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Abstract

Purpose: Land has always, particularly in Africa, been regarded as one of the most important forms of property, and for that reason, it is rigorously sought by those without it and jealously guarded by those who own it. This attitude towards its importance makes it a scarce resource in terms of accessibility and affordability for those who might be in many other aspects at an economic disadvantage. Women are among those who suffer this disadvantage.

Methodology: The methodology adopted is the doctrinal analytical approach. This is achieved through thorough inquiry in legal concepts, values, principles and existing legal texts such as international instruments particularly the international human rights instruments, statutes, case laws, opinions of publicists among others.

Findings: The deleterious effects of legal pluralism exacerbated by recognition and application of the African traditional law and Islamic law with regard to the property rights and particularly land in Africa in the modern-day have been discussed. Ossified legislations and traditional customary practices dubbed African customary laws, continue to legalise gender inequality until presented to formal justice system whence they are declared unconstitutional and invalid by the courts. Therefore, many a times when formal justice is inaccessible through the formal courts, the discriminatory laws carry the day. However, the tacit recognition of discriminatory laws and their entrenchment through national constitutions provide a situation where the choice of the applicable law affect the outcome of a matter.

Unique Contribution to Theory, Practice and Policy: African customs and practices on marriage, divorce and inheritance impact more disproportionately on rural women and on married women. This makes it necessary to not only have laws addressing intersectional discrimination but also have laws that do not address it interpreted and applied in a manner that addresses the intersecting statuses in order to eliminate all forms of discrimination against women in relation to the right to land.

Keywords: *Property, Land, Equality, Nondiscrimination, Gender, Human Rights, Affirmative Action, African Customary Law*

JEL Codes: *K11, K38, K39*

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INTRODUCTION

To appreciate the need to strengthen the protection of the right to land for women generally the starting point must be to appreciate that the vulnerability of women in many parts of Africa is systemic. From the very beginning of the African society, women did not have the legal capacity to own and transfer land on their own and depended on their husbands or male kin to access and use land (Ikdahl, 2005).

In the context of human rights, this points to the unconscious continued discrimination against women where customs as a core concept of identity for many African communities exacerbate and perpetuate discrimination on the basis of gender.

This vulnerability that persisted through the colonial and post-colonial epochs to the current times point can therefore be considered to be a structural by product of the interaction between the pre-colonial patriarchal African customs, the codification and formalisation of the said customs through policies and laws during the colonial and post-colonial period. This is seen clearly for example in the recognition of males as the heads of households hence representatives of the house in land/ property matters during the colonial and post-colonial period as shall be demonstrated in this paper.

Equality and Non-Discrimination in a Legal Context

In common parlance, the terms equality and non-discrimination are often used interchangeably as if the difference were only semantic and dictated by the context. However, in legal contexts they have a difference in meaning. In legal contexts, the term equality refers to the condition of possessing substantially the same rights, privileges, and immunities, and being liable to substantially the same duties (Campbell, 1968). The first provision on equality of men and women in a binding human rights instrument is the common Article 3 of ICCPR and ICESCR, where the States Parties undertake to ensure equal right of men and women to enjoyment of all the rights in the Covenant(s).[1] Therefore, equality of men and women is understood as the effort to offer them through the law, matching or corresponding treatment with regard to rights, privileges and immunities.

Under Article 1 of CEDAW equality is regarded as availing opportunities to men and women equally, with regard to accessing various human rights such as healthcare, education, work, and participation in political and economic decision-making. The comparative variable of equality here is that the access to opportunities enabled in political, economic, social, and cultural circumstances to men, be in the same breadth extended to women.

Providing equality of opportunities is however not enough. This is because the opportunities once availed, are availed competitively on the same conditions. Such equality is formal and ignores the already existing differences in natural endowments especially those that cannot be traced to the individual effort. Admittedly a *de jure* equality which may provide for neutrality cannot be achieved in practice due to the numerous existing obstacles that renders the law powerless. Thus, an equality that proposes differential treatment for purposes of achieving

[1] The Common Article 3 ICCPR and ICESCR, States Parties to the present Covenant undertake to ensure the equal right of men and women….. See also: the explanation of the HRC in its General Comment No. 18, para.8 'The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance'. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

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equality may be desirable for the attainment of equality is substantive equality (Jadeed, 2020). This may take forms such as affirmative action as proposed by Article 4(1) of CEDAW.

