comic book, which illustrated women’s land rights issues under the CLRA and the Constitution, as well as a flyer promoting the communal land rights of vulnerable people. An extensive awareness campaign with a specific focus on educating communities on women and vulnerable groups on their land rights was also conducted through radio, TV, and community meetings.<sup>269</sup>

### 3. Support to Verification, Registration, and Investigation

The objective of this component was to provide the MLR, CLBs, and MCA-Namibia with a strategy and implementation plan (including a timeline) for verification, registration, and investigation activities to be carried out through the remaining CLS components.<sup>270</sup> The component included a preparatory assessment and identification of the relevant land holdings, land-use types, and implementation regions and the land administration capacity of TAs, CLBs, and other relevant stakeholders in each region. The results of these two assessments provided the basis for planning of project implementation activities, which included a targeted review of gender-related registration issues.

Though gender activities were not a separate part of this component, staff working on the registration component provided input regarding gender into the policy and procedures review. In addition, the capacity assessment included an evaluation of barriers to women’s land tenure security related to these stakeholders’ awareness of and willingness to enforce provisions in the CLRA and regulations providing protections for women’s land rights and flagged follow-up work with MLR as a matter of urgency for the project.<sup>271</sup>

Registration and verification activities were guided by the CLS registration strategy and implementation plan (RSIP), which was completed in December 2010. Section five of the RSIP lays out the strategy for dealing with special cases, including women and vulnerable groups (section 5.3). As discussed above, the RSIP gender considerations included measures directly relating to the policy and procedures activity. In addition, the RSIP proposed specific measures to ensure that women and vulnerable groups were considered in the CLS registration process such as<sup>272</sup>

- ensuring that the names of spouses are registered on application forms through communication efforts and direct engagement with village headmen and other key informants;

- ensuring that the communication and training campaigns pay special attention to women’s rights to register land; and
- identifying, through vigilant attention to the implementation of adjudication and registration process, circumstances in which women are being denied their rights.

The registration strategy and implementation plan 2010 discusses considerations for women and vulnerable groups in some detail and proposes measures to ensure that women benefit from the project’s registration activities, though its most concrete gender-specific recommendations pertain to policy, communications, training, and verification activities, rather than to registration activities. The RSIP does recommend that the registration teams be aware and take note of circumstances in the registration process where women are being denied their rights.

### 4. Coordination, Planning and Administration, and Monitoring and Evaluation

This component consisted of the coordination of all project activities with relevant stakeholders, including the MLR; planning and administration of activities through work plan development and coordination with the MLR; and monitoring and evaluation of project implementation in accordance with the monitoring and evaluation (M&E) plan and data collection plan (DCP).<sup>273</sup>

Coordination and project planning and administration activities included regular meetings and coordination by CLS and MCC staff, during which gender issues were raised and solutions discussed.<sup>274</sup> This coordination role also included systematic consultation with relevant stakeholders in the NCAs, including CLBs, TAs, community members, and others. Working directly and developing effective communication and discussion with local communities was a focus of project activities.

Key activities included the development of the inception report for phase two and the development and administration of monthly and quarterly progress reports. Quarterly operational regional meetings with MLR staff and coordinating meetings with MLR senior staff and MCA-Namibia helped ensure alignment and integration of project planning with the MLR work plan and provided an opportunity to raise issues and support solutions related to gender.

Monitoring and evaluation activities were also included under this component. The MCA-Namibia’s Monitoring and Evaluation Plan 2012 sets out three process indicators to track the progress of the project toward its stated objectives, as well as four output indicators that track the number of stakeholders trained, outreach events held, rights secured, and parcels corrected or incorporated into the land system. The plan also calls for gender-disaggregated data to be collected

<sup>268</sup> *Id.* at 13.

<sup>269</sup> Inception Report, *supra* note 206, Appendix, at 44.

