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## **An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania**

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### **Abstract**

This article explores contemporary contestations surrounding women's inheritance of land in Africa. Legal activism has gained momentum, both in agendas for law reform and in test case litigation, which reached the United Nations Committee on the Elimination of Discrimination against Women in *ES and SC v. United Republic of Tanzania*. Comparing the approach of Tanzania to that of its neighbours, Uganda, Kenya and Rwanda, this article explores patterns of resistance and omission towards enshrining an equal right to inherit in land and succession laws. It identifies two main reasons: neoliberal drivers for land law reform of the 1990s and sociopolitical sensitivity surrounding inheritance of land. It argues that a progressive approach to constitutional and law reform on women's land rights requires understanding of the realities of claims to family land based on kinship relations. It calls for a holistic approach to land, marriage and inheritance law reform underpinned with constitutional rights to equality and progressive interpretations of living customary law.

### **Keywords**

Africa, CEDAW, constitution, customary law, gender, inheritance, land, Tanzania, women

### **Introduction**

This article explores the contested legal frontier of women's land rights in Africa. In 2013, activism surrounding an equal right to inherit land reached the international arena in the constitutional test case of *ES and SC v. United Republic of Tanzania*, when the United Nations Committee on the Elimination of Discrimination against Women (the CEDAW Committee) considered a claim brought on behalf of two Tanzanian widows. Such high-level legal battles by women are hard-fought, not least because in the majority of African countries the issue of enshrining an equal right to inherit land is one that has faced considerable resistance. This article explores reasons behind this resistance and a pattern of omission by African states to fully integrate women's inheritance of land into land law reform agendas. It argues for acknowledgement of the realities of claims to family land based on kinship relations and explores how women's inheritance rights could be integrated into statutory and constitutional reforms in future.

The pattern of omission is evident in many African countries. However, this article focuses on the East African context and Tanzania in particular, where the issue has been brought to international attention through the recent CEDAW Committee recommendation and national constitutional debates. For decades, Tanzania had been at the forefront of African countries in introducing some of the most progressive reforms on women's property rights, including the Law of Marriage Act of 1971 and the Land Act and Village Land Act of 1999 (the Land Acts). Pending a referendum, Tanzania's proposed Constitution of September 2014 (CRC, 2014) includes a new set of rights provisions to protect specific social groups, including women, and a clause enshrining women's equal rights to land. However, reform to laws of inheritance and

succession, including codified customary laws, remains a particular sticking point for the legislature and has been left almost untouched.

This article first contextualizes family landholding and the ways in which social practices have been constructed through various forms of customary law in Tanzania. It then analyses three different approaches to recognizing an equal right to inherit land in law – legislative, constitutional and judicial. The article explores in detail the recent CEDAW recommendation in *ES and SC v. United Republic of Tanzania* and its implications for law reform in Tanzania. Comparisons are drawn between Tanzania and Kenya, Uganda and Rwanda, where constitutional and land law reforms have taken place in recent years. It is observed that there have been two main factors behind the reticence to integrate gender equality into inheritance law reform: neoliberal economic drivers for African land law reform of the 1990s and sociopolitical sensitivity and power relations surrounding inheritance of land. In the context of Tanzania, both the proposed constitution and current review of the National Land Policy offer opportunities for reform in this area. The article explores how law reformers could approach the recognition of customary claims to family land based on kinship relations through a holistic approach to statutory law reform, a constitutionally enshrined equal right to inherit and progressive interpretation of living customary law.

## **Family Land and the Construction of Customary Law**

This section analyses the ways in which Tanzanian citizens acquire interests in land,<sup>1</sup> the social and legal meanings ascribed to these various modes of acquisition, and the implications for individual autonomy. Each of the ways is embedded in its own distinctive social, legal or political rationale. First, inheriting land, whether through lineal descent, a will or religious norms, remains one of the most common means of acquiring an interest in land. Second, in areas where land is available, village governments also have the power to allocate village land to their citizens (both women and men). Such practices were historically associated with *Ujamaa* (African Socialism) and the villagization policies of the 1960s, but the Land Acts have continued to provide for villages to allocate land to this day. Third, individuals or married couples may ‘self-acquire’ their interests in land through purchase, lease or by making permanent improvements to the land through clearance and cultivation on the basis of adverse possession. Across these various modes of acquisition, there is significant variation in the nature and extent of family and community interests over the land, and the degree of autonomy that an individual may have to use or dispose of it. Individuals have a large measure of control over land they have acquired for themselves, and spouses have shared rights in jointly acquired matrimonial property.<sup>2</sup> In contrast, land passed between the generations of a large family is regarded as family or clan land (James and Fimbo, 1973: 427). This ascribes certain gendered and intergenerational ties to the land and limits the power of an individual concerning allocation and disposition.

