

Translating Rights into Practice:  
A Study on Women's Land Rights in Kenya

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# 1. Introduction

## 1.1 Overview of the Problem

Women in Kenya and other parts of East Africa face widespread discrimination in relation to ownership, control and inheritance of land. While Kenyan women constitute 64 percent of subsistence farmers and make up the bulk of agricultural labour,<sup>1</sup> only 3 percent of registered land in the country is owned by women.<sup>2</sup> Inheritance of land and division of matrimonial property continue to be regulated primarily by the customary laws of the different communities which discriminate against women.<sup>3</sup> Family land is usually passed on to sons, whereas daughters are expected to access land through marriage. While traditionally marriage was a rather secure way for women to acquire a lifelong interest in their husbands' land, this is no longer the case. Growing land scarcity, formalisation of land ownership rights and the accumulation of wealth have all contributed in eroding women's land rights.<sup>4</sup>

Discrimination against women in relation to land has serious implications for women's enjoyment of their human rights. It places women in a position of dependency upon men and as such increases their vulnerability to domestic violence and other forms of abuse.<sup>5</sup> Women who divorce or separate from their husbands are often left without any share in their matrimonial property and forced to move to urban slums where they lack basic standards of living and security. Widows, on the other hand, are increasingly being subjected to abuse and eviction by in-laws, in particular in relation to HIV/AIDS.<sup>6</sup>

In August 2010 Kenya adopted a new Constitution which guarantees the equal rights of women and men in relation to land and makes the application of customary laws conditional upon their compliance with the constitutional principle of non-discrimination.<sup>7</sup> While an important step, which puts Kenya on par with other countries in the region, it is only the beginning of a long journey in the quest for women's equality in relation to land.<sup>8</sup> Not only

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<sup>1</sup> Human Rights Watch, 2003, p. 10.

<sup>2</sup> CEDAW, CEDAW/C/KEN/7 (State report, 2010), para. 95.

<sup>3</sup> National Land Policy, 2009, para. 90, 224.

<sup>4</sup> *Ibid.*, See also Englert & Daley, 2008, pp. 1-14.

<sup>5</sup> Human Rights Watch, 2003, pp. 30-31.

<sup>6</sup> Ong'wen Okuro, 2008.

<sup>7</sup> Constitution of Kenya, 2010, articles 2(4), 27.

<sup>8</sup> Benschop, 2002, p. vi.

must the government revise existing statutory legislation to ensure that it is in line with constitutional principle of equality, it must also engage in institutional, educational and other measures which ensure that women's *de jure* rights are translated into practice. This requires, among other things, measures which enhance women's access to the justice system and guarantee that they are given equal treatment by those who apply the law. In plural legal settings, such as the Kenyan one, this implies engaging with different socio-legal levels and mechanisms of dispute resolution which are guided by different and at times conflicting sets of norms.

Human rights actors have tended to focus on the statutory legal system for protecting women's rights, while dismissing customary law and local dispute settlement mechanisms applying such law as, by nature, discriminatory towards women and in conflict with human rights.<sup>9</sup> This view is problematic for a number of reasons. Firstly, it overlooks the central role customary law and dispute resolution structures continue to play in the daily lives of rural women and men. Secondly, it is based on an essentialist conception of culture, and the customs pertaining to such, which deprives it of its dynamic character and, consequently, limits possibilities for change from within. Thirdly, it strongly overestimates the power of statutory law to shape social and cultural norms, in particular in a context where the majority of the population does not have access to the formal court system. At the same time it ignores that the statutory legal system itself is not very women friendly.

This thesis will argue that the question is not one of privileging one system over the other but rather one of understanding how both systems work and seeking to identify the limitations and potential opportunities they pose for the protection of women's land rights. In how far are women's land rights protected by the Kenyan statutory legal system; which limitations does the system face? Which role do local dispute settlement bodies play in advancing (or undermining) women's land rights; are they *per se* in conflict with women's human rights? In how far does international human rights law recognize and protect women's human rights; which standards and obligations does it set with regard to local dispute settlement mechanisms? Which steps has the Kenyan government taken, or committed to take, to eliminate discrimination against women in relation to land; which is its approach to local-dispute settlement bodies?

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<sup>9</sup> Claassens & Mnisi, 2009, p. 491, Nyamu-Musembi, 2002, p. 126.

## **1.2 Methods and Material**

The second chapter will analyse the legal and socio-cultural context in which discrimination against women in relation to land takes place. The focus will be on the processes through which rights are secured and the interplay, in this regard, of socio-cultural and legal norms. The third chapter will discuss the protection of women's land rights under international law and identify the obligations which it imposes on governments. The fourth chapter will analyse the measures taken by the Kenyan government (in collaboration with donors and NGOs) to comply with its international human rights law obligations and its own constitution with regard to eliminating discrimination against women in relation to land. The focus will be on local dispute settlement mechanisms and how such can be improved to work better for women. While the study will also consider Uganda and Tanzania, who have many historical, cultural and legal features in common with Kenya, the overall focus will be on Kenya. This allows a more in depth analysis (which is necessary for the purpose of the study) and helps avoid generalisations.

The thesis will be throughout interdisciplinary, positioning itself primarily within anthropology, development studies and law. Material will, correspondingly, also be drawn from a wide range of sources, including (1) anthropological, legal and development literature; (2) NGO, governmental and donor reports; (3) international and domestic law, treaty body case law and general comments and reports by UN Special Rapporteurs.

## 2. Women's Land Rights in Kenya: Law and Practice

### 2.1 The importance of land rights for women

The majority of Africa's population lives in rural areas and depends on subsistence farming for their livelihoods.<sup>10</sup> Land provides men, women and children alike with shelter, food and water while being the principal means of agricultural production. It is not simply a commodity but is intrinsically linked with the social and cultural lives of the different communities inhabiting it. Families and communities, therefore, seek to retain control over land within their kinship group, making inheritance the primary means by which land is transferred.<sup>11</sup> Inheritance patterns in most African communities are patrilineal, meaning that land is passed on from fathers to sons.<sup>12</sup> Daughters are expected to leave their natal home upon marriage and become part of their husband's family through whom they will access land. Until then, they may access land through their fathers, brothers or other male relatives. More complicated, however, is the situation of widows and, in particular, of divorced women. Their access to land is, among other factors, highly dependent on their relations with their in-laws and the negotiation power they hold.

Control over land, as the principal means of production, is an important source of economic and political power in rural areas.<sup>13</sup> Women's lack of control over land, resulting from unequal inheritance rights, lies at the heart of power inequalities between men and women.<sup>14</sup> Women's inferior socio-economic position leads to their exclusion from decision-making processes and consequently serves to uphold male control and dominance. Socio-economic and political inequality thus mutually reinforce each other and ensure female dependency and subordination.

Women's historic exclusion from law making, independent of the legal system one talks about, has been central to the maintenance of unequal gender relations.<sup>15</sup> It has led to the selective translation of social norms into legal provisions which, as a result, fail to reflect the perspectives of women. In addition, women are often excluded from participation in bodies

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<sup>10</sup> Lund et Al., 2006, p. 4.

<sup>11</sup> Harrington, 2010, pp. 6-8, Banda, 2005, p. 150.

<sup>12</sup> Benschop, 2002, pp. 41-43.

<sup>13</sup> Royal Tropical Institute & Oxfam 2001, pp. 9-10.

<sup>14</sup> Ibid.

<sup>15</sup> Chanock, 1989, pp. 72-88, MacKinnon 1989, pp.237-249.

which interpret and enforce the law. The outcome is a legal system which is structurally biased against women and, as such, serves to perpetuate gender inequality.

Women's unequal access to and control over land carries significant consequences for women's enjoyment of their human rights. It places women in a position of insecurity and male dependency, limiting their intra-family negotiating power and making them vulnerable to violence and abuse by their husbands and in-laws. Women who separate from or divorce their husbands (or are divorced by them) rarely get any share in the matrimonial property, even where such was acquired or improved through joint effort.<sup>16</sup> Where they have no relative to take them in and little resources of their own, they either become homeless or are forced to move together with their children to urban slums where they lack decent housing conditions, sanitation and personal security.<sup>17</sup> Many women, therefore, see no other option than to remain in abusive relationships.<sup>18</sup>

While widows traditionally had a life interest in their husband's land and enjoyed the protection and support of their husband's family, they increasingly face risks of eviction and abuse by in-laws.<sup>19</sup> Growing land scarcity, privatisation of land tenure and individual greed resulting from capitalism and urbanisation have eroded many of the traditional safety nets of widows and rural women in general.<sup>20</sup> Similar to separated or divorced women, widows who have been evicted from their matrimonial land are often left with no other option but to become urban slum dwellers and/ or to engage in sex or other exploitative work for survival. The HIV/ AIDS epidemic, in turn, has left many women homeless, when their husbands or in-laws sold off family land without their knowledge.<sup>21</sup> On the other hand, women's lack of property rights increases their vulnerability with regard to contracting sexually transmitted diseases. It diminishes their ability to negotiate safe sex and drives widows into accepting harmful customary practices such as wife inheritance or cleansing in order to avoid eviction.<sup>22</sup>

## **2.2 National legal context and socio-cultural practice**

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<sup>16</sup> Federation of Women Lawyers Kenya (FIDA-K) & International Women's Human Rights Clinic, 2009, pp. 37-38.

<sup>17</sup> Human Rights Watch, 2003, p. 30.

<sup>18</sup> Ibid.

<sup>19</sup> Banda, 2005, pp. 149-150.

<sup>20</sup> Ibid., See also Englert & Daley, 2008, pp. 1-14.

<sup>21</sup> Ong'wen Okuro, 2008, pp. 121-137.

<sup>22</sup> Human Rights Watch, 2003, pp. 30-31.

### *2.2.1 Women's land rights in the new Kenyan Constitution*

In August 2010, after more than 20 years of struggle for constitutional reform, Kenya signed its new Constitution into law. The Constitution brings many essential and long overdue reforms for Kenyans, including in the area of land.<sup>23</sup> In contrast to the previous Constitution of 1963, it recognizes the importance of land to which it dedicates an entire chapter, rather than simply merging it with property. For Kenyan women, the new Constitution carries a number of significant gains.

One fundamental change has been the extension of the non-discrimination and equality provision to customary law. Article 27 of the Constitutional Bill of Rights protects women and girls from direct and indirect discrimination and guarantees their equality before and under the law. Article 2 (4) declares any law, including customary law, which is incompatible with the Constitution as void to the extent of the inconsistency. This stands in sharp contrast to the 1963 Constitution which, in Section 82 (4), exempted customary and religious family laws from the application of the equality provision, thereby officially sanctioning discrimination against women in areas which traditionally have been most disadvantageous for them. In placing customary law under the scrutiny of the Constitutional Bill of Rights, Kenya has finally caught up with other states in the region, such as Uganda, Tanzania and South Africa. Regrettably, however, Article 24 (4) of the new Constitution still makes an exemption from the equality provision for Muslims in matters relating to civil status, marriage, divorce and inheritance, which are to be dealt with by Kadhis' Courts in accordance with Islamic Law.

The new Constitution calls for legislative and other measures, including affirmative action and policies, to ensure women's right to equality and redress disadvantages resulting from past discrimination (Article 27 (6)). With regard to women's participation in public decision making, it requires that at least one third of members in elective or appointed public bodies must be women (Article 27 (8) and 81 (b)).

The Constitution also contains a number of provisions which are explicitly directed towards protecting women's land rights. Article 60 (1) (a) (f) eliminates discrimination in law, custom and practice against women and girls with regard to land and property and guarantees women's equal access to land. Article 60 (2) requires that principles contained in Article 60

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<sup>23</sup> For a brief historical overview on the land problematic in Kenya, see African Centre for Technology Studies, 2008.

(1) are implemented through legislation as well as through the development and review of a national land policy. It thereby gives the National Land Policy of 2009 (which will be discussed in detail in Chapter 4) constitutional backing.

Article 68 (c) (iii) (vi) provides for the enactment of legislation which recognizes and protects matrimonial property during marriage and its dissolution and which protects the land rights of widows and widowers. Article 63 (4) protects the interests of women in community land, whether registered or not.

## 2.2.2 *Women's land rights under the statutory legal system*

### 2.2.2.1 The impact of land registration on women's property rights

In Kenya, land ownership, control and access are regulated through a complex and confusing system of statutory, religious and customary law.<sup>24</sup> Over 75 different laws, many outdated and conflicting, create legal uncertainty and room for arbitrary interpretation of the law, more often than not to the disadvantage of women.<sup>25</sup> Discrimination against women in relation to land is to a large extent rooted in statutory law and its interplay with customary and religious<sup>26</sup> laws and practices. The few statutory provisions which seek to protect women's land rights are unclear, discriminatory and limited in their application to certain categories of women.<sup>27</sup> Gender neutral provisions, on the other hand, often ignore existing gender power inequalities, leading to such provisions having an indirectly discriminatory effect on women.<sup>28</sup> The formalisation of land ownership rights in Kenya, as well as in other East African countries, is one much criticized example in this respect, which has resulted in the strengthening of men's absolute ownership rights while further diminishing women's usage rights under customary land tenure.<sup>29</sup>

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<sup>24</sup> Kenya Land Alliance (KLA) & FIDA-K, 2006, p. 1.

<sup>25</sup> Ibid.

<sup>26</sup> Due to the limited scope of this study, I will not go further into religious law but focus on statutory and customary law only.

<sup>27</sup> See below discussion on Married Women's Property Act and Law of Succession, Section 2.2.2.2 and 2.2.2.3.

<sup>28</sup> Kameri-Mbote, 2006, pp. 43-48.

<sup>29</sup> For an excellent compilation of case studies illustrating the impact of land tenure privatisation on women's land rights in Eastern Africa, see Englert & Daley, 2008. See also Ik Dahl et Al. 2005.



The promotion of individual ownership of land in East Africa, and Kenya in particular, goes back to colonial times. While initially supporting communal tenure systems in view of political stability, from the 1930s onwards colonial administrators increasingly understood customary tenure as an impediment to agricultural development and economic growth and started promoting individual ownership of land.<sup>30</sup> Private ownership of land, based on Western notions of property rights, was seen as an essential element for agricultural investment and expansion of land markets.<sup>31</sup>

Kenya was the first country in East Africa to introduce tenure reform based on individual ownership as a means of increasing tenure security and triggering agricultural investment and development.<sup>32</sup> Formal registration of land rights for Africans began in the 1950s and remained government policy until recently.<sup>33</sup> During the 1980s, a number of case studies from Kenya and Sub-Saharan Africa in general found that rather than promoting tenure security, land titling had in fact resulted in increased insecurity, inequality and conflicts in the region.<sup>34</sup> They pointed to the negative effect titling had had on particular groups, including women, who had become more vulnerable to exclusion from land; the registration process failed to capture the rights they had hitherto enjoyed under customary tenure.<sup>35</sup> At the same time other studies, focussing on the economic impact of titling, showed that rather than enhancing investment and efficiency titling led to a concentration of land in the hands of economic and political elites, resulting in an under-utilisation of that land.<sup>36</sup> After being widely abandoned in the 1990s, the causal link between private ownership and economic development has recently gained fresh ground with the work of Hernando de Soto.<sup>37</sup>

The negative impact of land tenure formalisation on rural women and other marginalised groups lies in the narrow conception of rights upon which it is based. It vests absolute ownership with the title holder and fails to recognize the interests other people hold in the land. While women do not own land under customary tenure, they have secondary or derivative rights which entitle them to access land through their male relatives.<sup>38</sup> Men, on the other hand, have no exclusive ownership rights over land either but rather hold it in trust for

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<sup>30</sup> Whitehead & Tsikata, 2003, p. 4.

<sup>31</sup> Ochieng Odhiambo, 2006, p. vi.

<sup>32</sup> Walker, 2002, p. 52.

<sup>33</sup> Whitehead & Tsikata, 2003, p. 4.

<sup>34</sup> Whitehead & Tsikata, 2003, p. 5.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> de Soto, 2000. See Nyamu-Musembi, 2008, pp.18-35, for a critical assessment of de Soto's work.

<sup>38</sup> Benschop, 2002, p. 41.

the entire family and must take the needs of other family members into account when making decisions regarding the family land.<sup>39</sup> The translation of customary rights into formal rights has failed to capture secondary rights and has, thereby, strengthened men's absolute ownership rights and effectively extinguished customary claims to land held by women.<sup>40</sup>

In Kenya, there are three categories of land: Public Land, Community Land<sup>41</sup> and Private Land.<sup>42</sup> Agricultural land runs through all three categories.<sup>43</sup> The Registered Land Act (RLA)<sup>44</sup> was adopted by the Kenyan post-independence government as part of a land reform programme aiming to convert communal land ownership, based on customary tenure systems, into private land ownership, based on the British system.<sup>45</sup> Sections 27 and 28 of the RLA provide the title holder with absolute ownership rights, while relieving him (or her) from all other claims held in relation to that land:

The registration of a person as the proprietor of land *shall vest in that person the absolute ownership* of land together with all rights and privileges belonging or appurtenant thereto;<sup>46</sup>

The rights of a proprietor (...) shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, *free from all other interests and claims* whatsoever (...)<sup>47</sup>

The Act fails to give legal recognition to the customary claims to land held by women and instead maintains that such cease to exist upon formal registration. The failure to legally recognize women's customary entitlements in a context where the majority of women's access to land is based on such, leads to increased insecurity among women living on land registered in their husband's, father's or brother's name.<sup>48</sup> While judgements made by the High Court in the 1970s have been inconsistent as to whether or not customary rights can qualify individual ownership rights held under the Act,<sup>49</sup> a judgement by the Court of

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<sup>39</sup> Adoko & Lavine, 2008, pp. 108-109.

<sup>40</sup> Nyamu-Musembi, 2008, pp. 32-35.

<sup>41</sup> Previous to the 2010 Constitution 'Trust Land'.

<sup>42</sup> Kenya Constitution, 2010, Chapter V.

<sup>43</sup> FIDA-K & International Women's Human Rights Clinic, 2009, p. 12.

<sup>44</sup> Registered Land Act, 2009 (1989), Cap. 300 of the Laws of Kenya.

<sup>45</sup> Harrington & Chopra, 2010, p. 3.

<sup>46</sup> Section 27(a) RLA, 2009 (1989), emphasis added.

<sup>47</sup> Section 28 RLA, 2009 (1989) emphasis added.

<sup>48</sup> Nyamu-Musembi, 2008, pp. 32-33.

<sup>49</sup> Kameri-Mbote, 2006, p. 45.

Appeal<sup>50</sup> in 1988 has confirmed the absolute nature of ownership rights under the Act.<sup>51</sup> In its ruling, the Court held that a wife's customary entitlements cease to exist once the land is formally registered in her husband's name.

While there is no legal provision preventing women from registering land in their names or jointly with their husbands, in practice this rarely happens due to the highly gendered context in which titling takes place.<sup>52</sup> The superior economic and social position of men and their perceived role as the head of the family has led to family land being primarily registered in the names of the men.<sup>53</sup> Women who have tried to subsequently include their names on matrimonial property titles have faced not only bureaucratic hurdles but also discriminatory attitudes among officials.<sup>54</sup> In Kenya, titling initiatives were clearly directed towards men.<sup>55</sup> Women were represented neither in the adjudication committees in charge of demarcating land and determining ownership nor in meetings where titling was discussed.<sup>56</sup> As a result, only 3 percent of registered land titles are held by women<sup>57</sup> and only five to six percent are held jointly.<sup>58</sup> While the Registered Land Act allows for joint ownership, there is, unlike in other countries such as Tanzania, no presumption on spousal co-ownership.<sup>59</sup> While the Act itself is gender-neutral, its application in a gendered context leads to its having a highly discriminatory effect on women.<sup>60</sup> It strengthens men's ownership rights at the expense of women's usage rights and, by doing so, reinforces existing gender inequality with regard to land.<sup>61</sup>

The registration of matrimonial property solely in the name of the husband while failing to give legal recognition to women's customary entitlements has severely impacted on women's ability to claim their land rights under statutory law. The following sections will illustrate this.