<sup>270</sup> GTZ TOR, *supra* note 215. Under the Orgut-Cowi TOR for Phase Two, activities in this section were separated into Component 3: Support to Verification and Component 4: Support to Registration and Investigation. (Orgut-Cowi TOR, *supra* note 209).

<sup>271</sup> CLS Capacity Assessment Report, *supra* note 258.

<sup>272</sup> CLS Registration Strategy and Implementation Plan, *supra* note 250.

<sup>273</sup> Orgut-Cowi TOR, *supra* note 209 at 36.

<sup>274</sup> Interview with Louise Shixwameni.

about recipients of formal training or technical assistance, as well as for the number of certificates issued by CLS.<sup>275</sup> A review of two indicator tracking tables<sup>276</sup> confirms that training data was disaggregated. However, in these reports registration data was captured only at the household level and was not sex disaggregated.

Quarterly plans developed at the beginning of each quarter were cascaded into monthly operational plans, which were used to regularly monitor progress.<sup>277</sup> Through these monthly and quarterly work plan and progress reports, issues and insights gained from the field were raised and integrated into policy recommendations and training activities. This adaptive project management helped to flag and address issues related to gender across the project.

## 5. Evolving Approach to Operationalization of Gender Recommendations

Though the approach to integrating gender into the project in the early stages could be said to be somewhat ad hoc, the CLS project has moved toward a more systematic integration of gender considerations. The hiring of a gender and social inclusion consultant in July 2013 constituted the first time that MCA-Namibia staffing included a dedicated gender consultant and served to increase the focus on gender at MCA-Namibia.<sup>278</sup> This focus on gender began in early 2013 and came about at the insistence of consultants to MCA-Namibia, staff members, and MCC personnel.<sup>279</sup>

Interviews with MCA-Namibia project staff confirm that the project has changed from its initial conception and that it continues to evolve and respond to new information, challenges, and priorities. This happens on a smaller, less formal scale (for example, through field teams' observations about challenges that widows or orphans are facing), as well as more deliberately, on a larger scale (for example, through a workshop on policy and gender held in October 2013, during which staff from MCA-Lesotho (which ended in September 2013) shared their experiences, best practices, and lessons learned from their project's work, particularly on harmonization of laws and women's issues.

## IV. Analysis of CLS Subactivity from a Gender Perspective

### A. Institutional Changes Affecting Project Implementation<sup>280</sup>

MCA-Namibia project design and implementation began at a time when MCC's gender procedures and policies were still under development. There was an MCC Gender Policy (2006) in place that flagged gender as one among other issues to be considered during the project risk and impact assessment tasks. This was an important step that highlighted gender as a priority concern, but it fell short of ensuring the effective integration of gender considerations throughout MCC projects. During the initial phase of the project when there was not a dedicated SGA staff person at MCA-Namibia, oversight of gender integration into the CLS subactivity was the responsibility of the MCA-Namibia CLS manager and the environmental and social assessment director and support team. However, even without a dedicated SGA staff person at MCA-Namibia, gender integration within CLS has developed over the course of the project and has been supported by MCC's SGA team.<sup>281</sup>

MCC's approach to gender has continued to develop since that time, a process that culminated in a revised MCC Gender Policy (2011) and Gender Integration Guidelines (2011), which outlined specific requirements and clear guidelines for operationalizing gender throughout MCC projects. These changes have supported a deepening of gender integration in the CLS subactivity and are contributing to implementation and sustainability planning for the remaining period of the project.

### B. Factors Critical to Successful Integration of Gender in CLS Subactivity

Though implementation of the communal land support activity is still underway, the above-listed accomplishments show significant progress toward the aim of improving women's land-tenure security. Several factors contributed to these successes, most notably MCC's institutional emphasis on gender and the gender-related compact requirements and the specific personnel involved in the project.

