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Family histories and rural inheritance in Kenya

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What is Chronic Poverty?

The distinguishing feature of chronic poverty is extended duration in absolute poverty.

Therefore, chronically poor people always, or usually, live below a poverty line, which is normally defined in terms of a money indicator (e.g. consumption, income, etc.), but could also be defined in terms of wider or subjective aspects of deprivation.

This is different from the transitorily poor, who move in and out of poverty, or only occasionally fall below the poverty line.

Abstract

Inheritance systems and practices have a key role in people's ability to exit poverty, or, conversely, plunging them further into it. As land is the major asset in low-income developing countries, how property is passed on and divided between future generations is a significant factor. This paper looks at inheritance through minimally-structured interviews with several generations of Kenyan families, seeking to explain that the *how* and *why* of poverty can be understood in the wider family context. It analyses their fortunes and misfortunes over a given time period in the context of property ownership rights. It also looks at the impact of education and the inheritance of cultural capital. When both fertility and survival are high, traditional patterns of land inheritance can lead to progression sub-division of land with long-term adverse implications for sustainability. While inheritance in Kenya is male dominated, the paper nonetheless examines the position of women in the chain as vectors of male property rights. The application of male-oriented customary law where inheritance is concerned, rather than the use of statutory legislation, was found to be the reality for the overwhelming majority of the participants in the study.

Keywords: Kenya, inheritance, land ownership, women

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1 Introduction

Reviewing of 'Inheritance and the Intergenerational Transmission of Poverty in sub-Saharan Africa', Cooper observes that 'inheritance seems to lend itself well to focussing poverty alleviation policies and activities due to the fact that inheritance systems and practices are brought to light as a result of critical points in lifetimes, including the start-up of new households, usually at the time of marriage, and the devolution of property at the time of a person's death' (Cooper 2010a: 24). In a multivariate analysis of data from a ten-year longitudinal panel study, Muyanga *et al.* (2010) establish that the amount of land received from parents by the head of household is a significant predictor for identifying households that remained 'non-poor' for the duration of the study, as well as those that ascended out of poverty and those that descended into poverty. Remaining non-poor and ascent was associated with receiving larger amounts of land at the time the household was initially formed and descent with smaller amounts. (See also Davis, 2011.)

In low-income developing countries, land is the key asset, forming a large proportion of poor people's asset portfolios (Deininger, 2004) and, as Platteau and Baland (2001:28) observe, 'the major mode of land acquisition in most sub-Saharan African countries is inheritance'. Land is the primary source of wealth, social status, and power; it provides the basis for shelter, food, and economic activities. In subsistence economies having land is fundamental to household well-being (Mtika, 2003). Also, access to resources such as water and to services such as sanitation and electricity, as well as the ability to make long-term investments in land and housing, are often dependent on rights to access land (Cooper, 2010a). Unevenness in asset holdings can result in intense inequality in the 'initial conditions' of households, making it much easier for asset-rich households than others to save, invest and accumulate assets.

The study of the inheritance of assets in Kenya has concentrated upon rural inheritance, especially the inheritance of land. This approach has been dominated by a rural economic perspective, centring upon the size of land holdings and their change in size, usually a reduction or sub-division, as ownership moves between generations. More sophisticated analyses, such as Muyanga *at al.*, above have adopted multivariate statistical approaches in which inherited land is either a casual variable in a model explaining other features or in some cases a dependent variable. These studies have made progress towards answering important questions about *who* inherits, *how much* they inherit and, when regional patterns of inheritance are compared, *where* the inheritance takes place (e.g., Burke and Jayne, 2010).

This however begs other important questions. Specifically, questions about *how* inheritance takes place: *how* decisions are made about who will (and will not) inherit and *how* the transfer of resources between generations actually takes place. Secondly, while the study of inheritance focuses on the passing on of economic capital (in the rural context largely, but not exclusively, land), other types of 'valued goods' can be passed on in a manner equivalent

to inheritance. A family's reputation and social support networks do not die with the individual; they are valued social capital that can be passed on. Similarly, cultural, either in the form of knowledge or a *habitus* of positive attitudes towards hard work, adaptation or entrepreneurship can be passed on by one generation to the next. At a deeper level, there are background questions about *why* – essentially questions of motive: *why* are some persons seen as the proper or correct persons to receive inherited assets while others are not?; *why* are resources concentrated with some rather than being diffused across many?

This paper presents the results of an exploratory study carried out in Kenya that employed a method – minimally-structured qualitative family history interviews carried out across several generations within the same family – that has the capacity to provide insights into the *how* and *why* questions of inheritance. A detailed explication of the approach will be given below – how the families came to be chosen from a pre-existing longitudinal panel study sample, the approach to interviewing that was used across the several generations of the families and the mode of analysis employed. The method, through generating what is essentially a holistic view of the family, is capable of throwing light onto the *how* and *why* of inheritance.

2 Inheritance

The right to own and inherit property traverses the realms of civil, political, economic, social, and cultural rights. It is central to the empowerment of all in society and is a key developmental right. It needs to be a right shared by all members of a community (men, women and children) in order to safeguard their security and, ultimately, their dignity.

In much of sub-Saharan Africa, land markets are weak and fragmented, and land is generally acquired through inheritance or *inter vivos* gifts.¹ As a result, the inheritance or non-inheritance of assets has been found to be integrally linked to a person's poverty trajectory and their likelihood of remaining in or moving out of chronic poverty (Muyanga *at al.*, 2010). Inherited assets (particularly land) are a key determinant of non-labour income (Quisumbing, 1994). The gradual accumulation of assets can enable the diversification of livelihood options, provide collateral for formal sector borrowing, enable investment, including human capital formation, and reduce vulnerability to the impact of shocks or negative trends and can boost resilience and limit the need for the adoption of adverse coping strategies. Assets, when held by someone with both the necessary capabilities and agency to use them effectively, can therefore be an important source of social mobility. Further, where income is highly dependent on cultivable land, the children of people who are poor will grow up to be poorer (following the division of land) unless income diversification occurs, and successful diversification will only occur if higher investments in human capital are accompanied by improvements in labour and capital markets (Soto Bermant, 2008).

Obtaining land through inheritance or *inter vivos* gifts can have positive or negative effects on people's poverty status, through either property accumulation or the stripping of previously secure access to assets (Cooper, 2010a). On the positive side, the transfer of physical assets from the parent's generation to the child's generation has been shown to provide the start-up material for the younger generation's more independent future livelihoods and economic productivity (Fafchamps and Quisumbing, 2005 in Cooper, 2010a). On the negative side, studies of the poverty trajectories of households and individuals in sub-Saharan African societies have identified that exclusion from asset inheritance exacerbates vulnerability to chronic and the intergenerational transmission of poverty (Bird *at al.*, 2004). Furthermore, inheritance is not always a route out of poverty. It can also restrict mobility. For example, sons inherit land equally in much of India, but the eldest son stays to farm it, while

¹ *Inter vivos* gifts are those given while the gift-giver is still alive. They can include payments of bride-price and dowry and other transfers of land, livestock and wealth at marriage. They can also include other gifts given at key points in the life course. It is common in many low-income developing countries that *inter vivos* gifts exceed post mortem transfers and that the majority of an older person's assets have already been disposed of by their death. In effect, *inter vivos* gifts can be seen as early inheritance.

others are free to move into the non-farm sector or migrate, enabling upward mobility. And in India women's land rights can simply increase women's work burden, without much change in terms of status or decision-making authority (Rao, 2006).

2.1 The history behind ownership rights

The lack of formal control over land and resources has long historical roots, but it has become particularly problematic as economies and societies undergo extensive change. In subsistence production systems, access to land was often determined by status within the family rather than actual ownership rights; both men and women therefore had 'user rights' to produce food for their families.

Under colonialist regimes, the concepts of formal title to land and property and individual ownership were introduced in many cultures. In East and Southern Africa, for instance, the high number of white settlers encouraged the privatisation and subdivision of land, to be held under individual freehold titles. At independence, some new governments, as in Tanzania, Mozambique and Benin, proclaimed state ownership over all land, adding another layer of complexity to land ownership issues.

Inheritance and *inter vivos* gifts from one generation to another are key mechanisms by which intergenerational transfers are made. They can see siblings receiving very different amounts, with strong differentiation between brothers in some contexts and sisters often obtaining very little. Substantial asset transfers are made in many agrarian societies at the time of marriage, allowing the young couple to establish their own family farm. These *in vivos* transfers can be understood as 'advanced inheritance' (Fafchamps and Quisumbing, 2005: 3 in Cooper, 2010a). Where people are poor and assets take a long time to accumulate, the assets are brought together at marriage and can strongly determine the future wealth of the couple and their family (Quisumbing, 2007).

The decisions by parents to bequeath property to the next generation are not necessarily straightforward, but are influenced by parental preferences and assessments of the returns that beneficiaries are likely to obtain. Constraints to asset accumulation and intra-household decision making processes also influence inheritance outcomes (see Table 1 below).