In practice, the availability of these modes of acquisition varies according to the social and economic resources of individuals and families, demographic and commercial pressures on land and practices of landholding in a particular area. For example, in fertile agricultural regions of Tanzania, such as Kilimanjaro, Arusha and Kagera, demand for land is high and historically, customary family connections to the land have been strong and based on patrilineal principles (Cory and Hartnoll, 1945; Dancer, 2015; Gulliver, 1963; Manji, 2000; Moore, 1986; Moore and Puritt, 1977; Spear, 1997). However, socioeconomic change, including greater educational and employment opportunities for men and women, commercial investment and rapid urbanization have generated markets for the sale and lease of land and a gradual loosening of lineal ties to the land in these and other areas.

It is estimated that around 80% of ethnic groups within Tanzania follow patrilineal customary principles of marriage and inheritance, the remainder being based on matrilineal principles (Tenga, 1988). Historically, there has been comparatively little research on the practices of matrilineal communities in Tanzania (e.g. Dondeyne et al., 2003; Englert, 2003; Koda, 1998). In Dondeyne et al.'s study of Chiwambo village, southeastern Tanzania, it was found that while lineage practices followed the female line, inheritance patterns were bilineal and marriage practices were patrilocal. In November 2012, the Law Reform Commission of Tanzania completed a survey of customary laws of matrilineal communities in Mtwara, Lindi and Morogoro regions. The results were compiled in an unpublished report submitted to the Minister for Constitutional and Legal Affairs as part of a wider review of customary laws (LRCT, 2013). By comparison, in patrilineal areas, while practices vary, family and clan land is customarily heritable by men, with women acquiring their interests in land through their husbands.

In both patrilineal and matrilineal systems, customary land tenure practices are closely linked to significant life events such as marriage, separation and divorce, or death of a husband or father. Land may be allocated *inter vivos*, for example, to a son at the time of his marriage or after the death of a father. In some areas, case studies in patrilineal communities have also documented practices of allocating land to daughters (Dancer, 2015: 43–44; Odgaard, 1999; Tsikata, 2003; URT, 1994: 251). This may be, for example, because they remain unmarried or their father has no sons. Unless a widow is appointed as the administrator of her husband's estate, her access to land becomes contingent on her relations with the man appointed to take care of the family and land – often a son or brother of the deceased.

These living customary norms and practices of local communities are recognized as customary law under the Judicature and Application of Laws Act of 1961 (JALA), Section 11. Historical written interpretations of customary law are also found in authoritative texts, which are sometimes used by the higher courts in practice (Fimbo, 2007). These include Cory and Hartnoll (1945) on Haya law, Cory (1953) on Sukuma law and Cory (1955) on Nyamwezi law. In addition, in 1963, interpretations of various customary laws were codified and enshrined in the Local Customary Law Declaration Orders (CLDOs).<sup>3</sup> These textual and codified sources set out norms concerning customary issues of marriage, divorce, guardianship, inheritance and other matters in patrilineal communities. Both the CLDOs and these particular texts were the product of German anthropologist, Hans Cory. In the case of the CLDOs, male colonial officers collected individual statements on local practices from male elders of more than 20 patrilineal Bantu groups across the country (Twining, 1964: 36–38). This resulted in a highly patriarchal construction and codification of customary laws, which were enacted by many district councils in 1963, shortly after Tanzania's political independence. This process also occurred in other African countries and, it has been argued, served to consolidate the power of colonial governments and their successors (Chanock, 1985; Mamdani, 1996; Moore, 1986; see Claassens, 2013 for a recent discussion of this literature).

Despite many recommendations and calls for reform of these historical written customary laws, there have been no substantive amendments to the CLDOs since their enactment. In 1995, the Law Reform Commission of Tanzania made recommendations for reforming customary laws of inheritance and succession. These included a uniform law of succession, which would recognize but moderate tribal, customary and religious differences according to principles of justice and equity (LRCT, 1995: 62–70). More recently, the Law Reform Commission has recommended that all customary laws that are repugnant to the Constitution, Bill of Rights and natural justice be removed from the CLDOs (LRCT, 2009). Tanzanian feminist lawyers and activist civil society organizations have repeatedly campaigned for change. However, to date, the CLDOs remain in force and legally applicable as local law in many patrilineal areas of Tanzania.

## Women's Inheritance Rights in East Africa: Reform and Resistance

Tanzania is the last of the East African countries to undertake constitutional reform in recent decades,<sup>4</sup> although it was the second (after Uganda) to enact new legislation on land in the 1990s. The British draftsman of several East African land laws, Patrick McAuslan has reflected on the differences between the constitutions of these countries and their commitments towards realizing gender equality, women's land rights and inheritance law reform (McAuslan, 2013: 208–226). A notable feature has been a separation of land, marriage and inheritance laws that concern family land. Customary laws of inheritance and succession have been particularly neglected in most countries. This section analyses the pattern of omission of an equal right to inherit land in Tanzanian legislation, drawing comparison with other East African countries – Uganda, Kenya and Rwanda. In neighbouring Burundi, a new Constitution was adopted in 2005; however, the Land Code of 1986 has not been updated in spite of attempts at reform by the transitional government and international agencies. There is also no legislation in Burundi to prohibit discriminatory inheritance practices (Kazoviyo and Gahungu, 2011). Constitutional and legislative provisions on women's land and inheritance rights are analysed, with reflections on the drivers for change and resistance towards enshrining equal inheritance rights in law. This analysis is then contrasted with growing judicial activism on gender equality in a series of constitutional test cases over the last decade.