#### 1. Understanding the Context: Research and Consultations during Due Diligence

During the due diligence stage, the MCC team consulted available studies and experts on women's land issues and challenges emerging under the CLRA. This had a profound effect on the direction of the project, flagging women's issues as potential challenges and critically important to the success of the project from the first stage of design. In particular, this early awareness of women's issues had a significant impact on the design of the

275 MCA-Namibia, *Gender Issues including Progress on SGA Review and Update*, tables 8-10 (Oct. 23, 2013). Note that this update does not reflect final numbers, and as of the date of the report, data was only available for one region.

276 MCA-Namibia, Indicator Tracking Table Q16 (July-September 2013) and Q14 (January-March 2013).

277 CLS Inception Report, *supra* note 206 at 28.

278 Though new to this position, it should be noted that the person hired for the Gender and Social Integration Consultant position was previously the CLS Communications Advisor, and has been involved in the project from early on in the project.

279 Gender Consultant, MCC Senior Director of Social and Gender Assessment & Communications Advisor, interviews.

280 This section is based on Leonard Rolfes & Virginia Seitz, *Providing Farmland Ownership Rights to Women in Rural Mali: The MCC Experience*, Paper prepared for presentation at the Annual World Bank Conference on Land and Poverty, The World Bank, Washington, DC, April 8-11, 2013.

281 Comment on early draft of this paper by Jane Tomlinson, Consultant to MCC.

policy review and communications and training components. This early attention to joint registration and widows' inheritance issues in the CLRA directly and significantly impacted the contents and focus of the policy component. Likewise, due to this early awareness of the importance of women's land- rights issues in the NCA, communication and training activities for TAs and CLBs specifically included a module on women and also specifically targeted women for communications activities. The policy and communications activities are regarded as examples of successes for the project, indicating that, to be successful, women's issues must be "designed in" to land interventions from the beginning.

## 2. MCC Oversight and Participation

Equally important was MCC input and oversight to project design, strategic planning, and deliverables. Particularly for the policy component, the review of the CLS policy recommendations by the MCC land director and by both the MCC senior gender director and gender consultant, as well as others among MCC staff, ensured that gender remained a priority issue addressed in the review, helped to reinforce that gender issues were a priority for the MCA-Namibia project, and led to specific activities and considerations related to gender being included in the terms of reference. This resulted in several strong recommendations related to gender. More consistent involvement of MCC's SGA team after its creation in 2010 might have yielded improved results. For example, more systematic involvement of the SGA team in the review of the policy-review documents prior to their submission to the MLR might have contributed additional benefits.

In spite of a lack of formal channels within MCA-Namibia for addressing gender issues and establishing accountability for ensuring positive outcomes with respect to gender, the MCC gender consultant—informed by the comments, reports, and work of the CLS team—argued for more consistent and effective attention to gender on the part of MCC through "back channel communications." This could account in part for the increased attention to gender that began in 2013.

## 3. Gender and Social Integration Strategy Document

During the design and early implementation stages of the project, a clear mechanism for institutionalizing the recommendations of the GSIS was lacking. The GSIS itself mandated that the ESA director ensure the distribution of the document among the staff, but beyond that, there was no guidance or specific accountabilities attached to the strategy. The GSIS was distributed to each team and, at least for the communications and training activity, this was enough to provide guidance to develop strongly gender-focused approach to the activity.<sup>282</sup> This points more to a strong interest and awareness of the importance of gender on the part of CLS personnel than to the importance of the GSIS as a guiding document. Aspects of the project that

were especially strong on gender, such as communications, capacity building, and the policy review and procedural support activities, predated the GSIS. The GSIS reinforced the recommendations of the CLS team and to a certain extent provided an overarching guideline for taking action on gender issues identified in due diligence and early project-planning stages.<sup>283</sup>

Overall, interviews with MCC and MCA-Namibia staff yielded mixed impressions of the GSIS. Some seemed to regard the GSIS as an insignificant document and indicated that despite its production early in the project, it did not constitute a real gender strategy.<sup>284</sup> In addition, some interviewees noted a lack of clear leadership or responsibility for gender throughout the MCA-Namibia compact because of the lack of a social scientist with gender expertise on the MCA-Namibia ESA team. Others viewed the GSIS as an important document that, though it came out too late to serve as a guiding strategy on gender integration from the outset of the project, helped reinforce the need to take action on particular issues and provided an institutional "hook" with which to bolster efforts to carry out activities targeting gender issues flagged early in the project. In addition, when asked why gender issues emerged as a priority in particular CLS activities, MCA-Namibia staff indicated that once the ESA Director distributed the GSIS, it was clear that there were serious issues for women, and that the project had identified gender as a focal point for activities.