Table 1: Factors supporting or blocking the intergenerational transfer of assets within families

	Building Blocks	Barriers
Preferences	Parents care about the well-being of their children.	Parents can have different preferences about which child to invest in. Resources scarcity makes such trade-offs starker.
Returns	Parents assess the extent to which investments will make their children (and themselves) better off in the future, when making investment decisions.	Expected returns in labour and marriage markets, as well as provision of support in old age may differ between children and lead parents to invest differentially in their children.
Constraints	Parents' investments in their children are constrained by their access to resources (money and time) and prices plus their ability to trade off present versus future investments.	Poor households' resources are limited. Greater constraints mean trade-offs may become critical when responding to adverse shocks.
Bargaining	Differences in parents' relative bargaining power will affect these investments.	When exercising their bargaining power, the parent may exercise household decision-making in a way that is not conducive to the transfer of wealth to children, or to some children rather than others. This in turn may reinforce patterns of discrimination embedded in parental preferences.

Source: Quisumbing, 2007.

Furthermore, evidence suggests that it is crucial to have a physical presence on the land, or in the property, to secure the right to inheritance.

2.2 Customary practice

Land ownership and inheritance practices in many developing countries are an uneasy combination of traditional rules and customary practices and 'western-style' statutory laws. Rather than emanating directly from long-established tradition, what is now understood as 'customary law' in sub-Saharan Africa is more a product of an interaction between traditional practices and colonialism. 'The construction of customary law by courts during colonialism and within the independence period provides a useful insight into the dynamism and malleability of the law. It represents a scenario of cultures engaging one another with the one (western) seeking to subjugate the other (African customs). The interpretation of laws in the post-colonial era has continued in the same vein. There are stake-holders in the conflict grounds whose relative powers determine the principles that are upheld' (Kameri-Mbote, 2002: 1; see also Whitehead and Tsikata, 2003: 75 on Chanock).

Marjolein Benschop of the United Nations Human Settlements Program (or UN Habitat) has written about the impact of historical shifts: 'While traditionally, women in East Africa merely had access to land through male relatives, social rules guarded against exclusion of women from land. Colonial influences such as individualization of land tenure and changing gender relations contributed to an erosion of the traditional protection mechanisms. Women's position became more vulnerable.' (Benschop 2002: vii) Dual systems of European-origin

statutory law and African-origin customary law often disadvantage women, particularly in the application of 'codified' customary law, where traditional protections afforded women as mothers have gone into eclipse (Kameri-Mbote, 2002), leading to increasing alienation of women and emerging trends of the abandonment of community responsibility for the care of the vulnerable within society.

Deininger *at al.* (2010), in a study exploring inheritance patterns over three generations in India, highlighted that recent changes to inheritance laws giving daughters equal rights to family property have significantly increased women's chances of inheriting land, despite a substantial bias against daughters remaining. However, much policy on paper does not translate on the ground into improved outcomes for women. For example, in India, while it is widely understood by both the judiciary and the general public that the law² enables women to inherit land, half a century after the law changed to allow this most women are not given shares in family property or refuse it, when offered. The expectations of male and female heirs are affected by cultural norms and families circumvent the rights of female heirs and deter women from pursuing claims. This is an example of where women's ability to make effective claims to inherit and own land exists within the context of inequitable social relations and institutional and cultural biases that prevent them from succeeding in making claims and sustaining them (Whitehead and Tsikata, 2003: 92).

South Asian Islamic states tend to constrict women's rights to employment, property inheritance and around marriage and divorce more than other Asian countries. In Pakistan, a 1995 survey of rural households in the Punjab province indicated that nearly two-thirds of the households' daughters did not inherit land, because it was customary for only sons to inherit property or because the women could not or did not exercise their rights (HDRSA 2000: 89). On the other hand, although Islamic law in India and Sri Lanka recognise women's rights to own land, women effectively have no legal rights to make their own decisions on how to use these assets and resources (*ibid*).

In Nepal, Bangladesh, Sri Lanka and Cambodia, the constitution guarantees equality and protection to women, providing a legal basis for protecting women's property and inheritance rights. However, discrimination and contradictions embedded within the law limits the protection of women's property and inheritance rights. For example, under Islamic law, women are not accepted as the legal guardians of their own children. This means that, after the death of the husband, children often are removed from their mothers and raised by their paternal grandparents (Steinzor, 2003).

² The Hindu Succession Act (1956) - shortly after independence.

Customary systems governing land and inheritance dominate throughout much of sub-Saharan Africa. This is partly because many country's constitutions allow for discrimination against women in their customary and personal law (Cooper, 2010a). Inheritance is commonly placed under the control of customary law, with the country's constitution excluding inheritance, as well as marriage and other so-called 'family law' matters, from non-discrimination or equality clauses.

In Botswana, property inheritance is exempt from non-discrimination clauses in the Bill of Rights. Instead, inheritance is governed by the customary practice of the various ethnic groups (Cooper, 2010a). For most Batswana, this means that all property owned or acquired by a couple during their marriage belongs to the husband and will pass to the eldest son when his father dies. In theory, a woman retains the right to certain property, such as her ploughing fields, which she can pass to her daughter when she dies, but this can be vetoed by the male head of household (Richardson, 2004 in Cooper, 2010a).

In Lesotho, customary law also governs inheritance. Women are treated as minors and cannot be allocated land, inherit it or make decisions about its management or use. Daughters cannot inherit their father's fields and if there are no sons to inherit a man's land it can be claimed by the local chief to reallocate to others after the holder's death (Mutangadura, 2004 in Cooper, 2010a). Ghana, Kenya, Zambia and Zimbabwe also list inheritance-related matters as exemptions to the application of non-discrimination based on sex in their countries' laws (UN Habitat, 2006 in Cooper, 2010a).

In contrast, Ethiopia, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa, Tanzania, and Uganda have constitutions that explicitly prohibit discrimination in the application of law, including customary law, based on sex and do not make exemptions to this stipulation (Cooper, 2010a). Unfortunately, there is often a mismatch between the law and practice, partly because people have poor access to information about their rights, particularly in rural areas, and poor people are also often unable to go to court to resolve inheritance disputes because of the cost (Cooper, 2010a). In Namibia, for example, legislation has had little impact because women do not know their rights under statutory law, and it is customary law that is generally used when deciding on inheritance cases (Joireman, 2008 in Cooper, 2010a). Similarly, in Tanzania, even when courts agree to hear cases involving women's property rights, they often employ a 'mode of life' test when faced with contradictions between customary and statutory laws. This means that the former may be applied when plaintiffs and defendants are members of a community where traditional laws are established and accepted. In Uganda, there is a gulf between government rhetoric, legislation and policy and the reality experienced by rural women (Bird et. al., 2004: 31). Although commitments have been made in relation to gender equality and land rights, they have not been accompanied by measures to ensure their social legitimation, implementation and enforcement.

Customary practice surrounding inheritance is not fixed and immutable. It is embedded in social relations and changes over time in response to other changes in society. Its current forms largely developed as the outcomes of a struggle between the power holders of African indigenous societies and colonial powers (Whitehead and Tsikata, 2003: 75). Customary law can be seen as the last bastion of power for African males (Kameri-Mbote, 2002: 4). However, practice is continuing to evolve due to intensifying pressure for land, increased mortality amongst the economically active age-group through HIV/AIDS and increased nuclearisation of the family. Seeley (2008) shows that in Uganda the transfer of land between siblings and across generations depends not only on customary practice but also the nature of the personal relationships of those involved as well as outside influences.

The erosion of customary practice and pressure for land in many Sub-Saharan African countries has seen increased prevalence of asset grabbing from widows and orphaned children – where the family of the deceased claim all land, housing, productive assets and household goods, in sharp contravention of traditional norms.³ Widows are seeing their husband's family take control of assets without providing balancing support of any kind.

Changes in practice are not even. In some places in Kenya traditions have been maintained (Aliber and Walker, 2004 and Yamano, 2008 in Cooper, 2010a), while in others they have been eroded (Human Rights Watch, 2003 in Cooper, 2010a). In northern Uganda, a recent study among the Langi found that 63 percent of households caring for orphans were not headed by paternal kin but by widows, grandmothers or other single women receiving little support from the paternal clan. This is explained by changes in Langi culture, driven by conflict and HIV/AIDS, which has placed pressure on extended families (Oleke *at al.*, 2005 in Cooper, 2010a). But even in this case, the children's clan affiliation was not questioned, suggesting that although they were growing up poor and without access to their father's land, they could eventually inherit.

The barriers to women acquiring land rights can be seen as falling under three spheres of practice: the empowerment of women due to factors that promote or retard their socio-economic well-being; the implementation of customary women's rights, where the safeguards that exist in theory are not observed in practice; and barriers that exist in codified law, where the actual provisions will work to the disadvantage of women. The three spheres are linked and attempts to overcome barriers in one are likely to be ineffectual unless they coincide with changes in the other spheres (Cooper, 2010a: 14-23).