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<sup>50</sup> The Court of Appeal is the second highest court in Kenya (under the Supreme Court).

<sup>51</sup> *Elizabeth Wangari Wanjohi & Elizabeth Wambui Wanjohi v. Official Receiver & Interim Liquidator (Continental Credit Finance Ltd.)*, Civil Application NAI No. 140 of 1988 in Nyamu-Musembi, 2008, p. 33.

<sup>52</sup> Kameri-Mbote, 2006.

<sup>53</sup> Benschop, 2002, p. 49, Nyamu-Musembi 2008, pp. 32-35, Kenya Land Alliance cited in FIDA-K & International Women's Human Rights Clinic, 2009, p. 14.; Harrington & Chopra, 2010, p.3.

<sup>54</sup> Ik Dahl, 2008, p. 53 (case study on Tanzania).

<sup>55</sup> Walker, 2002, p. 52.

<sup>56</sup> Ibid.

<sup>57</sup> CEDAW, CEDAW/C/KEN/7 (State report, 2010), para. 95.

<sup>58</sup> KLA & FIDA, 2006, p. 1.

<sup>59</sup> Benschop, 2002, p. 154. However, it is questionable how well the presumption on spousal co-ownership in Tanzania works, See Ik Dahl, 2008, pp. 51-55.

<sup>60</sup> Kameri-Mbote, 2006, p. 45.

<sup>61</sup> Nyamu-Musembi, 2002, p. 33.

### 2.2.2.2 Protection of matrimonial property during marriage and upon divorce or separation

Marriage and divorce in Kenya are regulated through a wide range of partly overlapping laws.<sup>62</sup> The State recognizes five different types of marriages, each of which is subject to a different legal regime:<sup>63</sup> civil,<sup>64</sup> Christian,<sup>65</sup> Hindu,<sup>66</sup> Muslim<sup>67</sup> and customary<sup>68</sup>. In contrast to the others, customary marriages are not formally registered. Both Muslim and customary marriages are potentially polygamous, whereas the other three must be monogamous. While Kenyan law does not allow the ‘mixing’ of marital regimes, in practice it is not uncommon for a man to marry various wives under different regimes, given that there are separate registries, or no registry at all in the case of customary marriages.<sup>69</sup> This not only leads to legal confusion but also risks leaving such women outside the protection of the law.<sup>70</sup>

Significant gaps as well as judicial uncertainty prevail in the existing legal framework with regard to protecting women’s property rights during marriage and its dissolution. The Married Women’s Property Act, an antiquated British law dating back to 1882, is the only legislation which governs the division of matrimonial property in cases of divorce.<sup>71</sup> While the Act guarantees spouses’ equal rights to own property, it does not define matrimonial property nor does it provide any guidance on how such property should be divided upon divorce or separation.<sup>72</sup> The original purpose of the law was to protect women’s right to hold and dispose of property independently and without guardianship from their husbands, rather than protect women’s interest in matrimonial property.<sup>73</sup> The Act gives judges wide discretion in deciding on property disputes:

‘In case of any question or dispute between husband and wife as to the title to or possession of property, either party may apply to any judge of the high court. The judge may make such orders with respect to the disputed property *as he thinks fit*.’<sup>74</sup>

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<sup>62</sup> FIDA-K & International Women’s Human Rights Clinic, 2009, p.16.

<sup>63</sup> Ibid.

<sup>64</sup> Marriage Act, 1902, Cap. 150 (Kenya).

<sup>65</sup> African Christian Marriage and Divorce Act, 1931, Cap. 151 (Kenya).

<sup>66</sup> Hindu Marriage and Divorce Act, 1960, Cap. 157 (Kenya).

<sup>67</sup> Mohammedan Marriage, Divorce and Succession Act, 1806, Cap. 156 (Kenya).

<sup>68</sup> Regulated by the various customary laws pertaining to the 42 different ethnic groups.

<sup>69</sup> Human Rights Watch, 2003, p. 8, Banda, 2005, pp. 114-116.

<sup>70</sup> Banda, 2005, p. 115.

<sup>71</sup> FIDA-K & International Women’s Human Rights Clinic, 2009.

<sup>72</sup> Married Women’s Property Act, 1882, Section 1 (Kenya).

<sup>73</sup> FIDA-K & International Women’s Human Rights Clinic, 2009.

<sup>74</sup> Married Women’s Property Act, 1882, Section 17 (Kenya).

The complete lack of guidance on what constitutes matrimonial property, and how such property should be divided in case of divorce or separation, has resulted in Kenyan courts applying the Act in an inconsistent and arbitrary manner, in particular when it comes to determining women's contribution to matrimonial property.<sup>75</sup> Since most property is registered in the name of the husband and the Act does not presume co-ownership, it is up to women to prove their contribution. While a series of court cases had extended the interpretation of contribution to include women's non-monetary contributions,<sup>76</sup> a recent judgment by the Court of Appeal has rejected this progressive standard. In *Echaria v. Echaria*,<sup>77</sup> the Court dismissed women's non-monetary contributions to matrimonial property, thereby effectively eliminating claims by non-salaried wives to property held in their husband's name. This restrictive interpretation seriously undermines women's ability to claim their rightful share in matrimonial property, given that only a very limited number of rural women have the opportunity to engage in paid employment. It ignores women's immense domestic contribution, including subsistence farming, household duties and child bearing, and the fact that women's income (where such exists) is commonly spent on consumables for the family.<sup>78</sup>

Women in customary marriages face additional hurdles in asserting their statutory rights to matrimonial property, due to the fact that customary marriages are not registered and, therefore, may be hard to prove before the court.<sup>79</sup> While courts have interpreted the Married Women's Property Act as covering customary and Muslim marriages, most women are not aware of the entitlements they have under the Act.<sup>80</sup> Under customary law women have no right to a share in matrimonial property; in some communities they are in fact themselves considered property.<sup>81</sup>

Women not only face difficulties in claiming their equal share (or any share at all) of matrimonial land at divorce or separation but also have little control over such land during marriage. There is not a single law which protects women's rights over matrimonial property during marriage, where such is registered solely in the name of the husband. Transfers in

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<sup>75</sup> FIDA-K & International Women's Human Rights Clinic, 2009, Benschop, 2002, pp. 163-164.

<sup>76</sup> Benschop, 2002, pp. 163-164; See for example *Kivuiti vs Kivuiti* 1985, (1991), Civil Appeal No. 26 eKLR (Kenya) or *Tabitha Wangechi Nderitu vs Simon Nderitu Kariuki* (1997), Civil Appeal No. 203, eKLR (Kenya).

<sup>77</sup> *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A) (Kenya).

<sup>78</sup> Banda, 2005, p. 132.

<sup>79</sup> KLA & FIDA-K, 2006, p. 2, See also Banda, 2005, pp. 112-114.

<sup>80</sup> Benschop, 2002, p. 164.

<sup>81</sup> Human Rights Watch, 2003, FIDA-K & International Women's Human Rights Clinic, 2009, pp. 52-53.

agricultural land are regulated by the Land Control Act (LCA) and subject to approval by the Land Control Boards.<sup>82</sup> The main objective of the LCA is to avoid sub-division of land into uneconomical parcels.<sup>83</sup> Despite a non-binding administrative decree from the 1980s which instructs Land Control Boards to take the interests of all adult family members into account when approving land transactions, this is not common practice.<sup>84</sup> There are various reasons to why the boards fail to make land sales and mortgages conditional on the consent of wives and adult children. One such reason is the exclusion of women from sitting on the boards and the resulting lack of attention accorded to women's needs and concerns.<sup>85</sup> Other reasons include corruption among officials and presentation of "fake" wives.<sup>86</sup> Judges, on the other hand, have also failed to protect the spouse's right to be consulted before land sales. The case *Jacinta Wanjiku Kamau vs. Isaac Kamau Mungai & Ndirangu Gitigi* demonstrates the reluctance of courts to protect women's rights over matrimonial property where such has been registered in the husband's name.<sup>87</sup> In the given case, the Court of Appeal ruled that it is neither established practice nor legal obligation to consult one's spouse before disposing of land registered in one's name.

Another factor which significantly affects women's ability to control their matrimonial land is that most land transactions take place outside the law and are therefore not subjected to the approval of Land Control Boards.<sup>88</sup> Research carried out by Ong'wen Okuro in Kombewa Division, Kenya, shows how women's lack of control over matrimonial property has been exacerbated in the era of HIV/AIDS, where husbands and in-laws sell off family land for medical bills and related expenses without consulting their wives who are living on the land.<sup>89</sup> Such land sales, which are usually informal and only involve the chief or assistant chief at the last instance, have resulted in increased land and homelessness of widows and their children, making them even more vulnerable to extreme poverty and disease.<sup>90</sup> Women married under customary law face particular risks of dispossession by their in-laws. The fact that their

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<sup>82</sup> Land Control Act, (2004), Cap. 302 (Kenya).

<sup>83</sup> Kenya Land Alliance, 2006, p. 11.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Human Rights Watch, 2003, p. 33.

<sup>87</sup> Court of Appeal, Civil Appeal No. 59 of 2001 (Kenya)

<sup>88</sup> Ong'wen Okuro, 2008. p. 129.

<sup>89</sup> Ibid., pp. 125-128.

<sup>90</sup> Ong'wen Okuro, 2008, See also Human Rights Watch, 2003.

marriages are not officially registered can make it hard for them to prove their entitlements and challenge decisions made to sell their matrimonial land.<sup>91</sup>

Polygamous marriages pose additional threats to women's property rights during marriage. Since the husband is the one controlling the matrimonial land he may without consent of his first wife allocate land to additional wives or use part of it as dowry.<sup>92</sup> There is no law requiring women's consent to additional wives, leaving women with no other choice than sharing their land as well as its produce with co-wives and their families.<sup>93</sup>

The Marriage Bill 2007 and the Matrimonial Property Bill 2007, both awaiting approval by Parliament, are attempts to harmonize the different marriage regimes and offer uniform protection to women married under the various regimes. The latter will be the first statutory law to explicitly address the issue of matrimonial property and protect spouses' equal interest in matrimonial property during marriage and upon its dissolution, independently of their contribution and the name of the title holder.<sup>94</sup> The continuous shelving of the bills shows how reluctant (male) decision-makers are in advancing women's rights in the fields of marriage and property rights.

### 2.2.2.3 Access to land through inheritance: Widows and daughters

In most East African communities land inheritance is patrilineal, the land being inherited by sons or other male relatives. Daughters are expected to leave their paternal homes once they marry and access land through their husbands and in-laws. This places women in a position of socio-economic dependency and limits their decision and bargaining power within the family and the community at large. The lack of land 'of their own' also renders women vulnerable to eviction when their husbands die.<sup>95</sup> Land grabbing by in-laws has become a major problem, in

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<sup>91</sup> Ong'wen Okuro, 2008, p. 130-131.

<sup>92</sup> FIDA-K & International Women's Human Rights Clinic, 2009, pp. 32-34.

<sup>93</sup> Ibid.

<sup>94</sup> Matrimonial Property Bill, 2007, Section 8: 'Ownership of matrimonial property, shall be deemed to vest in the spouses in *equal shares irrespective of the contribution* of either of them towards the acquisition thereof, and shall be divided accordingly upon the occurrence of divorce or dissolution of the marriage provided that in appropriate circumstances a determination can be made during the subsistence of the marriage.' Section 1 defines matrimonial property as: '(a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; (c) immovable property, *owned by either spouse* which provides the basic income for the sustenance of the family; (d) any other property acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property.'

<sup>95</sup> Banda, 2005, pp. 148-157.

particular in connection to HIV/AIDS.<sup>96</sup> Most men do not write wills as they expect the wider family to take care of their spouses after their death. However, due to capitalism and urbanization as well as increased land scarcity this ‘collective accountability’ is slowly eroding.<sup>97</sup> Without a will, formal land title or even a marriage certificate, widows are left at the mercy of their in-laws. Their security of tenure then depends to a great degree on their personal characteristics, such as their age and the number and gender of their children, and the relation they have with their husband’s family.<sup>98</sup>

How does statutory law protect the land rights of widows? Are daughters accorded equal inheritance rights to those of sons? Since the 1980s African governments have tried to put legislation into place which would safeguard women’s inheritance rights.<sup>99</sup> This move has been influenced by development concerns, as well as by pressure from national and international NGOs and Treaty Bodies, such as CEDAW or the African Commission on Human Rights, which require governments to report on the inheritance rights of widows and daughters.<sup>100</sup> Changes introduced to the inheritance regime have, not surprisingly, met with the resistance of those who historically have been privileged by unequal inheritance rules.<sup>101</sup> While most disputes relating to inheritance never reach the courts, even those that do are subject to uneven and often gender-biased interpretation of the law.<sup>102</sup>

The Kenyan Law of Succession Act<sup>103</sup> was adopted in 1972 in an effort to harmonize different succession regimes and offer better protection to Kenyan women.<sup>104</sup> In 1990, the Act was amended to exempt Muslims from its application.<sup>105</sup> The Act applies to both testate and intestate succession, which is the most common form of succession in Africa. With regard to intestate succession, the Act directly discriminates against women in a number of ways. In addition, some judges have applied even gender-neutral provisions in a discriminatory manner.

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<sup>96</sup> Human Rights Watch, 2003, p. 30., Harrington & Chopra, 2010, p.4.

<sup>97</sup> Banda, 2005, p. 149, Harrington & Chopra, 2010, p.4.

<sup>98</sup> Maragia, 2008, p. 350.

<sup>99</sup> Banda, 2005, p. 150.

<sup>100</sup> Ibid.

<sup>101</sup> Banda, 2005, p. 152.

<sup>102</sup> Ibid.

<sup>103</sup> Law of Succession Act, 2010 (1981), Cap 160 (Kenya).

<sup>104</sup> Harrington, 2008, p. 19.

<sup>105</sup> See Law of Succession, Section 2.



While the Act entitles both widows and widowers to a life interest in the net estate of the deceased, for widows this interest terminates upon remarriage.<sup>106</sup> Rather than owning the land, the widow holds it in trust for her children upon whom the land devolves upon her death or remarriage.<sup>107</sup> This effectively limits the ability of widows to sell or dispose of inherited property or to include it in their will.<sup>108</sup> While the Law of Succession extends to women married under customary law, the fact that a widow must establish her marital status in order to claim rights under the Act effectively excludes many women in non-registered customary marriages.<sup>109</sup>

The Act provides that all children, regardless of their sex and marital status, have a right to equal shares in their parent's property.<sup>110</sup> Despite the clear provisions of the Act, courts have at times applied the Act in a discriminatory way, ruling that married daughters have no right to their father's property.<sup>111</sup>

In 1981, the Act was amended<sup>112</sup> to recognize the equal rights of wives and children in polygamous unions, whose husband had entered a monogamous marriage prior or subsequent to their marriage.<sup>113</sup> While commended for reflecting Kenyan reality and offering wider protection for women in polygamous marriages, the amendment has also been criticized for curtailing the rights of wives in monogamous marriages.<sup>114</sup> It erodes the security for which such women have chosen monogamous marriages and forces them to share their inheritance with other wives and their children whom they may meet for the first time at their husbands' funeral.<sup>115</sup> Courts have applied the section inconsistently, sometimes allowing for the inheritance of subsequent wives and their children and sometimes not.<sup>116</sup>

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<sup>106</sup> Section 35 (1) and 36 (1)

<sup>107</sup> Section 35 (5)

<sup>108</sup> Benschop, 2002, pp. 167, 171.

<sup>109</sup> KLA and FIDA-K, 2006, p. 2.

<sup>110</sup> Section 38.

<sup>111</sup> *Estate of Njeru Kamanga [deceased]*, Succession Case No. 93 of 1991 (unreported) in Benschop, 2002, p. 168.

<sup>112</sup> Act No. 10 of 1981 added section 3(5).

<sup>113</sup> Kameri-Mbote, 1995, pp. 15-16.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *The Matter of the Estate of Duncan Kiiru Karuku (Deceased)*, Succession case No. 74 of 1987 and *The Matter of the Estate of Reuben Mutua Nzioka*, Succession case No. 843 of 1986, cited in Kameri-Mbote, 1995, p. 16.

Furthermore, the Act is problematic in that it excludes certain gazetted areas of agricultural land, unless registered under the Registered Land Act, from its application.<sup>117</sup> Intestate succession in these areas is governed by customary laws which deny women the right to inherit their parents' property.<sup>118</sup>

While existing case law on women's land rights can provide important insight into the inconsistent and often biased application of statutory legislation, the picture it paints is a fairly limited one, given that very few cases reach the High Court and the Court of Appeal, which are the only courts whose judgements are recorded in Kenya.<sup>119</sup> The majority of disputes relating to the control, division or inheritance of land are dealt with either by local tribunals applying customary law, or informally by local authorities, such as chiefs or elders.<sup>120</sup> Such decisions are not recorded anywhere and are therefore difficult to evaluate.

Most rural women have limited knowledge regarding their statutory entitlements and lack capacity to challenge discriminatory customary practices through the court system. However, even in the rare occasion when a woman has both the knowledge and the financial means to bring her case before court and win, it will in practice not be easy for her to enjoy her land where such is surrounded by hostile family members.<sup>121</sup> In general, women have the desire to maintain good relations with their family and in-laws and, therefore, refrain from claiming their entitlements through the court system.<sup>122</sup> The extended family continues to play an important role in the African context; it provides women and their children with a sense of belonging at the same time as constituting an important safety net in the absence of a functioning welfare system.<sup>123</sup> There are many other social and cultural barriers which prevent women from claiming their rights, including fear of being accused of witchcraft and made responsible for their husband's death.<sup>124</sup> Women's position as outsiders in the community they marry into plays an important role in the creation of such barriers and leads to even

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<sup>117</sup> Areas include: Wajir, West Pokot, Turkana, Tana River, Garissa, Marsabit, Isiolo, Mandera and Lamu, see Harrington, 2008, p. 20.

<sup>118</sup> Benschop, 2002.

<sup>119</sup> International Development Law Organisation (IDLO), 2010, p. 133.

<sup>120</sup> Benschop, 2002, p. 170, Harrington & Chopra, 2010, p.6, Henrysson & Joireman, 2009, Ong'wen Okuro, 2008.

<sup>121</sup> Benschop, 2002, p. 170.

<sup>122</sup> Armstrong, 2000, pp. 91-92.

<sup>123</sup> Ibid. p. 91.

<sup>124</sup> Banda, 2005, pp. 153-154.

middle class women who know their legal rights not claiming their full property entitlements.<sup>125</sup>

### 2.2.3 *Women's land rights in customary law and practice*

#### 2.2.3.1 Conceptualising customary law

The majority of disputes relating to matrimonial property and inheritance are solved within family or clan structures. Where no agreement can be reached at this level, the case is taken to local dispute settlement bodies which apply and are guided primarily by customary law. Given the central role such bodies play in solving land disputes in rural areas, it is important to understand their way of functioning as well as the nature and content of the law they apply. As a first step, it is helpful to distinguish between what Woodman terms 'lawyers' customary law', referring to the law applied in courts and state-sponsored tribunals, and 'sociologists' customary law', denoting the social norms which govern peoples' behaviour.<sup>126</sup> The former notion, which tends to dominate the discourse on legal pluralism, is an excessively legal one.<sup>127</sup> Customary law as applied by courts has been shown to be largely constructed by the colonial administration in an attempt to systemize customary practices and frame them in Western legal terminology.<sup>128</sup> Not only does it reflect a selective interpretation of customary practices, it also deprives them of their dynamism and flexibility, resulting in a static and, correspondingly, archaic version of custom. The second notion, on the other hand, understands customary law as shaped by actual practices and, in this sense, as inherently flexible and responsive to changing circumstances.