## 4. Individual Interest, Initiative, and Skill

This lack of clear institutionalization of gender considerations throughout the project led to an ad hoc approach to integrating gender throughout the activities. As a result, success in the project's gender aims was largely the result of various MCA and MCC staff members' initiative, energy, and interest in gender issues. Tasks outlined in the terms of reference specifically targeting gender issues provided a requirement for the project to undertake certain gender integration steps. However, requirements of the terms of reference alone would not have accomplished the level of gender integration ultimately achieved throughout the project without the additional attention, focus, and initiative of the communications and training advisor. This impression—that the project's success at raising awareness and stimulating wider discussion of gender issues was due in large part to the work and personal initiative of the communications and training advisor of the project—was echoed by almost all MCC and MCA-Namibia staff members interviewed. This individual's efforts were supported by MCC staff and consultants, and later by others among the MCA-Namibia staff who shared her interest and understanding of the importance of gender issues.

## 5. Staff Training

MCA-Namibia staff members and members of the consultant's field teams were also trained on women's issues relevant to the

282 Louise Shixwameni, telephone interview, Aug. 12, 2013.

283 Comments on early draft of this paper from MCC staff and consultant.

284 Jane Tomlinson (MCC Consultant), interview, Aug. 1, 2013.

project, and this training was followed up with staff discussions in which field staff could share challenges and field experiences related to women's land issues. Staff interviewed for this review cited the trainings and group discussions as factors important to ensuring that their work included gender considerations. The "focused approach" used for project implementation may also been a factor in ensuring that field staff understood the importance of gender issues. Under this approach, field teams worked together in each village from the beginning of the identification to the end of registration and verification activities, ensuring that at least one staff person with gender expertise was present throughout the implementation of each element of the work.

### C. Factors Critical to Whether the Recommendations Were Followed

The project's positive outcomes result in large part from the team's efforts to understand the cultural and legal context of the NCA implementation area during the due diligence stage; inclusion of gender issues in the project's terms of reference; insistence, pressure, and support by MCC for MCA-Namibia to follow through on gender priorities; and staff initiative and awareness of the issue's importance.

It should be noted that where the project has yet to see its gender objectives fulfilled, the relatively short implementation timeline may offer a partial explanation. Although trainings, registration, awareness raising, and sensitization are challenges that can be met within the project period, reforming policy and legislation and changing cultural attitudes and practices are necessarily longer-term undertakings.

#### 1. Mid-Course Corrections

The design process has been iterative from the start. Staff discusses challenges, issues, and successes during periodic and quarterly review meetings. Annual action plans are devised to address identified barriers or challenges, and the field team or CLS team also meet regularly and resolve issues, including those related to gender integration, as they arise. This adaptive project design ensures there is room for innovation and adjustments in the project. For example, when the field team realized they lacked information about how many women are registering, the team devised a plan and began working with the CLBs to track statistics about women's registration. The team made further adjustments once it found that women were less actively participating in the registration activity than expected and is now actively seeking out women and vulnerable groups to apply to register.

In addition, a gender integration workshop was held in November 2012 for all MCA-Namibia projects. An outcome of this workshop has been that the role of gender in the project is more strongly emphasized and additional pressure is being placed on the projects to integrate gender. The result is that there is now increased accountability to fulfill gender-related recommendations and some reporting requirements on what

gender work has taken place. Funding to carry out these plans remains a challenge.