³ In Africa overall more than 90 percent percent of land is owned under some form of customary tenure and remains outside the statutory legal system (Deininger, 2004). More than 50 percent of the peri-urban population in Africa and more than 40 percent percent in Asia live under informal tenure and therefore have highly insecure land rights (Deininger, 2004).

Table 2: Overview of barriers to women acquiring land rights under customary and statutory land tenure systems

Barriers linked to the socioeconomic well-being of women	Barriers linked to custom or traditional law	Barriers related to statutory law
<ul style="list-style-type: none"> • High female illiteracy rates • Ignorance of land rights • Lack of resources for claiming women's rights • Internalised discrimination • Limited participation of women in decision-making bodies on land tenure issues • 	<ul style="list-style-type: none"> • Limited rights of women to own land due to patriarchy • Land allocation administered by traditional leaders • Traditional leaders do not know about land laws that provide for women's rights • Daughters cannot inherit land • Limited participation of women in traditional community decision making 	<ul style="list-style-type: none"> • Land law lacks clauses promoting women's land rights • Land law is non-discriminatory but not harmonised with other laws in the system (e.g., laws on inheritance or marriage) • Lack of capacity or knowledge among implementers of the law • Some legal codes do not allow joint ownership of land • Women who marry may become legal minors depending on the type of marriage and the property law applied (for instance, in Lesotho and Zimbabwe).

Source: UNECA (2003)

2.3 Social trends

Emerging legal and social trends, as they relate to the ownership and inheritance of property, indicate a practice that has largely worked to the detriment of women in virtually all communities and social classes in Kenya. These include the laws relating to property, to marriage and dissolution of marriage, the land registration systems and the social and cultural attitudes that determine the actual enjoyment of this right. Because property is generally kept within families, women's lack of succession rights means that when they marry into other families they have no control over the property of their birth families.

The importance of securing women's property and inheritance rights has been recognised in a growing number of national laws, as well as in international legal instruments in the context of both development and equality (e.g., in the International Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights and the Platform of Action adopted at the 1995 Beijing World Conference on Women). Development experts increasingly link women's lack of land and property rights to problems facing nations as a whole, in particular a lack of education, homelessness, hunger, poverty, and poor health. Evidence from around the world indicates that women dedicate most of the earnings they control to fulfil household needs, while men often spend much of their income on personal items. In fact, NGOs and international agency representatives testified at the World Food Summit in June 2002 that ensuring women's land and property rights is essential to enabling them to better provide for their children, which would in turn help to mitigate world hunger.

However, the continued disenfranchisement of the female half of many populations poses a barrier to overall socioeconomic progress. Eve Crowley of the Land Tenure Service at FAO

states that: 'Poverty is inversely correlated with household land ownership. The landless are more vulnerable, especially in famines, and have higher infant mortality rates. Women and children suffer disproportionately from shocks when their rights to household resources, including land, are mediated through men. Direct access to land minimizes women's risk of impoverishment and improves the physical well-being and prospects for her children' (Crowley 2001).

'In the development of private property regimes of any kind, sub-Saharan African women tend to lose the rights they once had. This is because women suffer systematic disadvantages both in the market and in state-backed systems of property ownership, either because their opportunities to buy land are very limited, or because local-level authorities practise gender discrimination, preventing women from claiming rights that are in theory backed by law.⁴ In addition, property and inheritance claims are generally processed through loosely organised administrative bodies consisting of local leaders and clerks with limited legal training. Most of these decision makers are men, and claims are often decided in an ad hoc manner based on personal views and interests rather than consistent legal precedent. Under the customary law that evolved during the colonial period, effective control of land has been concentrated among men. The process of titling has been administered with strong gender bias, with women usually denied equal ownership rights. In Kenya, Ensminger has documented that land titling has reduced women's tenure security (Ensminger, 1997 in Cooper, 2010a). Since men are now regarded as the 'traditional' owners of land, land titling will have the effect of strengthening their land rights at women's expense (Quisumbing, 2007: 14).

More recently, processes of industrialisation and globalisation have disrupted long-standing livelihoods and systems of production, forcing many families to focus more on income-generating activities than on subsistence practices. The gradual but dramatic shift from subsistence agriculture to cash-crop production in much of the world has had a strong impact on food security. Women have long held primary responsibility for raising food and for gathering water and fuel to feed and sustain families. Social systems affording women informal rights to control land and property have been severely shaken; at the same time disputes over property—now afforded a monetary value—have become more prevalent.

These systemic shifts have compounded existing cultural and social biases against women's rights to inherit or ability to manage property. Because of the worldwide prevalence of patrilineal inheritance customs, both productive resources (e.g., land and livestock) and property such as household goods have ended up in the hands of men and not women.

⁴ These findings are important because many gender and development policy documents still advocate a blanket policy of ensuring women's land access through titling, without any reference to the specificities of the sub-Saharan African situation (Whitehead and Tsikata, 2003: 79).

When only men have rights of inheritance or family succession, women have little opportunity to improve their status or living conditions within the family and community. Consequently, they are rendered dependent on male relatives for survival and have little say over how property is used to generate income or to support families.

In most communities in Kenya, as long as a husband's family has paid brideprice to his wife's family, wives are not to gain any additional property or wealth. Upon divorce, a wife can keep her own personal effects (e.g., clothing and gifts), but everything else—including livestock, businesses, and even children—remain with the husband. Where a husband dies, his widow is not able to sell or exchange property, and is not to remarry. Polygamy is still practiced among some tribes, which may result in an unfair distribution of property among wives following the death of a husband, or render some women destitute when resources are limited.

These practices are often at the root of 'property grabbing' by a widow's in-laws and may result in women or children losing everything, from household items to the house itself, or they may be blocked from working land or accessing resources such as water.⁵

Furthermore, wife inheritance is still practiced in some parts of Africa. According to this custom, a widow is married off to her deceased husband's brother or other male relative, effectively becoming part of her former husband's estate while also losing all land and property to in-laws.

Reconciling such entrenched norms of behaviour with national laws is clearly not easy, and the outcomes may vary. For example, even though the Kenyan Registered Land Act of 1963 provides land title to individuals, women are often not registered as landowners because, traditionally, only men are viewed as heads of households. As a result, family members can evict women with impunity.

In 1981, Kenya passed the Law of Succession Act (LSA) to unify inheritance laws throughout the country. The LSA stipulates that both men and women have equal rights to inheritance. However, in 1990, an amendment was added to exempt Muslims and allow them to follow the Koran. This in effect sanctioned several discriminatory practices, including that girls inherit half of what boys do.

The Act also states that if the man dies without a will, the customary inheritance law of his group will prevail. Since few men write wills and most Kenyan communities do not allow a

⁵ While 'property grabbing' certainly exists, the extent of the problem in Kenya is unclear. Aliber and Walker argue that most HIV/AIDS widows and orphans are able in the end to resist having their assets appropriated due to a number of factors, including having recourse to the protection of customary law (Aliber and Walker, 2004 in Cooper (2010a)).

woman to inherit property from her husband or father, the equality provisions of the Succession Act will generally not apply.

In reality, one UN study argues, inheritance rights for women in Kenya do not exist. Another law dictates that any Kenyan of sound mind over the age of 18 may own property. However, one section also instructs that 'courts shall be guided by African customary law in civil case . . . so far as it is applicable and not repugnant to justice or morality', (Human Rights Watch, 2003) a type of interpretation that many courts are unable to make.

In Western Kenya, a childless widow (or a widow without a son or sons) has a weak claim to family land under customary law. Inheritance arbitration by clan leaders are inevitably skewed by personal judgement and so a woman of 'bad character' (accused of practicing witchcraft, being sexually promiscuous, drinking alcohol or being rude or stubborn, particularly toward in-laws) is vulnerable (Henrysson & Joireman, 2009 in Cooper, 2010b), as are young widows, who have not had time to cement relationships with their husband's family (Aliber and Walker 2004, in Cooper, 2010b).

2.4 Children

What happens to children on the dissolution of their family through death of a parent or another event (e.g., separation or divorce) is important for the transfer of land and property, as well as the acquisition of human capital through education and the maintenance of their health (Seeley, 2008). Children's land rights are generally subsumed under their mother's property rights (Cooper, 2010a)⁶. In several countries, children born to unmarried parents are not recognised as legitimate heirs. In Rwanda, the law ranks the rights of children of a dead parent ahead of other members of the extended family and states that children should inherit an equal share of all assets, irrespective of gender (Cooper, 2010a).

Despite this legal protection, many orphans lose control of their parents' customary land-holdings to their guardians (Rose, 2005). It is not just physical assets that are vulnerable, but the children themselves. Evidence suggests that orphaned girls (particularly those without adult protection) are especially vulnerable to being victims of sexual exploitation and trafficking (Sloth-Nielsen, 2004).