The two notions of customary law differ fundamentally and consequently lead to very different conclusions regarding the possibilities of constructively engaging with customary law and the institutions which interpret and apply such law. While some human rights activists have called for the abolition of customary law and institutions, which they perceive as 'backward' and by their very nature discriminatory and in conflict with human rights,<sup>129</sup> others have chosen a more pragmatic approach which seeks to engage with and *transform*

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<sup>125</sup> Ibid.

<sup>126</sup> Woodman 1985 in Whitehead & Tsikata, 2003, p. 7.

<sup>127</sup> Whitehead & Tsikata, 2003, pp. 6-7.

<sup>128</sup> Ibid., pp. 6-8.

<sup>129</sup> Ibid., pp.18-21.

customary law and the structures applying such law.<sup>130</sup> Courts have also varied in the way they have interpreted customary law, some applying it in a rigid and archaic manner while others, including the South African Supreme Court, have emphasized that customary law is a 'living instrument' which should be interpreted in the light of changing circumstances.<sup>131</sup>

Those who argue for the abolition of customary law and prefer to look to the statutory legal system for solutions, tend not only to overlook the central role customary norms and institutions play in terms of governing the daily lives of rural women and men but also significantly overestimate the power of statutory law. While statutory law no doubt plays an important role in influencing and shaping local norms, its limitations as a tool for social and cultural change must be kept in mind, in particular in a context where the institutions enforcing such law remain inaccessible to the majority of the population. In addition, as the previous section has shown, statutory law and courts are not necessarily more favourable towards women. Those who pass statutory legislation in parliament and those who apply and interpret it in courts are not only predominantly men but often, despite their education and legal training, continue to be bound by socio-cultural norms and attitudes which discriminate against women.

#### 2.2.3.2 The development of legal pluralism in East Africa

The unreliability of oral transmissions and the colonial distortion of customary systems make it difficult to assert the content and nature of pre-colonial customary law.<sup>132</sup> Nevertheless, some (assumed) features regarding pre-colonial land tenure and the underlying socio-legal systems can be outlined in order to provide a better understanding.

Prior to the advent of colonisation, the various ethnic groups in East Africa had their own legal systems based on their traditions and practices.<sup>133</sup> Elders and clan leaders were in charge of enforcing custom and solving disputes among community members.<sup>134</sup> Land was held communally, with different family or clan members having different rights and obligations. In

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<sup>130</sup> Claassens & Mnisi, 2009, p. 491, Nyamu-Musembi, 2002, Englert & Daley, 2008,.

<sup>131</sup> Claasens & Mnisi, p. 494, Nyamu-Musembi, 2003, p. 12.

<sup>132</sup> Banda, 2005, p.14, see also Whitehead and Tsikata, 2003, p. 3.

<sup>133</sup> Benschop, 2002, p. 41.

<sup>134</sup> Ibid.

most communities land was inherited through patrilineal lines and managed by male elders.<sup>135</sup> Women and other groups, such as young men or pastoralists, had only secondary rights, which included the right to use land and benefit from its harvest. Such rights were derived, and as such dependent, from their relationship to male family members. Unmarried women would access land through their fathers or brothers, while married women would access land through their husbands and in-laws.

It is important to note that there remains considerable debate on the nature and content of women's land claims under customary tenure systems. Many scholars have questioned dominant assumptions of customary tenure, including the hierarchical order of land claims which they see as being based on Western legal concepts of rights and largely constructed by the colonial administration.<sup>136</sup> They hold that women's land rights under customary tenure are not only more diverse but also much stronger than generally presented.<sup>137</sup> While women may not have been allowed to 'own' land under customary tenure, men equally had no exclusive ownership rights.<sup>138</sup> Decisions concerning land were usually made jointly by the extended family and had to take the needs of all family members into account.<sup>139</sup> Women participated in such decision making, although with less influence.<sup>140</sup> While it is difficult to assert the precise strength of women's land claims under pre-colonial customary tenure, it is unlikely that they ever had claims equal to those of men, given their distinct position within the kinship system.<sup>141</sup> What is also clear is that much of the historical protection offered to women under customary systems has disappeared in modern times, where land has become a scarce resource which is subject to increased competition.<sup>142</sup>

Subjugation to colonial rule has been a common feature of most East African countries. One of its many effects was the imposition of European legal systems upon the respective colonies.<sup>143</sup> Kenya, Uganda and Tanzania, after Germany's defeat in World War I, were held under British rule and, as such, were subjected to English common law. While the 'received' law was given the status of general public law, the British 'allowed' the indigenous

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<sup>135</sup> Ibid.

<sup>136</sup> Whitehead & Tsikata, 2003, p. 7-9, Armstrong, 2000, pp. 89-90.

<sup>137</sup> Whitehead & Tsikata, 2003, p. 9.

<sup>138</sup> Armstrong, 2000, pp. 89-90, Adoko & Lavine, 2008, pp. 108-109.

<sup>139</sup> Ibid.

<sup>140</sup> Armstrong, 2000, p. 89.

<sup>141</sup> Whitehead & Tsikata, 2003, p. 9.

<sup>142</sup> Harrington & Chopra, 2010, pp. 2-4., Whitehead & Tsikata, 2003, p. 10., Banda, 2005, pp. 149-150, Englert & Daley, 2008, pp. 1-14.

<sup>143</sup> Banda, 2005, p. 15.

population the use of their personal laws as long as such were not ‘repugnant to natural justice and morality’.<sup>144</sup> The recognition of customary law in the field of private law was an essential element in Britain’s policy of indirect rule, which sought to overcome staff shortages and defuse resistance among the local population.<sup>145</sup> In Kenya, the East African Order in the Council of 1897 set up a tripartite lower court system comprised of Native Courts, Muslim Courts and Magistrate Courts.<sup>146</sup> Native Courts, administered by commissioners or appointed chiefs, applied customary law, whereas Magistrate and Higher Courts were to be guided by customary law in cases which involved Africans.<sup>147</sup> It has been argued by scholars that the content of customary laws as applied in Native Courts had little to do with pre-colonial customary rules applied by the different communities.<sup>148</sup> Rather they were the combined product of a selective presentation of custom by male elders seeking to enhance their authority, including over women, and an equally selective interpretation by male colonial administrators.<sup>149</sup> In contrast to the flexible and dynamic nature of lived customary norms, the male colonial construction of custom was of rigid and immutable character. The exclusion of women in the formulation of ‘court’ customary law explains the gender bias inherent in such law. This is in line with radical feminist critic of law which sees law as a male tool of maintaining unequal power relations between men and women and as such as structurally biased against women.<sup>150</sup> Colonial customary law can thus be seen as an attempt by male members of African communities to ‘keep women in their place’ at a time when their dominance was perceived to be threatened. Colonial administrators, on the other hand, readily bought into the version of customary law they were presented with (and did not seek any alternative interpretation), given that such a version matched well with their own understanding of female subordination.<sup>151</sup>

At independence, different models were adopted to deal with the inherited parallel legal systems. The most common approach was to abolish the separate court system and integrate the different bodies of law, with the lower courts having jurisdiction over customary law cases

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<sup>144</sup> Banda, 2005, p. 16.

<sup>145</sup> Laurence, 2002, p. 8.

<sup>146</sup> Republic of Kenya: The Judiciary, ‘Our History’ Section, at [http://www.judiciary.go.ke/judiciary/index.php?option=com\\_content&view=article&id=261&Itemid=295](http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=261&Itemid=295)

<sup>147</sup> Read, 1972, p. 167, cited in Banda, 2005, p. 17.

<sup>148</sup> Ikdahl et Al., 2005, pp. 5-7.

<sup>149</sup> Chanock, 1989, pp. 72-87, See also Whitehead & Tsikata, p. 7.

<sup>150</sup> See for example, Mac Kinnon, 1989, pp. 237-249.

<sup>151</sup> Chanock, 1989, pp. 77-78.

as courts of first instance.<sup>152</sup> The nature and competences of customary law were laid down in national constitutions and statutory legislations.<sup>153</sup> In contrast to other countries in the region, in Kenya customary laws have neither been codified nor standardized.<sup>154</sup> The only monographs of customary laws which are available, and often used in a rigid manner by Kenyan courts, have been compiled through a project of the School of Oriental and African Studies.<sup>155</sup> The competences of customary law are broadly defined by the Kenyan Constitution, the Judicature Act and the Magistrates' Courts Act. Section 3(2) of the Judicature Act, which makes provisions regarding the jurisdiction of the High Court, the Court of Appeal and subordinate courts, requires that such courts:

(...) shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and *is not repugnant to justice and morality or inconsistent with any written law* (...)<sup>156</sup> (emphasis added)

The jurisdiction of Magistrate Courts is defined in the Magistrates' Court Act and includes 'claims under customary law'. Such claims may involve:

- (a) land held under customary tenure;
- (b) marriage, divorce, maintenance or dowry;
- (c) seduction or pregnancy of an unmarried woman or girl;
- (d) enticement of or adultery with a married woman;
- (e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;
- (f) intestate succession and administration of intestate estates, so far as not governed by any written law;<sup>157</sup>

The Judicature Act reiterates the colonial repugnancy clause, thereby, leaving wide discretion to judges in determining what is moral and just.<sup>158</sup> Given that most judges, despite their legal training, continue to be bound by their socio-cultural values and beliefs, the protection offered by the clause to women is fairly limited. The new Constitution, which makes the application of customary law conditional on its conformity with the non-discrimination and equality clause, in this sense, presents a great opportunity for strengthening women's protection from discriminatory treatment based on customary law. It finally puts Kenya on par with its

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<sup>152</sup> Banda, 2005, p. 20.

<sup>153</sup> Whitehead & Tsikata, 2003, p. 7.

<sup>154</sup> Laurence, 2002, p. 9.

<sup>155</sup> Nyamu-Musembi, 2003, p. 12.

<sup>156</sup> Judicature Act, 2007 (2003), Cap. 8 (Kenya).

<sup>157</sup> Magistrates' Courts Act, 2007 (1989), Cap. 10 (Kenya), Section 1(2).

<sup>158</sup> Laurence, 2002, pp. 5-6.

neighbours and unequivocally requires decisions based on customary law to comply with basic human rights requirements.<sup>159</sup> The critical question, however, is how the provision will reach out beyond the formal court system and safeguard women's human rights in local dispute settlement forums applying customary law, most of which operate outside the law.

### 2.2.3.3 Local dispute settlement mechanisms

Broadly speaking, there are three different socio-legal levels of dispute resolution in which customary law is applied or used as reference: (1) informal mechanisms of local dispute resolution, (2) state-sponsored local level courts and arbitration fora and (3) higher level courts which apply primarily statutory law but may resort to customary law in their judgements.<sup>160</sup> Up to now, we have primarily looked at the third level, which is the only level at which recordings of judgements are (publicly) available in Kenya. However, as mentioned earlier, cases dealt at this level present only a tiny fraction of land disputes. Most cases are solved at the 'local' level, either in state-sponsored institutions applying customary law or, more commonly, through informal arrangements of dispute resolution.

In Kenya, the land adjudication committees and the land disputes tribunals are the two formal institutions adjudicating land disputes at the local level.<sup>161</sup> The former are *ad hoc* bodies which have been established under the Land Adjudication Act and are in charge of settling disputes arising in the process of land titling.<sup>162</sup> The latter have been set up under the Land Disputes Tribunal Act as a means of providing alternative mechanisms of land dispute resolution which are more accessible to the local population.<sup>163</sup> Both institutions are made up of panels of local elders who are given authority to hear and adjudicate disputes 'in accordance with recognized customary law'.<sup>164</sup> In contrast to Uganda and Tanzania, elders serving on local dispute settlement mechanisms are not locally elected but appointed by the Ministry of Lands, in the case of the land adjudication committees, or the District Commissioner, in the case of the land disputes tribunals.<sup>165</sup> Provincial administrators,

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<sup>159</sup> Benschop, 2002, p. 8.

<sup>160</sup> Bosworth in Whitehead & Tsikata, 2003, pp. 23-24.

<sup>161</sup> Another body would be Magistrates' Courts which operate at the District Level.

<sup>162</sup> Land Adjudication Act, 2009 (1977), Cap. 284 (Kenya). See also Nyamu-Musembi, 2003, p. 14.

<sup>163</sup> Land Disputes Tribunal Act, 2009 (1990), Cap. 303 (Kenya). See also Nyamu-Musembi, 2003, p.14.

<sup>164</sup> Land Adjudication Act, 2009 (1977), Section 20, Land Disputes Tribunal Act, 2009 (1990), Section 3.

<sup>165</sup> Nyamu-Musembi, 2003, p. 19.



including chiefs<sup>166</sup> and assistant chiefs, are equally government appointed.<sup>167</sup> As a result, local provincial administrators and formal dispute settlement bodies at times lack legitimacy with the local population. Corruption and lack of accountability is a common concern, in particular where officials have been appointed for political reasons rather than for their actual capability.<sup>168</sup> Women remain *de facto* excluded from both land adjudication committees and land disputes tribunals.<sup>169</sup> While Uganda and Tanzania have made efforts to introduce quotas ensuring women's representation in such bodies, no similar measure has been taken by Kenya.<sup>170</sup> Women's lack of voice in local dispute settlement systems significantly compromises the ability of such bodies to give an impartial and representative interpretation of customary law. It also presents a barrier for a more dynamic interpretation of custom that would take into account changing circumstances and practices and, instead, favours the application of a rigid and archaic version of custom which seeks to uphold prevailing gender roles and power relations.

The gender bias inherent in state-sponsored dispute settlement systems applying customary law is exacerbated by the lack of procedural safeguards in such bodies. Land disputes tribunals allow neither for legal representation of disputing parties nor for appeal against their decisions before courts.<sup>171</sup> Furthermore, their decisions are not subjected to any routine court review and little documentation regarding their procedures exists.<sup>172</sup> The insulation of their judgements and procedures from external scrutiny implies that women are left without legal protection or option for redress regarding discriminatory decisions made by such bodies. The denial of legal representation, on the other hand, affects women more strongly than men. Their generally lower socio-economic and political position implies that they do not hold the same bargaining power and influence as their male opponents. In addition, they tend to be less conversant with the functioning of the plural legal system and the entitlements they have under both customary and statutory law. As a consequence they are less proficient in navigating and exploiting the plural legal system to their advantage.<sup>173</sup> It is important to

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<sup>166</sup> Chiefs and assistant chiefs make up the bottom rung of the provincial administration.

<sup>167</sup> Ibid.

<sup>168</sup> Nyamu-Musembi, 2003, pp. 19-20, 22, Joireman & Henrysson, 2009, p. 54.

<sup>169</sup> Nyamu-Musembi, 2002, p. 132, Harrington, 2008, pp. 20-21.

<sup>170</sup> Nyamu-Musembi, 2003, p. 25.

<sup>171</sup> Appeal to a court is only possible on matters of law, which excludes questions of customary law which are deemed to be questions of fact under the Act (Land Disputes Tribunal Act, Section 8 (10)). The only possibility of appeal against a decision made by the Land Disputes Tribunals is to the provincial Land Disputes Appeal Committee (Land Disputes Tribunal Act, Section 9).

<sup>172</sup> Nyamu-Musembi, 2003, p. 31, Harrington, 2008, pp. 20-21.

<sup>173</sup> Harrington & Chopra, 2010, pp. 1-2

understand, in this context, how different sets of norms within plural legal systems do not function in isolation but intersect and mutually influence each other. Women and men alike tend to resort to both customary and statutory law, independently of the forum in which the dispute is carried out, in an effort to maximize their land claims.<sup>174</sup> Present day violations of women's land rights often take place precisely in the intersection between the two sets of law. The practice of property grabbing by in-laws illustrates the way in which men resort to both statutory (absolute ownership of title holder) and customary discourses ('custom does not allow women to inherit') to strip widows of their land rights.<sup>175</sup> A distorted version of custom, like the one that women do not inherit under custom,<sup>176</sup> is often invoked to mask what in reality is economic self-interest.<sup>177</sup>

Most family disputes relating to land reach neither courts nor state-sponsored local dispute settlement forums but are solved through informal structures based on customary norms and practices. The specific character of such systems varies among communities and includes, at the first stage, family or clan based mediation.<sup>178</sup> Where conflicts cannot be solved at this level, they are commonly referred for adjudication to local authorities, such as elders (traditional) or chiefs (governmental).<sup>179</sup> Neither of the two has legal authority to adjudicate in land matters; nevertheless, mediation by elders and chiefs remains the most common form of dispute resolution beyond the family and clan level in rural areas.<sup>180</sup> Decisions made under such arrangements are neither based on clear or standardized procedures nor subject to external review.<sup>181</sup> While this is problematic from a general justice point of view, a number of factors make it particularly troublesome for women.

First of all, as mentioned earlier, women's lower social, economic and political status implies that they have less social capital and bargaining power and are, therefore, more dependent on

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<sup>174</sup> Whitehead & Tsikata, 2003, pp. 23, 28, Armstrong, 2000, p. 91., Ong'wen Okuro 2008, Henrysson & Joireman, 2009.

<sup>175</sup> Harrington & Chopra, 2010, pp. 1-2, Whitehead & Tsikata, 2003, pp. 23-25, Armstrong, 2000, p. 87-90.

<sup>176</sup> See Armstrong (2000) who critically examines the commonly made argument that women do not inherit under custom and concludes that such argumentation is highly problematic in that it is based on Western legal notions of inheritance which refer to the passing on of *ownership* over property and ignores that exclusive ownership in the Western legal sense did not actually exist in pre-colonial customary land tenure systems, not even for men.

<sup>177</sup> Harrington & Chopra, 2010, pp. 7- 8.

<sup>178</sup> Due to the limited scope of this study I will not go into clan and family based mediation. For discussion see Nyamu-Musembi, 2002.

<sup>179</sup> Nyamu-Musembi, 2003, p. 16.

<sup>180</sup> Henrysson & Joireman, 2009, pp. 49-51, Nyamu-Musembi, 2002, p. 131. See also Ong'wen Okuro, 2008.

<sup>181</sup> Nyamu-Musembi, 2003, p. 23.

procedural safeguards which guarantee their equality of arms. This is particularly true in a context in which corruption among officials and elders who intervene in disputes has become common practice. Whereas traditionally a hot meal would be served to elders engaged in dispute resolution, present day dispute resolution by elders and chiefs usually requires some kind of monetary compensation ('money for the pen').<sup>182</sup> The amount of money varies and depends on what the parties to the dispute can afford.<sup>183</sup> The lack of a 'fixed price' is likely to affect the impartiality of the adjudicating elder or chief. Research carried out in Kisii District by Henrysson and Joireman (2006) suggests that in order for a woman to win her case she must be able to outbid her opponent.<sup>184</sup> Since men tend to exert more control over household resources and are more likely to be in paid employment, corruption among officials and elders puts women at a clear disadvantage. In addition, while being lower than the costs of bringing a case to the land disputes tribunal and much lower than bringing a case to court, informal payments to chiefs and elders still exceed the very limited budget of many rural women.<sup>185</sup> Such women are left with no single avenue for challenging decisions made at the family or clan level.

However, it is not only women's inferior economic position which compromises their chances of having a fair trial in informal dispute settlement carried out by elders and chiefs but also their social status. Women's inferior social standing affects the attitudes local decision makers hold towards women while at the same time limiting women's ability to argue and negotiate their claims successfully. Local justice systems tend to be flexible and their decisions outcome of negotiations. On the one hand, this is a positive feature as it allows for less adversarial dispute resolution and accomodation of different interests. On the other hand, however, it also makes them susceptible to reproducing existing power inequalities between the disputing parties.<sup>186</sup> This is particularly problematic in a context where disputes are carried out between highly unequal opponents. Another factor which contributes to women being disproportionately affected by the lack of procedural safeguards in informal dispute resolution is the aforementioned absence of women in decision-making positions. Women remain *de facto* excluded from senior positions in both the local public administration and

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<sup>182</sup> Ong'wen Okuro, 2008, pp. 129-131, Henrysson & Joireman, 2009, p. 49.