Also, the shift of implementing contractors created an opportunity to revisit the strategy and approach for the project. In some cases this resulted in renewed attention to gender (as in the revised communications and dissemination plan).

The evolution of the MCC Gender Policy and Implementation Guidelines suggests an intensification of MCC's approach to gender. This heightened attention and pressure on MCA-Namibia resulted in changes, including staffing changes, gender assessments (undertaken by the MCC gender consultant and gender and social inclusion advisor), and a formalization of the operational and institutional priorities and pathways established in the earlier documentation.

#### 2. Potential Improvements to Gender Integration throughout CLS

Although the CLS project has made positive achievements in its aims to ensure women benefit from its activities, these efforts can be strengthened through improvements to the systems and institutions in place for integrating gender through a project, as well as substantively improving the content and approach of gender recommendations and implemented programming.

#### *Systematic and Institutional Improvements to Gender Integration*

The CLS project design and implementation took place at a time when MCC's overall approach to integrating gender considerations into its projects was still evolving. Thus, many of the suggestions offered below will likely be addressed through thorough and consistent implementation of the 2011 Gender Policy and the Gender Integration Guidelines.

##### Staffing

The positive provisions of the gender and social integration strategy were unevenly implemented in large part because of a lack of dedicated and qualified gender staff to oversee the mainstreaming of gender principles and the implementation of specific recommendations made in the GSIS. Leadership on gender within MCA-Namibia was lacking and is important to ensuring that gender concerns are not sidelined or tacked on as an afterthought to implementation of other project activities.

Responsibility for gender was initially assigned to the ESA director, whose mandate included all environmental and social concerns arising from the project. A dedicated gender expert on MCA-Namibia staff from the beginning would have strengthened the project's efforts to integrate gender considerations by ensuring that each aspect of project activities, from design to implementation, were considered with a view to ensuring that gender was adequately addressed through project activities.

## Staff Training

Training of all staff on substantive issues related to women's land rights in the NCA, as well as general training on the importance of women's land tenure security, is important to ensuring gender is effectively mainstreamed throughout project activities. Although the CLS project included some staff training on gender, it could have been strengthened by conducting training at the beginning of the project and ensuring that follow-on trainings throughout the project reinforced the training's principles.

## Systems and Processes Facilitating Gender Integration

Gender review of project strategic-planning documents and deliverables would have been improved through stronger and consistently applied processes. Gender planning and review should have been systematically implemented during the first two and a half years by MCA-Namibia. A specialized gender review of the CLS policy review by both MCC and MCA-Namibia prior to submitting the document to the MLR might have improved the recommendations. A clear, mandatory process for review by MCA-Namibia gender staff can help to ensure that gender is adequately considered in every element of project planning and implementation.

## Clear Roles Established

Following the development of the GSIS and activity-level strategic plans, each project team was supposed to incorporate its recommendations, under the leadership of the coordinator responsible for each respective component. Responsibility was not clearly delineated, nor was it made clear that the GSIS recommendations were mandatory. The GSIS should have established clear lines of responsibility for operationalization and accountabilities and budget support to realize the recommendations in the project implementation. Clarity about roles and responsibilities for ensuring that gender recommendations were operationalized would have greatly improved the project's gender integration efforts.

## Clear Milestones and Processes

Accountabilities could have been built in to the project to ensure that gender was a central focus throughout all activities. Clear targets and "check-in" activities can help to demystify what it means to "integrate" gender into a project. For each major deliverable in the project, a clear and specific milestone regarding gender would have provided clear direction for CLS staff and would have helped to clarify for them how well they were integrating gender into each aspect of their work. For example, in the support to registration and investigation component, an output described in the terms of reference is a monitoring framework with targets for documentation and registration of verified cases, and for certificates and leaseholds issued. Specifying a target for the number of women issued each type of documentation would have provided a clear aim that could have

improved integration of gender considerations throughout the project.