Affirmative action is taken in order to diminish the gap that arises after the opportunities are availed equally and competitively due to the already existing endowments that has so far given men an advantageous position.[2] If equal treatment is interpreted as the treatment of likes in a similar manner and un-likes in a similar manner (Mackinnon, 1987) it fails to take into account the distinctions that are as a result of social construction. An objective standard of equality is first required so that the treatment accorded to a man is the same as the standard accorded to a woman and if a gap arises at no fault of the woman to meet the standard, then affirmative action is adopted.[3]For example, in a situation where the land ownership conditions are the same for men and women and it is found that the number of women is so negligible and the equal conditions are impossible to attain due to the poor economic status of women, certain legal measures such as waiver of taxes in favour of women can be implemented for a specific period to enable them fulfill the conditions for ownership vis a vis men who as per their economic conditions are capable of paying the taxes.

On the other hand, discrimination presupposes the denial of rights to persons based on a certain criterion that distinguishes those persons from others who are accorded the said right. Such criteria are listed in the Common Article 2 of ICCPR and ICESCR. They include but are not limited to; race, colour, sex, disability language, religion, political or other opinion, national or social origin, property, birth among others. Thus, non-discrimination is the prohibition of discrimination based on any of the said criteria.

An elaborate classical legal definition in the context of human rights of the scope of conduct that constitute discrimination has been offered by international human rights law in conventions dealing with specific categories of persons which the convention protects, Article 1 of CEDAW, Article 1 of ICERD, and Article 2 of ICRPD. Extending this protection to all grounds, the HRC has extrapolated the definition of discrimination as:

Any **distinction, exclusion or restriction** made on the basis of *(sex, race, disability or any of the grounds aforestated)* which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by ***all persons*** on an equal footing, of all rights and freedoms.[4]

The meaning of discrimination based on the above definition is clear in daily life scenarios within which discrimination can be deduced for its failure on the equality test. For example, in the case of women, *distinction* include situations where different treatment is given to men and women in similar circumstances e.g., in distribution of inheritance, portions of the heirs are different on the basis of sex where men take more than women. *Exclusion* refers to circumstances where women are totally omitted and only men are considered for instance in decision making forums that consists of the head families and as a result of that criteria, men only. *Restrictions* refers to a situation that places demands requirements that are difficult for women to attain compared to men such as instances where negative pregnancy status automatically discriminate women who might be pregnant.

The relationship between equality and nondiscrimination is that nondiscrimination is corollary to equality. This means that the absence of discrimination denotes equality to the extent that non-discrimination prohibits differential treatment of a person or group of persons based on

[2] (HRC), *CCPR General Comment No. 18: Non-discrimination,* HRI/GEN/1/Rev.9 (Vol. I), para.10.
[3] Ibid.
[4] HRC), *CCPR General Comment No. 18: Non-discrimination,* HRI/GEN/1/Rev.9 (Vol. I), para.7

his/her or particular status or situation. However, equality does not necessarily imply non-discrimination for reasons that equality can be either formal/ *dejure* or substantive/ *defacto*. It is the later form of equality that can be equated to nondiscrimination.[5]

This definition elicits a relationship between the different forms of equality and different forms of discrimination. The failure to offer equal treatment that leads to different results is considered as direct discrimination. Whereas, where the same treatment leads to different and unfair results is considered as indirect discrimination and with regards to law, where a particular law result to an impairment or nullification of the recognition, enjoyment, or exercise of rights by all persons then it is indirectly discriminatory (Jadeed, 2020). These results are common in gender neutral laws that are meant to apply uniformly without due consideration of the circumstances of the persons to who it is applied. The neutrality amounts to an omission of provision for the circumstance or layer of identity that vitiates the equality.

Under international Human Rights Law, non-discrimination has various functions, first as a guiding principle as is the case with Article 3 of ICRPD [6] and secondly as the aim or purpose of the instrument as is the case with CEDAW, ICERD[7]. As a guiding principle, it cuts across all the provisions of a Convention meaning that every right provided therein must be enjoyed without discrimination. As an aim and purpose, it becomes the intended achievement of a Convention whereby the main purpose of the rights therein is to eliminate discrimination which presumably existed at the time of the Convention. For instance, CEDAW is explicit on its aim and purpose as it intends to eliminate all discrimination against women.

Jurisprudence from Human rights enforcement institutions such as the African Commission and the ECtHR, demonstrates specific instances when the violation of the principle of non-discrimination may arise. The African Commission in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, African Commission Communication 294/04 restated the definition of discrimination as stated under CEDAW and ICERD in a case where a non-national was treated differently for reasons that he was a non- national only and states that similarly situated persons must receive similar treatment under the law.