<sup>183</sup> Interview with elder from Kisii District (2006), cited in Henrysson & Joireman, 2009, p. 54.

<sup>184</sup> Henrysson & Joireman, 2009, pp. 54-55.

<sup>185</sup> Henrysson & Joireman, 2009, p. 55.

<sup>186</sup> Nyamu-Musembi, 2002, p. 127, Whitehead & Tsikata, 2003, p. 25.

traditional governance structures.<sup>187</sup> As a result, they lack voice when it comes to interpreting and defining customary norms and practices within such institutions. The lack of gender balance in informal dispute resolution by local authorities presents an important barrier to a more progressive articulation of custom which responds to changing circumstances and practices. At the same time, socio-cultural assumptions regarding gender roles often place constraints on impartial decision making by male authorities leading to ‘idealised’ versions of custom dominating over factual evidence.<sup>188</sup>

The intersection of local dispute settlement bodies, whether formal or informal, with rural power relations has been identified as a major stumbling block for customary systems to deliver gender equality.<sup>189</sup> Women’s inferior social and economic position is translated into their exclusion from local decision making processes, which in turn allows for a gender biased interpretation of customary laws and norms which seeks to maintain the status quo of unequal land rights. Traditional and governmental authorities involved in the adjudication of disputes alike tend to be bound by socio-cultural attitudes which deny women equal, if any, property rights.<sup>190</sup> At the same time women are denied procedural safeguards which would put their bargaining power on par with that of their male opponents and place male decision makers under external scrutiny, thereby making them accountable for discriminatory decision making.

However, it is important to bear in mind that negative attitudes concerning women’s land rights are not only held by men but tend to be shared by many women, who have had the same social upbringing.<sup>191</sup> Enhanced participation of women in local dispute settlement mechanisms, on its own, will therefore not necessarily lead to changed attitudes or less gender bias within such mechanisms. Besides this, women will not automatically gain the same decision-making power as men with such structures given the prevalence of socio-cultural gender norms which demand female compliancy and subordination. It is thus essential to intervene at the various levels where socio-cultural norms which inform peoples’ attitudes and behaviour are created. This includes, in particular, the family which is the principle site in which negative attitudes towards women are produced and passed on to the next generation.

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<sup>187</sup> Nyamu-Musembi, 2002, pp. 141-142. See also FIDA-K & International Women’s Human Rights Clinic, 2009.

<sup>188</sup> Nyamu-Musembi, 2002, pp. 139-141.

<sup>189</sup> Whitehead & Tsikata, 2003, p. 24.

<sup>190</sup> Human Rights Watch, 2003, pp. 33-38.

<sup>191</sup> Human Rights Watch, 2003, p. 35.

At the same time, it is the place in which most violations of women's property rights take place and disputes are dealt with.

### **2.3 Concluding Remarks**

This chapter has shown that both the statutory and the customary legal system (informal and formal) discriminate against women with regard to land. While this discrimination is partly due to the discriminatory or gender-insensitive content of the law itself, it is equally a result of the processes through which land claims and interest are secured. Laws and socio-cultural norms governing land relations are often interpreted and applied in a discriminatory manner by those involved in adjudicating disputes. This is particularly problematic, where laws are formulated in a loose way or unwritten and where decisions are insulated from external review. Discriminatory decision-making by local dispute settlement bodies and courts is a combined result of socio-culturally entrenched negative attitudes concerning women's land rights and the exclusion of women from participation in decision-making structures. In addition, disputes take place between parties with highly unequal levels of social, economic and political power.

Socio-cultural norms and rural power dynamics provide the foundation upon which land disputes are carried out. They influence the constellation and mindset of decision-making bodies as much as they determine the ability of the disputing parties to bring and effectively negotiate their claims. Strategies towards change must, therefore, move away from a narrow focus on the law and examine the various processes through which claims and interests are secured and social norms created or reinforced. Formal equality will only be translated into *de facto* equality when local dispute-settlement bodies and courts interpret and apply the law in a non-discriminatory manner. Sensitization of those adjudicating land disputes and the creation of more inclusive dispute-settlement structures which reflect the needs of *all* community members are essential in this regard. Equally important are review mechanisms which reach down to the lowest levels of dispute resolution and ensure accountability of those applying the law.

At the same time, women's relative bargaining power as parties to disputes must be addressed through legal aid schemes as well as community-based strategies which challenge and seek to transform discriminatory attitudes and practices within families and communities, while

creating awareness for the formal legal framework on equality and the different channels for securing claims arising from discriminatory practices. Such strategies are fundamental also in terms of reducing bias among decision-makers whose attitudes are, even where they have undergone legal or human rights training, shaped by their socio-cultural upbringing and environment. The family is an important site for intervention. Not only do most violations of women's property rights take place and get 'dealt with' in the realm of the family, it is also the principle site in which negative attitudes towards women are produced and passed on to the next generation. Socio-cultural and legal norms as well as the processes through which they are secured are intrinsically linked with each other. Intervention strategies must, therefore, be multi-faceted and target the various levels of norm creation and interpretation.

### 3. International human rights law and women's land rights

#### 3.1 Introduction

Women's equal rights to access, control and own land are protected under both the international and the African human rights system. While international human rights law does not (yet) explicitly recognize land as an independent human right, several of the existing provisions offer protection for women's land rights. Above all, women's land rights are protected through the right to non-discrimination and equality which is a cross-cutting feature of all human rights, as well as a right in itself.<sup>192</sup> The most elaborate protection of women's right to non-discrimination is found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which contains both general and specific clauses on discrimination.

Other than this, women's land rights, and land rights more generally, have been approached primarily through the right to property and the right to an adequate standard of living, which includes the right to food and the right to housing.<sup>193</sup> In both cases there are two dimensions which deserve consideration: the protection of land rights in themselves and the protection of land rights in relation to non-discrimination and equality. While in the context of women's land rights the primary issue appears to be one of discrimination, it is equally important to discuss land rights more generally and to stress the central role land plays in the livelihoods of people in rural areas- men and women alike- and the corresponding urgency to secure women's land rights. This is to say, while discrimination in itself is problematic, the principle concern is with the *effects* of discrimination which in the case of land are particularly grave given the importance of land, in rural settings, for the enjoyment of fundamental rights and

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<sup>192</sup> Article 26 of the ICCPR protects the right to non-discrimination as a right in itself, whereas the general non-discrimination provisions found in international and regional human rights treaties must be applied in conjunction with the infringement of one or more of the rights protected by that particular treaty or, in the case of CEDAW, in conjunction with any human right or fundamental freedom. The right to non-discrimination as an independent right will, due to limitations of space, not be discussed in this context. For comprehensive discussion of article 26 of the ICCPR, see Choudhury, 2003.

<sup>193</sup> In the Kenyan context, land rights have been addressed from various perspectives. FIDA has primarily addressed the issue as a non-discrimination and property rights violation, whereas COEHRE, for example, has addressed it in relation to the right to adequate housing. Others, such as KELIN have approached women's land rights in relation to HIV/AIDS.

freedoms, including food and shelter. In fact there are few rights which have a similarly profound impact on human dignity as land, which provides the basis for the enjoyment of numerous other rights, including the right to culture, work, private life, family, health, and liberty and security of person.<sup>194</sup> On the other hand, there are various other rights which, as the previous chapter has illustrated, are essential for women's ability to enjoy their land rights. These are, in particular, rights relating to women's participation in public decision-making and their ability to have a fair trial.

This chapter will start by giving an introduction on the right to non-discrimination and equality, thereby focusing on CEDAW and the general obligations the treaty imposes. It will then proceed to provide an overview of the manner in which human rights treaty bodies and Special Rapporteurs have approached the issue of land rights *per se* and women's land rights more specifically, within the context of the right to property, the right to food and the right to housing. Finally, women's participatory and fair trial rights will be explored with regards to the standards they set in relation to the nature and composition of dispute-settlement bodies dealing with land.

### **3.2 The Right to Non-Discrimination and Equality**

The principle of non-discrimination and equality is a key feature of international human right law. It guarantees the right of every individual to exercise and enjoy their human rights without any discrimination based on the grounds of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>195</sup> In addition to a general non-discrimination clause, most human rights treaties have a specific provision which guarantees the equal rights of men and women as regards the enjoyment of the rights protected by that treaty.<sup>196</sup> Women's historically disadvantaged position in society as well as the persistent and systemic

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<sup>194</sup> For reasons of space, the discussion will be limited to the right to non-discrimination and equality, the right to property and the rights to food and housing.

<sup>195</sup> See article 2 of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also article 2 of the African Charter on Human and Peoples' Rights (ACHPR) which adopts a slightly different wording.

<sup>196</sup> See article 3 of ICCPR and ICESCR.



nature of discrimination against women has further led to the adoption of a specific treaty which protects women from all forms of discrimination: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The convention defines discrimination against women as

‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.<sup>197</sup>

Three important elements of CEDAW’s approach to non-discrimination and equality are already expressed in this definition. Firstly, in referring to women’s ‘enjoyment or exercise’ of human rights, the treaty adopts a *substantive* understanding of equality which goes beyond the formal recognition of sex/ gender equality and requires women’s *de facto* equal enjoyment of their human rights. Secondly, in referring to ‘effect or purpose’ CEDAW prohibits not only *directly* discriminatory legislation, policies or practices but also those which are gender neutral in appearance but discriminatory *in effect*. Thirdly, in linking discrimination to the enjoyment of human rights and fundamental freedoms in the ‘political, economic, social, cultural, civil *or any other field*’, the scope of protection offered by the treaty is very wide and covers practically all spheres of life.<sup>198</sup>

The treaty contains both general and specific obligations concerning the elimination of discrimination against women. The general obligations are expressed in articles 2 to 5 of the treaty and require State Parties to:

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<sup>197</sup> CEDAW, article 1.

<sup>198</sup> See also Holtmaat and Tobler, 2005, pp.402-404.

1. ensure that legislation does not directly or indirectly discriminate against women and that women are protected against discrimination in both the public and the private sphere<sup>199</sup>
2. improve women's *de facto* position through targeted policies and programmes<sup>200</sup>
3. address prevailing gender relations and gender-based stereotypes which affect women in their relations with others, in law and in legal and societal structures<sup>201</sup>

The three obligations are complementary and are to be implemented by States in an integrative manner.<sup>202</sup> They comprise norms which are applicable in themselves, while at the same time constituting the general interpretative framework for the other more specific articles of CEDAW (article 6-16), some of which will be discussed more in detail in the next sections of this chapter.<sup>203</sup> The first obligation addresses women's *formal* equality and ensures that women are not treated differently in law or practice only because they are women.<sup>204</sup> The second one is directed towards achieving *substantive* equality ('equality of results') and requires deliberate and targeted efforts to enhance women's position in society.<sup>205</sup> The third obligation addresses the underlying structural dimensions of discrimination against women, i.e. culturally and socially embedded gender roles and stereotypes which lead to the subordination of women in both public and private life. It aims at the transformation of such roles and stereotypes and, therefore, may be termed *transformative* equality.<sup>206</sup>

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<sup>199</sup> CEDAW, article 2, CEDAW, General Recommendation No. 25, para 7.

<sup>200</sup> CEDAW, articles 3- 4, CEDAW, General Recommendation No. 25, para 7.

<sup>201</sup> CEDAW, article 5, CEDAW, General Recommendation 25, para. 7.

<sup>202</sup> CEDAW, General Recommendation No. 25, para 6.

<sup>203</sup> Holtmaat & Naber, 2011, p. 25.

<sup>204</sup> *Ibid.*, The legal principle of equality, however, does not mean that women and men must always be treated in an identical way. It is based on the Aristotelian equality maxim which demands that people in the same situation should be treated equally while people in different situations should be treated according to those differences. In other words, States must consider and accommodate real differences between people when developing their policies and legislation, wherever such are relevant. See Oddný Mjöll Anardóttir, 2007, pp. 142-143.

<sup>205</sup> CEDAW, General Recommendation No. 25, para 8.

<sup>206</sup> For detailed discussion of article 5, see Holtmaat & Naber 2011, pp.28-40.

The three general obligations under CEDAW have been further developed by Ricki Holtmaat who identifies three corresponding strategies towards eliminating discrimination against women: the *individual rights strategy*, the *social support strategy* and the *strategy of social and cultural change*.<sup>207</sup> The three strategies will be briefly outlined below as they provide us with a useful framework for assessing the measures taken by the Kenyan government in view of eliminating discrimination against women in relation to land (chapter 4).

### 3.2.1 *Individual rights strategy*

The individual rights strategy focuses on granting individual women a legal right to equal treatment, for example through the inclusion of a non-discrimination clause in the constitution or the adoption of equal treatment legislation, and empowers them to seek legal redress in cases of discrimination.<sup>208</sup> While an important element in achieving gender equality, the strategy has been criticized for not sufficiently addressing the underlying causes of discrimination.<sup>209</sup> In addition, it is an *individual rights strategy*, which already implies that not all women will benefit equally from it but possibly only those who hold more privileged positions in society, such as educated middle-class women living in urban areas. Nevertheless, combined with legal aid and awareness programmes the individual rights strategy plays an important role in the quest for gender equality.

### 3.2.2 *Social support strategy*

The social support strategy recognizes that in order to achieve *de facto* equality, positive measures need to be taken to support certain groups whose disadvantaged social position does not allow them to fully enjoy their rights. It aims at creating an enabling environment which assists them in overcoming past and present discrimination and marginalisation and ensures their equality of opportunities in the

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<sup>207</sup> See Holtmaat & Naber, 2011, p. 27, Holtmaat & Tobler, 2005, pp. 404-409.

<sup>208</sup> Holtmaat & Naber, 2011, p. 27.

<sup>209</sup> Holtmaat & Tobler, 2005, p. 405.

enjoyment of human rights. One important aspect of such a strategy is the adoption of *temporary special measures*<sup>210</sup> which aim at accelerating progress towards improving women's situation and ensuring their equal participation in all spheres of life.<sup>211</sup> Such measures include outreach programmes, budgetary reallocation and quota systems.<sup>212</sup> The adoption of temporary special measures in relation to any of the substantive articles under CEDAW (articles 6 - 16), has been considered mandatory by the CEDAW Committee wherever such is deemed necessary to achieve women's *de facto* equality.<sup>213</sup>

### 3.2.3 *Strategy of social and cultural change*

While the first two strategies are crucial for eliminating gender discrimination in law and practice, they will only have an enduring effect where they are combined with measures which address the *causes* of discrimination against women. Article 5 of CEDAW obliges governments to actively engage in transforming socially and culturally defined gender-stereotypes and parental roles wherever such have the effect of restricting women's control over their lives and their ability to fully and equally enjoy their human rights. Gender-stereotypes and roles place women and men into clearly defined gender-categories and ascribe to them a fixed set of characteristics, to which they should behave accordingly.<sup>214</sup> In doing so they can deprive individual women and men of their capacity to act freely and take independent choices regarding their way of life. The prescriptive and controlling effect of gender-stereotypes and fixed parental roles is particularly strong where such are enshrined in social, cultural or religious practices and beliefs or in public institutions and laws.<sup>215</sup> While the Convention itself gives little guidance on which measures should be taken by States to comply with article 5, the Concluding Recommendations issued by the CEDAW Committee provide some orientation in this regard. Recommendations made to

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<sup>210</sup> Also referred to as 'affirmative' or 'positive' action measures

<sup>211</sup> CEDAW General Recommendation No. 25, para 18.

<sup>212</sup> *Ibid.* para 22.

<sup>213</sup> *Ibid.*, para 24.

<sup>214</sup> Holtmaat & Naber, 2011, p.31.

<sup>215</sup> *Ibid.*

Kenya, Tanzania and Uganda strongly resemble each other and require State Parties to:

- take coordinated measures to ‘modify or eliminate’ negative practices and stereotypes which discriminate against women, e.g. through education and awareness-raising campaigns which target women and men, as well traditional leaders<sup>216</sup>
- enforce legal prohibitions of harmful practices<sup>217</sup>
- use the media and other innovative measures to foster better understanding of gender equality and promote a positive and non-stereotypical portrayal of women<sup>218</sup>

An interesting recommendation is added to the Tanzanian government which is requested to ‘view its cultures as *dynamic* aspects of the country’s life and social fabric and as *subject*, therefore, *to change*.’ This recommendation touches upon a vital point: that governments, as a first step, must recognise that culture is not static and can (and, in certain circumstance, must) be changed.

### 3.3 Women’s Property Rights

The right to property is protected under both article 17 of the Universal Declaration of Human Rights (UDHR) and article 14 of the African Charter on Human and Peoples’ Rights (ACHPR).<sup>219</sup> It entails the right of everyone to own property and be protected from arbitrary interference with one’s property. In addition, both the Convention on the Elimination of all Discrimination against Women (CEDAW) and its African counterpart, the Protocol to the African Charter on the Rights of Women in Africa

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<sup>216</sup> CEDAW, C/KEN/CO/7 (Kenya 2011), para. 18, CEDAW, C/UGA/CO/7 (Uganda 2010), para. 20, CEDAW, TZA/CO/6 (Tanzania 2008), para 118.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> The right to property under international human rights law is a controversial and legally complex area, a thorough discussion of the right, therefore, falls outside the scope of this study which, instead, will focus on women’s property rights under CEDAW and the Maputo Protocol.

(‘Maputo Protocol’), contain explicit provisions regarding the property rights of women. Article 16 of CEDAW places State Parties to the Convention under the obligation to ‘eliminate discrimination against women in all matters relating to marriage and family relations’ and ensure equal rights for spouses with regard to ‘ownership, acquisition, management, administration, enjoyment and disposition of property’.<sup>220</sup> While the Convention does not include an explicit inheritance provision, the CEDAW Committee has interpreted article 16 (h) to encompass equal inheritance rights of widows and widowers and daughters and sons, regardless of their marital status.<sup>221</sup> It has also held that financial and non-financial contributions to matrimonial property should be given the same weight in the division of such property upon divorce or separation.<sup>222</sup> Recognizing that many women, including single and divorced women, carry the sole responsibility for maintaining their families, the Committee has declared that ‘any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or upon the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person’.<sup>223</sup>

In responding to State reports, the Committee has addressed discrimination against rural women in relation to ownership and inheritance of land primarily under article 16 and article 14 of the Convention. Recommendations issued to East African countries in relation to article 14, which addresses the particular challenges faced by rural women, strongly resemble each other. In all of them, the Committee expresses its concern for the disadvantaged position of rural women and the persistence of customs and traditional practices which prevent such women from inheriting and owning land.<sup>224</sup> State parties are requested to enact and effectively implement legislation protecting rural women’s land rights and combat negative customs and traditional practices which affect their property rights.<sup>225</sup> In addition, the Committee

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<sup>220</sup> CEDAW, article 16 (h).

<sup>221</sup> General Recommendation No. 21, para 28 and 35.

<sup>222</sup> *Ibid.*, para 32.

<sup>223</sup> *Ibid.*, para 28.

<sup>224</sup> CEDAW, C/KEN/CO/7 (Kenya 2011), para. 41, CEDAW, C/UGA/CO/7 (Uganda 2010), para. 41, CEDAW, TZA/CO/6 (Tanzania 2008), para 140.

