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# **ACHIEVING GENDER EQUALITY IN A PLURAL LEGAL CONTEXT: CUSTOM AND WOMEN'S ACCESS TO AND CONTROL OF LAND IN KENYA**

Celestine Itumbi Nyamu<sup>\*</sup>

## **I. INTRODUCTION**

Kenyan women are largely excluded from control of land and other key economic resources. Statistically, most of the registered land is held in men's names. Although gender disaggregated statistics are difficult to obtain, some studies have established that only 4% of land is registered in women's names.<sup>1</sup> Land is crucial for women's basic livelihood security. In addition, ownership of land is a prerequisite for access to credit facilities and other benefits, since land is almost the only widely acceptable form of collateral for loans. Land is a major concern for most Kenyan women, particularly rural women who make up 67% of the rural population. The primary and most widely held justification for the exclusion of women from ownership and control of land is that African customary law of most communities does not permit women to own or have major control over land. In most ethnic groups in Africa, a person's basic rights to land are defined by reference to that person's position within a kinship or lineage network. For women, access to land is closely defined by kinship and marriage ties, and is largely dependent on marital status. Land is therefore central in defining women's identity and social status.

At the Fourth World Conference on Women held in Beijing in September 1995, the issue of women's equal access to economic resources, including land, became one of the hotly contested issues. The debate centered on the girl-child's equal right to inheritance of the family's property. As the contest unfolded, it became clear that the objections came from the Islamic countries, with Syria at the forefront. The objections of these countries were perceived as a cultural relativist

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<sup>1</sup> This estimate is given in a study conducted by EarthCare Africa. See *Land Legislation Shuts out Women*, DAILY NATION (Nairobi) August 7, 1997, at 20.

move. The NGO Forum's Human Rights Caucus saw this as one of the several attempts that were being made by certain governments at the conference to cite cultural and religious specificity as grounds for weakening language on the universality of human rights in the Beijing Platform of Action. They saw such moves as an attempt to reverse earlier international documents recognizing the universality of human rights, such as the Vienna declaration that had been adopted only in 1993.<sup>2</sup>

Syria and other Islamic countries objected to the use of the word 'equal', on the basis that Islamic law on inheritance is clear: girls inherit half of the share inherited by their brothers. They argued that this is justifiable because male children have greater financial responsibility in the family.<sup>3</sup> This objection to the use of the term 'equal' must be viewed in the broader context of the negotiations on the language of the Beijing Platform as a whole. The debate on whether to use the term 'equality' or 'equity' became one of the most difficult issues to resolve in the inter-governmental negotiations on the platform, and it was one of the very last issues to be resolved.<sup>4</sup> Informal negotiations had been held prior to the conference to try to come to a consensus on some of the contested issues in advance of the conference. During these preparatory conferences, as they were called, Islamic countries, led by Iran and Sudan, proposed to use the word 'equity' in every instance where the document used the term 'equality'.<sup>5</sup> This practice continued into the conference itself, with some Islamic countries making reservations to some provisions when

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<sup>2</sup> The issue of universality of human rights versus cultural and religious specificity was raised at the very first meeting of the Human Rights Caucus as one of the issues that the Caucus would have to monitor with great vigilance. The Caucus set up a working group on the issue of inter-governmental negotiations on the language of the platform. Other working groups were set up on other issues in the platform, such as violence against women in situations of armed conflict, displaced and refugee women, national and international institutional arrangements, and the tension between 'equality' and 'equity' in the platform's terminology. [Author's personal observation notes. Meeting of the Human Rights Caucus, August 31, 1995, Huairou, China.]

<sup>3</sup> For an account of this and other debates at the conference, see Dzodzi Tsikata, *The Beijing Conference: Prospects for Implementation*, AFRICAN AGENDA, Vol.1, No.7 (1995), 8-12.

<sup>4</sup> See, *A Final Report on the Fourth World Conference on Women*, 14 EARTH NEGOTIATIONS BULLETIN (Number 22, Monday, 18 December 1995) [Published by the International Institute for Sustainable Development (IISD)]. See also *Statement by Mrs. Gertrude Mongela, Secretary-General, Fourth World Conference on Women*, Press Release, 13 September, 1995 WOM/BEI/Note 14.