In *Marck v Belgium*, the ECtHR demonstrated two critical considerations from which discrimination must be assessed. First, when similar cases are treated differently whereby an *ex-facie* discrimination is established. Second, when a difference in the treatment of the similar cases does not have an objective and reasonable justification; or if there is no proportionality between the aims sought and the means employed.[8] Where these two factors are established, the differentiation of treatment will constitute discrimination. Thus, if the criteria for such differentiation are reasonable and objective, and the aim is to achieve a purpose that is legitimate under the Covenant, it is not considered as discrimination.

For this Article, the contextual definition of equality and non -discrimination is as set out in articles 1 of CEDAW. It is a definition that combines both equality and non-discrimination but at the same time distinguishes them. This definition demonstrates that non –discrimination is a

[5] Committee on ESCR, General comment No. 16, *Art.3, The equal right of men and women to the enjoyment of all economic, social and cultural rights*, 11 August 2005, E/C.12/2005/4.
[6] CRPD Vol 2515 UNTS 3.
[7]Each of the Preamble of the two Conventions confirms that the attainment of non- discrimination is the main purpose of these two Conventions.
[8] *Marck V Belgium* Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979, paragraph 48, See also, HRC HRI/GEN/1/Rev.9 (Vol. I) paragraph 13.

quintessential element in the attainment of equality and also that equality can be attained through differential treatment that does not discriminate.

Gender Equality in relation to the Right to Land

Article 15(2) of CEDAW endeavors to address the legal and practical challenges to the enjoyment of land rights for women by obligating states to accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property. This inequality manifest itself as a result of various limitations as discussed herein. They include but are not limited to; the Public-private divide in protection, inadequate participation of women in decision making, equality before the law, legal pluralism and access to justice (Steiner & Alston, 1996).

Whereas international law concerns itself with the relations of states, national law concerns itself with the relations of the states and the relations of the individuals within its jurisdiction. International human rights law however distinguishes itself insofar as it monitors and guards the relationship between as states and the individuals within it. For this reason, the relations among private individuals themselves such as those in the family, or immediate community have been left largely to the dictates of national law. Thus, the concern herein is the extent to which international law can monitor the adequacy of national law in relation to private individual actions.

The overarching aspect in the issue of gender equality and gender discrimination is the distinction between the public and private spheres. This distinction is skewed to make the works and needs of women invisible' (Steiner & Alston, 1996). The protection of the right to privacy as a civil human right under Article17 of ICCPR is in direct conflict with the question; to what extent when and how should the state interfere with private matters in a bid to protect human rights?

Consequently, there is a tendency of the state to lean more on the public sphere where the actions of state officers are involved (vertical relations) than on the private sphere where individuals are involves with each other (horizontal relations), unless or until there is a distress call from the private sphere. This distress call more often than not when it is too late for instance in matters of gender based domestic violence, the state is mandated to prosecute the perpetrators and if found guilty keep him away from the society and thus protect other individuals from an individual who has been proven a threat to them. Since there is no obligation among individuals vs individuals in the realm of human rights, the likelihood of perpetuation of covert abuse of rights without the assistant of the State is high and has in many instances led to homicide, homelessness or some kind of violation before it attracts the attention of the state.

In the same vein, issues of user and ownership rights of the family land are considered private, hence within the protection of the right to privacy under Article 17 of ICCPR. Rarely does a State interfere with the affairs of a family unless intervention is sought through the available redress mechanisms provided by the state such as judicial remedies. Having the area out of the State's direct scrutiny has therefore made the family relations on matters of land marred with exploitative relations between men and women whereby in most cases the woman is the labourer, who neither enjoys the fruit of her labour nor the ownership rights of the land (Renee, 2016) For example, in a case where a husband evict a wife from their matrimonial home over a domestic quarrel, the law is slow to respond and only responds when invoked by the aggrieved party or on behalf of the aggrieved party. Such situations are worse in an adversarial

system where the law often acts *ex post facto* because many a times the cases are not subjected to judicial remedies or are subject long after alternative dispute resolutions have failed and untold sufferings have been endured.

In this regard, a State's role ought to be to protect the vulnerable gender i.e., the woman from exploitation by a man in whose favour the power relations tilt towards. Some cases in Kenya demonstrates the continued gender discrimination in matters of family land. in *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir*[9] the Kenyan High Court heard that the clan elders relying on a traditional custom of the Kipsigis Community had upheld the distribution of the Estate by the administrator of the Estate of the Deceased to two sons only, leaving 6 daughters without a share and one of them facing eviction despite having resided on the land for over 30 years. In this case, the court relying on Article 27(4) Constitutional provision on non-discrimination overruled the clan elders and stated that "*that there should be no discrimination on the basis of sex or marital status.”* Thus, the court only interfered after the distress call of the aggrieved and long after the clan elders had made a discriminatory decision. In matters of private interest between individuals, the law often seems to act as a sword and not as a shield. Owing to this absence of direct application of human rights standards between individuals’ human rights violations abound in the area of family relations which is largely considered as private.