Of particular urgency to this issue are the circumstances that have emerged in the wake of the HIV/AIDS disaster in Kenya. The effect of HIV/AIDS on women is worse than it is on

⁶ Some countries, such as Botswana, do not have specific legislation dealing with children's inheritance while other countries, such as Lesotho, Malawi, South Africa, and Zambia, have legislation that provides children with a portion of the deceased's estate in the case of intestacy (a person dies without leaving a will) (Rose, 2006 in Cooper 2010a).

men. Women are more vulnerable to HIV infection for various reasons, physiological, cultural and socio-economic. Women suffer more from the high stigma associated with this disease and this has manifested itself in the way that women living with HIV/AIDS have been treated by the society. This is illustrated by the abuse of the right to own and inherit property that extends to other members of HIV-affected families, particularly orphans (both girls and boys) in the form of property-grabbing and abuse.

3 Method

This section will give a detailed explication of the conduct of the research – how the families came to be chosen, the approach to interviewing that was employed across the several generations of the family and the mode of analysis employed.

Household level panel data collected under the TAPRA (Tegemeo Agricultural Policy and Research Analysis) programme was used to identify households that had exited poverty. The panel study consists of four waves collected in 1997, 2000, 2004 and 2007 by the Tegemeo Institute at Egerton University. The initial sample was drawn in 1997. Stratified sampling was used to generate a sample of 1,500 households taking into account all eight agro-regional zones in the country, excluding the pastoral areas. The existing districts were clustered into the eight agro-regional zones within which 24 districts were selected. Using standard proportional random sampling, aided with data from the Central Bureau of Statistics (CBS), 1,500 households were randomly sampled for interviews. Due to attrition, the number of the households has reduced over the years. In 2000, the number of households fell to 1,428 (93 percent), 1,324 in 2004 (86 percent) and 1,275 in 2007 (83 percent). Thus the full panel constitutes 1,275 households that were consistently interviewed across the four waves (Suri *et al.*, 2008).

The data collected in each wave covered broad aspects, including a variety of rural household livelihoods. Information collected from the households includes: detailed information on the crops grown and harvested; inputs used (seed, fertiliser, labor and land preparation costs); outputs and market outlets and prices; information on livestock and livestock products; household demographics; health and education data on each individual household member; a detailed profile of household income incorporating all sources of income of all members of the household: crop income; livestock income; salaried income; remittances, business income; and any other sources of casual or informal income (Suri *et al.*, 2008).

Using the Tegemeo panel data and respective rural poverty lines, sample households were classified into five categories depending on their poverty status across the panel waves. The nominal rural poverty lines for 2000, 2004 and 2007 were computed by linear extrapolation of the CBS rural poverty lines for 1997 and 2006, which were Ksh 1,239/month and Ksh 1,562/month, respectively. The resulting nominal poverty lines were: Ksh 1,239/month in 1997; Ksh 1,347/month in 2000; Ksh 1,490/month in 2004; and Ksh 1,598/month in 2007. Using these poverty lines, households were classified in each wave as being either below or above the poverty line in each year. An observation of the poverty status of individual households across the four waves enabled the following classification: stable non-poor (24.1 percent), households that remained above the poverty line in all the four waves; chronically poor (14.9 percent), those households that remained below the poverty line during the four waves; poverty exiters (20.1 percent), those households that were below the poverty line in

1997 but rose above the poverty line by 2007; poverty descendents (2.9 percent) as households that were above the poverty line in 1997 but ended below the poverty line by 2007; and oscillators (38 percent), households that were both at one time above and the subsequent time below the poverty line during the four waves.⁷

From the panel of 1,275 households, poverty exiters were listed and then grouped by district to check on their distribution across the sample districts. Once the households were confined to those owning four acres or less of land, the total number of exiters from the panel was 202 households. Due to time limitations and the intensity of the planned interviews, the research team picked the two districts which had the highest number of exiters. Since the poor live side by side with the non-poor, sampling for the descendents was informed by the choice of the exiters. The team sampled descendents within the same general location as with the exiters in the two districts.

Once the areas for fieldwork had been selected and the 'ascender' and 'descender' households that were potential cases for interview had been identified on the basis of quantitative data held in the panel study files, the research moved to its qualitative fieldwork stage.

The first stage was to conduct a focus-group discussion with representatives from the selected village. With the assistance of a local elder, an ad hoc group was assembled and asked to discuss: the history of the village, particularly in recent times; the general economic characteristics of the area, people's livelihoods and how these had changed in living memory; major events and trends in recent years; and people's expectations for the future.⁸

The purpose of these focus groups was threefold. First, they enabled the research team to develop an understanding of the local context in which the families that subsequently were going to be interviewed were living. Second, while the panel data provided a means of identifying 'ascenders' and 'descenders', the statistical information on which these attributions were based are a relatively blunt instrument and the focus group discussions provided the research team with a more detailed understanding of local factors associated

⁷ Muyanga *et.al.* (2010) carried out a similar operation on the TAPRA panel data, placing households into the same categories, only with the attribution based upon households falling into the top and bottom terciles of assets over the four waves: their chronically poor were households in the bottom tercile in each of the four waves; their ascenders were those in the bottom tercile in 1997 and the top in 2007; descendents, the reverse, top tercile in 1997 and bottom in 2007; and the consistently non-poor those in the top tercile across all four waves. Using their method, about the same numbers of households are categorised as chronically poor and as descendents but fewer as consistently non-poor and considerably fewer as ascenders. However, they found 'a high degree of correlation between changes in income and asset wealth' (Muyanga *et.al.*, 2010: 9).

⁸ The research team was strongly influenced at this stage of the research by the work of Krishna *et al* (Krishna *et.al.*, 2004; Krishna, 2007) who have carried out focus group-style interviews with villages in India, Latin America, parts of Africa and, of particular relevance to our study, Kenya, collecting local histories and developing definitions of poverty that are locally-based and locally valid.

with upward and downward mobility. Third, while the research team had used an analysis of panel data in order to identify a relatively small number of households that were potential candidates for interview, these exceeded the number we could interview in the time available for fieldwork. A small sub-set of households would need to be targeted for interview and it was crucial that households were targeted that would give the best chances of yielding family cases that were true 'ascenders' and 'descenders'. The team needed a means to triangulate information beyond that available in the panel study data to identify the best potential cases. At the end of the discussions, once the focus groups had been told about the broad interests of the research team, the group was shown the list of 'ascender' households and asked to discuss whether these households were truly households whose economic position had changed for the better in recent years. They were also asked to describe the reasons behind their 'ascent'.

The team chose not to share the list of 'descenders' with the focus group on the grounds that the households on the list might not want their poverty status discussed by members of their own community since such a discussion might invade their privacy and could find it invidious that they had been identified by 'the Institute' as falling into poverty. However, the latter list was shared with the village elder who was assisting us in each locality and ask him to give his opinions about the reasons these households and been identified as 'descenders'.⁹

In both instances, the information gained was invaluable in enabling the research team to select good candidates as starting points for each series of family history interviews.

It is important to understand that, while the qualitative family-history study was 'piggy-backed' on a household-panel study, the ambit of the family-history interviews did not limit themselves solely to the household members in the panel study. The panel data gave the fieldwork team a 'contact person' -- an individual who was the starting point for a series of family history interviews.¹⁰ Once the interview with the first individual was completed, the research team would then move to multiple interviews within the interviewee's family. The spread of interviewees was both vertical, in the sense of interviews conducted with adults

⁹ At this point we diverged from the practice of the Krishna *et al* researchers (Krishna *et.al.*, 2004; Krishna, 2007), who categorised all households in their villages into wealth groups, identifying the always poor, the always rich, the transitorily poor and both ascender *and* descender households. Their approach identified greater movement (both into and out of poverty) -- much larger proportions of the village households were typed as either 'ascenders' or 'descenders' than from the quantitative panel-study data. However, we coincide with the Krishna team on its essential point -- that local definitions of poverty and attributions to those who have moved into or out of poverty are at least as valid as externally-imposed categorisations (and probably moreso).