### *Legislative Approaches*

The pattern of omission on women's inheritance rights in Tanzania may be traced back to the 1970s. This is in spite of many progressive reforms in other aspects of women's property rights. The country's Law of Marriage Act of 1971 was the first of its kind in Commonwealth Africa to recognize married women's rights to 'acquire, hold and dispose of property, whether moveable or immovable . . . ' (section 56) (Read, 1972: 19). The right was subsequently extended to all women, regardless of marital status under section 3(2) of the Land Acts of 1999, which recognize the right of every woman to 'acquire, hold, use and deal with land . . . to the same extent and subject to the same restriction . . . as the right of any man', and a number of other spousal rights. However, both these emblematic provisions on women's property rights omit a right to inherit land. This was not simply an oversight. The Presidential Commission on Land Matters that preceded the drafting of the Land Bills favoured a middle ground 'evolutionary' option to the issue of women's inheritance of land. The recommendation was that laws concerning Islamic and customary inheritance practices that were gender discriminatory would remain unchanged, but that other laws such as the Bill of Rights, land tenure and property law should be addressed in the hope that they would have an impact on inheritance laws (URT, 1994: 256–257). Subsequently, the government's National Land Policy stipulated that 'inheritance of clan land or family land will continue to be governed by custom and tradition provided they are not contrary to the Constitution and principles of natural justice' (URT, 1995: para 4.2.6).

A number of changes were made to the draft Land Bills in response to two workshops, civil society lobbying by the National Land Forum and Gender Land Task Force coalitions and wider debates on the proposed legislation (Manji, 2006; Tsikata, 2003). When the Land Acts were eventually passed in 1999, they included a provision that any rules of customary law that deny women lawful access to ownership, occupation or use of land be held as void (section 20(2)). However, the Land Acts did not alter the general statutory recognition of customary law and existing laws governing women's inheritance of land were left unchanged. In fact, there have been no reforms to Tanzania's laws of inheritance and succession for decades. Tanzania's Indian Succession Act of 1865 codifies a gender-neutral English common law on succession, yet this is applicable only to Christians and persons of European origin. In the case

of African Christians, there is a statutory rebuttable presumption under JALA that customary law shall be applied, while estates of Muslims may be administered according to Islamic and/or local customary law. The draftsman of Tanzania's Land Acts, Patrick McAuslan later reflected that while progress was made in strengthening women's land rights, it was a mistake not to push harder for a new succession law at that time, not least because this represents one of the most significant issues for women's land tenure security (McAuslan, 2013: 221).

The striking lack of reform concerning women's inheritance rights is not unique to Tanzania. When Uganda's Land Act of 1998 was passed, there was much controversy surrounding the so-called 'lost clause' on spousal land rights. This was subsequently revised and enacted as section 39 through the Land (Amendment) Act of 2004 (Kafumbe, 2010; McAuslan, 2013: 217–220). However, gaps remain and there has been little progress on gender equality in matters of inheritance and succession law (Kafumbe, 2010: 206–213; Khadiagala, 2001, 2002). Issues surrounding the inheritance of family land have been kept quite separate in law reform agendas. The CEDAW Committee has made recommendations for reform on gender discriminatory customary laws of inheritance (CEDAW, 2002: part three, para 152; CEDAW, 2010: para 42). However, legislative reform in this area has stalled.

In Kenya, as in Uganda, land law reform followed constitutional reform. Kenya's Land Registration Act, National Land Commission Act and Land Act were all enacted in 2012, less than 2 years after the new Constitution. McAuslan (2013) and Manji (2014) have both commented that this was an unrealistic timescale for ensuring proper public debate and participation by civil society in the development of the legislation. A particular legacy of Kenya's colonial past has been a highly centralized structure for land tenure and administration. Neoliberal titling initiatives since the 1990s have been widely criticized for their negative impact on women, where preexisting gendered patterns of customary land tenure have led to most titles being registered in the names of male household heads (Ensminger, 1997; Joireman, 2008; Kenya Land Alliance, 2004; Mackenzie, 1993). A stated intention of the 2009 National Land Policy, Land Act of 2012 and Kenya's 2010 Constitution was to promote greater equity in the distribution of land in Kenya. Echoing the Constitution, the guiding principles of the Land Act include 'elimination of gender discrimination in law, customs and practices related to land and property in land' (section 4(2)(f)). However, Kenya has yet to reform discriminatory aspects of its Law of Succession Act of 1972, which would be necessary to ensure that gender equality principles run consistently through all legislation concerning family land matters, including customary and religious practices.