In the absence of such a direct relationship between individuals and the state that give rise to the duties akin to those of the state. The role of the state in private matters, then, is to ensure that there exist effective judicial remedies to which private individuals can resort to in the event of violation by another private citizen.

With regard to participation in decision making, decision-makers in every society exude a certain power over the people on whose behalf they make those decisions given that those decisions are ultimately converted into policies and later into law. This is no exception to the relations between men and women. Paragraphs 8 and 13 of the preamble of CEDAW underscores two ideals resulting from participation. First, it would lead *to* the full development of the potentialities of women in the service of their countries and humanity, and second, complete development of a country, the welfare of the world, and the cause of peace require the maximum participation of women on equal terms with men in all fields.[10] The development of a country depends largely on the utilization of resources and land is a key resource in this regard so that the participation of women on matters relating to land would be key to the development of any country.

Article 16(h) of CEDAW provide for the same rights for both spouses in respect to ownership, management, enjoyment, and disposition of property. In relation to the right to land, participation in decision making in Africa is grossly affected by unequal power relations within the families[11] inequality in the family underlies all other aspects of discrimination against women and is often justified in the name of, tradition, and culture. Women often do not equally enjoy their family's economic wealth and gains, yet they bear the greater cost of the breakdown of the family than men. This is because many a times they opt to carry with them the children of the marriage and take care of them despite their impoverished status, women may also be

[9] **S**uccession Cause No.297 Of 2015**,** [2017] eKLR.

[10] See also, *Report of the Fourth World Conference on Women*, Beijing, 4-15 September 1995, S No. E.96.IV.13, chap. I, resolution 1, annex II, para. 13.

[11] See CoEDAW, General recommendation on Article 16, 30th October 2013, CEDAW/C/GC/29, para. 1 and 2.

left destitute upon widowhood, especially if they have children and particularly where the State provides little or no economic safety net for widows and single women. [12]

This is because the man in most cases as the *de-facto* head of a family becomes the *de-jure* owner when properties are registered in his name, which presupposes that he is the ultimate decision-maker in matters relating to ownership, acquisition, management, administration, enjoyment, and disposition of property. This is detrimental to a woman's right to land as she cannot make developmental decisions relating to the family land. She cannot use such land to pledge the credit or access other forms of resources for economic development. She is also unable to stop the man (because the man is the registered owner) from using the family property to pledge credit especially when the family is at risk of losing their home and lives.

There are many patrilineal communities in Africa. Men as *de facto* heads of households have the largest role in decision-making about resources at both the household and community level. This means that women have disproportionately fewer rights to land and property (Giovarelli, 2016)

Article 25 (a) and (b) of ICCPR provides for the right of every citizen in the conduct of public affairs of their country and the right to vote and be elected. Though a civil political right, it is an imperative one for women's land rights because the determination of land management systems and legal frameworks for land administration is largely influenced by policy and lawmakers in parliaments. The presence and participation of women in such bodies ensure that the needs of women are considered while passing laws that may affect their rights for instance in allowing a state's compulsory acquisition which necessitates evictions. A case in point is the *Communal Land Reform Act 5 of 2002 of Namibia* [13]. Under this Act, customary land rights are allocated by the traditional authorities but the decisions made by the traditional authorities are subject to the approval of community land boards, the jurisdictions of which are determined by the Minister of Lands. The Minister appoints the board members, who typically number at least 12. Under Section 4 of the Act, community land boards must include four women (two engaged in farming and two who have other substantive expertise relevant to the functions of the board).[14] These community land boards can, in practice, provide an extra layer of protection for women land rights. (UN Women, 2013)

The right to participate refers to the opportunity for a person to provide meaningful, timely, and informed input, and to help shape decisions.[15] For a woman, if these rights are not guaranteed in private arrangements such as in the family, her exercise of these rights in the public i.e., at the community level is also affected. Thus, at the community level, the voice of the community is the sum total of the households within that community meaning that if none of those households are represented by women, then a woman's voice is unheard in the particular matters of such a community and so are her needs.

The effect of participation in decision-making on matters relating to land by women is twofold. First, as a facilitator of better access rights, and second, as an outcome. As a facilitator of better access right to land, participation in decision-making enables a woman voice her concerns related to the security of tenure. Once the right to access is guaranteed, then she is able to make decisions on the use of the land. Women with such a capacity make decisions that are not only

[12] Ibid.
[13] GG 2787, brought into force on 1 March 2003 by GN 33/2003 GG 2926, Sections 20-29.
[14] Ibid Section 4.
[15] UN, Guidelines for States on the effective implementation of the right to participate in public affairs, A/HRC/39/28, para.63.