¹⁰ While the panel study collected information on households, one should note that this information was based upon one interview carried out with a single individual in each household who gave information about the whole household. Our starting point for the family history was the same individual, but we then used this person as the link to a number of other members of the family, who were also interviewed. At the same time, the panel study data gave the team a baseline level of context about the households prior to the interviews which saved time and gave us cross-reference points.

across several generations, and horizontal, through interviews with several people in the same generation.¹¹ We sought to interview adults from each generation present in the family (ideally, three generations: the middle-aged; their young adult children; and, if they were still surviving, the elderly) and family members of both genders, although this was not always possible. The number of persons interviewed in a family depended upon the numbers and 'variety'¹² of those available. If there were a lot of potential interviewees available and willing, findings from what was revealed in the initial interviews were used to help us choose which individuals should be targeted for the latter interviews. One should note that those in the family who were interviewed did not have to be members of the same household – a relation living nearby could be interviewed.¹³

3.1 Conduct of the interviews

The method of qualitative interviewing employed was an adaptation of the biographical narrative interview method pioneered in Germany by Fritz Schütze and colleagues. Essentially, this is a highly qualitative mode of interviewing that moves from a completely open-ended beginning through stages that become progressively more interrogative. The aim of the interview is to give the respondent the maximum control for as long as possible over what is raised in the interview and how it is raised. After introductions and securing the consent of the respondent, the interviews began with a request to the interviewee to tell us the history of their family from their point of view, how they came to be living in the area and how they came to be at their current level of living. Sometimes after prompting, the interviewees then embarked on their personal account of the family's history, which could be quite lengthy and detailed.¹⁴ Once the interviewee had finished, we moved to a more interrogative phase in which questions were asked, but only about events or issues that the interviewees had already raised themselves. Finally, if there still were issues that we wanted

¹¹ Usually the partner of the initial interviewee and/or a sibling living nearby.

¹² The fieldwork had to be carried out within a limited time span. Where there were a number of family members who appeared quite similar (e.g., siblings close in age all doing the same type of work), we did not interview them all.

¹³ We had had plans to follow up family members who were working away from their home in Nairobi by attempting to find and interview them when we returned to the city at the end of the fieldwork. However, this was not possible since none of the families had members working in Nairobi at the current time. This may have just been chance. However, we noted that the original sample for the panel study had been drawn over a decade earlier, with the result that, overall, the sample had become older. A 'family life cycle', by which family members worked away and sent remittances home when young but then returned home when they were older may have been a factor. Had we carried out our interviews at the time of the first wave of panel interviews, several families would have had their male breadwinner working away.

¹⁴ It sometimes required some prompting for the respondent to realise that we simply wanted their own detailed account. The interviewees were 'veterans' of four waves of a quantitative panel study and were used to social research being carried out in a highly-structured question and answer format.

to know about that had not been raised by the respondent at all, we would fall back on direct questioning. Each interviewee's account was kept confidential from other family members.¹⁵

The goal of this approach to qualitative interviewing is to preserve the 'gestalt' of the interview as long as possible, ceding control of the interview to the interviewee and giving pride of place to topics and stories that they consider important. The main contrasting mode of qualitative interviewing, the semi-structured interview, employs a directly interrogative mode in which the research team devises a schedule of questions prior to any fieldwork taking place about the topics or issues that they have determined in advance will be of significance. The semi-structured method of interviewing can be effective for testing pre-existing hypotheses or expectations or for 'putting meat on the bones' of quantitative findings by making it possible to go beyond commonsense suppositions when attaching meaning to statistical results. However, the odds that genuinely new or serendipitous findings will emerge from a semi-structured interviewing technique are minimised by the approach itself.¹⁶ Many of the interviews were successful in that they yielded rich detailed accounts that threw up unexpected material.¹⁷

The main mode of analysis could be termed contrastive comparison, in that the research team discussed among themselves the accounts and information given by the interviewees and how different persons' accounts, often of the same events, varied. The end result is a multi-faceted view of the family with the 'facets' being the different perspectives on the family that are held by different members of it.

Interviews were conducted in the language of the respondent's choice, usually their own tribal language. While the interviews were audio-recorded in full, these have not yet been transcribed. The interview team took notes during the interview and a team member wrote up

¹⁵ In terms of practice, this was not always possible since other family members often wandered in and about or sat down and joined us (though we tried to discourage the latter). Occasionally the team did have to deflect questions in one interview about what another family member had told us previously. It also became clear during the interviews in 2008 that it was virtually impossible for a male researcher to interview a woman without the presence of either a female researcher or another family member as a 'chaperon'.

¹⁶ Keeping 'on schedule' when working with a semi-structured interview schedule can be quite difficult. The interviewer can become blinkered by the list of topics that must be covered so that the significance of anything that does not 'fit' is missed. Furthermore, there is the danger of regarding attempts by the interviewee to raise the issues that he/she considers important as digressions and consequently prematurely cut off revealing lines of enquiry.

¹⁷ One of the purposes of the interviews that had been carried out in 2008 had been to establish whether the minimally-directive biographical narrative mode of qualitative interviewing would be effective in a non-European, African milieu in which many of the interviews would have little formal education and relatively less exposure to mainstream consumerist 'western' culture. In retrospect, these misgivings seem ludicrous and probably reflect the Eurocentric origins of the approach. If undirected biographical narrative interviewing had been developed in Africa and then in turn tried out in Europe, a more genuine concern might have been whether Europeans existing in cultures where oral traditions are largely moribund would be capable of providing rich narrative life stories.

an account in the evening following the interview, which was then reviewed and added to by the other team members.

As the number of interviews accumulate, it can be difficult to avoid becoming overwhelmed by detail. A standard commercial 'family tree' genealogical computer programme, Family Tree Maker, was used to manage the data. The programme coped easily with Kenyan polygamous marriages and provided a reliable family structure framework in which to record the results of individual interviews. Important facts and selected notes could be attached to any individual's record. The fieldwork team usually concluded an interview by taking photographs of the respondent and their relations and surroundings. These photographs could be attached to the individual's record in the family tree programme, which proved invaluable in aiding the team's recall of interviewees later on.

4 Findings

All of the families possesses some amount of economic capital, mainly but not always exclusively, land, had strategies for developing cultural capital through the education of their children and existed within a network of social capital connections. While none of the families were chronically desperately poor, neither were any of the families completely insulated from economic shocks.¹⁸ They were acutely conscious of their potentially precarious positions and the interviewee's accounts of the families oriented themselves towards strategies for survival. The accounts in the interviews yielded rich material and particularly in Area 1 inheritance issues were prominent.

Inheritance between generations was almost solely the inheritance of land. When talking about what had been passed down from previous generations or what would be passed on to the younger generation, land was almost always the sole item that was mentioned, even though many of the male interviewees had spent much of their adult lives living away from their families for extended periods while they worked in urban areas and some of the families ran small shops.¹⁹ In contrast, inter vivos transfers were more varied. There was transfer of land from a living father to his sons at the time of their marriage, however, this was always the granting of land use and not land title. Inter vivos transfers also consisted of financial assistance, particularly targeted towards the costs of school fees and assistance through patronage mechanisms.²⁰ The patronage we found was within families and, rather than the transfer of assets, consisted of advice or help in finding employment. The payments of bride price were mentioned, but only by a few elderly women of the oldest generations in the families we interviewed, usually in the form of animals, and, at least for the groups we interviewed, appear to have become an archaic practice. While the study was carried out in a limited number of areas, it is noteworthy that we found almost no instances in current practices of inter vivos gifts that genuinely could be considered equivalent to inheritance (i.e., transfers of wealth or assets linked to life course events). The only specific mention, where parents had promised to buy their son a welding kit to enable him to set up his own business, could not be honoured due financial setbacks.

The inheritance of land was male-dominated with sons receiving land from their fathers. Coincident with Platteau and Baland (2001), the apportionment of land was equal across sons. Fathers making living transfers were careful to divide the land equally across all sons,

¹⁸ And several had experienced in recent times, or were experiencing, shocks.

¹⁹ There was one notable exception, an 'entrepreneur family' that will be discussed below.

²⁰ However, considering parents' paying the school fees of their children to be an inter vivos transfer of assets that is equivalent to an inheritance may be stretching the analogy too far. When relations other than the parents were helping with school fees, it was always an elder sibling.

regardless of whether the son was in employment that provided an alternate source of income or whether the son would be dependent upon the land for his sole support. The same principle applied to transfers at death, with the apportioning being done by tribal elders if the father had not designated the division before his death.

Hence, inheritance runs almost solely along male lines and done according to customary practices. The effect of this is that it is essential to have a male heir, not simply to maintain the family name, but to maintain and retain secure ownership. This raises difficulties when the first children born to a couple are girls. The lengths to which families (and men) will go to secure a male heir were most apparent in two cases. In one instance, the couple had a string of six daughters. The wife wanted to stop having children after the third birth but at the husband's insistence they continued to have children until finally the birth of a son at child seven, at which point they stopped having children.²¹

The most extreme case, however, was a family in which the couple had had three daughters when the husband was arrested and subsequently imprisoned for a serious crime. There was a real possibility that he would die in prison. When he was released after fourteen years, he returned home to a family of four children, including a twelve year-old son. We questioned the couple gently about the discrepancy in separate interviews but received only oblique replies. After careful discussion among ourselves, we concluded that the conception of the son had not been an act of adultery but deliberate, probably with the husband's brother, in order to produce a male heir and ensure that his name and his family's right to their land would be secured.²² At the time of the interview, the daughters were all married and had left and the son also was married with a family, living adjacent to his parents and co-farming the land.