Of the four East African countries discussed here, Rwanda has been the exception in its approach to inheritance law reform. This has been largely due to the country's particular post-Genocide context. An important theme of Rwanda's 2003 Constitution was a state commitment to conform to the principle of equality of all Rwandans (Article 9), with discrimination of whatever kind, including sex, being prohibited and punishable by law (Article 11). By that time an equal right of inheritance had already been recognized in the Matrimonial Regimes, Liberalities and Succession Law of 1999: 'all legitimate children under civil law shall inherit equally without any discrimination between male children and female children' (Article 50). This was subsequently reinforced by the Organic Land Law, enacted in 2005, which prohibited discrimination based on sex or origin and enshrined the equal rights of husband and wife over land (Article 4) (McAuslan, 2013: 210–214). Scholars have commented on the significance of the unique political backdrop, which made it possible to reform succession law at an early stage in the life of the post-Genocide government (Daley et al., 2010; McAuslan, 2013: 222). This presented a very different set of social and political imperatives and opportunity for law reform from those of the other East African countries discussed here.

This survey points towards two main factors that explain the widespread omission of an equal right to inherit land in most legislation. The first concerns agendas for land law reform

across Africa since the 1990s. Manji, Whitehead and Tsikata have observed that the main drivers for the 1990s reforms were domestic grievances and conflicts over land within states, and the neoliberal agendas of the World Bank and other international actors geared towards the liberalization of African economies (Manji, 2006; Whitehead and Tsikata, 2003). In Tanzania, this has been reflected not only in the significant focus on land dispositions and investment within the Land Acts themselves, but also in a series of subsequent policy initiatives, including the 2004 'Property and Business Formalisation Programme' (MKURABITA). Among other things, this policy promotes the use of formalized assets by the poor to access economic opportunities in the formal market (MKURABITA, 2008). While it is also true that important gender equality provisions were incorporated into Tanzania's Land Acts, they failed to address substantively the close relationship between land, marriage and inheritance law, particularly as it affects women. In 2016, the Tanzanian government announced a review of the National Land Policy. The first consultation draft indicates that inheritance and ownership of land between husband and wife are among the issues on the agenda (URT, 2016). Here, Mbilinyi notes that although the focus has shifted from 1990s neoliberalism, the consultation draft places large-scale land investment and commercial agribusiness at the centre rather than rights to land and livelihoods of smallholder producers and communities (Mbilinyi, 2016). While the government has approached its review of the National Land Policy in consultation with both civil society organizations and agribusiness, these policy priorities are an early indication that an equal right to inherit could slip off the political agenda again.

The second factor concerns the social and political sensitivity surrounding inheritance of family land. It is often said that customary practices are evolving, flexible and discretionary. The Presidential Commission on Land Matters commented that 'in many parts of the country . . . the various customary laws are not frozen, but living social organs which respond to social change' (URT, 1994: 252). Nevertheless, women's inheritance of land remains a sensitive issue in family contexts where customary practices of marriage and succession maintain a gendered lineal connection with the land. These gendered social ties to the land reproduce unequal gendered power relations between spouses, siblings and generations of a family (Dancer, 2015; Manji, 2000; Odgaard, 1999, 2002; Whitehead and Tsikata, 2003; Yngstrom, 2002). Gendered ties to the land are also associated with a social construction of marriage whereby a woman is 'sent off' to join her husband's family (and his land) (Dancer, 2015: 39). This is commonly used to justify the argument against a daughter inheriting a share of her father's land, on the basis that she would receive land twice – once from her natal family and again from her husband's family. However, it also means that unless a wife has the resources to acquire land or property in her own right, in patrilineal communities her interests and ability to access land will usually be determined by her husband's male relatives. Her children will also be regarded as descendants of her husband's family.

It follows that much of the contestation surrounding women's inheritance of family land is linked to social resistance to reconfiguring family ties to land upon marriage. If a woman has access to resources independently of her husband and his family, this also challenges the dynamic of power relations within marriage. In spite of this, attitudes towards women's inheritance of land in Tanzania have been changing. Between 2009 and 2010, I conducted ethnographic fieldwork on women's claims to land in Arusha, Tanzania. In that context, I found that some parents were choosing to allocate land to their daughters as a form of security in case their marriages should fail. Alternatively, as more parents were investing in educating their daughters, some daughters were also being given land linked to future caring responsibilities for their parents or siblings. This appears to be based on a similar rationale for giving land to an eldest or youngest son, who is expected to take on certain responsibilities within the family (Dancer, 2015: 42–44). Empirical evidence illustrates the discretionary nature of living customary law and its continued evolution with social change. It also points towards

possibilities for inheritance law reform that continues to acknowledge the socially embedded nature of family land tenure.

The legislature has already grappled with the status of discriminatory customary law under the Land Acts and in claims to land heard by Tanzania's specialist system of land courts. These courts are statutorily obliged to apply customary law (Land Act, section 180(1)), but with the caveat that any rules of customary law denying women lawful access to ownership, occupation or use of land be held as void (Village Land Act, section 20(2)). This has effectively set land courts an agenda to interpret customary law purposively in a way that is progressive in recognizing women's equal rights (Dancer, 2015: 116–117). However, land courts do not deal with administration of estates matters. These are determined by the ordinary courts under JALA, which has not been updated since the 1970s. This Act requires the ordinary courts to apply customary law in succession matters, subject to religious laws and the Indian Succession Act. However, even the existing law under JALA section 11(3) provides ' . . . the court shall not apply any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or superseded by any written law'. Enshrining an equal right to inherit in land, marriage and inheritance law would be the next logical step towards statutory recognition of gender equality in all family land matters.