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beneficial to them in person, but also to the community at large. Those without the opportunity to participate in decision making feel that since their rights are insecure, she can only make decisions that are only in her best interest and thereby neglects decisions that would otherwise be beneficial to the larger community.

For example, a country-wide study in Uganda shows how land tenure insecurity can impact agricultural productivity and food security. When women farmers did not have independent and secure rights to the land that they were farming, many chose not to let it lie fallow during the optimal periods. Since their rights to use the land were insecure and dependent on a relationship with a male, the women feared that not using the land for one season would impact their longer-term access. The land was therefore overworked. The study concluded that when women are forced to struggle to maintain control of their land, productivity and income fall (Masson and Carlsson, 2005). Similarly, a study in Kericho, Kenya, shows that women neglect to tend tea plantations because they have limited control over proceeds from the tea, resulting in increased household tensions and lower productivity.

As an outcome, where a woman has secure land rights and owns the property, she is able to participate more effectively in their immediate communities and in the larger civil and political aspects of society (FAO, 2002). This is because she is her own provider of the economic resources and is not dependent on a man to provide, and thereby decide for her in which other areas of the community she should invest her time and resources.

The other cause of gender inequality in land matters is Legal pluralism. This arises where the *Grund Norm* (Constitution) of a State recognises several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official *Grundnorm* provides an operating environment for the plural legal orders. (Kabemba, 2021). For example, a constitution of a state may provide for the application of certain religious or traditional customary laws such as *Shari'a* Law for Muslims or African traditional customary law for particular ethnic communities as the recognised applicable law of the State for these groups (Kabemba, 2021).

On matters of equality and gender discrimination, Article 2 of CEDAW obligates States Parties to scrutinize the applicable legal systems in a state to ensure that there are no applicable laws perpetuating discrimination. Under Article 2(f) states are to take all appropriate measures, including legislative to modify or abolish existing laws, regulations, customs, and practices that constitute discrimination against women.

The recognition and continued application of customary and religious laws without scrutinizing their content in terms of gender equality often eviscerate both the international law and the constitutional protections offered to women in a State. This concern has been consistently expressed by the CoEDAW which has observed that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory against women.[16] Lack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination.[17] A perfect example is where a State's Constitution provides for the jurisdiction of religious or customary courts to deal with marriage, divorce, distribution of marital property, inheritance, guardianship, adoption, and other such personal matters.[18]

[16] CEDAW/C/GC/29 paragraph 14

[17] CEDAW/C/GC/29 paragraph 14.

[18] See Article 170 (5) Constitution of Kenya on the jurisdiction of the Kadhi courts, see also Tanzania's Customary Law Local Customary Law (Declaration) (No.4) Order Government Notice No. 436 of 1963.

Legal pluralism creates uncertainty because rival claimants can use a large legal repertoire to claim a resource. (Ruth, 2004). This is evident by the number of appeals in national Courts arising from the decision of Kadhi courts which apply Islamic laws in family matters relating to land, many people resort to either religious or customary law to resolve the disputes and while these mechanisms may be affordable and accessible, they are more often than not, discriminatory to women because they are guided by traditions and customs that are inherently discriminative.

The African customary law is largely undocumented, inconsistent, and patriarchal when it comes to land rights. It is therefore difficult to rely on it in formal Courts because its adaptions are '*ad hoc* and not uniform.'[19] Being largely patriarchal, it is unlikely to be fair to a woman given that most women gain access to productive resources primarily within marriage and family through inheritance (UN Women, 2013). A few examples from various national jurisdictions in Africa expounds this situation.

The South African Upgrading of Land Tenure Rights Act, 1991[20] provided *interalia* for conversion into ownership of certain rights granted in respect of land, and these rights, unfortunately, did not take into consideration that it was the cultural rules that may have been used to allocate the land to the presumed owner. These cultural rules included rules such as the primogeniture rule that allowed only male successors to inherit from the deceased. Under this rule, only a male who is related to the deceased qualifies as an intestate heir. In a monogamous family the eldest son of the family is the heir and if the deceased is not survived by any male descendant, his father (if alive) succeeds him. Thus, the rules preclude widows, daughters, younger sons and extramarital children from inheritance.