Women do have rights, but these rights are located within a framework dominated by male inheritance norms. In polygamous marriages, women can provide access to inheritance for their sons. Among the groups that we interviewed, each wife has the right to an equal portion of their husband's land as a vessel for passing the land on to her sons. One family were interviewed was descended from a 'patriarch' who had had three wives. When the 'patriarch' died, the male sons of each wife received an equal portion of the land, even though one of the wives had died before the 'patriarch'. The portions for the two elder wives passed

²¹ The husband had been the person interviewed by the Tegemeo panel study and his was one of the minority of households chosen as descender households to provide a comparative basis for the ascenders. He considered himself to be better off than previously, despite the descender attribution from the panel data, which was confirmed by the local elder at the time of the village focus group. In contrast, in her interview, his wife felt that they were worse off than in the past. The main reason that he felt better off was that he finally had a son and heir.

²² We also interviewed the son, who is now an adult in his thirties. He told a detailed story about how his father had been arrested when returning to his job in Nairobi after having visited home to celebrate the birth of his first son. The son believed this story.

immediately to their grown sons. However, the portion that went to the youngest wife stayed with her temporarily since her sons were not yet adults. The land is currently being jointly farmed by the sons.

Equal allocation of land in a polygamous marriage can depend upon the physical location of the wives. In the above case, the three wives lived next to each other in the same location. The land was divided into three equal parts. In the second family that we studied which was descended from a polygamous marriage, the 'patriarch' had maintained two families on separate farms located about thirty kilometers apart. In this instance, each farm was divided separately amongst the sons of the wife who lived on that farm.

One should note that while the wives in a polygamous marriage are acting basically as vessels for transmitting inheritance, the equal division is between the wives, who then divide their portion equally amongst their sons, and not between the sons as a total. That is, each wife receives an equal portion of the land as long as she has at least one male child who will eventually inherit. Sons unlucky enough to be in a nuclear family with many brothers by the same mother will have to make do with a smaller portion than their half-brothers²³ by the other wives who are an only son or a son with few nuclear brothers.

Inherited land can have a special significance. In one case we studied, the respondents discriminated between land they had inherited from their father, which could not be sold, and land they had accumulated themselves, which could be bought and sold freely. However, most families we interviewed appeared to attach no such special meaning to inherited land. We also had a case in which legal title of the inherited land still rests with a man's widow, even though the land is farmed separately as six clearly-demarcated plots farmed by each of his sons. When questioned the family seemed unconcerned, saying that widow is 'holding the land in trust' and that eventually they will have the division recognised by the clan elders, though emphasising that the eventual formal division would involve only the sons and not any grandsons who had grown to maturity.

The early death of an eldest son of another family provides an additional example of how women can act as vessels for transmitting inherited land and assets between males in different generations. The panel study contact was a 72-year-old widow who in effect is acting as custodian for her husband's land. Her elder son had been in the Kenyan Air Force, remitting money back to his family. That money had enabled the family to increase its

²³ 'Half brother' is a phrase being used here by me for clarity. The interviewees who were offspring of polygamous marriages referred to all their siblings as 'brother' and 'sister' and did not discriminate between those who were children by their mother and those who were children by the other mothers (which caused some confusion, at least for European ears). Considering the high rates of mortality of child-bearing women in the not-so-distant past, a being in a polygamous marriage could be seen as a strategy for a woman ensuring that her children would by custom still have a mother in the event of her premature death.

holdings, including buying two and a half acres for his own family (wife and two sons) and two acres for his younger brother who was driving a matatu (mini-bus). The elder son died unexpectedly but the family weathered this shock. His son's widow received compensation from the Kenyan government which she used to buy an additional four acres. At present, the two widows are farming their holdings jointly with the help of the younger brother, who has returned to live in his own shamba (farm) nearby, which he farms on his own. When the elder widow dies, the younger surviving son will get a portion and the children of her elder son will get shares through their father, even though he is dead. The only complication is that the elder woman also has grandchildren living with her who are the children of a daughter who has died. When the elder widow becomes too old to manage the land, a clan meeting will be held to identify the beneficiaries and decide whether the daughter's children, some of whom are male, should get a share. The sons of the elder brother will inherit separately the land currently held by their mother.

The other instance in our interviews in which a woman might have rights to inherited land was in cases when a woman would be single due either to having never married or having had to return to her family after a marriage had broken down. In those cases, a woman would have a right to a portion of land, but this would have to be shared with any sisters in the same predicament. The right would cease if she (re)married.

The land in several of the areas in which interviews took place had been owned by the families concerned for no longer than one generation, with title having been obtained either due to the land being cleared or individual titles coming down from the dissolution of cooperatives that were created from large white-owned farms around the time of Uhuru (Independence).²⁴ One area, however, had been farmed traditionally for generations. This latter area had had its land titles regularised beginning with an aerial survey in 1974 that did not culminate until a formal ascription of titles in the late 1990s through a consultation among tribal elders in 1996, followed by the allocation of plot numbers in 1998.²⁵

²⁴ As described in the Methods section, the areas in which the interviews took place were selected because of their concentration of ascenders. The choice of former white-settlement areas and an area that had been cleared for about half of our interviews however probably has not reduced our ability to gain insights on inheritance since several of the 'patriarchs' who had brought their families to these areas have died and inheritance has taken place. While most of the residents of these areas were migrants who previously either had no land or were pushed out of land in the first place, it is interesting that customary, male-centred, practices of inheritance still seem to dominate.

²⁵ Equal portions of land were allocated by the clan to the men, with the better land being apportioned first, followed by a second apportionment of the poorer land. However, what is 'equal' can depend upon one's point of view. One interviewee, a young man at the time but now a tribal elder, reported that the 'consultation' had been an acrimonious debate between the older tribal elders and younger men who had felt excluded from the division of the land.

The regularisation of title in this community has brought benefits. Land-grabbing or the ad hoc appropriation of land by distant 'relatives' has now become more difficult. As one interviewee put it when speaking about the situation prior to regularisation: 'You could wake up in the morning and find someone planting on your own doorstep.' There also was consolidation of small, diverse, traditionally-held plots into single holdings; an significant advantage in a region with generally poor growing conditions.

However, there are drawbacks to the regularisation of land titles. The communal use of land has declined radically, with cooperative ventures extending only to those on adjacent plots, commonly close family members. Both of the village focus groups remarked on the difficulties of starting and maintaining communal initiatives. In the absence of effective government intervention, day-to-day road maintenance must fall to the locality if it is to occur at all. This is reflected in both of our major areas of study in the very poor quality of immediate road access, which undermines the ability of the local residents to get their crops to markets.²⁶ 'Area 1' also has been crucially by the lack of a central irrigation plan. The area suffers from water deprivation and a seasonal drought, limiting agricultural production. Irrigation schemes using existing water resources have been small-scale ad hoc arrangements by individuals or, at most, a couple of families working together. These have been plagued by water theft that, at its height, required families to guard their lines continuously, continued tension between families about water use and has led to the breakdown of some irrigation systems, possibly exacerbated by sabotage. In these ways, the decline of communal practices impacts directly on families' potential for agricultural production.

'Inheritance', broadly conceived, may not be positive. As one respondent wryly remarked: 'Unlike people, debts do not die.'²⁷ Debts owed by one generation will fall to the next if they are not cleared. Here, mediation by traditional authorities plays a significant role, acting both as a court to obtain payment for debts, but also having potential to ameliorate the worst effects of debts being passed from parents to children. Here, the clearest example was one group of brothers. The elder brother originally had played a role of advisor and supporter of his younger siblings. Later, partly due to alcoholism, he managed to get them to invest in a doomed business venture in what came close to amounting to fraud. The elder brother then died suddenly before his debts to two of this younger siblings could be repaid. The younger

²⁶ In Area 1, the local clan elder links one of the few concrete resources he has, the distribution of food aid for an NGO, to road maintenance. The distribution of the aid 'coincidentally' takes place at the same time as a call for road repair; the able-bodied who arrive to collect the aid find themselves obligated to help with road repairs. In Area 2, the decline of the local roads coincided with the demise of the local cooperative.

²⁷ 'Succession among many African communities denotes the passage not only of the property of the deceased but also the obligations to which he was subject and the status that he held in society. The heir on the other hand gets a share of the property but is not under a similar obligation' (Kameri-Mbote, 2002: 4).

brothers are pursuing repayment through their elders. The situation is exacerbated because the family of the elder brother also has lost out due to his failed business dealings, his sons are newly married and full repayment would impoverish them. Furthermore, one of the younger brother's families has suffered multiple shocks due to severe illness, alcoholism and loss of employment, as well as the fraud, and are in desperate financial straits. It is likely that when (or if) the elders adjudicate repayment, the aggrieved plaintiffs will receive something, but less than the full amounts that would be owed them through formal legal proceedings.²⁸

²⁸ For a fuller account of his family, see Miller *et. al.* (2011).