### *Constitutional Approaches*

Tanzania's proposed Constitution represents a further opportunity for inheritance law reform and bringing principles of gender equality to the forefront of democratic debate. However, to date, the proposed Constitution does not explicitly include an equal right to inherit land. A Constitutional Review Commission was established in 2012 and the first draft of the proposed Constitution, produced in Kiswahili, was launched on 3 June 2013 (CRC, 2013). Women's rights provisions were developed throughout the review process. In contrast to relatively weak rights to gender equality and property in the 1984 Bill of Rights, for the first time in the country's history, a stand-alone article to protect the rights of women was included. Article 46 (as it was in the 2013 version) made specific reference to protection against 'dangerous customs' and also promoted 'dignity, security and opportunities for women, including the widows'.<sup>5</sup> However, while the clause included provisions protecting socio-economic rights such as education, equal pay and medical care, there was no explicit reference in Article 46 to land. Moreover, there was little substantive amendment to the existing Article 36 right to own property. An overarching Article 53 required any limitations on human rights to be applied 'transparently and democratically by observing dignity, equality, freedom . . .' and a list of other 'important qualifications'.

The first draft was met with a mixed response from the Gender Forum on the Constitution – a coalition of Tanzanian women's rights NGOs, who had campaigned for women's equal rights from the outset of the constitutional review process (TAWLA, 2013). They not only welcomed the increased recognition of women's rights but also noted significant gaps (Alais, 2014; Kaale, 2013). As far as an equal right to inherit property was concerned, the first draft left the constitutional position of discriminatory customary laws unchanged. A second revised draft was produced in September 2014 (CRC, 2014) and approved by Tanzania's Constituent Assembly on 2 October 2014, to be submitted for a national referendum. However, political controversy surrounded the approval process and the referendum was postponed indefinitely.

The September 2014 version includes a new Article 22 enshrining the right of every woman to 'acquire, own, use, develop and manage land on the same conditions as for a man'.<sup>6</sup> This essentially repeats but would constitutionally entrench the equal rights provisions contained in the Land Acts. A number of other articles protect the rights of children, young people, persons with disabilities, minority groups, women and the elderly (Articles 50–55). The women's rights article (renumbered Article 54) was redrafted to include a broad

prohibition against ‘discrimination, harassment, abuse, violence, sexual violence and harmful traditional practices’. This article includes a right to property, among other rights. However, neither Article 54 nor Article 55 on the rights of the elderly addresses discrimination against widows as a particular social group. Once again, an equal right to inherit land was omitted. The revised version also remains silent on the status of codified customary laws and future law reform on inheritance and marriage.

The examples of Uganda and Kenya illustrate both the importance and the limited impact of incorporating legislative commitments into constitutional reforms. The Ugandan Constitution of 1995 is progressive and unambiguous in its commitment to gender equality. It prohibits gender discriminatory laws and customs, as well as providing that women have the right to equal treatment with men. Moreover, section 33 includes a right to affirmative action for women to redress the imbalances created by history, tradition and custom. It mandated that the country’s land law reforms should be completed by 30 June 1998. Nonetheless, as discussed earlier, subsequent legislative reforms on women’s inheritance in the context of land law have been patchy.

Kenya is the latest of the East African countries to pass constitutional and land law reforms addressing women’s land rights. Similar to the Ugandan Constitution, Article 27 of the 2010 Kenyan Constitution enshrines the right to equality and prohibition against discrimination. It includes a requirement for the state to take legislative and other measures, including affirmative action programmes to redress disadvantage and past discrimination. Article 40(1) provides for the right of every person to acquire and own property ‘of any description’, while Article 60(f) further prohibits discrimination concerning ‘law, customs and practices related to land and property in land’. The constitution does not explicitly guarantee an equal right to inherit land. However, Article 2(4) makes customary law subject to constitutional provisions, while Article 68(c) requires parliament to enact legislation on the recognition and protection of matrimonial property and of dependents of deceased persons with an interest in land, including spouses in actual occupation. This culminated in Kenya’s Marriage Act of 2014.

In contrast to Uganda and Kenya, the proposed Tanzanian Constitution of September 2014 contains no commitment to inheritance and succession law reform or reform of codified customary law. The experiences of Uganda and Kenya illustrate that where legislative commitments to land law reform have been incorporated into constitutions they have been followed through. However, issues surrounding gender equality and family land have not been approached in a holistic way by reforming land, marriage and succession laws together. Moreover, tight timetables and limited public and civil society engagement at times, have produced laws with omissions or which have failed to fully address the most deep-seated issues of inequality. With the exception of Rwanda, it is apparent that inheritance and succession law remains a particular sticking point for law reform across East Africa. Without clear commitment from states, law reform on women’s inheritance rights will continue to proceed very slowly and lean towards the status quo.