<sup>5</sup> Dzodzi Tsikata, *supra* note 3, at 12.

they could not get the word 'equal' replaced by 'equitable'.<sup>6</sup> NGOs and other governments, particularly Northern governments, viewed this as an attempt to dilute the strength of the document by leaving too much room for discretion or arbitrariness in deciding what is equitable.<sup>7</sup> Anyhow, in the end, the formulation using the word 'equal' was accepted, with the understanding that 'equal right to inheritance' does not necessarily mean 'equal shares' of inheritance.

Before this compromise was reached, I recall having a conversation with a North American woman, an NGO participant at the conference. She told me that she found it impressive that the African countries were not part of this relativist move; that they did not use the argument of culture to oppose women's equal access to economic resources. I felt compelled to explain why I did not share this celebratory attitude towards the African governments' apparent position on the issue. I tried to explain that one reason for the absence of objections on the part of African governments was because the provision in question talked only about legal provisions, and that the governments could choose to interpret this narrowly to refer only to statutory provisions. That if we were talking more broadly about law, to include that category referred to as 'African customary law', perhaps the African governments would find it necessary to take a position similar to that of Syria and the other states.

In this exchange, I was drawing on the conventional view expressed in debates on the issue of application of various personal laws alongside national statutes in societies described as legally and culturally pluralistic.<sup>8</sup> The position taken by people interested in

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<sup>6</sup> For example, the United Arab Emirates, Sudan and Jordan immediately made reservations to paragraph 168 (b) of the draft platform, which called on governments to "strengthen the incentive role of the state as an employer to develop a policy of equal opportunities for women and men". They made the reservations because they could not get the other countries to agree to substitute 'equitable' for 'equal' in the paragraph. This paragraph is now paragraph 166 (b) in the final document, and the equality language was retained in it, as it was in the whole of the Platform for Action. See UN FOURTH WORLD CONFERENCE ON WOMEN, THE BEIJING DECLARATION AND PLATFORM FOR ACTION (1996).

<sup>7</sup> My personal view is that the debate did not point to an inherent tension in the concepts of equity and equality. Rather, my impression was that the responses were dictated more by a concern with positioning. Since Islamic governments were the ones pushing the equity line, then all 'progressive' forces must necessarily position themselves in opposition to them.

<sup>8</sup> The following are some writings in these debates: Barthazar A. Rwezaura, *The Integration of Marriage Laws in Africa with Special Reference to Tanzania*, in LAW, SOCIETY AND NATIONAL IDENTITY 139 (J.M. Abun-Nasr, U. Spellenberg & U. Wanitzek eds., 1990); Chuma Himonga, *Integration of Family Law in Zambia: Marriage and Succession Law*, in LAW, SOCIETY AND NATIONAL IDENTITY 163; Gordon R. Woodman, *Unification or Continuing Pluralism in Family Law in Anglophone Africa: Past*

gender equality is that although the laws in the statute books are gender-neutral and do not discriminate against women, for instance with regard to succession and inheritance, customary law, which has more immediate application in most parts of the country, discriminates against women. Culture, not law, is the problem. Culture is what is responsible for gender imbalance and for women's exclusion from control of resources. This view runs through several works on women and property, set in the human rights tradition, or the 'women in development' tradition.<sup>9</sup> A different view appears occasionally in work set in the mainstream property law scholarship in Kenya. The mainstream property law scholarship sees existing property law and institutions as impositions of Western conceptions of property on African indigenous institutions. Hence, I label this type of scholarship the 'legal imposition' approach. Writers in the legal imposition school argue, therefore, that it is in the process of imposition that women's interests, which were previously well protected under custom, are wiped away or compromised.<sup>10</sup>

Each of these views or explanations of women's position with regard to property has its shortcomings. The explanation offered by the legal imposition approach romanticizes custom or 'indigenous' African property arrangements. Only a minority of writers in this tradition are concerned with gender inequality. Even these few fail to engage seriously and critically with women's positions in these 'indigenous' arrangements. In their view, customary arrangements were egalitarian and it is the process of imposition that introduces