5 Discussion

Conventionally, the legal parameters governing inheritance in sub-Saharan Africa generally and Kenya specifically are seen as a dual structure of European-origin statutory laws sitting in uneasy juxtaposition to African customary laws and practices 'premised on the fallacious assumption that African customary laws of succession and inheritance have fallen into desuetude. The striking feature in the application of these laws, however, is the prevalence of customary norms even as unified statutes have been promulgated to regulate inheritance matters. . . . Empirical research into inheritance laws and practices in Eastern and Southern Africa has led to the questioning of long-held notions that customary law is bad for women and statutory law (borrowed largely from English law) is good for women' (Kameri-Mbote, 2002:1). However, Whitehead and Tsikata (2003) observe, 'studies, then, tend to confirm the critical perspective adopted by some African feminist lawyers with respect to customary practices, whose starting point was that the "customary", considered as institutions, as social relations and as discourses, are sites where, on the whole, men have more power than women' (Tsikata, 2003: 98). As noted in the review at the beginning of this paper, customary law arguably is more a product of the confrontation between African traditional practices and the European colonisers than a representation of a direct lineage of traditional practices that have been passed down to the present. In addition, the notion of parallel dual structures of statutory and customary law has been questioned with an alternative of a variable mix of the statutory and the customary being posited. Furthermore, a distinction is made between 'codified' customary law that is static and set by courtroom precedents and grassroots customary practice that are informal and *ad hoc*.²⁹ The former is seen as inflexible and oppressive of women and the latter is seen as open to particular circumstances and local contexts, more 'communal' and more conducive to women's well-being (albeit in a patriarchal way).

All this leads to a policy debate about the best way to bring about the realisation of women's access to equal property and inheritance rights. The 'dualists' tend to see statutory law as more progressive. The way forward that they advocate is the refinement of statutes so that they more effectively promote and protect women's rights, coupled with more effective enforcement and application of existing statutory law (Cooper, 2010a: 20-21; Whitehead and Tsikata, 2003: 92). Their long-term goal would be the eventual supplanting of customary law by statutory law.

²⁹ With regard to these distinctions, Woodman (1985) points out that there is a dominant centrist legal conception that view statutory law as a proper and higher form of law and customary law as a residual subordinated category. Woodman describes this as "lawyers' customary law" and contrasts it with "sociologists' customary law" "the former referring to that law applied within the state courts, the latter to that which is socially-recognized outside" (cited in Whitehead and Tsikata, 2003: 74).

In contrast, 'investigations in the operation of inheritance systems make evident that if inheritance practice are to change, customary law must also be the focus of reforms (Cooper, 2010a). Even when statutory laws do exist to govern these rights, customary laws are often the most common recourse in inheritance cases because they are governed locally and hence more readily accessible and socially legitimate (ibid.). As Rose (2006:8) observes, "although the provisions of statutory law are supposed to prevail when the provisions of customary law and statutory law are contradictory, the reality is that statutory law will be poorly implemented and possibly completely ignored." Moreover, although it is quite widely acknowledged that local customary law adjudication is often male-dominated in contemporary African societies, in some cases women have been found to prefer to take their inheritance cases to this local adjudication of uncodified, customary laws because it is more flexible and takes extra-legal matters into consideration whereas codified laws can be too restrictive (Kameri-Mbote, 2002)' (Cooper, 2010a: 19). Those who see the two systems as inextricably intertwined would argue for a progressive evolution of customary law and practices towards a more equal and woman-supportive system. 'The need to rethink and reconstruct customary laws has become even more urgent with the realization that most aspects of women's lives pertaining to ownership, management and control of property continue to be governed by these laws' (Kameri-Mbote, 2002: 1). Those who see a split between 'codified' and 'grassroots' customary law see codification as antithetical to this evolution (e.g., Gopol, cited in Whitehead and Tsikata, 2003: 84).

With regard to this debate, in our results, aside from discussion about land title, we found absolutely no mention of statutory law, its impact, the use of courts, the incursion of para-legals etc. in any of the interviews carried out during the span of the project. The most discussion about land title came about when interviewees in Area 1 talked about the imposition of titling during the late 1990s. Significantly, the most animation in those discussions came about when they talked about the adjudication of titles that had been carried out by the clan elders. As can be seen from the results presented in the Findings section above, inheritance was governed solely by custom. It is also clear from the findings that, coincident with the literature, the core principle of customary practice concerning inheritance is that the possession of land is *male* possession of land. If women own or control land, it is in relation to some male, sometimes their husband or father but, most crucially, as a mother to (male) children where they in effect are holding the land for a while before it eventually goes to the sons.

'Many . . . policy advocates prize the consensual and negotiated character of decision-making, a stance . . . that ignores rural power relations' (Whitehead and Tsikata, 2003: 101). The adjudicators of custom are men and hence women are placed in a vulnerable position, dependent upon mores of communal responsibility that may be eroding. 'The importance of the agency of influential individuals (e.g. sub-chiefs) who intervene to mediate local-level disputes plays a critical role in protecting, or not, vulnerable people's property rights. While . . . Kenya's statutory tenure system does offer protection to women and orphans . . . this

protection is not consistently or automatically applied, and often requires the person who believes her/his rights have been violated to initiate engagement with local officials and for these local officials to decide to act' (Cooper, 2008: 21, reviewing Aliber and Walker, 2004). Women without a link to some male are in a particularly precarious situation. The clear result of the research is that custom dominates. There was neither evidence of statutory incursion nor any sign of the waning of customary practices. If anything, the evidence is that, on the contrary, customary practices are alive and well, and evolving with the times.

The current situation of rural land inheritance can be seen as an amalgam of statutory legal land title embedded firmly within customary practice. Rather than traditional use rights which were communal in nature, land is held by individuals (usually male) and passed on by customary routes to other individuals (usually male). Aside from a veneer of land title and exceptions, such as wives whose husband die before their male offspring have attained maturity, the holding of land remains customary in that it is still owned by men and passed on to men, with all the sons of a father inheriting equally.

Land is a finite resource. The continued predominance of all-male inheritance of equal plots by all brothers, when combined with high fertility and reduced mortality, brings with it the danger of a progressive sub-division of land into ever smaller plots as subsequent generations inherit. The effect of this is that land inheritance can become a poverty trap. While some of the families in this study had a cash crop that enabled them to make a reasonably stable living from their existing land, this, however, might not continue to be the case if later generations of the same families are unable to expand the existing holdings and these holdings continue to be sub-divided.

Moreover, the land holdings of many families are, in themselves, too small to provide anything more than basic subsistence, and even this depends on good weather and no unexpected shocks. In combination with 'popular non-compliance' with statutory legal reforms 'Equality in inheritance seems to be maintained at the price of reducing landholdings to minuscule sizes that cannot ensure decent livelihood for the rightsholders' (Platteau and Bland, 2000: 34 in Cooper, 2008). In common with Platteau and Bland, we found that the principle of equal division among male siblings holds even when some brothers have significant income from outside the farm and others have none. Most households in the study received the majority of their cash income from non-farm employment. Employment outside the farm was often reported as supplying the extra income that is crucial for expanding holdings through the purchase of additional land. Rather than seeing this outside income as augmenting the income from farming, in many cases it is probably more accurate to see the *shamba* as augmenting the outside income. The *shamba* provides a place to live and a refuge if employment opportunities outside the farm dry up. For many, rather than being a source of income from the market, food produced on the *shamba* was more important for home consumption as it provides the bulk of the food on which the household subsists. It is notable that the family among those interviewed that is in the most desperate economic

straits is there due to the unexpected loss of the outside income of the main breadwinner, throwing them back upon the *shamba*.³⁰

In the longer term, the possible effect of the continued sub-division of holdings into ever smaller plots is more serious. Sub-Saharan Africa has seen 'a historical shift from land abundance to relative land scarcity' (Whitehead and Tsikata, 2003: 68). In several study sites in which we interviewed, the land showed signs of exhaustion due to over-intensive farming, with the older interviewees commenting that yields had been better in the past. In an echo of the origins of the Irish Potato Famine, the consequences of progressive land sub-division coupled with steadily rising population are potentially dire.

On a more positive note, it is worth pointing out that inheritance can take forms other than the direct passing on of economic capital. Social capital, in the form of support networks and social contacts, the reputation of a family or the standing of a parent, can be passed on from one generation to the next in a manner analogous to the inheritance of economic capital. Rather than being isolated nuclear units, families can be seen as buffered by concentric rings of the wider family, the immediate area and the clan. A good example of this in the interviews was from one of the 2008 families in which an uncle who owned a garage had provided jobs and mechanic training for two of his nephews that led to their subsequent independent employment.

Cultural capital can also be passed on. Virtually all of our families valued providing the maximum amount of education possible for their children.³¹ Several had made or were making considerable financial sacrifices in order to send their children away to secondary-level boarding schools. The parents and grandparents we interviewed did not have high levels of educational attainment themselves so we cannot yet assess directly whether educational capital will be inherited directly across generations. *Inter vivos* transfer of educational and economic capital to educational capital, however, was a feature of several families with birth order being important -- elder siblings helping to provide support for the education of their younger brothers and sisters.³²

³⁰ See Miller *et al*, (2011) for an account of this family.