In the *Bhe and Others v Khayelitsha Magistrate and Others* commonly referred to as the *Bhe case*.[21] The facts were that two daughters of an unmarried woman were denied the inheritance of their father based on the primogeniture African customary rule. The South African Constitutional Court found that the primogeniture rule under the Black law and custom, which is central to the customary law of inheritance discriminates unfairly against women and children born outside of marriage. The South African intestate succession regime is governed by two Acts of Parliament namely the Intestate Successions Act and the Black Administration Act read together with the Regulations of the Administration and Distribution of the Estate of Deceased Black persons and the *Intestate Succession Act 81 of 1987.* In particular, Section 23(2) of the Black Administration Act provide that the Estate of a black deceased person is to be distributed according to the Black law and Custom while Section 1(4)(b) of the *Intestate Succession Act 81 of 1987* excluded the blacks from the provisions of section 1 of the Act. The Court accordingly declared all the provisions applied in reaching the decision at the Magistrate's Court[22] in this case to be unconstitutional and invalid on the ground of discrimination. The Court further decided that until the aforegoing defects would be corrected by competent legislature, the distribution of intestate black estates would be governed by S1 of the Intestate Succession Act 81 of 1987 thus gave an interim regime to govern the deceased's Estate.

[19] *Bhe and Others V Magistrate, Khayelitsha and Others,* 2005 (1) Sa, 580 (Cc).
[20] Act No. 112 of 1991, see also *Rahube vs Rahube,* Case Number 101250/2015) [2017] ZAGPPHC 651; 2018.
[21] ***Bhe and Others V Magistrate, Khayelitsha and Others* 2005 (1) Sa 580 (Cc).**
[22] Section 23 (10) (a)(c) and (e) of the Black Administration Act, Regulation 2 (e) of the Administration and Distribution of the Estates of deceased Black persons and Section 1 (4)(b) of the Intestate Succession Act.

The situation of women in South Africa with regard to the application of the customary law on the area of property is best summarised under paragraph 78 of the *Bhe Case* Constitutional Court judgement as follows;

The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.[23]

The *Bhe* case bring out two forms of vulnerabilities perpetuated by the African customs applicable to property rights in succession matters. First, under the South African primogeniture rule there would never be an opportunity at all for a woman to own land to the extent that the said customary rules have got no devolution rules for land owned by a woman who might pass it on because in the first place they would never have the opportunity to own the land under the traditional customary practices. Second, the total exclusion of women from the future possibility of owning such land as they are not to succeed any man. Thus, by invalidating these rules the court did not only uphold the right to equality before the law but also the right and freedom to own property in future for black women in South Africa.[24] The primogeniture rule is therefore a form of exclusion that constitute discrimination against women under Article 1 CEDAW.

Another danger of the unwritten customary laws is that their meaning and interpretation is subjective and dependent on the persons interpreting it. This was the situation in the case of *Mojekwu v Iwuchukwu.* [25] The Supreme Court of Nigeria failed to uphold the finding of the Court of Appeal judgement and held that a custom can only be invalidated if discriminatory. This case was an appeal against the judgment of the Court of Appeal in the former case of **Mojekwu v Mojekwu,**[26] where the Court of Appeal had found the *Oli-epke* custom of the *Nnewi* people discriminatory. The Court of appeal had held that the Nnewi custom of *Oli-epke* was discriminatory and any form of societal discrimination on grounds of sex was unconstitutional and against the principles of an egalitarian society. A court of law cannot invoke a customary law which is repugnant to natural justice, equity and good conscience. Under the Nnewi custom, the inheritance rights of females is prohibited and the custom provides that the eldest male in the family will inherit. The custom further provides that where the male issue of the direct line is deceased, the first son of the late brother of the deceased, the nephew or *'Oli-ekpe'* will inherit. This disappointing holding by a supreme court was highly criticized and has since been rectified by subsequent judgements of the Supreme Court of Nigeria e.g., in *Anekwe & Anor. v Mrs. Maria Nweke* and in *Ukeje v Ukeje.*[27]

In Tanzania, The Local Customary Law (Declaration)[28]codifies the customary law which provides for various customs particularly with regard to ownership of land upon widowhood whereby the rights of a widow are only guaranteed until remarriage. Section 20 which is a

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[23] Supra note 38.

[24] *See also Shibi v Sithole and Others (CCT 50/03, CCT 69/03, CCT 49/03) [2004where Ms.Shibi was, in terms of that system (Section 23), precluded from being the heir to the intestate estate of her deceased brother.*

[25] (2004) 11 NWLR (pt. 883) 196.

[26] 7 NWLR (1997) PT 512.

[27] Suit No. SC. 129/2013 (2014) LPELR – 22697 (SC) and (2014) LPELR – 22724 (SC). These cases confirmed the women right to inherit.