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*Experience, Present Realities, and Future Possibilities*, 4 LESOTHO LAW JOURNAL 33 (1988); Anne Hellum, *Actor Perspectives on Gender and Legal Pluralism in Africa*, in LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW, 13 (Hanne Petersen & Henrik Zahle eds. 1995). Debates on legal pluralism have also gone on with respect to contexts outside of Africa. In India, for example, the debate on a Uniform Civil Code is continually revived by cases such as the Shah Bano case [Mohammed Ahmed Khan v Shah Bano (1985) 2 Supreme Court Cases, 556]. For a brief historical overview of the debate on personal laws in India, particularly on how women are positioned within the debate, see Maya Manian, *Personal Law in India: Gender, Identity and Community* (JD paper, Harvard Law School, 1998).

<sup>9</sup> Perpetua Karanja, *Women's Land Ownership Rights in Kenya*, 1991 THIRD WORLD LEGAL STUDIES 109; Kivutha Kibwana, *Law and the Status of Women in Kenya: The Example of Laikipia District* (Institute for Development Studies, University of Nairobi, Working Paper No. 481 January 1992); Florence Butegwa, *Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 495 (Rebecca Cook ed. 1994).

<sup>10</sup> See Okoth-Ogendo, *The Imposition of Property Law in Kenya*, in THE IMPOSITION OF LAW 147, 164 (Sandra B. Burman & Barbara Harrell-Bond eds. 1979) [hereinafter *Imposition*]; Okoth-Ogendo, *Some Issues of Theory in the Study of African Agriculture*, 59 AFRICA 6 (1989).

differentiation, including gender-based differentiation, which then accounts for the diminution in women's status with regard to landholding. There seems to be no empirical basis for this egalitarian presumption with regard to pre-colonial social order. On the contrary, there is evidence of differentiation in pre-colonial arrangements, suggesting that the ideal picture of an egalitarian society really depends on whose perspective is being described.<sup>11</sup>

The explanation offered by the human rights and women in development approach, attributing women's conditions to a vague notion of 'culture' or 'custom', masks the role played by formal legal institutions in creating those conditions and exonerates the state from having to deal with the issue in any serious manner. A vague notion of 'culture' will always be the elusive culprit. Kenya's national report to the Beijing conference illustrates this very clearly. It states,

Kenya's constitution and laws do not discriminate against women. However, certain *traditional practices* inhibit women's equal access to and ownership of property. The law of succession enacted in July 1981, gave both men and women equal rights of ownership and disposal of property and was, therefore, an empowerment for women who traditionally were not allowed to inherit family property.<sup>12</sup>

The report is replete with 'cultural explanations' for diverse issues such as low participation of women in politics, violence against women and the role of women in policy design. On the implementation of land policies, the report states,

Soon after independence, the Kenya Government embarked on a resettlement programme to resettle the landless. Through the programme, land titles deeds were and are still issued to men and

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<sup>11</sup> Some scholars in legal anthropology and legal history identify a tendency, in debates on pre-colonial social, economic and political arrangements, to present them as non-conflictual, in contrast to 'imposed' Western forms, or in contrast to the exercise of state power in a post-colonial setting, invoking ideals of 'harmony'. See JUNE STARR & JANE F. COLLIER, *HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY* (1989) [Introduction].

<sup>12</sup> Republic of Kenya, National Report Prepared for the Fourth World Conference on Women to be held in Beijing, China, 4-15 September, 1995 (May 1994), [hereinafter Kenya National Report] at 5.

women without discrimination although *due to cultural factors*,  
men outnumber women.<sup>13</sup>

Both positions pay little attention to the reality of interaction between prevailing notions of custom and formal legal institutions, and how women are affected significantly by this interaction. However, a third view is emerging. This view looks at ways in which women living in a plural legal setting deal with the complex and dynamic intersection of prevailing notions of local customs and national formal legal structures. It attempts to go beyond the dichotomy between custom and formal legal institutions and processes. It remains conscious of the continuous interaction between them. Therefore, rather than blame either custom or 'imposed Western institutions', it focuses on what works in seeking to redress gender inequality in property relations, whether what works can be characterized as belonging in the cultural sphere, in the sphere of formal legal structures, or in the overlap between them. I have given this approach the provisional label of 'a critical pragmatic' approach to pluralism.