### *Judicial Approaches*

Notwithstanding the reticence of governments and legislatures, in the last decade, a series of cases have shown a new wave of judicial activism on women’s inheritance rights in African higher courts. The 2005 South African case of *Bhe and Others v. Magistrate of Khayelitsha and Others* was groundbreaking for declaring gender discriminatory customary rules on male primogeniture under the Black Administration Act of 1927 to be unconstitutional. In the 2007 Ugandan case of *Law Advocacy for Women in Uganda v. Attorney General*, a number of gender discriminatory provisions of the 1972 Succession Act were declared null and void on constitutional grounds by the Ugandan Constitutional Court. In Kenya, significant court decisions have exposed the inconsistencies between women’s rights and rules of succession



concerning family land. In both the 2005 case of *Rono v. Rono and Another* and the 2008 case of *In Re Estate of Ntutu (Deceased)*, the higher courts relied on constitutional, regional and international human rights provisions to reject claims based on gender discriminatory rules and recognize women's inheritance rights in the distribution of the estates (see Bond, 2014: 254–255). Similar rulings have been made in more recent Kenyan cases following adoption of the 2010 constitution (Makana and Muthoni, 2016). More recently, in 2014, the Nigerian Supreme Court delivered a landmark judgement in the case of *Ukeje v. Ukeje*, overruling the decisions of the High Court and Court of Appeal. Finding in favour of a daughter who had inherited her late father's land, the Supreme Court declared that Igbo law and custom, which discriminated against daughters inheriting their fathers' estate, conflicted with sections 42(1)(a) and (2) of the 1999 constitution.

Another landmark example of a court striking out discriminatory rules of inheritance is the 2013 Botswanan case of *Ramantele v. Mmusi and Others*. The Court of Appeal of Botswana struck out a customary rule denying women the right to inherit the family home as violating their constitutional right to equality. In an important judgement, Lestedi J took the opportunity to outline how courts should determine the constitutionality of a customary law. He stated that courts should breathe life into the constitution by adopting a generous and purposive approach to fundamental rights. Laws should be read in line with constitutional rights but struck out where it is not possible to do so. He noted that customary law is not static and that texts and articles 'merely record the position of a given custom as it prevailed at a particular point in the life or history of a tribal community but not subsequently' (para 77). The judgement has wider implications, not only for litigation on discriminatory customary laws in other African countries but also for signalling a way for legislators to approach the task of customary law reform itself. If textual sources are treated as simply a historical record of customary law, rather than used for contemporary interpretation, this principle could logically be extended to codified customary laws that have not been updated for decades since their original enactment.

At one stage, it appeared that Tanzanian jurisprudence was also moving in the direction of recognizing an equal right to inherit land. Tanzania's current 1977 constitution, which includes the 1984 Bill of Rights, enshrines a right to equality (Article 13)<sup>7</sup> and a right to own property and to the protection of property lawfully acquired (Article 24(1)). The high point for women's inheritance rights came in the leading 1989 case of *Ephrahim v. Pastory and Another*, when the Tanzanian activist judge, Justice James Mwalusanya declared Rule 20 of CLDO No. 4 concerning women's inheritance of clan land discriminatory and inconsistent with Article 13(4) of the constitution.<sup>8</sup> In two cases heard in 2001, equal rights principles were again held to have trumped gender discriminatory customary norms. In *Ndossi v. Ndossi*, the High Court applied constitutional and international human rights principles in upholding a lower court decision to replace the deceased's brother with the deceased's widow as administrator of an estate. Judge Munuo, as she then was, stated that the provisions protected widows and children from 'uncouth relatives prying and/or attempting to alienate the estate of deceased fathers and mothers under the shield of custom'.<sup>9</sup> In another 2001 decision, *Mtawa v. Risasi*, the High Court considered an appeal on the issue of gender discrimination under Rule 77(3) and (4) of the CLDO on the Law of Persons. This Rule provides for a usufruct interest of a widow to immovable property acquired during her marriage as well as apportioning other movable property according to the duration of the marriage. The High Court held that the Rule was discriminatory on grounds of sex, contrary to Articles 2 and 17 of the Universal Declaration of Human Rights, the Tanzanian Constitution and section 3(2) of the Land Act of 1999. Accordingly, the widow and the children of the deceased were each entitled to half shares in the matrimonial home (see Rwegasira, 2012: 277; Rwezaura and Wanitzek, 2007: 110–131).

Despite the wave of cases that have recognized an equal right to inherit, the question of whether discriminatory customary rules of inheritance are legally trumped by constitutional

rights has yet to be resolved conclusively by the Tanzanian courts. The 2005 constitutional test case, *Stephen and Charles v. Attorney General* signalled a conservative retreat by the High Court on the status of codified customary law. A group of activist lawyers initiated the case on behalf of two widows at the High Court of Tanzania, challenging a number of discriminatory codified customary rules of inheritance on constitutional and international human rights grounds. The claimants were widows of customary marriages, who had each been denied by their husbands' relatives the right to administer or inherit their husbands' estates, including their homes according to Sukuma customary law. The High Court declined to declare or strike out as unconstitutional discriminatory paragraphs of CLDO No. 4. The reasoning is significant in illuminating the High Court's approach to Tanzania's customary laws and the role of the judiciary:

After agreeing that the impugned paragraphs are discriminatory in more ways than one we have thought whether it will be in the best interest to give the orders prayed for. In reaching our decision, we are guided by a number of factors. We are aware that what the Order did was to declare and recognize some of the customs of the people, which were there for many years before. These customs evolve and change with time, a process that does not end, nor can it be ended.