³¹ With feelings of frustration about the cost of school fees also being a universal theme in the interviews. Many interviewees reported they or their children having had to stop education early due to the cost. If families have to choose which children to support, often they choose the boys.

³² In one case, this was voluntary: a grown daughter, born years before the mother entered into marriage, who is now a secondary school teacher providing advice and financial assistance for the education of her mother's marital family, her half-brothers and half-sisters. In another case, this was not voluntary: a family in dire circumstances had decided to concentrate all of their remaining financial resources into educating the bright youngest son in the hope that he will be able to reverse the family's failing economic fortunes. The second-youngest son has been compelled to leave education, forget his ambition to start a welding business and instead work on the *shamba* to support his younger brother's education.

Cultural capital can be more than education. Ways of behaving or a type of outlook on the world, a *habitus*, can also be passed on between generations. Although it is not exclusively rural, we have an interesting case of the transmission of an entrepreneurial outlook from one generation to the next. One respondent, a man now retired and in his sixties, was contacted as an ascender. His life history was an entrepreneurial story of upward mobility. Born into a landless family, he accumulated capital and early on began buying land, some of which he uses for farming and some of which he retains as a speculative investment, along with a variety of other investments. In his later working life, he obtained a job as a security guard for the Ministry of Water. When he retired he received a 'golden handshake' and used the money to purchase a plot of land beside a busy road, which he subdivided into smaller plots and with his brother then developed the plots into shops and dwellings for rent.³³ When we subsequently interviewed his daughter, we found exactly the same attitude of using money to make money. She had started a series of businesses, periodically selling and restarting new businesses as she followed her second husband as he moved from one town to another. Now, thanks to a combination of reinvesting profits, securing government finance from Kenyan Women's Financial Trust and a 'merry-go-round'³⁴ in which she is raising a significant amount of finance with other businesswomen,³⁵ she owns and manages an expanding chain of profitable M-pesa³⁶ shops.

'I knew business by then.' During the interview, the daughter talked energetically about how she had learnt business from her parents. She became considerably more animated when

³³ The interviewee stated that one of the attractions of the government job in addition to the regular salary was that he knew it eventually would result in a retirement bonus that he could invest.

³⁴ 'Merry-go-rounds' or 'ROSCAs' (rotational savings and credit associations), common throughout sub-Saharan Africa, are indigenous savings and credit initiatives mainly undertaken by members who come together to pool finances and help each other. Different approaches are used, building on a basic model of informally organised groups in which each member buys a place and then regularly contributes a set amount of money, usually on a monthly cycle and usually a fairly modest amount. This is often combined with informal networking and meetings where problems are discussed and advice is given and received, etc. All or a significant portion of the cash is given out to a single member of the group each month, with each member's turn coming around in a rota. Hence, a relatively small cash outlay each month eventually results in a considerably larger payout after a predictable period of time. A 'merry-go-round' helps the individuals involved to save and at the same time gives them hope and motivates them to work hard to look for the money to stay in the group. Depending on the scale, the 'merry-go-round' can be used to purchase fairly mundane items such as kitchen utensils or furniture or for more substantial purposes such as paying children's school fees, house improvements, investing in farm or other business activities etc. Sometimes the resources of the 'merry-go-round' can be used by a member to acquire collateral for a loan from a more formal financial institution. The 'merry-go-rounds' identified during this research were organised solely by women, for women and were particularly important for them, as they were largely excluded from formal financial services.

The 'merry-go-round' in which our interviewee was involved was of a considerably larger scale than most. The 'merry-go-round' currently is not paying out the money put in by its members but instead is investing it with the intention of eventually buying and developing land jointly. So far, they have raised 600,000 Kenyan shillings.

³⁵ We had to wait to begin the interview while she concluded an appointment with another businesswoman.

³⁶ M-pesa shops are a network based on mobile telephone communication in which quick and reliable cash transfers can be made from one part of Kenya to another, for a fee.

the interview turned to business topics, making vigorous chopping motions with her hands as she explained the finances of the M-pesa business to us. Interestingly, the father also has a son who both he and his daughter regard with disdain because he does not share the same entrepreneurial spirit.

The father and daughter both spoke about the possibility of the old man selling off the farm, moving into the city and running one of the M-pesa shops – though with an interesting difference in perspectives. The father spoke about it as him investing in/buying a shop and learning the business; the daughter spoke about it as her buying out her father's block of shop holdings and setting him up as someone she can trust to manage one of *her* shops.³⁷ While the precise business model differs from that of her father, daughter and father share the same entrepreneurial view of the world.

³⁷ One should note that the daughter is in an urban context whose property is not land. She was young and we did not ask her about who would inherit her businesses (though her 22 year-old son manages one of the M-pesas). Her second husband is employed as an administrative policeman and takes no active part in the businesses.

6 Conclusion

This paper has concentrated upon what the interviewees themselves considered as important for inheritance, predominantly (though not exclusively) male pathways of land transfer. Nevertheless, whether we are considering the bulk of our families that are located in rural areas in situations either of precariousness or moderate security, or the special case of the entrepreneurs, what has emerged is that the *how* and *why* questions about patterns of inheritance are best understood in the context of the wider family. This study was confined to a relatively small number of families on small or moderate holdings in a small number of rural areas that are on the borderline of poverty. Results might be different for other regions, or for families located in urban areas or in contrast to either the profoundly poor or the absolutely non-poor. Nevertheless, if we had to cite one key finding, it would be that the debate between the applicability of statutory law versus customary practice to questions of inheritance that exists in the literature is not a debate that is reproduced on the ground. What we found across the families in all the areas were inheritance practices that, aside from some allusions to land title, were governed wholly by male-oriented customary law administered at the immediate local level by the clan.

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Appendix

Descriptions of the Fieldwork Areas

Area 1

Located in the Kilungo hills east of Nairobi at an elevation of approximately 2,000 metres. Immediate road access is very poor. The land in the area is very steep and arid. The quality of the land is poor and rocky and lack of water is a perennial problem with annual periodic drought. Disputes over irrigation are an issue; with the net effect probably being a widening of disparities between families that can afford irrigation and families that cannot. Agriculture is mixed cropping, mostly for subsistence with the main cash crop being coffee, avocados or mangos and some vegetables. Coffee farming dwindled severely a decade ago but now has revived thanks to the coffee cooperative, but not to its former level. The area is distant from the main markets of Nairobi and Mombasa and the local farmers are dependent upon middle men to sell their produce.

The area has been settled for a long time by Akamba with the families having been located in the area for generations. Much of the land was terraced 'during colonial times'. There is little remaining land worth clearing so, as the population has risen, the land has had to support larger numbers of people. Several of the older interviewees talked about crops being better in the past and there is some sign of soil exhaustion.

Area 2

Located in the North Rift Valley near Eldoret at an elevation of approximately 2,500 metres. Immediate road access has degenerated over time and now is poor. The land is undulating hills, soil quality in the area is good and rainfall is plentiful. The average temperatures are temperate chilly so there is a single crop cycle per year. Pyrethrum was the main cash crop until it failed. Agriculture is now mixed cropping, with the main cash crop being maize and most produce being bought by middle men.

The immediate area of the interviews was a 400-acre farm owned by a rich white who sold it to a Kenyan at Uhuru. The land subsequently was sold to a cooperative of 120 members created with government support in 1970 that was made up of Kalinjin and Kikuyu who moved into the area. The co-op subsequently faded. The area was subject to severe ethnic strife in 1992 and most of the Kikuyu left at that time. Because people came into the area, no single clan dominates and so the clan functions are elected.

Pretesting of the method employed was done in several areas two years earlier in 2008. Fewer interviews were done and there was no general focus group with representatives of the area, but brief descriptions can be made.

Area 3

Located near Kericho. The area is a prime tea-growing area with regular rainfall each afternoon. Tea plantations were established by white colonists at the beginning of the 20th century. Africans cleared additional land at the time of Uhuru and established small holdings with tea as a cash crop. Road access is fair. The local population is mainly Kipsigis, a sub-tribe of the Kalenjins.

Area 4a

Located in the South Rift Valley near Nakuru. The land is flat with maize as the main cash crop. The land was owned as a single large farm by a white farmer who left at the time of Uhuru. A co-operative of Kenyans created with government support subsequently bought the land and continued to run it as a single unit with hired agricultural labour; effectively taking over the white farmer's role. When the loan that set up the cooperative was paid off, the coop was closed down and the land split among its partners. Road access is good. The local population is mainly Kikuyu.

Area 4b

Located in the South Rift Valley near Nakuru. The land is rolling hills with mixed croppage, mainly subsistence. Its history is unclear, but it now is owned by Kenyan families who have been there for at least one generation. The local population is mainly Kalenjin, followed by Kikuyu.



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