This paper sets out to examine these three broad approaches and, in so doing, to argue for adoption and further development of the third. I devote a major part of the paper to questioning two basic assumptions implicit in the first two approaches. First, there seems to be an assumption that conceptually, there can be a clear divide between formal law and custom or that, in issues of gender inequality, it is possible to clearly identify one side of the formal law/custom divide as the oppressor, and the other as the liberator. In this paper, I question the idea that we can coherently speak of such a divide in contemporary Kenya, and ask what consequences the deployment of this binary between formal law and custom has for the achievement of gender equality. My position is that this binary cannot be sustained. Formal law and custom intersect in rather overt ways. Often, their intersection results in the undermining of women's control over resources. The state is actively involved in shaping custom, and the two ostensibly separate systems reinforce each other. Kenya's land relations illustrate this interdependent relationship, as I will demonstrate.

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<sup>13</sup> *Id.* at 23.

Secondly, there appears also to be an assumption concerning the very nature of customary law itself. In both views that I discuss, the existence and coherence of customary law as a category is taken for granted, as is its antiquity, authenticity and historical continuity. This gives the impression that this category (customary law) has always existed with very little, if any, change, and is 'innate' to a community. Both mainstream property law legal imposition scholarship, and human rights activism and scholarship, take for granted the existence and coherence of customary law as a legal category, without questioning the process through which the category as a whole came to exist, and how certain rules within it come into existence. They do not question the power relations implicit in its creation. Yet it is crucial to examine whose interests are served by portraying custom as unchanging in a specific instance.

I have divided the article into five parts, the first being the introduction. In the second part, I outline the key features of the mainstream property law (legal imposition) approach. I then critique this approach in light of the two assumptions identified above, namely reifying a dichotomy between customary law and formal law, failing to take account of the dynamic nature of customary law, and failing to recognize the power relations inherent in the dynamic process of shaping custom. In part III, I outline the human rights and 'women in development' approaches, identifying three key strategies that the scholars and activists in these schools have used in confronting gender inequality with regard to property relations. I similarly critique these two approaches in light of the two assumptions identified above. In part IV I build on my critiques of the approaches discussed to propose alternative approaches to addressing gender inequality in property relations in a plural legal context. I refer to frameworks of analysis that may be helpful in conceptualizing appropriate or effective approaches in a plural legal context, such as the semi-autonomous social field, the intersectionality of gender and culture, and critical pragmatism. Finally, in part V, I draw some brief conclusions.



## II. GENDER AND CUSTOM IN MAINSTREAM PROPERTY RELATIONS SCHOLARSHIP

The major preoccupation of property relations scholarship in Kenya has been with the imposition of individualistic Western laws and concepts of property on African people who relate to the land in a communal context. The basic argument of this school is that the imposition of Western notions of property disturbed the stability of African land tenure arrangements.<sup>14</sup> In making this argument, they presume that customary law arrangements were defined and conclusive.

The legal imposition approach, in analyzing post-colonial legal and institutional settings, is influenced by the 'dependency' school of thought which gained popularity in the mid to late 1970s in Africa and Latin America.<sup>15</sup> Dependency thinking attributes underdevelopment in Africa to structures of global capitalism and post-independence collaboration between African elites and foreign capital to serve their own interests at the expense of the poor majority of Africans. The preservation of colonial agrarian institutions and land tenure policies, to the detriment of indigenous African institutions, is therefore seen as part of this collaboration. Professor Okoth-Ogendo, who is regarded as one of the leading property law scholars in Kenya, analyzes the institutional structures governing property relations in Kenya in these terms of dependency:

At the macro-level continuous imposition of law can be seen as an expression of dependency relations between the Third-World (the

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<sup>14</sup> Okoth-Ogendo, *Imposition*, *supra*, note 10. See also Rudi W. James, *Land Tenure Reform in Developing Countries: From Westernization to Indigenization*, 12 EASTERN AFRICA L. R. 1 (1976); Bondi Ogolla, *The Legal Regime and the Peasantry: The Case of Land Reform in Kenya*, 4 NAIROBI UNIV. L. J. 109 (1987); Gibson Kamau Kuria, *The Role of Customary Land Tenure in Rural Development in Kenya*, (Unpublished paper presented at the Seminar on Law and Rural Development, Kisumu, Kenya 1977).