<sup>225</sup> *Ibid.*

recommends legal aid and awareness schemes as to strengthen the knowledge and capacity of rural women to claim their legal entitlements.<sup>226</sup> With regard to article 16, the Committee focuses on discriminatory statutory legislation on marriage, divorce and inheritance and makes broad requests to States to bring their civil, religious and customary law into line with the Convention.<sup>227</sup>

The Maputo Protocol is arguably the most explicit human rights instrument in dealing with women's land and property rights. Article 19 on the right to sustainable development imposes direct positive duties upon State Parties to ensure women's land rights. It requires governments to 'take all appropriate measures' to 'promote women's access to and control over productive resources such as land and guarantee their right to property'.<sup>228</sup> With regard to divorce or separation, article 7 (d) of the Protocol stipulates that matrimonial property must be divided equitably among the spouses. The Protocol also contains an explicit provision on the inheritance rights of women. According to article 21, a widow has the right to an 'equitable share' in the inheritance of her husband's property.<sup>229</sup> She also has the right to remain in the matrimonial house and, in the case of remarriage, continue to live there if the house is hers or she has inherited it.<sup>230</sup> Children, on the other hand, have the right to inherit their parents' property in equitable shares, independent of their sex.<sup>231</sup>

### **3.4 The right to food and housing**

Access to land is a fundamental element of the right to food and the right to housing, both of which are enshrined in the Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>232</sup> and the Maputo Protocol.<sup>233</sup> The latter imposes a direct obligation on States to provide women with access to land as a means of ensuring their right to

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<sup>226</sup> CEDAW, TZA/CO/6 (Tanzania 2008), paras 140-141.

<sup>227</sup> CEDAW, C/KEN/CO/7 (Kenya 2011), para. 45-46, CEDAW, C/UGA/CO/7 (Uganda 2010), para. 47-48, CEDAW, TZA/CO/6 (Tanzania 2008), para 146-147.

<sup>228</sup> Maputo Protocol, Article 19 (c).

<sup>229</sup> Maputo Protocol, Article 21 (1).

<sup>230</sup> Ibid.

<sup>231</sup> Ibid., Article 21 (2).

<sup>232</sup> ICESCR, Article 11.

<sup>233</sup> Ibid., Article 15 (a) and Article 16.

adequate and nutritious food.<sup>234</sup> While the ICESCR provision guaranteeing everyone's right to an 'adequate standard of living (...) including adequate food, clothing and housing' does not explicitly refer to land, it has been interpreted by its monitoring body, the Committee on Economic, Social and Cultural Rights, as well as by the Special Rapporteurs on the Right to Food and the Right to Housing to include access to land. In its General Comment No. 12 on the Right to Adequate Food the Committee unequivocally recognizes the importance of land for realizing women's right to food. It requests governments to develop a national strategy for implementing the right to food which 'give[s] particular attention to the need to prevent discrimination in access to food or resources for food [and includes] guarantees of full and equal access to economic resources, particularly for women, *including the right to inheritance and the ownership of land and other property.*'<sup>235</sup>

The Special Rapporteur on the Right to Food, Olivier De Schutter, has dedicated an entire report to the importance of access to land and security of tenure for realizing the right to food in which he appeals to the international community to recognize land as a human right.<sup>236</sup> In elaborating on the obligations which arise from the right to food, both the Committee and the Special Rapporteur have stressed that States have a primary obligation to *respect* and *protect* individuals' access to productive resources, such as land, which they require to feed themselves.<sup>237</sup> While recognizing the importance of strengthening customary systems of land tenure, the Special Rapporteur has emphasised that such systems must be 'carefully scrutinized and, if necessary, amended to bring them into line with women's rights'.<sup>238</sup> He has further recommended the enactment of tenancy laws which provide for joint titling of spouses and protect widows from eviction.<sup>239</sup> In general, State parties have an obligation to ensure that titling schemes are *equally beneficial* to men and women and, where necessary, correct prevailing inequalities.<sup>240</sup>

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<sup>234</sup> Ibid., Article 15 (a).

<sup>235</sup> CESCR, General Comment No. 12, para. 26. Emphasis added.

<sup>236</sup> UN Doc. A/65/281, 2010.

<sup>237</sup> Ibid., para 2- 3, CESCR, General Comment No. 12.

<sup>238</sup> Ibid. para. 24.

<sup>239</sup> Ibid. para. 41 b.

<sup>240</sup> Ibid. para. 42 b (ii).



The former Special Rapporteur on the Right to Housing, Miloon Kothari, has throughout his reports emphasised that land is an essential element of the right to housing and that inadequate housing commonly is a consequence of previously denied access to land.<sup>241</sup> He sees the failure to give legal recognition to land rights as an important factor in rural-urban migration which often leads people to live in informal settlements where they lack basic standards of living and security.<sup>242</sup> Stressing the fundamental importance of land not only for the right to housing but also for other human rights, such as the right to food or the right to work, the Special Rapporteur has on various occasions appealed to the Human Rights Council to ‘recognize land as a human right and strengthen its protection in international human rights law’.<sup>243</sup> In his reports on the situation of women in relation to housing, the Special Rapporteur notes widespread violations of women’s housing and land rights and a ‘culture of silence’ which surrounds the issue.<sup>244</sup> He expresses particular concern about discriminatory socio-cultural norms and customs which are reflected in personal and customary laws and deny women their rights to land and property and, as such, prevent them from exercising their housing rights.<sup>245</sup> He also recognizes the various economic, social and cultural barriers women face with regard to redressing violations of their land rights through both statutory and ‘non-formal’ mechanisms and the difficulty of challenging discriminatory customary rules in customary land forums which are dominated by men.<sup>246</sup> He urges governments to provide women with effective channels through which they can legally redress violations of their land and inheritance rights and to ‘act with due diligence to prevent, investigate and punish’ such acts.<sup>247</sup> Furthermore, he recommends human rights education and training for those applying and enforcing the law as to ‘bridge the gap’ between the legal and policy recognition of women’s land and housing rights and their implementation.<sup>248</sup>

### **3.5 Women’s Participatory Rights**

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<sup>241</sup> UN doc. A/HRC/7/16 (13.02.2008), para. 65-78, UN doc. A/HRC/4/18 (05.02.2007), para. 25-31.

<sup>242</sup> UN doc. A/HRC/7/16 (13.02.2008), para. 68.

<sup>243</sup> UN doc. A/HRC/4/18 (05.02.2007), para. 31 and 33 (e), UN doc. A/HRC/7/16 (13.02.2008), para. 104.

<sup>244</sup> UN doc. E/CN.4/2006/118 (27.02.2006), para. 79.

<sup>245</sup> *Ibid.*, para. 37.

<sup>246</sup> *Ibid.* para. 45- 46.

<sup>247</sup> *Ibid.* para. 83 (d) (f).

<sup>248</sup> *Ibid.* para. 79 & 83 (i)

The right to participate in decision making processes is a core principle of international human rights law which has been explicitly and implicitly recognized in a number of human rights treaties and declarations. In addition, the right to participation and inclusion plays a central role in a human rights based approach (HRBA) to development and poverty reduction which has been recommended by the Committee on Economic, Social and Cultural Rights<sup>249</sup> and is increasingly being adopted by UN agencies, donors and NGOs.<sup>250</sup>

With regard to the direct protection of women's participatory rights under international human rights law, the most important treaties are the ICCPR, CEDAW and the Maputo Protocol. Article 25 of the ICCPR protects the 'right and opportunity' of every citizen to 'take part in the conduct of public affairs, directly or through freely chosen representatives' and to 'have access, on general terms of equality, to public service' in ones country.<sup>251</sup> In its General Comment No. 25 the Human Rights Committee (HRC) defines 'conduct of public affairs' broadly as to entail the 'exercise of legislative, executive and administrative powers' including 'all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels'.<sup>252</sup> With regard to the local level, this also entails citizens' rights to participate in 'popular assemblies' which are given decision making power over community issues and affairs.<sup>253</sup> Article 25 requires States not to make any distinction based on sex with regard to the enjoyment of the right to participation at the same time as placing them under the positive obligation to adopt legislative and other measures to 'ensure that citizens have an *effective opportunity* to enjoy the rights [article 25] protects'.<sup>254</sup> Similarly, the 'right and opportunity' to equal access to public service positions, entails not only that appointment, promotion and dismissal of civil servants must be based on objective and reasonable criteria but also that

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<sup>249</sup> ICESCR, 2001, para. 1.

<sup>250</sup> A HRBA to development is guided by human rights standards and principles in both its outcome and processes. Participation and inclusion of beneficiaries, in particular marginalised and vulnerable groups, in the formulation and implementation of development policies and programmes (*process*) is considered to be an essential element for the realisation of human rights-oriented development and poverty reduction (*outcome*). For a comprehensive discussion of a Human Rights Approach to Development, see Gready and Ensor, 2005.

<sup>251</sup> ICCPR, Article 25 (a) and (c).

<sup>252</sup> HRC, General Comment No. 25, para. 5.

<sup>253</sup> *Ibid.*, para. 6.

<sup>254</sup> *Ibid.*, para. 1 and 3.

affirmative measures may be adopted where such are deemed necessary to ensure equality of access.<sup>255</sup> In other words, States are not only under an obligation to guarantee women's *de jure* equality as regards the participatory rights enshrined in article 25 but must also take positive measures, including affirmative action, to ensure their *de facto* equal chances of enjoying such rights.<sup>256</sup>

Women's right to take part in the 'political and public life' of their countries is protected under both article 7 and article 14 of CEDAW. The former obliges States to 'eliminate discrimination against women in the political and public life of the country' and to 'ensure to women, on equal terms with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government'.<sup>257</sup> In contrast to the ICCPR, the right to participation under CEDAW is not restricted to citizens and extends to participation in 'non-governmental organizations and associations concerned with the public and political life of the country'.<sup>258</sup> The definition adopted by the CEDAW Committee on political and public life is equally broader than the one adopted by the HRC. It refers to the 'exercise of legislative, *judicial*, executive and administrative powers' and includes 'all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels' as well as 'many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life'.<sup>259</sup> Apart from extending participation to the civil society sphere, the Committee directly refers to women's participation in the judiciary.

In its General Recommendation No. 23, the Committee stresses the historical exclusion of women from decision making processes and their assignation to the

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<sup>255</sup> Ibid., para. 23.

<sup>256</sup> See also HRC, General Comment No. 28, which states that 'States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take *effective and positive measures* to promote and ensure women's participation in the conduct of public affairs and in public office, *including appropriate affirmative action.*' (para. 29)

<sup>257</sup> CEDAW, article 7 (b).

<sup>258</sup> Ibid. Article 7 (c).

<sup>259</sup> CEDAW, General Recommendation 23, para. 5.

private sphere.<sup>260</sup> It identifies various factors which contribute to women's exclusion from political and public life, including cultural and religious values and beliefs, economic dependence on men and failure of men to assist with household and child caring duties.<sup>261</sup> The Committee notes the wide gap in most countries between women's formal right to participate in public decision making processes and their *de facto* exclusion from such due to social, cultural and economic barriers.<sup>262</sup> The adoption of temporary special measures which promote women's participation in political life is, therefore, not only encouraged but considered *mandatory* by the Committee, wherever such is deemed necessary and appropriate to achieve women's substantive equality.<sup>263</sup> In addition, States are under the obligation to identify and change 'traditional and customary attitudes that discourage women's participation' in political and public life.<sup>264</sup>

With regard to non-governmental organisations and associations, States must enact legislation which protects women from discrimination while encouraging such organisations to promote women's participation.<sup>265</sup> Article 14 of CEDAW, which makes reference to the particular hardship faced by rural women, requires State Parties to 'take all appropriate measures to eliminate discrimination against women in rural areas' and ensure their 'right to participate in the elaboration and implementation of development planning at all levels' and 'in all community activities'.<sup>266</sup> The Committee, in responding to country reports, commonly expresses concern regarding the exclusion of rural women from local decision making and calls upon States parties to 'increase and strengthen the participation of women in designing and implementing local development plans, and to pay special attention to the needs of rural women, in particular women heads of household, by *ensuring that they participate in decision-making processes*'.<sup>267</sup> So far the Committee has not adopted a General Comment clarifying the precise content of State obligations arising under article 14.

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<sup>260</sup> Ibid., para. 8.

<sup>261</sup> Ibid., para. 10.

<sup>262</sup> Ibid. para. 13-16.

<sup>263</sup> CEDAW General Recommendation 25, para 24.

<sup>264</sup> Ibid. para. 27 and 28.

<sup>265</sup> Ibid. para. 47 (a) and (b)

<sup>266</sup> CEDAW, article 14 (a) and (f).

<sup>267</sup> CEDAW, C/KEN/CO/7 (Kenya 2011), para. 41, CEDAW, C/UGA/CO/7 (Uganda 2010), para. 41, CEDAW, TZA/CO/6 (Tanzania 2008), para 140.

Women's participatory rights are also covered by various provisions of the Maputo Protocol which makes explicit reference to such rights not only in the context of political life and decision-making (article 9) but also with regard to the promotion and maintenance of peace (article 10), the formulation of cultural policies (article 17), environment and natural resource management (article 18) and the formulation and implementation of development policies and programmes (article 19). Article 9 of the Protocol requires State Parties to take affirmative action and other positive measures to 'promote participative governance and the equal participation of women in the political life of their countries'.<sup>268</sup> It goes on to oblige governments to ensure the 'increased and effective representation and participation of women at all levels of decision-making'.<sup>269</sup> While the first section refers specifically to women's participation in governance and political life, the second one is very wide and virtually covers all other areas of decision-making, including non-governmental structures.

Another provision of the Protocol, which is relevant to women's land rights, is article 17 which recognizes the importance of strengthening women's voice in the interpretation of culture. The article protects women's right to 'live in a positive cultural context and to participate at all levels in the determination of cultural policies' and obliges State Parties to take 'all appropriate measures' to enhance such participation.<sup>270</sup> The right to participate in the development and interpretation of one's culture is also recognized, though less explicitly, in article 15 (a) of the ICESCR, on the right to take part in cultural life, and article 13 (c) of CEDAW, on the rights of women to participate in *all aspects* of cultural life.

### 3.5.1 *Access to Justice and the Right to a Fair Trial*

The previous chapter has illustrated the central importance a well functioning justice system which is accessible to women and guarantees their equality of treatment has for realizing women's land rights in practice. Various provisions under international human rights law guarantee women's access to courts and other judicial bodies and

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<sup>268</sup> Maputo Protocol, article 9 (1).

<sup>269</sup> Ibid., article 9 (2).

<sup>270</sup> Ibid., article 17.

ensure their equality of treatment by such. Article 14 of the ICCPR, on the right to equality before courts and the right to a fair trial, is the most comprehensive provision in this regard. It is complemented by two other articles in the Covenant, article 26 on equality before the law and equal protection of the law and article 2 (3) on effective remedies.<sup>271</sup> In addition, the right to equality before the law is protected under article 3 of the ACHPR and, with regard to women, under article 15 of CEDAW and article 8 of the Maputo Protocol. The two women-specific treaties have additional provisions, similar to that of article 2 (3) of the ICCPR, which oblige State Parties to ensure women's access to 'competent' public institutions which offer effective protection and remedies in cases of gender discrimination.<sup>272</sup>

Article 14 (1) of the ICCPR states, that 'all persons shall be equal before the courts and tribunals' and that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.<sup>273</sup> The right to equality before courts and tribunals ensures that parties to a dispute are *treated without discrimination* and encompasses, apart from a fair hearing by an impartial tribunal, the right of *equal access to a court* and *equality of arms*.<sup>274</sup> The former imposes a duty on governments to ensure that no one is denied access to the administration of justice on any of the prohibited grounds, including sex.<sup>275</sup> It also entails that the imposition of fees for proceedings must not prevent *de facto* access to justice<sup>276</sup> and that, under certain circumstances, States have the duty to provide legal aid to those who lack financial means to enter or meaningfully participate in

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<sup>271</sup> The focus will be primarily on article 14 which sets the most comprehensive standards regarding access to justice and fair trial. For a more detailed discussion on article 26, see Choudhury 2003. Although the right to effective remedies is also central in the context of human rights violations and non-discrimination in particular, the focus of the thesis is on women's ability to have a fair trial in *judicial bodies* with regard to which article 14 has been most elaborated upon and, therefore, sets the most comprehensive standards. For discussion on the right to an effective remedy, see Nowak, 2005, pp. 62-75.

<sup>272</sup> CEDAW, article 2 (c) requires State Parties to 'ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination', Maputo Protocol, article 25 requires State Parties to 'provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated [and] ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law'.

<sup>273</sup> ICCPR, article 14 (1).

<sup>274</sup> HRC, General Comment No. 32, para. 8.

<sup>275</sup> *Ato del Avellanal v. Peru*, para. 10.2

<sup>276</sup> *Lindon v. Australia*, No. 646/1995, para. 6.4. See also *Äärelä and Näkkäläjärvi v. Finland*, No. 779/1997, para. 2.4, 3.2, 7.2.

proceedings.<sup>277</sup> The principle of *equality of arms*, on the other hand, ensures that disputing parties enjoy the same procedural rights.<sup>278</sup>

The right to a ‘fair and public hearing by a competent, independent and impartial tribunal’ has various elements. Firstly, it requires that the judiciary is independent, i.e. free from political interference, and that judges are appointed according to clear procedures and qualifications.<sup>279</sup> In addition, judges must be impartial, meaning that they must not be influenced in their decisions by ‘personal bias or prejudice’ and must treat the parties in fair manner which does not unduly advance either of their interests.<sup>280</sup> The HRC has found the expression of racist attitudes by judges<sup>281</sup> or the selection of a racially biased jury to be one instance which can result in a violation of the principle of a fair hearing.<sup>282</sup> One would assume that the Committee was to apply similar standards with regard to sexist attitudes among adjudicators or a judicial body which is solely composed of one gender. The right to a fair hearing also entails that justice is not unduly delayed.<sup>283</sup>

The term ‘tribunal’ has been interpreted broadly by the Committee to include, regardless of denomination, any mechanism which is established by law and has ‘judicial independence in deciding legal matters in proceedings that are judicial in nature’.<sup>284</sup> Furthermore, the guarantees set out in article 14 apply to courts and tribunals applying customary law *where such are recognized in a State’s legal order*.<sup>285</sup> In addition to meeting the ‘basic requirements’ of a fair trial and other guarantees contained in the Covenant, decisions made by such courts *must be validated by State courts* to ensure their compliance with the guarantees set forth in the Covenant. Furthermore, *affected parties must be able to challenge decisions* made by such courts in a procedure which meets the requirements of article 14. In its

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<sup>277</sup> Nowak, 2005, p. 313.

<sup>278</sup> *Jansen-Gielen v. The Netherlands*, No. 846/1999, para. 8.2 and *Äärelä and Näkkäläjärvi v. Finland*, No. 779/1997, para. 7.4.

<sup>279</sup> HRC, General Comment No. 32, para. 19.

<sup>280</sup> *Karttunen v. Finland*, No. 387/1989, para. 7.2.

<sup>281</sup> *B.d.B. v. The Netherlands*, No. 273/1988, para. 6.3

<sup>282</sup> HRC, General Comment No. 32, para. 25.

<sup>283</sup> *Munoz Hermoza v. Peru*, No. 203/ 1986, paras. 11.3, 12.

<sup>284</sup> HRC, General Comment No. 32, para. 18.

<sup>285</sup> *Ibid.*, para. 24.

Concluding Observations, the HRC has so far not commented on the operation of local dispute settlement bodies, including customary justice systems, in Tanzania, Uganda or Kenya, nor has it commented more generally on women's access to justice and their ability to have a fair trial. It has, however, expressed its concern with the overall limited access of citizens to domestic courts and judicial remedies which it sees primarily as a consequence of pervasive corruption and lack of human and material resources, resulting in 'serious dysfunctions in the administration of justice'.<sup>286</sup>

Another instrument which deals comprehensively with access to justice and equality before the law is the Maputo Protocol. Article 8 of the Protocol explicitly addresses States' duties with regard to ensuring women's *de facto* access to the justice system and legal assistance.<sup>287</sup> In addition, it requires States to put into place educational structures and create public awareness on the rights of women.<sup>288</sup> Law enforcement organs *at all levels* must be trained to effectively understand and enforce gender equality rights.<sup>289</sup> In addition, States must ensure that women are *equally represented* within the judiciary and law enforcement bodies.<sup>290</sup> While article 15 (1) of CEDAW, on equality before the law, is not quite as explicatory, the Committee has interpreted the article much in line with the obligations spelled out in the Maputo Protocol. In its Concluding Observations to Kenya, Tanzania and Uganda, the Committee emphasizes the need to enhance women's access to justice through training of judicial officers and legal aid and literacy programmes.<sup>291</sup> In its Concluding Observation to the Kenyan government, for example, the Committee recommends that the Convention and other domestic legislation concerning women's rights 'be made an integral part of the legal education and training of judges and magistrates, lawyers and prosecutors, particularly those working in the local council courts, so that a legal culture supportive of women's equality with men and non-discrimination on the basis of sex is firmly established in the country'.<sup>292</sup> It, furthermore, requests the government to take measures to remove existing barriers which prevent women from claiming their

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<sup>286</sup> HRC, CCPR/CO/83/KEN, para. 9, 20.