What we are saying is this. It is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality. This will be opening the Pandora's box, with all seemingly discriminative customs from our 120 tribes plus following the same path.

The legislature saw this danger and in its wisdom, came up with section 12 of the Judicature and Application of Laws Act [cap. 358 R.E. 2002] . . . [judgement cites the section, which provides a formal mechanism for the declaration and modification of customary law by district councils.]

We are of the considered opinion that the provisions of the foregoing section would provide the best avenue to remedy the situation now complained of. The advantage of this avenue is that it will start from the grass roots where any custom is felt and a decision will be acceptable and implementable by the majority.

In an interview conducted by Natalie Bourdon with Justice Mihayo on his decision in this case, Justice Mihayo clarifies his view that 'only matters of great importance' should proceed straight to the High Court: either because there is no other remedy, or because it will affect the majority of Tanzanian women. Bourdon reports Justice Mihayo as saying: 'I like my decisions to have a natural effect. The decision must have an impact. You can't have a decision that fizzles in the air . . . ' (Bourdon, 2012: 194). I have argued elsewhere that the High Court judgement recognizes that customary laws are living and evolving but sees the task of changing the codified CLDOs as a matter for local councils rather than the judiciary. This appears to assume that the statutory mechanism for doing so under JALA is effective for harmonizing codified rules with social change. However, in its most recent review of customary laws, the Law Reform Commission of Tanzania has noted that in practice none of the district councils of Tanzania has used the statutory provisions in JALA to conduct periodic studies of customary laws within their respective areas (LRCT, 2009). This suggests that there is a lack of momentum from 'the grassroots majority' (or lack of will from local councils) to change the CLDOs. Instead, the current statutory mechanism and judicial approach serve to reinforce the status quo, since it does nothing to address the gendered social power relations that create resistance to amending local laws to promote gender equality (Dancer, 2015: 119–120).

### **Opening 'the Pandora's Box' and CEDAW**

This was not the end of the matter in *Stephen and Charles v. Attorney General*. In December 2010, it was reported that the Court of Appeal had struck out the claimants' appeal as incompetent for being accompanied by a defective drawn order that was wrongly dated (Kapama, 2010). The claimants unsuccessfully made three subsequent requests for a corrected

drawn order. In November 2012, they submitted their case to the CEDAW Committee, which issued its recommendation in the case of *ES and SC v. United Republic of Tanzania* in April 2015. The procedural obstacles encountered in appealing to the Court of Appeal were criticized by the CEDAW Committee (in para 7.7) as a ‘denial of access to justice’ amounting to a failure to provide an effective remedy in violation of Article 2(c) of CEDAW.

On the substantive legal issue of an equal right to inherit, the CEDAW Committee found that ‘although the State party’s Constitution includes provisions guaranteeing equality and non-discrimination, the State party has failed to revise or adopt legislation to eliminate the remaining discriminatory aspects of its codified customary law provisions with regard to widows’ (para 7.6). The committee found the legal framework to be gender discriminatory. Specifically, the state party had failed to discharge its obligations under CEDAW by denying the widows equality in respect of inheritance and by failing to provide them with any other means of economic security or any form of adequate redress. It made seven recommendations. These included: (i) an expediting of the constitutional review process to ‘address the status of customary laws to ensure that rights guaranteed under the Convention have precedence over inconsistent and discriminatory customary provisions’; and (ii) the repeal or amendment of all discriminatory customary laws, to be brought into full compliance with the Convention and the Committee’s general recommendations. The remaining recommendations included capacity building, consultation, awareness-raising, education and dialogue with legal professionals, civil society, women’s organizations, local authorities, traditional leaders and the wider public on the issues (para 9).

The state party was required to submit a written response in light of the recommendations within 6 months. This coincided with a period of political build-up: to national elections in October 2015 and to the referendum on the proposed Constitution which, to date, has been postponed indefinitely. The coinciding of the CEDAW recommendation with the constitutional debates gave women’s rights activists a further opportunity to push for legal reform. However, the constitutional debates at that time were dominated by questions of the structure of the United Republic. Moreover, CEDAW Committee recommendations cannot be legally enforced against State parties. Previous recommendations (CEDAW, 1990: para 99; CEDAW, 1998: part two, para 230; CEDAW, 2008: part two, para 111) have not brought inheritance law reform. On 11 July 2008, the committee considered Tanzania’s combined fourth, fifth and sixth periodic reports. When asked about repealing existing discriminatory laws that did not address women’s inheritance, the government minister was reported as saying ‘I think we still have a long way’ (International Service for Human Rights, 2008: 4). In its concluding observations, the committee expressed concern at ‘the lack of priority given to comprehensive legal reform to eliminate sex-discriminatory provisions . . . in particular, about the delay in the passage of the proposed amendments to the Law of Marriage Act of 1971, inheritance laws . . .’ (CEDAW, 2008: part two, para 111). It further urged the state party to

complete its law reform in the area of marriage and family relations in order to bring its legislative framework into compliance with Articles 15 and 16 of CEDAW. . . [and] to ensure that where conflicts arise between formal legal provisions and customary law, the formal provisions prevail. (CEDAW, 2008: part two, para 147).