[28] 1963, (No. 4) Order, Government Notice (GN) 436/1963, *in Judicature and Application of Laws Act*, Tanzania Laws Subsidiary Legis. [CAP 358 R.E. 2002], Sec. 11.

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Haya[29] customary law provides that women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.[30] In the case of *Ephraim v Pastory,* [31] Ms. Pastory, inherited clan land from her father by a valid will and sold the land to a man who was not a member of her clan. The next day, the appellant, Mr. Ephraim, filed suit seeking a declaration that the sale of land by Ms. Pastory was void under the customary law that a woman has no power to sell clan land. The Court of Appeal of Tanzania held that the customary law regarding women's property rights discriminated women on the ground of sex in that, unlike their male counterparts, they were barred from selling clan land. The prohibition of women from selling clan land is a distinction solely based on sex that has the effect of denying women their tight to land. Hence it was in violation of Article 1 of CEDAW, Article 18(3) of the African Charter on Human and Peoples' Rights, and article 26 of the ICCPR as well as Article 13 (4) under the Bill of Rights in the of Tanzania's Constitution[32] As a result, the said section 20 of the Local Customary Law (Declaration) was declared void and of no effect.

The above cases show that without the court's intervention, customary rules unfortunately continue to be applied. There is continued violation of women right to land despite the elaborate legal protection provided both by the international and national law. To have a case reach the higher courts especially, in an adversarial system, requires effort by the litigant which includes financial ability to have legal representation. Owing to their impecuniosity, African women particularly the rural women who unfortunately depend on land for subsistence give-up on litigation meaning that the customary rules which are discriminatory will continue to carry the day unless measures are put in place to restrain their use at the community level. Such measures having codifying customary that act as prima facie evidence of the existence of a particular custom and hence make it easy and possible to challenge such customs in a Court of law if the custom is discriminatory in any way.

The other hurdle to the realisation of the right to land for women is Access to Justice. The right to equality before the law and in particular in matters of property is premised on Article 15(2) of CEDAW which provides that States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. This is a further affirmation of the right to a judicial remedy and its enforcement under Article 2 of ICCPR and Article 2 of CEDAW which emphasise the importance of competent national tribunals and other public institutions as a means of redressing breaches.

Access to justice for women with regard to land rights is largely ensured in a State through the provision of dispute resolution mechanisms that are affordable, proximate, ensure speedy justice and whose processes and procedures are understood by users. These include not only courts and tribunals but also administrative and institutional structures (FIDA, 2011). Many challenges hamper the accessibility because the administration of justice institutions are sometimes not user-friendly owing to factors such as costs, geographical distance, unavailability of information, complex rules of procedure, illiteracy, undue delays among others. (FIDA, 2011)

[29] A tribe in the southern part of Tanzania.
[30] Local Customary Declaration, 1963.
[31] Mwalusanya J, (2001) AHRLR 236 (TzHC 1990).
[32] *Constitution* of the United Republic of *Tanzania* 1977, as amended in 2005, Art 13(5).

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This situation makes legal help a necessity for any person not well versed with either the language or the procedures while dealing with any land matters. This entails engaging a lawyer or a paralegal in cases of registration of land which services are costly and not always readily available. The situation is further exacerbated by corruption leaving out the poor and the vulnerable without any help.

Efforts to promote gender equality in land registration systems imply investment in inclusive planning processes, capacity building of officials, public education, and supportive dispute resolution mechanisms. This is because the way in which local institutions function and their ability to represent vulnerable groups can reinforce or contradict registration systems that are designed with gender equality in mind or even interpret the system more equitably (Nazneen, 2005). Further, ignorance abounds, among the rural women on the procedures of ownership, safeguarding, alienation, and the available redress mechanisms in the event of a violation.

Article 14 of CEDAW is relevant in this regard as it recognises the importance of the participation of women in these institutions (Nazneen, 2005). Land institutions include those directly responsible for the governance of land tenures, such as land registration offices, as well as those responsible for land management, land use and adjudication of land-related disputes.

Essentially, effective institutions are pivotal to the implementation of laws aimed at securing women's land rights.[33] These institutions have the following role in the promotion of gender equity in relation to land rights; ensuring active participation of men and women in the processes from planning, implementation and evaluation of results; public education e.g. on the rights and obligations of holding title to land; inclusion of spouses in legal ownership documents, consideration of the financial burdens; simplification of registration procedures, bridging the physical accessibility/proximity of the institutions and providing affordable legal advice on matters of land to women.