<sup>287</sup> Maputo Protocol, article 8 (a) (b).

<sup>288</sup> *Ibid.*, article 8 (c)

<sup>289</sup> *Ibid.*, article 8 (d).

<sup>290</sup> *Ibid.*, article 8 (e).

<sup>291</sup> CEDAW, C/KEN/CO/7 (Kenya 2011), para. 14(b), CEDAW, C/UGA/CO/7 (Uganda 2010), para.

14, CEDAW, TZA/CO/6 (Tanzania 2008), para 114.

<sup>292</sup> CEDAW, C/KEN/CO/7 (Kenya), para. 14 (b).



rights by ‘speedily adopt[ing] the national legal aid and awareness policy with the view to institutionalize legal aid throughout the country [and] implement legal literacy programmes and disseminate knowledge of ways to utilize available legal remedies against discrimination’.<sup>293</sup> While the Committee identifies the ‘persistence of traditional justice systems’ in Kenya as a *barrier* to women’s access to justice, it does not provide any guidance on how the country should deal with such systems.<sup>294</sup> The Concluding Observations issued to the governments of Tanzania and Uganda do not make reference to traditional justice systems at all.

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<sup>293</sup> Ibid, para. 14 (c). Awareness and legal literacy measures have equally been recommended in the case of Tanzania(para. 114) and Uganda (para. 14) whereas legal aid has only been addressed in relation to Tanzania

<sup>294</sup> Ibid., para. 13.

## 4 Translating Rights into Practice

### 4.1 Introduction

The previous chapter has shown that the equal rights of women to own and inherit land are protected under several international and regional human rights law treaties, all of which have been ratified by Kenya.<sup>295</sup> With the adoption of its new constitution in August 2010 the Kenyan government has taken an important step towards eliminating discrimination against women in conformity with its obligations under international human rights law. The central question, however, is how the constitutional promise for non-discrimination and gender equality will be translated into practice. This section discusses some of the measures taken by the Kenyan government to eliminate discrimination against rural women with regard to their access, control and ownership of land. It does so against the background of the human rights obligations discussed in the previous chapter, especially, the threefold approach to non-discrimination under CEDAW. The focus of the analysis is on community-based dispute settlement mechanisms and in particular, on four inter-related aspects which are crucial for enhancing women's ability to enjoy a fair trial in such bodies: These approaches are the *participation of women, human rights training and sensitisation of decision makers, procedural safeguards and transformation of negative socially and culturally entrenched stereotypes and attitudes.*

As mentioned in the previous chapter, the three strategies towards eliminating discrimination against women under CEDAW, as elaborated by Ricki Holtmaat<sup>296</sup>, should be seen as complementary and mutually reinforcing. Applied in an integrative fashion, they make up a holistic approach towards eliminating discrimination against women and ensuring their *de facto* equality with regard to land. For example,

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<sup>295</sup> Kenya is yet to deposit its instrument of ratification for the Maputo Protocol with the African Union. The Kenyan Parliament has authorized ratification in October 2010. See

<http://safariafricaradio.com/index.php/section-blog/96-women/807-maputo-protocol-a-hard-won-victory-for-women> and <http://www.africa4womensrights.org/post/2010/10/11/Kenya-%3A-Concrete-steps-required-to-demonstrate-government-s-will-to-respect-women-s-rights> (last accessed 04.07.11)

<sup>296</sup> Holtmaat & Naber, 2011, Holtmaat & Tobler, 2005.

individual litigation triggered by the formal recognition of women's equal land rights and the provision of legal aid can play an important role in enhancing rights awareness among women and contribute, in the long run, to the transformation of local norms and practices, in particular, where positive judicial decisions are displayed at community level and successful women become role models to others. Supportive measures, such as female quotas in local dispute-settlement bodies, on the other hand, ensure that women's perspective is taken into account in the interpretation, application and *creation* of customary law and thus, contribute to ensuring women's formal and substantive equality at the same time as exerting a positive influence on social norms and customs. Combating negative gender-stereotypes, on the other hand, is an essential element in making formal and informal land adjudication bodies more 'women friendly' and enhancing women's meaningful participation in such bodies, both of which encourages female victims of discrimination to bring their cases before such bodies.

#### **4.2 Enhancing Women's Access to Justice (*Individual Rights Strategy*)**

In its recent report on the implementation of the ICCPR, the Kenyan government acknowledges the many barriers Kenyan citizens, particularly women, face in using the statutory legal system.<sup>297</sup> The report refers to problems relating to both the legislation itself, which is 'written in difficult, technical language' and is in 'inaccessible statute books' as well as the judicial bodies applying the law, which are geographically inaccessible and apply complicated procedures which citizens cannot follow.<sup>298</sup> These problems are further compounded by legal and general illiteracy among the population, resource constraints and the marginalisation of certain groups of society, including women, due to 'insensitive laws, legal procedures, institutional and general social practice'.<sup>299</sup> Lawyers, who could assist people in using the legal

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<sup>297</sup> CCPR/C/KEN/3 (State report 2011), para. 58-59. Similar acknowledgements have been made in the State report on CEDAW (e.g. para. 96), CEDAW/C/KEN/7 (State report, 2010).

<sup>298</sup> CCPR/C/KEN/3 (State report 2011), para. 58.

<sup>299</sup> *Ibid*, para. 59, see also CEDAW/C/KEN/7 (State report), para. 249 and 250.

system, are due to their high costs and urban location only accessible to a minor part of the population.<sup>300</sup>

A review of government policies, programs and reports to human rights treaty bodies suggests a preference by the Kenyan government for a *legal* strategy towards eliminating discrimination against women in relation to land.<sup>301</sup> This preference is shared by national women's rights organisations engaging in advocacy for women's land rights.<sup>302</sup> Within this strategy there is an increasing recognition of the need to promote and make use of Alternative Dispute Resolution (ADR), including traditional dispute-settlement mechanisms, as alternative ways of enhancing access to justice in land related conflicts.<sup>303</sup> Unfortunately, this recognition is not accompanied by clear guidelines on *how* local dispute-settlement bodies will be brought under the scrutiny of the constitutional non-discrimination/ equality clause.

#### 4.2.1 *Legislative Measures (enhancing 'de jure' equality)*

Section 60 of the new Kenyan Constitution establishes the principles for land ownership, use and management in the country. The principles include 'equitable access to land', 'elimination of gender discrimination in law, customs and practices related to land and property in land' and 'encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution'.<sup>304</sup> Section 60(2) requires that the aforementioned principles are implemented through a national land policy and legislation.<sup>305</sup> In doing so, it gives constitutional backing to Kenya's first national land policy which was adopted by the

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<sup>300</sup> Ibid.

<sup>301</sup> See for example, Sessional Paper No. 3 of 2009 on National Land Policy (National Land Policy), National Legal Aid and Awareness Programme (NALEAP) (discussed below), CEDAW/C/KEN/7 (State Report 2010), CEDAW/C/KEN/Q/7/Add.1 (State responses 2010), CCPR/C/KEN/3 (State report 2011). See also field research conducted by Harrington & Chopra (2010) who reach similar conclusions.

<sup>302</sup> See for example FIDA-K. See also Nyamu Musembi, 2002, pp. 126-127.

<sup>303</sup> Constitution of Kenya, 2010, National Land Policy, 2009, CCPR/C/KEN/3 (State report 2011). See also projects by Kenya National Commission on Human Rights/Health Policy Initiative (KNCHR/HPI) and Kenya Legal and Ethical Issues Network on HIV & HIV (KELIN), discussed under section 4.4 of this chapter.

<sup>304</sup> Constitution of Kenya, 2010, Section 60 (1) (a) (f) (g).

<sup>305</sup> Ibid., Section 60 (2).

Kenyan parliament in December 2009, eight months before the new constitution entered into force.<sup>306</sup> The National Land Policy acknowledges the huge disparities in land ownership and the widespread discrimination against women with regard to inheritance and transfer of land as well as women's exclusion from decision making processes concerning land.<sup>307</sup> The impact of biased decision-making by land management and dispute settlement bodies on women and vulnerable groups is equally recognized.<sup>308</sup> The Policy points to 'culture and traditions' as well as discriminatory and gender-insensitive legislation as key determinants of discrimination against women in relation to land.<sup>309</sup> It calls upon the government to repeal and review discriminatory legislation, in particular in the field of succession and matrimonial property, and put into place a legislative framework which effectively protects women from discriminatory customs and practices.<sup>310</sup> It explicitly requires the government to replace the Married Women's Property Act of 1882 with a new piece of legislation which governs the division of matrimonial property and ensures co-ownership and equal rights of spouses with regard to such property.<sup>311</sup> Furthermore, it recognizes the need to legally define and protect women's rights under communal land ownership and ensure their consent to land transactions.<sup>312</sup>

Schedule Five of the Constitution gives the Kenyan parliament 18 months to review existing land legislation in line with the principles set out in article 60, which are further elaborated in the National Land Policy, and enact legislation which regulates the recognition and protection of matrimonial property during marriage and its dissolution (article 68 (c) (iii)) and protects the land rights of widows and widowers (article 68 (c) (vi)).<sup>313</sup> Until then, any law in force 'shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution'.<sup>314</sup> This also applies to customary law which, in case of conflict with the Constitution, must be considered void to the extent of its

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<sup>306</sup> Sessional Paper No. 3 of 2009 on National Land Policy, 2009.

<sup>307</sup> *Ibid.*, para. 1, 24, 89-91, 220-225.

<sup>308</sup> *Ibid.* para. 25 (f), 196.

<sup>309</sup> *Ibid.* para. 90, 220, 224.

<sup>310</sup> *Ibid.*, para. 223 (a) (b) (c), 225 (a) (b) (c) (d).

<sup>311</sup> *Ibid.*, para. 225 (a) (b) (c).

<sup>312</sup> *Ibid.* para. 66 (d) (i) (vi), 221, 223 (d).

<sup>313</sup> Constitution of Kenya, Schedule 5. To be read in conjunction with para. 68 (b) (c) (iii) (vi).

<sup>314</sup> *Ibid.* Schedule 6.

inconsistency.<sup>315</sup> In other words, even before the required legislation protecting women's right to non-discrimination and equality in relation to land is enacted by parliament, courts as well as local dispute settlement bodies are under an obligation to interpret both statutory and customary law in conformity with women's constitutional right to equality and non-discrimination. Moreover, the new constitution brings a fundamental change with regard to the domestic application of international human rights treaties ratified by Kenya. Whereas the previous constitution required the enactment of national laws to domesticate the rights contained in such treaties, the new constitution provides that international treaties, upon ratification, automatically become part of the domestic legal system.<sup>316</sup> This means that judicial bodies must interpret and apply existing legislation and customary law on land not only in line with the constitutional non-discrimination clause but also in conformity with CEDAW and other international human rights treaties ratified by the country.

So far, three bills- all redrafted versions from 2007- have been submitted for enactment to the Kenyan Parliament: the Matrimonial Property Bill, the Marriage Bill and the Equal Opportunities Bill.<sup>317</sup> Both the Matrimonial Property Bill and the Marriage Bill had been previously rejected by the Kenyan parliament, among other things, due to objections regarding equality in marriage.<sup>318</sup> The *Matrimonial Property Bill* of 2007,<sup>319</sup> once enacted, would go a long way towards protecting women's land rights during marriage and its dissolution. It would be the first legislation to clearly define matrimonial property<sup>320</sup> and provide guidance on the division of such property in case of divorce or separation. The Bill holds that ownership of matrimonial property is vested in equal shares in the spouses, independently of individual

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<sup>315</sup> Ibid. Para. 2 (4).

<sup>316</sup> Ibid. Para. 2 (6). For more discussion on this provision see also Gathii, 2011 available under <http://nairobiawmonthly.com/index/content.asp?contentId=253&isId=6&ar=1>

<sup>317</sup> CEDAW/C/KEN/7 (State report 2010), para. 18.

<sup>318</sup> CEDAW/C/KEN/Q/7/Add.1 (State responses 2010), para. 5.

<sup>319</sup> Available at <http://kenyalaw.org/klr/fileadmin/pdfdownloads/Bills/Unpublished/200702.pdf> (consulted on 25 June 2011)

<sup>320</sup> Section 7 (1) of the Bill defines matrimonial property as '(a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; (c) immovable property, owned by either spouse which provides the basic income for the sustenance of the family; (d) any other property acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property.'

contribution to the acquisition of such property, and must be divided accordingly in case of dissolution of the marriage.<sup>321</sup> Furthermore, the Bill protects the interests of a spouse in any other property, owned by the other spouse, to which he or she has made a contribution, even where such contribution has not been monetary.<sup>322</sup>

The *Marriage Bill* of 2007<sup>323</sup> seeks to consolidate the various marriage regimes into one piece of legislation which gives all marriages equal status. It guarantees the equal rights and responsibilities of men and women in marriage (independent of the regime under which concluded) and mandates the registration of customary marriages. Once enacted, the Bill would make it much easier for women to understand the legal rights and obligations arising from marriage and, thus, improve their access to justice. In addition, the registration of customary marriages would significantly improve the protection of women married under such systems who would no longer have to rely on relatives and other witnesses to verify their marriage status.

The *Equal Opportunity Bill* of 2007,<sup>324</sup> once enacted into law, will protect and promote the constitutional right to equal treatment and equal opportunities of all persons, including women, and prohibit any form of discrimination, including on grounds of sex or gender. The bill foresees the establishment of an 'Equality Board' which, among other functions, will have jurisdiction to hear and determine allegations of discrimination and order remedies for victims.<sup>325</sup> The board will be composed proportionately of men and women.<sup>326</sup> While the new constitution obliges the Kenyan parliament to enact legislation which implements the constitutional right to equality and non-discrimination,<sup>327</sup> the government itself, in its report to the CEDAW

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<sup>321</sup> The Matrimonial Property Bill, 2007, section 8.

<sup>322</sup> Ibid., section 10 in conjunction with section 2. Section 2 explicitly recognizes a spouse's non-monetary contribution to property.

<sup>323</sup> The Marriage Bill, 2007, at <http://www.kenyalaw.org/Downloads/Bills/Unpublished/200703.pdf> (consulted on 25 June 2011)

<sup>324</sup> Available at

<http://www.kenyalawreports.or.ke/klr/fileadmin/pdfdownloads/Bills/Unpublished/200705.pdf> (consulted on June 25 2011)

<sup>325</sup> Ibid. Section 27.

<sup>326</sup> Except for one additional member who is appointed by the Minister. See Section 26 (1).

<sup>327</sup> Constitution of Kenya, 2010, section 261.

Committee, acknowledges the obstacles posed to passing gender equality bills in the context of a male-dominated parliament.<sup>328</sup>

#### 4.2.2 Institutional Reform

The Kenyan government has initiated various institutional reforms to enhance access to justice which has been identified as one of the country's key development priorities.<sup>329</sup> Reforms include the establishment of additional court houses,<sup>330</sup> decentralisation of the Court of Appeal and High Court and the establishment of a Task Force on Judicial Reforms which has come up with extensive recommendations on how to enhance the independence and effectiveness of the judicial system.<sup>331</sup> In addition, the High Court has, in response to the backlog of land-related cases, established a special division on land and environment which will eventually become a specialized court on that matter.<sup>332</sup> Moreover, effort is being made to set up a pilot scheme which would make it mandatory for disputing parties to attend mediation (ADR) prior to resolving the matter in court.<sup>333</sup> With regards to the training of judges, a 'Continuing Legal Education' programme has been introduced which is to keep judges and lawyers informed on modern legal practices.<sup>334</sup> The report does not point to any government efforts towards improving community-based dispute settlement mechanisms, including traditional ones. The only project which explicitly engages with such structures, and to which the government refers to numerous times in its CEDAW report- the 'Women's Property Ownership and Inheritance Rights' (WPOIR) project- will be discussed in Section 4.5.<sup>335</sup>

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<sup>328</sup> CEDAW/C/KEN/7 (State Report 2010), para. 96.

<sup>329</sup> CCPR/C/KEN/3 (State Report 2011), para. 60.

<sup>330</sup> It is, however, not clear where these court houses have been established (e.g. whether only in cities or also smaller towns). The government only refers to 'over 50 new court rooms in Nairobi alone'. CCPR/C/KEN/3 (State Report 2011), para. 110.

<sup>331</sup> *Ibid.*, para. 110 and 112.

<sup>332</sup> *Ibid.*, para. 113.

<sup>333</sup> *Ibid.*, para. 115.

<sup>334</sup> *Ibid.*, para. 136.

<sup>335</sup> The project will be discussed under 4.4. See CEDAW/C/KEN/7 (State Report 2010), para. 31, 32, 50, 77, 82. The government only indirectly refers to the project. For more information on the actual project, see Policy Project, 2005, at [http://www.policyproject.com/pubs/countryreports/KEN\\_InheritanceRights.pdf](http://www.policyproject.com/pubs/countryreports/KEN_InheritanceRights.pdf)



The Constitution and the National Land Policy are explicit on the need to promote the use of community-based dispute settlement mechanisms in land conflicts while ensuring that such systems comply with constitutional standards of non-discrimination and equality. The constitution places the exercise of judicial authority in courts and tribunals which are to promote alternative forms of dispute resolution, including traditional ones.<sup>336</sup> Such systems, however, must only be used in manner which does not infringe the bill of rights, is not ‘repugnant to justice and morality’ and is consistent with the Constitution and any other written law.<sup>337</sup> The Constitution grants the High Court supervisory jurisdiction over subordinate courts and ‘any person, body or authority exercising a judicial or quasi-judicial function’ from which it may request a record of proceedings and may ‘make any order or give any direction it considers appropriate to ensure fair administration of justice’.<sup>338</sup> In addition, the High Court has jurisdiction to make determinations regarding the denial, violation, infringement or threatening of a right or fundamental freedom enshrined in the bill of rights and the consistency of any law with the constitution.<sup>339</sup> In relation to land, the constitution mandates the establishment of a National Land Commission which among other things has the function to promote the application of traditional dispute settlement mechanisms to resolve land disputes.<sup>340</sup> Again, such systems must be in conformity with the constitution and must in no way contravene the constitutional bill of rights.<sup>341</sup>

The National Land Policy calls for the existing institutional framework for land administration and management to be replaced with one which is less centralized and bureaucratic and more participatory and accountable.<sup>342</sup> Three institutions are to be set up in this regard: the National Land Commission (NLC), District Land Boards (DLBs) and Community Land Boards (CLBs).<sup>343</sup> In relation to dispute settlement, the

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<sup>336</sup> Constitution of Kenya, para. 159 (1) (2) (c).

<sup>337</sup> *Ibid.*, para 159 (3) (a) (b) (c).

<sup>338</sup> *Ibid.*, para 165 (6) (7).

<sup>339</sup> *Ibid.*, para. 165 (3) (b) (d) (i).

<sup>340</sup> *Ibid.*, para. 67 (2) (f).

<sup>341</sup> *Ibid.*, para. 60 (g), 159 (3) (a) (b) (c).

<sup>342</sup> National Land Policy, 2009, para. 228.