A specific gender action plan that makes integration of gender aspects systematic and accountable is one way that this could have been achieved. The MCC gender director is pushing for this, and a gender and social inclusion plan was developed in August 2013 with the aim of ensuring that each gender component is implemented, feasible and accommodated by budget, and integrated throughout the project for the remaining project period. Importantly, the plan lays out specific tasks and milestones, and assigns team or individual responsibility for carrying out each identified activity.

## **Substantive Improvements to Gender Recommendations and Implementation Activities**

### Scope of Legal Review and Recommendations

A thorough understanding of the framework for women's land rights in a given context calls for an analysis of both the formal and customary rights to inherit property, as well as the gaps between law and practice. The CLS Policy Review and due diligence review did consider women's property rights but did so in the somewhat narrow context of the CLRA. These assessments should have included an analysis of the inheritance and family laws. Without this broader analysis, efforts to identify gaps and inconsistencies in the legal framework for women's land rights protections may be incomplete.

Though the policy review included recommendations for spousal joint registration, more comprehensive legal reforms could have been achieved with recommendations to include the Estates and Succession Act, the Married Persons Equality Act, and the Children's Rights Act.<sup>285</sup>

The policy review recommended that land legislation add anti-discrimination clauses providing for equal tenure security, land rights and benefits for men and women. Such a recommendation is positive, but anti-discrimination clauses on their own are often not enough to ensure that women and men equally register property rights in practice. To be effective, antidiscrimination clauses should be accompanied by specific regulations and procedures for registration that provide clear direction to implementing authorities. Additional recommendations might include a directive to the registrars to only require written or witness proof of marriage if marriage is disputed by one or the other of the spouses, a rule that both spouses must be present for registration, or a regulation that states that the registrar is responsible for nondiscriminatory practices with regard to gender. Assigning to an administrator clear responsibility to ensure that legal gender rights are observed in the implementation of the law has proven to be a powerful factor in ensuring that women's rights are recorded.

<sup>285</sup> MCC Gender Consultant, interview, Aug. 7, 2013.

## Improvements to Capacity Building

The training and communication components of the project were exceptionally strong in terms of their inclusion and consideration of women. However, fairly late into the project, MCA-Namibia staff commented that the transfer of rights to widows upon the death of a spouse remains a significant barrier for many women, in large part due to persistent traditional practices and confusion on the part of TAs and CLBs about the process. Given the complexity of the issues and the strong cultural norms that the CLRA contradicts, added training on the technical aspects of the registration process, as well as on the importance of protecting women's rights to effective land administration and legal compliance, may have helped to overcome resistance on the part of the MLR and CLBs to implementing the new forms and to ensuring that women's rights were protected. Having a multi-touch or recurrent training approach has been successful elsewhere in overcoming social barriers to protect women's land rights.

Additionally, targeted leadership training of women representatives on CLBs and headwomen would have improved the quality and impact of their participation.<sup>286</sup> Beyond a one-time training, experience elsewhere also indicates that having a resource person available to guide individuals (and particularly women) through the registration process and to answer general questions shows dramatic improvements in terms of the number of women who successfully participate in the registration process (jointly or individually).

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<sup>286</sup> *Id.* This was a recommendation made by Gender Consultant during a telephone interview.



# GENDER *and* LAND

## *Good Practices and Lessons Learned from Four Millennium Challenge Corporation Compact-Funded Land Projects*

### *Synthesis Report and Case Studies: Benin, Lesotho, Mali, and Namibia*

Prepared for Millennium Challenge Corporation by Renee  
Giovarelli, Leslie Hannay, Amanda Richardson, and Elisa Scalise

Landesa Center for Women's Land Rights, December 2013

#### **Landesa Global Headquarters**

1424 Fourth Avenue, Suite 300  
Seattle, WA 98101, USA

(206) 528-5880 *phone*  
(206) 528-5881 *fax*  
[www.landesa.org](http://www.landesa.org)



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