<sup>15</sup> For a brief overview of the trends in dependency theory scholarship generally see Brian Tamanaha, *The Lessons of Law and Development Studies*, 89 AM. J. INT'L LAW 470 (1995). The legal imposition school has remained the dominant mode of analysis of land relations in Kenya, particularly by legal scholars and activists. See, for example, OKOTH-OGENDO, *TENANTS OF THE CROWN: EVOLUTION OF AGRARIAN LAW AND INSTITUTIONS IN KENYA* (1991); Gibson Kamau Kuria, *id.* Arguments on imposition of Western legal and institutional arrangements on African societies are not unique to property law. They have also been made with regard to Western liberal democratic institutions, see JACKTON B. OJWANG, *CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE* (1990), and with regard to family law, see Gibson Kamau Kuria, *Christianity and Family Law in Kenya*, 12 EAST AFRICAN L. J. 33 (1976).

periphery) and industrialized nations (the metropole centers).... [The] impetus for imposition of law can be seen at this level as being generated from without rather than arising from within.<sup>16</sup>

He traces the impetus for legal imposition as coming also from within; from local elites who are committed to the survival of the imposed system, whose effect is to "restructure the flow of national resources in a manner that increases the inequality of the distribution of benefits in the society".<sup>17</sup>

The imposition approach has played a very important role in showing that African land relations were, in the colonial encounter, viewed through conceptual categories created by Western property theory, and how these perceptions have continued to shape legal and institutional structures governing property relations in post-colonial Africa. However, the legal imposition analysis has two major shortcomings, which are relevant to our discussion on the binary between law and custom, and the consequences that it has for women: first, it pays inadequate attention to gender in the clear divide it constructs between law and custom. Mainstream scholarship on property relations in Kenya and other African countries completely ignores gender relations. This can be attributed to the fact that the field has remained dominated by a narrow class of scholars who have little interest in gender issues. Furthermore, there are hardly any women scholars doing mainstream property relations scholarship. The few who do write on property relations are more accurately described as being in the human rights and women in development school, since they are concerned with gender inequality in property relations.<sup>18</sup> Second, mainstream property law scholarship, in describing customary

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<sup>16</sup> Okoth-Ogendo, *Imposition*, *supra* note 10, at 148.

<sup>17</sup> *Id.* at 148-9.

<sup>18</sup> Women scholars who have written on property relations in Kenya include Achola Pala Okeyo (an anthropologist), see *Women's Access to Land and Their Role in Agriculture and Decision-Making on the Farm: Experiences of the Joluo of Kenya*, 13 J. EAST AFR. RESEARCH & DEV. 69 (1983), Janet Kabeberi-Macharia (a lawyer) see *Women and Property in Kenya: Towards Equal Inequality?* (Working Paper No.13, NORAD Institute of Women Law, November, 1988), Perpetua Karanja, (a lawyer) *supra* note 9, and historian TABITHA KANOGO, *SQUATTERS AND THE ROOTS OF MAU MAU, 1905-63* (1987). Since 1991, several scholars and activists involved in the Women and Law in East Africa research project have been carrying out research and writing on issues such as inheritance and matrimonial property. WLEA publications include *THE LAW OF SUCCESSION IN KENYA: GENDER PERSPECTIVES IN PROPERTY MANAGEMENT AND CONTROL* (1995).

arrangements, ignores the power relations that shape customary land tenure arrangements.

***A. Reification of the Dichotomy Between Formal Law & Custom,  
Western Institutions & Indigenous Institutions***

Legal imposition analysis in mainstream property law scholarship is characterized by dichotomy: between Western (imposed) institutions and indigenous institutions; between formal law and custom. The manner in which legal imposition scholars deal with gender, when they do deal with gender at all, illustrates the reification of these distinctions.