In its 2012 follow-up report, the Government of Tanzania indicated that processes for amending marriage and inheritance laws were still underway, in that the government had submitted a cabinet paper for approval, following which a white paper would be issued to invite public opinion and stakeholder consultation (CEDAW, 2013). As at September 2016 the government review process was still in progress. Meanwhile, although broader women’s rights provisions had been included in the proposed draft constitution (CRC, 2014), these had stopped short of enshrining an equal right to inherit land.

## **Towards an Equal Right to Inherit in Tanzania?**

The conservative retreat of the Tanzanian High Court in *Stephen and Charles* stands out against the trend of African constitutional cases on women's inheritance rights in the last decade. This raises the question as to why the High Court in *Stephen and Charles* took such a different approach. The reasoning of the court presents something of a contradiction. On the one hand, it recognized the disjuncture between living customary laws and the codified gender discriminatory rules that were the subject of the claim. On the other, instead of using the constitution as the supreme source of law to strike out the discriminatory legislation, it placed reliance on a local government mechanism to modify laws that has never been used. The court did not address the failure of this mechanism in practice. The legislature has also missed opportunities for law reform on inheritance of land: firstly in the passing of the Land Acts, and more recently, in the failure to include an equal right to inherit in the proposed constitution. At the same time, discrimination against female inheritance of land remains widespread. Maintaining the legal status quo serves only to reproduce gendered power inequalities. As Tsikata argues: 'To ask women to wait until customary practices have themselves evolved through contest within their societies is to deny them a level playing field, and that is discriminatory'. The question is 'how to bring statutory law closer to ordinary people and how to encourage its implementation in a democratic and equitable manner' (Tsikata, 2003: 179–180).

It is clear that while living customary laws continue to evolve within local communities, legislative intervention is still needed to repeal outdated codified versions. Many feminist lawyers, scholars, the Law Reform Commission of Tanzania and the CEDAW Committee are in accord in calling for the repeal of discriminatory codified customary laws of inheritance. Given that they reflect an ossified version of customary law that has not been updated since the early 1960s, such reform need not be considered unduly controversial. It would not represent the end of customary law itself. Whatever is done at a statutory level regarding codified versions, the customary laws of local communities live on and would continue to be recognized as a source of law in Tanzania's legal system. Importantly, a constitutionally enshrined equal right to inherit would signal a national commitment to gender equality. It would provide a touchstone for the evolution of living customary laws and for purposive judicial interpretation in accordance with constitutional rights. This highlights the importance of consultation, education and social dialogue alongside legal change. To militate against backlash on a socially sensitive issue, legal reform also requires sustained programmes of community engagement and spaces for discussion, which are truly socially inclusive.

At the time of writing in 2016, with constitutional reform on hold, the Government of Tanzania had begun the process of reviewing both the Law of Marriage Act and its National Land Policy. The first consultation draft of the National Land Policy includes inheritance and ownership of land between spouses on the agenda (URT, 2016). This is an opportunity for the Tanzanian government, in consultation with civil society organizations and commercial actors, to look holistically at law reform on family land tenure, customary law and gender equality. Will that opportunity be seized?

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1. The concept of an individual owning the land itself is not known in Tanzanian law. The Land Amendment Act No. 2 of 2004, section 2 provides that citizens acquire ‘an interest in or over land’.
2. The Law of Marriage Act, section 60 creates a rebuttable presumption that land acquired individually or jointly during a marriage will be regarded as individually or jointly owned according to its acquisition. This is subject to the presumption of spousal co-occupancy under the Land Act, section 161(1) and (2).
3. The Law of Persons, First Schedule Local Customary Law (Declaration) Order GN 279 of 1963; the Law of Inheritance, Second Schedule Local Customary Law (Declaration) (No. 4) Order GN 436 of 1963.
4. Constitution of the Republic of Uganda 1995; Constitution of the Republic of Rwanda 2003; Constitution of Burundi 2005; Constitution of Kenya 2010.
5. Unofficial English translation of the original Kiswahili version of the first Draft Constitution by Mapunda (2013).
6. Unofficial English translation of the second Draft Constitution by International IDEA (2014).
7. The equality clause (Article 13) was amended with effect from July 2000 to include a provision expressly prohibiting gender discrimination.
8. Rule 20 provides: ‘Women can inherit except for clan land which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership’.
9. Case summary available at <http://www.widowsrights.org/legalchallenges.html> (accessed 21 September 2016).

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