Land tenure security refers to certainty of recognition and protection of a person's right to land, especially in the event of specific challenges (UN, 2015). Accordingly, states are encouraged to protect occupants/users against forced eviction, harassment, displacement and other threats related to land. This can accordingly be achieved by among other measures; Having the land tenure recognized as legitimate, including in cases where these entitlements are not stipulated in statutory law but may arise from indigenous, customary, and other forms of tenure rights; effective dispute resolution mechanisms in the event of disputes and competing claims, and effective recourse mechanisms and remedies where there is a violation of tenure rights; and due process in conformity with national and international standards in matters of compulsory acquisitions (UN, 2015.

The South African Constitutional court in the case of *Rahube Vs Rahube* [34] illustrates not only the continued existence of discriminatory laws but also the duty of a state to protect a woman's right to land. In this case, the Constitutional Court of South Africa confirmed the judgment of the High Court at Gauteng Pretoria, which had declared section 2(1) of the Upgrading of Land Tenure Rights Act[35] unconstitutional to the extent that it provided for automatic conversion of tenure rights into ownership without any procedures to hear and consider competing claims to ownership.[36]In particular, the ownership rights were granted under circumstances that excluded

[33] Supra note 365, p.47.

[34] Case Number 101250/2015) [2017] ZAGPPHC 651; 2018, and CCT319/17 ZACC 42 (Constitutional Court of South Africa 2018).

[35] Act 112 of 1991, Laws of SA.

[36] Ibid. para 61.

women from consideration as right holders. The Constitutional court in its affirmation reiterated article 1 of the UDHR which proclaims that all human beings are born free and equal in dignity and rights. The court allowed Parliament 18 months to take steps to undo the unconstitutionality of the discriminating section of the Upgrading Act. The Constitutional Court further affirmed the order of the High Court that the ruling be made retrospective to April 27, 1994. This had the effect of allowing the successful Applicant Ms. Mary Rahube who was facing eviction proceedings from his male sibling to apply to be the registered owner of a house in which she had lived for forty years but the brother was the registered owner as favoured by the discriminatory law.

Thus, although the South African case was based on Article 9 (1) of its Constitution which provides for equality before the law, and 9(2) that provide for legislative and other measures to be taken to promote equality, the said provisions also lie within the provision of Article 2(1) of the Maputo Protocol which provides that States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

This combating of all forms of discrimination falls within a state's duty to protect a woman's right to land. Other cases cited herein before such as the *Bhe,* case of South Africa, the *Pastory case* in Tanzania and the *Mojekwu* case in Nigeria, all attest to the State's duty to protect by ensuring elimination of customs that are perpetuated by private persons to discriminate a woman on her right to land.

Implication of the Study

The paper is an awareness raising attempt to demonstrate that discrimination is rooted in African customs and practices and perpetuated by legal pluralism, whereby laws reinforce the application of African customary and religious laws alongside the statutory law and the Constitution. African customs and practices on marriage, divorce and inheritance impact more disproportionately on rural women and on married women. This makes it necessary to not only have laws addressing intersectional discrimination but also have laws that do not address it interpreted and applied in a manner that addresses the intersecting statuses in order to eliminate all forms of discrimination against women in relation to the right to land.

It is also an invitation to the responsible institutions to take their mandate seriously if any progress towards the attainment of the right to property for women in Africa is to be attained in the near future.

Conclusion

From the aforegoing discussion, this article submits that Gender and gender equality are socially constructed terms whose meaning definitively emerges from the context of their use. In whichever context the term gender equality is used, a few golden threads run through the meaning.

Firstly, the idea of a male and female human persons as the basis of the discussion is presumed; Secondly, the idea of a comparative index is also engrained whereby the index is the particular context in which the equality is sort namely the right to land; thirdly, there is a presumption that the female gender is more vulnerable than the male and finally, that to achieve equality, all manner of discrimination against the vulnerable gender whether direct or indirect must be eliminated and both formal and substantive equality should be achieved.

The deleterious effects of legal pluralism exacerbated by recognition and application of the African traditional law and Islamic law with regard to the property rights and particularly land in Africa in the modern-day have been discussed. Ossified legislations and traditional

customary practices dubbed African customary laws, continue to legalise gender inequality until presented to formal justice system whence they are declared unconstitutional and invalid by the courts. Therefore, many a times when formal justice is inaccessible through the formal courts, the discriminatory laws carry the day. However, the tacit recognition of discriminatory laws and their entrenchment through national constitutions provide a situation where the choice of the applicable law affect the outcome of a matter.

Thus, to rethink the right to land for women require a re-examination of the existing legal frameworks in developing countries vis a vis the actual practice, together with continued monitoring of the enjoyment of the right to Land by women as the utmost indicator that indeed the right to land has been realised.

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