<sup>343</sup> *Ibid.*, para. 231.

policy envisions the establishment of District Land Tribunals which are to replace the current Land Dispute Tribunals.<sup>344</sup> It does not, however, spell out what the specific nature or composition of such tribunals will be. Instead it makes some general remarks, maintaining that dispute resolution must be ‘fair and efficient’ and carried out by ‘independent, accountable and democratic systems backed by law’ which have ‘clear operational procedures, and clear record-keeping’.<sup>345</sup> Furthermore, the policy requires DLBs and CLBs to make use of ADR mechanisms where such is possible.<sup>346</sup> Cases may also be referred to the land division of the High Court.<sup>347</sup>

#### *4.2.3 Legal Aid and Rights Awareness*

The National Land Policy recognizes that the protection offered by statutory legislation in the field of inheritance is limited by the fact that transfer of land tends to take place within customary and religious systems which discriminate against women.<sup>348</sup> It calls upon the government to ‘sensitize and educate’ citizens on the provisions of the Law of Succession Act and ensure that succession cases are displayed at the community level.<sup>349</sup> Furthermore, it recommends public awareness campaigns which stress the importance of protecting the land rights of dependents through the writing of wills.<sup>350</sup> While the National Land Policy promotes the use of accessible forms of justice,<sup>351</sup> it does not mandate the provision of legal aid to those who lack resources. The Constitution, on the other hand, while not explicitly requiring

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<sup>344</sup>Their denomination of the tribunals which are to replace the Land Disputes Tribunals does not become very clear from the National Land Policy which in some occasions (executive summary; para. 227 (b) (iii); para. 251) refers to ‘District Land Tribunals’, and on others (proposed organisation structure, p. 61) to ‘Land Disputes Tribunals’. It is however certain that the Land Disputes Tribunal Act will be repealed and replaced (para. 261). The Kenya Law Reform Commission has already prepared a draft bill which amends the Land Disputes Tribunal Act (‘Land Disputes Tribunal (Amendment) Bill’).<sup>344</sup> Unfortunately, the Bill is not publicly available for review (at least not on the internet).

<sup>345</sup> Ibid. para. 170 (a) (b).

<sup>346</sup> Ibid. para 262.

<sup>347</sup> Ibid. para. 263.

<sup>348</sup> Ibid., para. 90,

<sup>349</sup> Ibid., para. 91 (a) (c).

<sup>350</sup> Ibid. para. 223 (f).

<sup>351</sup> See for example para 169, 170 (c).

the provision of legal aid, does oblige the government to ensure that everyone has access to justice and that, wherever fees are imposed, these do not prevent access.<sup>352</sup>

The Kenyan government is currently developing a national legal aid and awareness policy which will be based on the experiences of the pilot phase of the National Legal Aid and Awareness Programme (NALEAP).<sup>353</sup> The NALEAP, which runs under the auspices of the Ministry of Justice, National Cohesion and Constitutional Affairs, was officially launched by the Kenyan government in September 2008 and is carried out in partnership with the judiciary and civil society organizations.<sup>354</sup> The programme forms part of a wider legal reform process which seeks to enhance access to justice for the poor as a means of combating poverty and achieving development.<sup>355</sup> It seeks to raise legal awareness and provide free legal advice and court representation to poor and vulnerable members of society.<sup>356</sup> Currently it is operating at six pilot sites located in Nairobi (two), Eldoret, Nakuru, Madiany and Mombasa.<sup>357</sup> While the government explicitly states that the programme targets both the urban and rural population,<sup>358</sup> only one out of the six pilot sites (Madiany Paralegal Advice Office) is not located in an urban centre. To address issues of importance to women, including those concerning matrimonial property disputes, widow eviction and access to land, a 'Women and Family Division' has been set up within the programme. The division which, among others, works together with the Kenya Federation of Women Lawyers (FIDA-K) and the Kenya National Commission on Human Rights (KNCHR),<sup>359</sup> is, however, again situated in the country's capital, Nairobi. The programme is not only limited in geographical terms, but also in the scope of advisory services provided. NGOs have criticized the programme for offering only the 'bare minimum' of services and not actually enabling poor women to act upon the legal advice given by

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<sup>352</sup> Constitution of Kenya 'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.' (para. 48)

<sup>353</sup> CEDAW/C/KEN/Q/7/Add.1 (State responses 2010), para. 6.

<sup>354</sup> CEDAW/C/KEN/7 (State report 2010), para. 33

<sup>355</sup> *Ibid.*, para. 78.

<sup>356</sup> CCPR/C/KEN/3 (State report 2011), para. 61-62.

<sup>357</sup> *Ibid.*, para. 62. See also

[http://www.justice.go.ke/index2.php?option=com\\_content&do\\_pdf=1&id=162](http://www.justice.go.ke/index2.php?option=com_content&do_pdf=1&id=162) (consulted on 12 July 2011).

<sup>358</sup> CEDAW/C/KEN/7 (State report 2010), para. 78.

<sup>359</sup> *Ibid.*

filing a lawsuit or seeking administrative redress.<sup>360</sup> The impact of the programme in terms of improving *de facto* access to justice for poor women living in rural areas, thus, appears to be marginal. After completion of the pilot phase of three years, the government intends to roll out the programme throughout the country.<sup>361</sup> However, the high dependency on donor funding (which has been reducing) poses a significant challenge to the expansion and sustainability of the programme.<sup>362</sup>

The government acknowledges that general and legal illiteracy remain significant barriers to the advancement of rural women and that existing awareness activities reach only a small number of rural women.<sup>363</sup> While it assumes partial responsibility for this situation, admitting that measures have been limited in scope and resources, it also assigns blame to rural women themselves who, due to high levels of poverty, are ‘pre-occupied with the quest for survival and hardly pay attention to legal awareness campaigns, adult education and other measures intended to improve their socio-economic status’.<sup>364</sup>

### **4.3 Bringing change from within (*Social Support Strategy*)**

When it comes to female participation in public decision-making, Kenya performs fairly poorly compared to its East African neighbours.<sup>365</sup> Kenyan women make up less than 10% of parliamentarians,<sup>366</sup> 13% of Ministers and Assistant Ministers and 16% of Councilors.<sup>367</sup> The situation is no better with regards to the Provincial Administration, in charge of implementing legislation and policies at the community level. Only one out of eight Provincial Commissioners, six out of 88 District

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<sup>360</sup> FIDA-K & COHRE, 2010, p. 9.

<sup>361</sup> CEDAW/C/KEN/7 (State report 2010), para. 78.

<sup>362</sup> Ibid., para. 36., FIDA-K & COHRE, 2010, p. 9.

<sup>363</sup> CEDAW/C/KEN/7 (State report 2010), para. 36, 249.

<sup>364</sup> CEDAW/C/KEN/7 (State report 2010), para. 250.

<sup>365</sup> See for example, Inter Parliamentary Union world ranking of women in national parliaments, in which Kenya holds the 103<sup>rd</sup> position, compared to Rwanda (1<sup>st</sup>), Uganda (14<sup>th</sup>), Tanzania (16<sup>th</sup>), Ethiopia (29<sup>th</sup>) and Sudan (35<sup>th</sup>).

<sup>366</sup> Inter Parliamentary Union (as of 30<sup>th</sup> of April 2011), at <http://www.ipu.org/wmn-e/classif.htm>.

<sup>367</sup> UN Women, 2010, pp. 16 and 18.

Commissioners and 164 out of 701 District Officers are female.<sup>368</sup> At the lowest levels of government administration, the situation is even worse with only 4% of Chiefs and 8% of Assistant Chiefs being women.<sup>369</sup> With regards to the judiciary, women present on average 34% of the judges, with female representation increasing at the lower level courts (Magistrates Courts) and only one female judge serving on the Court of Appeal (out of 10).<sup>370</sup>

In contrast to neighbouring countries, such as Tanzania, Uganda or- most famously- Rwanda, Kenya has so far not put into place female quotas or other effective affirmative action measures which would enhance women's participation and redress existing disadvantages stemming from past and present discrimination.<sup>371</sup> A presidential decree issued in 2006, which requires that at least 30% of all new positions in public service be allocated to women, has so far not materialized.<sup>372</sup> The president has himself, on various occasions, ignored his own decree.<sup>373</sup> A recent study by the Ministry of Gender, Children and Social Development on the implementation of the decree reveals that while taken as a whole, 31% of the newly recruited civil service staff are women, the vast majority of them (72%) has been employed in lower cadre positions.<sup>374</sup> This coincides with a baseline survey commissioned by UNIFEM which found that while women constituted 34% of the overall workforce in local governments, they only held 10% of senior management positions.<sup>375</sup> In fact, 98% of women employees at this level of government were found to work in bottom rank positions as sweepers or revenue collectors.<sup>376</sup>

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<sup>368</sup> Ibid., p. 20.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid. p. 17.

<sup>371</sup> Nyamu-Musembi, 2003, p. 25.

<sup>372</sup> Examples are the appointment of the *Waki* or *Kriegler* Commission in relation to the Post-Election Violence 2007/ 2008. CEDAW/C/KEN/7 (State report 2010), para. 52, CCPR/C/KEN/3 (State report 2011), para. 128. See also IPS, 2009, at <http://www.ipsnews.net/news.asp?idnews=45621> or Nairobi Standard 2009, at <http://www.standardmedia.co.ke/archives/health/InsidePage.php?id=1144021035&cid=4&kywrd=AG>.

<sup>373</sup> Ibid.

<sup>374</sup> See Ministry of Gender at, <http://www.gender.go.ke/index.php/Gender-and-Social-Development-Divisions/gender-and-development.html> Unfortunately, the full study is not available online.

<sup>375</sup> UN Women, 2010, p. iv.

<sup>376</sup> Ibid.

The new Constitution obliges the government to take legislative and other measures, including affirmative action, to ensure women's participation in public decision-making and redress disadvantages resulting from past discrimination.<sup>377</sup> It requires that no more than two-thirds of the members of any elected or appointed body shall be of the same gender and that the chair and vice-chair of any government appointed commission must be of opposite sexes.<sup>378</sup> One of the Commissions established by the Constitution is the Judicial Services Commission which, among other functions, recommends judges for appointment by the president and, in doing so, must promote gender equality.<sup>379</sup> The recent nomination of five Supreme Court Judges- only one of them a woman- by the Judicial Services Commission has sparked much debate in Kenya regarding the constitutional requirement that no more than two-thirds of members of appointed public bodies shall be of the same gender.<sup>380</sup> Following an application by the Federation of Women Lawyers Kenya (FIDA-K) and five other women's rights groups, the High Court has issued a restraining order which put the inauguration of the appointed judges on a temporary halt.<sup>381</sup> The matter has been forwarded for review to the Chief Justice who is expected to give a final decision on the matter.<sup>382</sup>

Enhanced community participation, especially of previously excluded groups such as women, in decision-making processes concerning land is one of the core principles of devolved land governance envisioned by the National Land Policy.<sup>383</sup> With regard to women's participation, the policy goes even further than the constitution and requires that women be *proportionately* represented in institutions dealing with land at all

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<sup>377</sup> Constitution of Kenya, 2010, Section 27(6) and 27 (8).

<sup>378</sup> Ibid., section 27 (8), 81 (b), 175 (c), 197 (1), 250 (11)

<sup>379</sup> Ibid., section 172 (1) (a) (2) (b).

<sup>380</sup> The five nominated judges add to the Chief Justice (male) and the Deputy Chief Justice (female), meaning that only two out of the seven judges serving on the newly established Supreme Court would be women. See Daily Nation, 17 June 2011, at <http://www.nation.co.ke/News/politics/-/1064/1184068/-/7tatth/-/index.html>.

<sup>381</sup> The Daily Nation, 27 June 2011, at <http://www.nation.co.ke/News/politics/Judges+hiring+case+referred+to+CJ+/-/1064/1190350/-/84p4ki/-/index.html>, see also press statement by FIDA-K, 15 June, at <http://fidakenya.org/2011/06/press-statement-by-fida-kenya-proposed-nominees-to-the-post-of-supreme-court-judge-by-the-judicial-service-commission/>

<sup>382</sup> Ibid.

<sup>383</sup> National Land Policy, 2009, e.g. para. 24 (c), 39 (c), 66 (d) (v) (vi), 197 (c), 223 (h), 229 (d), 230 (b).

levels.<sup>384</sup> Given that women make up 50.2 percent of the Kenyan population, this implies that women should hold *at least* an equal share of positions in such bodies.<sup>385</sup> The Ministry of Lands has just recently published a draft National Land Commission Bill which sets out the functions and composition of the National Land Commission (NLC).<sup>386</sup> The Bill upholds the constitutional principle of gender equality in requiring that the composition of the NLC shall reflect gender balance and that the chairperson and vice-chairperson must be of opposite sex.<sup>387</sup> In addition, it mandates that one of the members of the interview and short-listing panel, which will identify and recommend chairperson and commissioners of the NLC, must be nominated by a women's rights organization or association.<sup>388</sup> One of the functions of the NLC will be the promotion of the use of traditional dispute settlement mechanisms in land conflicts.<sup>389</sup> In performing this and other functions, the NLC must strive towards eliminating gender discrimination in law, customs and practices.<sup>390</sup>

While the Constitution and National Land Policy place clear legal and political obligations on the government concerning women's participation in government offices, what about non-state institutions and mechanisms, such as traditional dispute resolution by elders? Does the government have an obligation to ensure or at least promote women's participation in such structures? The equality and non-discrimination provision (article 27) of the constitutional bill of rights clearly extends to private actors. This is made explicit in article 27 (5) which states that '[a] *person* shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)'.<sup>391</sup> The State, on the other hand, has

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<sup>384</sup> Ibid., para. 223 (h).

<sup>385</sup> See Kenya Population Data Sheet 2011, p. 6. Available under [http://www.ncapd-ke.org/index.php?option=com\\_docman&task=cat\\_view&gid=81&Itemid=73](http://www.ncapd-ke.org/index.php?option=com_docman&task=cat_view&gid=81&Itemid=73) (consulted on 30.06.2011)

<sup>386</sup> The bill is available under [http://cickenya.org/sites/default/files/bills/National\\_Land\\_Commission\\_Bill.pdf](http://cickenya.org/sites/default/files/bills/National_Land_Commission_Bill.pdf)

<sup>387</sup> Draft National Land Commission Bill, 2011, para. 10 (3) (4).

<sup>388</sup> Ibid. para. 6 (2) (e).

<sup>389</sup> Constitution of Kenya, 2010, para. 67 (2) (f), Draft National Land Commission Bill, 2011, para. 4 (h).

<sup>390</sup> Draft National Land Commission Bill, 2011, para. 4 (g).

<sup>391</sup> These grounds include 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'. (emphasis added), Article 27 (4).

a duty to ensure that private actors observe their constitutional obligation not to discriminate. Article 27 (6) provides that the State must put into place legislative and other measures, including affirmative action to give full effect to the realization of the rights protected under article 27. The State, thus, has a positive obligation to ensure through legislation and other measures that private institutions do not place any requirements or restrictions for participation which directly or indirectly discriminate against women. One could even go further and argue that under certain circumstances the State has a duty to impose the adoption of quotas or other affirmative measures on private institutions where such are deemed necessary to ensure women's *de facto* equal opportunities of participating in such institutions.<sup>392</sup> With regard to traditional dispute resolution bodies it is even questionable if these can be considered private actors given the public functions the constitution confers upon them by officially recognizing and encouraging their use in relation to land conflicts.<sup>393</sup> In this sense, one may argue that in taking on a public role they are under the same obligations as public bodies and, therefore, must equally comply with the constitutional requirement that no more than two-thirds of their members shall be of the same gender.<sup>394</sup> The National Land Policy, on the other hand, simply refers to women's participation in 'institutions dealing with land' without at any stage of the document indicating that this refers to public bodies only. Given the policy's overall emphasis on promoting the use of alternative dispute resolution mechanisms 'to facilitate fair and accessible justice', it would be surprising if such bodies are to be exempted from the gender balance requirement.<sup>395</sup> It can, thus, be hoped that increased official recognition of alternative dispute resolution, including traditional mechanisms, will go hand in hand with increased supervision and imposition of standards and duties upon such bodies. In this sense, Kenya may want to follow the example of countries like Uganda or Tanzania who have introduced laws which require female participation in local dispute settlement systems.<sup>396</sup>

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<sup>392</sup> This argument can be supported by article 27 (3) which holds that '[w]omen and men have the right to equal treatment, including the right to *equal opportunities* in political, economic, cultural and social spheres' (emphasis added).

<sup>393</sup> Constitution of Kenya, 2010, article 159 (2) (c), 67 (2) (f).

<sup>394</sup> *Ibid.*, article 27 (8).

<sup>395</sup> National Land Policy, 2009, para. 262.

<sup>396</sup> Nyamu-Musembi, 2003, p. 25.



#### 4.4 Creating space for women and men to question the ‘norm’ (*Strategy for Social and Cultural Change*)

In its country report and delegation answers to the CEDAW Committee concerning measures taken to eliminate harmful traditional practices and gender stereotypes, the Kenyan government points to a whole list of legislative, judicial and legal literacy measures (discussed in section 4.2), while making little reference to non-legal approaches targeting socially-embedded gender roles and stereotypes upon which discrimination against women in relation to land are founded. The National Land Policy is similar in this respect. Its primary concern is with legal measures which ensure women’s de jure equality and protect them from discriminatory customs and practices.<sup>397</sup> Such measures are to be complemented by legal awareness campaigns which are hoped to enhance the protection offered by statutory law.<sup>398</sup> The only broad reference to a non-legal measure in this regard is found in article 223 (g) which calls for educational campaigns which ‘encourage the abandonment of cultural practices that bar women from inheriting family land’.<sup>399</sup> However, it does not give any further guidance on *how* cultural practices are to be ‘abandoned’, nor does it make any explicit reference to the underlying gender-stereotypes and social hierarchies which give rise to such practices. It simply assumes discriminatory practices to be ‘cultural’ without questioning where they come from, who in the community supports them (and benefits from them) and what their purposes and objectives are (or used to be).

At the same time as identifying culture as one of the primary barriers to realizing women’s land rights,<sup>400</sup> the Kenyan government, through the *Kenya National Commission on Human Rights* (KNCHR), has started engaging with cultural structures to protect women from violations of their land rights. Since 2004 the KNCHR, in cooperation with the *Health Policy Initiative* (HPI),<sup>401</sup> has been working

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<sup>397</sup> National Land Policy, 2009, para. 223 (a) (b) (c) (d), 225 (a) (b) (c) (d).

<sup>398</sup> *Ibid.*, para. 91 (a) (c), 223 (f).

<sup>399</sup> *Ibid.*, para. 223 (g).

<sup>400</sup> CEDAW/C/KEN/7 (State report), e.g. para. 265.

<sup>401</sup> The Health Policy Initiative (formerly ‘Policy Project’), is a USAID (United States Agency for International Development) funded project which provides technical assistance in developing countries in the field of health policy development and implementation, thereby focussing on family planning and reproductive health, HIV/AIDS and maternal health. See <http://www.healthpolicyinitiative.com/index.cfm?id=about> (consulted on 02.07.2011)

with traditional leaders of the Luo and the Meru communities of Kenya,<sup>402</sup> the *Luo Council of Elders* and the *Njuri Ncheke*, in an effort to relocate HIV/AIDS infected and/or affected widows who have been evicted from their matrimonial land and raise public awareness on the practice of widow disinheritance.<sup>403</sup> Building on the experiences made by the KNCHR and HPI, the *Kenya Legal and Ethical Issues Network on HIV & AIDS* (KELIN) has in 2009 launched a similar project in other parts of Luo Nyanza and developed a working tool on enhancing access to justice and protecting the rights of vulnerable groups through cultural structures.<sup>404</sup> The two main starting points for the KNCHR/ HPI and the KELIN projects are, on the one hand, the inaccessibility of the formal legal system for women, in particular poor women living in rural areas, and hence the failure of existing statutory legislation to offer meaningful protection to victims of property rights violations<sup>405</sup> and, on the other hand, the recognition of the importance of cultural structures as the first instance of governance available and accessible to rural women and hence their potential to assume greater responsibility in safeguarding women's rights at community level.<sup>406</sup> The objective of the projects is, thus, to strengthen and, where they no longer exist, reconstruct traditional structures of authority and dispute resolution and promote their intervention in cases of widows' property rights violations.<sup>407</sup> This is done through a series of consultative and capacity-building forums with vulnerable and affected groups, elders, the provincial administration, community-based organisations and support groups, media representatives and the general public.<sup>408</sup> The forums serve to identify the root causes of the problem and discuss its relation to culture, encourage elders to assume responsibility and intervene to protect widows and create community awareness and promote the referral of cases to elders.<sup>409</sup>

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<sup>402</sup> The idea is that the project will be replicated in other regions of Kenya, see Policy Project 2005, p. 5 and 8, at [http://www.policyproject.com/pubs/countryreports/KEN\\_InheritanceRights.pdf](http://www.policyproject.com/pubs/countryreports/KEN_InheritanceRights.pdf)

<sup>403</sup> The project is mentioned various times in the Kenyan country report to CEDAW, para. 31, 32, 50, 77, 82. For more information, see Policy Project, 2005, See also

[http://www.jaramogifoundation.org/html/womens\\_right.html](http://www.jaramogifoundation.org/html/womens_right.html)

[http://www.healthpolicyinitiative.com/Publications/Documents/405\\_1\\_FINAL\\_Dorothy\\_Awino.pdf](http://www.healthpolicyinitiative.com/Publications/Documents/405_1_FINAL_Dorothy_Awino.pdf)

<sup>404</sup> The tool can be downloaded at <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf> (consulted 12 July 2011). It is meant to be applicable to other areas of human rights violations as well.

<sup>405</sup> Policy Project, 2005, p. 5, KELIN, 2010, p. 4.

<sup>406</sup> Policy Project, 2005, p. 6.

<sup>407</sup> Policy Project, 2005, pp. 6- 9, KELIN, p.4.

<sup>408</sup> Policy Project, 2005, pp. 8-14, KELIN, pp. 7- 14.

<sup>409</sup> Ibid.

The KELIN project adopts a human rights-based approach throughout its work which encourages high stakeholder participation and, thereby, seeks to ensure sustainability and community ownership of the project.<sup>410</sup> It holds capacity-building workshops to empower vulnerable and affected groups to know their rights and the corresponding duty-bearing structures (including cultural ones) through which they can redress violations.<sup>411</sup> At the same time, the project conducts human rights trainings for the elders who have been identified to mediate in disputes, which include discussions and skill building exercises regarding the application of key human rights principles, including those relating to fair and impartial dispute resolution.<sup>412</sup> Pro bono lawyers are also involved in sensitization work and in taking cases which cannot be solved at community level to court.<sup>413</sup> The two projects have had considerable impact at community level both in terms of raising awareness on the issue<sup>414</sup> and in relocating widows who had been evicted from their family land. While figures from the KNCHR/ HPI project are difficult to ascertain (varying between 20 and 150 cases depending on the source),<sup>415</sup> the KELIN project documents 84 cases which have been referred for mediation to elders, out of which 43 have been ‘successfully completed’.<sup>416</sup>

Both projects must be complemented for their innovative approach to make use of cultural structures to protect women’s human rights- an approach which sharply departs from the classic approach taken by human rights organisations and treaty bodies who often perceive culture as a barrier to human rights (and women’s rights in particular) rather than exploring its potential for protecting such rights.<sup>417</sup> The

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<sup>410</sup> KELIN, pp. 5-6, email communication with Nancy Ondeng, field officer for KELIN in Nyanza province (Kenya), 28 June 2011.

<sup>411</sup> KELIN, p. 10.

<sup>412</sup> Ibid. pp. 11-14.

<sup>413</sup> Email communication with Nancy Ondeng, 28 June 2011.

<sup>414</sup> KELIN states that 250 community members, including elders, youth and widows, have been sensitized and are now championing the rights of widows and orphans to own and inherit property. Communication by Nancy Odeng., See also Policy Project, p. 16 ‘several women have been empowered and know their rights to property ownership’

<sup>415</sup> The government in its report to CEDAW refers to ‘at least 20 cases’ (CEDAW/C/KEN/7 para. 50) while the working tool developed by KELIN states that the KNCHR/ IHP project was able to reinstall 150 widows and orphans between 2004 and 2009. See KELIN, p. 4. Yet another document published by HPI refers to 50 widows. See

[http://www.healthpolicyinitiative.com/Publications/Documents/405\\_1\\_FINAL\\_Dorothy\\_Awino.pdf](http://www.healthpolicyinitiative.com/Publications/Documents/405_1_FINAL_Dorothy_Awino.pdf)

<sup>416</sup> Communication Nancy Odeng. ‘Less than five’ women have disappeared from the market place before concluding their cases, while three women have pulled out of the project due to fears of later attack or bewitching.

<sup>417</sup> See Engle Sally, 2006, Nyamu-Musebi, 2002.

projects, in facilitating fast, affordable and culturally acceptable (less adversarial) means of dispute resolution, offer practicable solutions for some of the most vulnerable groups in society. At the same time they help develop rights awareness among the affected women and the community at large and provide public space for community discussions and deliberation on negative practices which are carried out in the name of culture. Furthermore, KELIN, in providing human rights training and sensitization workshops for elders engaged in mediating land disputes and in its incipient attempts to promote the participation of women in decision-making structures of the Luo Council of Elders,<sup>418</sup> has taken important steps towards making local dispute settlement by elders more ‘women friendly’.

However, there are also some significant limitations and potential risks inherent in the approaches taken by KNCHR/ HPI and KELIN. Most importantly, in being too culturally conformist they are likely to compromise the transformative potential of human rights. While working within existing cultural structures renders the projects- and the concept of women’s human rights in general- more acceptable to the community, it also implies that existing power hierarchies and gender stereotypes are not questioned but, in fact, reinforced. Both projects appeal to and seek to strengthen the traditional role of the elders (predominantly men) to protect ‘the vulnerable’ (women and children) rather than scrutinize and expose the *causes* of women’s disenfranchisement and vulnerability which would imply challenging the patriarchal social order itself. This is what Sally Engle identifies as one of the principle challenges faced by human rights activists who seek to translate human rights law into local justice: The need to frame human rights in ‘culturally resonant wrappings’ without stripping them of their potential to challenge existing power relations and social inequalities.<sup>419</sup>

A further limitation, which is related to the first, concerns the applicability of the projects’ approach to other aspects of women’s lands rights which are more contested, such as equal inheritance rights of daughters and sons or the rights of divorced

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<sup>418</sup> Email Communication with Nancy Odeng, 28 June 2011. However, it must be said that success in this matter appears to be rather limited. So far 3 women have been included in leadership roles in two of the constituencies KELIN works in. There is little updated information on the KNCHR/HPI project. However, the available material does not suggest that any efforts are taken to promote women’s participation in cultural structures.

<sup>419</sup> Merry, 2006, pp. 5, 136 & 221.

women. The practice of evicting widows from their lands, while being disguised as ‘cultural practice’, has in reality little to do with Luo culture which, to the contrary, demands care and protection of widows by the extended family.<sup>420</sup> The issue at stake is, thus, an abuse of culture rather than an actual ‘negative’ cultural practice. This means that it is fairly unproblematic to engage the cultural leaders to make a declaration on ‘true Luo culture’<sup>421</sup> and intervene on behalf of the affected women. However, the situation is far more complicated where the violation in question is in fact consistent with Luo culture as, for example, in the case of denying daughters equal inheritance rights. Allowing daughters equal inheritance rights would fundamentally interfere with the established social order and radically alter gender hierarchies within that order. Women would not only no longer depend on their male relatives for accessing land and, thus, be far more independent and free in the choices they make, their entire position within the family would shift drastically: They would no longer be considered only ‘transient members’ of their natal homes who move away once married, neither would they be any more ‘outsiders’ in the community they marry into than their husbands in theirs. In contrast to the case of widows, allowing daughters to inherit on an equal basis with sons would imply a fundamental redistribution of power and privileges and, hence, it is much more likely to meet resistance from those who are benefiting from the existing social order.

The documentation of Luo culture in the case of the KNCHR/ HPI project is another aspect which is problematic in that it narrows opportunities for cultural change.<sup>422</sup> While it may be useful for the purpose of protecting widows from misconstruction and exploitation in the name of culture,<sup>423</sup> it also suggests that culture and the customs pertaining to it are rooted in the past and in doing so reinforces an essentialist view of

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<sup>420</sup> See for example Policy Project, 2005, p.9 ‘It was observed that most cases presented, indicated a violation and deviation from Luo culture. (...) Both the cultural and the political leaders agreed to document the Luo customary law on inheritance in order to curb the exploitation of the culture by greedy people in the community.’ See also KELIN, p. 8. ‘Is it a clear violation of human rights but disguised as culture? This is an important question since it helps in clarifying what the true culture is and may be an entry point for protection by the cultural structures. For example, in the project involving culture and property rights among the Luo, it was made clear that sending a widow and orphans away from their land is not an accepted Luo cultural practice, and that it is also a violation of the rights of a widow under Luo customary law.’ More generally on the abuse of culture with regard to widows’ inheritance rights, see Armstrong, 2000, pp. 87-99.

<sup>421</sup> Ibid.

<sup>422</sup> Policy Project, pp. 9-11.

<sup>423</sup> Policy p. 8 ‘(...) women felt intimidated by cultural beliefs and felt helpless and defenseless when confronted by them after the death of their husbands. Many of the widows identified were young and did not understand the Luo customs very well. As a result of this, they were easily exploited.’

culture. Culture 'as it used to be' is carved into stone, thereby, depriving it of its dynamic character. In order to promote cultural change a fluid understanding of culture as a set of ideas and practices which, due to internal contestation, changes in circumstances and external influences, are continuously reshaped is essential.<sup>424</sup> It allows one to scrutinize existing cultural practices and beliefs, the assumptions on which they are grounded and the purposes they intend to fulfill. Some cultural practices may, once scrutinized, be found to be based on outdated or wrong assumptions while others may no longer fulfill the purposes for which they were designed, due to changes in circumstances. Others, however, may still fulfill a valid purpose but are not reconcilable with 'modern' (or dominant) ideas of social justice and equality. Thus, denying women equal inheritance rights certainly has a function (maintenance of clear gender hierarchies and, consequently, social order; ensuring that clan land remains within the clan; etc.), however, this function is carried out to the detriment of one section of the population and can, therefore no longer be justified or tolerated- at least not by the State that has committed to such values. It is here where cultural change will prove most challenging and will require deliberate efforts by the State to create public spaces for exposing and contesting the established order.

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<sup>424</sup> Merry, 2006, p. 11.

## 5. Conclusion

This analysis has revealed significant limitations of both the statutory and the customary legal systems for ensuring women's land rights in practice. Whereas some of these limitations are system specific, others apply to both systems. Two principle concerns relating to the statutory legal system are its inaccessibility, in general and in particular for women, and its failure to recognize and address existing gender power imbalances. The barriers women face in access to the formal justice system are numerous. The most obvious ones are lack of financial resources, limited knowledge regarding statutory entitlements and the procedures through which to claim them, physical distance of/to the courts and, finally, the nature of court proceedings, which are lengthy, tiresome and do not necessarily lead to the desired result. In addition, there are various social and cultural barriers which lead even the most educated and financially well-equipped women not to pursue their rights through the court system. These have to do, in particular, with the adversarial nature of court proceedings and the fact that most women do not wish to disrupt ties with their family or in-laws. The woman's position as an outsider in the family she marries into is an additional factor which not only influences her own sense of entitlement but also makes it difficult for her in practical terms to live on and enjoy land which is surrounded by hostile in-laws.

The second point relates to statutory legislation on women's land rights and its at times arbitrary and biased application by courts. The present analysis has shown that whereas some laws are outrightly discriminatory towards women, others -- in being gender-neutral and thus blind to the gendered-context in which they are applied -- have an equally discriminatory effect on women. The outcome in both cases is the reinforcement of existing gender power inequalities with regard to land. In addition, other areas of central importance to women, such as control over or division of matrimonial property, either entirely lack statutory regulation or such regulation is formulated in a vague manner which gives wide discretion to the judges in their interpretation. This has led to the arbitrary and often biased application of such laws, given that judges themselves often carry negative socio-culturally informed attitudes towards women's ability to own and control land.

Community-based mechanisms for dispute settlement, however, face equally significant problems in delivering gender equality in relation to land. Although they have the principle advantages of being more accessible to rural women and leading to outcomes more acceptable to the community at large in that they are less adversarial, their socio-cultural embeddedness also makes them more likely to reflect and reinforce existing power inequalities between men and women. Women's exclusion from both formal and informal structures of dispute resolution significantly contributes to the failure of such bodies to interpret customary law in a progressive manner which is reflective of the needs of women and men alike. A common misconception of customary law as something static which is rooted in the past and must be preserved adds to this. Such an essentialist view deprives culture and the customs pertaining to it of their fluid character and their ability to adjust to changing circumstances. It serves to uphold the position of those with power and privileges and fundamentally undermines the efforts of those who contest the dominant system and are struggling for cultural and social change.

A further problem of both formal and informal structures of customary dispute settlement, which affects women more strongly than men, is the lack of procedural safeguards and external review mechanisms. It denies women, who tend to have less bargaining power due to their lower social and economic standing, *de facto* equality of arms and the possibility of appealing to discriminatory decisions by such bodies. Present day corruption among traditional and governmental authorities involved in informal dispute settlement further compounds women's disadvantage, given that they lack the necessary financial resources to buy themselves the favour of the adjudicators.

In conclusion, both legal systems tend to reinforce existing gender power relations rather than to challenge them. This can be partly ascribed to women's continued under-representation in, or even exclusion from, law-making and law-enforcing bodies. It is furthermore a reflection of prevailing socio-cultural gender norms which are not only entrenched in the law itself but strongly influence those who are meant to apply the law in a neutral and impartial manner.



The analysis of international human rights law has shown that while land is yet to be recognized as a human right on its own, there are several other provisions under international human rights law which offer protection for land rights in general and the land rights of women more specifically. Women's land rights are protected primarily through the right to equality and non-discrimination, the right to property, and the rights to food and housing. The Committee on Economic, Social and Cultural Rights as well as the Special Rapporteurs on the Right to Food and the Right to Housing have recognized the central importance of land for realizing the rights to food and housing. They have stressed that States are under an obligation to protect access to land as a productive resource and prevent discrimination against women in this regard. Furthermore, the Special Rapporteur on the Right to Housing has urged States to ensure that women have effective channels for legally redressing violations of their land rights and provide human rights training to those applying and enforcing the law. Both Rapporteurs have called upon the international community to give legal recognition to land as a human right.

Among the treaty bodies, the CEDAW Committee is the only one which has explicitly addressed the issue of women's land rights in considering reports from Kenya, Tanzania and Uganda. In its approach to eliminating discrimination against women in relation to land, the Committee relies primarily on a legal strategy for change which includes changes in legislation, legal aid and literacy programmes and training of judicial officers. The focus of the Committee is exclusively on the statutory legal system, while traditional mechanisms for dispute resolution are seen as an actual barrier to justice. The Committee does not provide any guidance on how States should deal with such mechanisms, nor does it consider the possibility of their being means through which land rights can be secured. With regard to customary practices which negatively affect women's land rights, the Committee is similarly vague, calling on states to 'modify', 'abolish' or simply 'address' such practices without exploring how this is to be done. No general comment has yet been issued either on either Article 5 or Article 14 of CEDAW which could give more guidance on how States are to deal with cultural practices or institutions in relation to women's rights.

The Human Rights Committee, in its interpretation of Article 14 of the ICCPR, has provided some general guidance on the obligations governments have in relation to

local dispute settlement mechanisms. It has held that customary dispute resolution mechanisms, wherever such are recognized in a State's legal order, must comply with the basic requirements of Article 14 on a fair trial, which include impartiality and equality of arms, and other guarantees (e.g. non-discrimination) set out in the Covenant. Furthermore, decisions made by customary dispute settlement bodies must be subject to review by a state court and appeal (in a procedure which meets Article 14 standards).

The Kenyan government, in its new Constitution and the National Land Policy, has made strong legal and political commitments towards eliminating discrimination against women in relation to land ownership, control and inheritance. The strategy through which it pursues the goal of gender equality is primarily a legal one and includes legislative and institutional reform, legal aid and legal literacy measures, all of which are aimed at ensuring women's *de jure* equality and enhancing their access to justice. At the same time, there is an increasing recognition by the government of the need to promote the use of Alternative Dispute Resolution (ADR) mechanisms, including customary systems, as means of facilitating accessible and speedy dispute resolution, in particular in matters relating to land. This is informed by a huge backlog of land-related court cases and acknowledgement of the many barriers Kenyan citizens face in accessing the formal court system. The increased recognition of community based mechanisms of dispute resolution, however, fails to be accompanied by a clear strategy on how the government will ensure that such systems comply with the constitutional bill of rights and, in particular, the principle of non-discrimination and equality.

Equally strong commitments have been made by the government with regard to strengthening the participation of women in public decision-making, including in relation to land. The Constitution requires the government to take legislative and other measures, including affirmative action, to enhance women's participation and ensure that at least one-third of members of elected and appointed bodies are women. The Policy, on the other hand, requires that women be proportionately represented all levels in institutions dealing with land. If implemented, this would bring fundamental changes to the current situation in which women are grossly under-represented in decision-making positions at both national and local levels. It remains to be seen how

willing the government will be to adhere to and enforce its own commitments regarding increased participation of women in decision-making positions. While not exactly one of its strengths in the past, the new Constitution provides a powerful tool, as women's rights organisations have already shown, for holding the government accountable to its promises.

In addition, the government has a clear obligation under the new Constitution to ensure that non-governmental bodies, such as dispute resolution by elders, do not place any restrictions on participation which directly or indirectly discriminate against women. Where such mechanisms are given official recognition by the State to carry out public functions, they should equally be bound by the one-third gender equality obligation. This is even more obvious in the case of state-sponsored mechanisms, such as the Land Dispute Tribunals or future District Land Tribunals.

Last but not least, the government has undertaken efforts to engage with traditional structures to protect widows from violations of their land rights. It must be commended for this innovative approach which departs from the lived realities of rural women and provides real solutions for those affected. At the same time, however, there is need to ensure that the project does not in fact reinforce existing power structures and gender stereotypes and, in doing so, undermine struggles and opportunities for more transformative change. The organisation of community forums which allow for community discussions on cultural practices, as done by the KNCHR/HPI and the KELIN project, can be a powerful tool for cultural change if they promote a more fluid conception of culture, rather than one based on the premise that true culture lies in the past. Furthermore, they must address more controversial aspects of women's land rights, in particular the equal inheritance rights of daughters, which will disrupt the existing social order and, in doing so, allow for true change.

What is needed are also more field studies, like those carried out by Nyamu-Musembi, Ong'wen Okuro or Henrysson and Joireman, which document the way local level dispute resolution mechanisms function in practice and critically assesses the challenges and opportunities they pose for safeguarding women's land rights. Such studies can inform the government in the design of a strategy on how to work

with such systems to ensure that they comply with the constitutional bill of rights and obligations under international human rights law. Simply recognizing such systems without a clear strategy in place on how to improve them can have very counter productive results, in particular for women. On the other hand, ignoring such institutions or calling for their abolition as has been the dominant approach among local human rights activists and, to some degree, international human rights treaty bodies cannot be the solution either as it ignores the lived realities of rural women and is based on a static conception of culture which denies it its potential to adjust to changing circumstances. What is needed is true government commitment towards positive social and cultural change which recognizes and exposes the established power hierarchies and supports those who contest them.

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