Although mainstream property analyses link the process of 'imposition' of Western property notions and institutions to inequality in the distribution of benefits in society, they ignore gender relations as a factor in the manner in which property relations are defined. Some writings in this tradition do allude to the fact that women's proprietary rights were weakened as a result of the legal imposition of Western concepts of property. Where this observation is made, the tendency is to blame the process of imposition and the 'imposed institutions' for women's disadvantaged position, and to romanticize what was there in the past under customary tenure as purportedly offering protection to women. For these writers there is a clear distinction between formal law (imposed) and custom (indigenous). The imposed law is the 'oppressor', eroding, in its wake, protective measures previously available to women under the indigenous institutions. For example, at the end of his essay on the imposition of property law in Kenya, Okoth-Ogendo observes:

an economy that depends so heavily on female labour cannot really afford to weaken the proprietary status of women over land. Customary property law ... avoided this by separating access rights from control and subjecting control to the economic tasks required by reason of the former. The economic role of women in indigenous society, it must be emphasized, depended largely on the protection of their access rights to land.<sup>19</sup>

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<sup>19</sup> Okoth-Ogendo, *Imposition*, *supra*, note 10, at 164.

I acknowledge, as do other writers<sup>20</sup>, that various measures under customary tenure, such as restrictions on outright sale of land, offered protection to the interests of family members, especially women and children. The statement quoted, however, goes beyond this to legitimate customary property arrangements in their entirety and to preempt any questioning of the actual nature of property rights that are accorded to women within them. In other words, Okoth-Ogendo romanticizes customary tenure by arguing that everything was good for women before the imposed institutions came in. In this mode of analysis, it is the *process* of fitting customary tenure into the narrow categories of property rights created by Western property theory that results in the dispossession experienced by women. The legal imposition school does not pin responsibility for remedying this situation on any specific existing institution, in the same way that the human rights/development diagnosis identifies a vague notion of culture/custom as the culprit. It also leaves unanswered the question of what to make of existing arrangements that are described as customary. Does this romanticizing of custom preclude contemporary criticism of present 'customary' arrangements?

The central issue for me is not to determine which entity -law or custom - is responsible for women's present status with regard to access to property. It is more instructive to examine how, in the present setting, social practices justified by custom interact in complex ways and at various levels with government policy to undermine the position of women with regard to control of economic resources. Customary land law has influenced and, in turn, has at the same time been influenced, altered and reproduced in government policy. One example of this process of interaction is the on-going tenure reform program, under which the Kenya Government is undertaking to register under statute all land that is currently unregistered, and which is therefore presumed to be held under customary tenure.<sup>21</sup>

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<sup>20</sup> Achola Pala Okeyo, *supra* note 18; Perpetua Karanja, *supra* note 9.

<sup>21</sup> This policy, commonly referred to as the tenure reform program, was initiated in the 1950s by the colonial government. The policy has resulted in land disputes, typically between the individual(s) registered as statutory owners and other family members asserting their claims to the land on the basis of custom. For a detailed discussion of the tenure reform program and the resultant land disputes see Celestine I. Nyamu, *Land Dispute Processing in Kenya: A View on the Land Disputes Tribunals Act of 1990* (1992) (LL.B. Dissertation, University of Nairobi).

The process of tenure reform is a three step process involving adjudication (to determine existing interests in the land), consolidation<sup>22</sup>, and registration. The process culminates in official registration and issuance of a document to evidence title. Usually, registration is effected in the name of one person as the official 'owner' of the land, even where it is more appropriately described as family land. The understanding of most family members is that the person so registered, usually the father or eldest brother, is registered in a representative capacity. Obviously the implementation of this policy has made women's position in relation to land even more insecure. The exercise has resulted predominantly in the registration of men as individual proprietors of land on the basis that they are the 'male heads of households', a result largely influenced by cultural bias on the part of the implementers of the policy.<sup>23</sup> It should be noted that nothing in the land statutes prevents women from being registered either as individual or joint owners of land. Neither do the statutes require that the land must be registered in the name of a male head of household.<sup>24</sup> Further, the title granted under the statute is absolute and entitles the man (official title holder) to sell or mortgage the land at will, with no regard for obligations he might have had to other family/clan members under custom. Therefore, women's rights of access previously guaranteed under customary law, even though very limited, become even more insecure, as a result of this interaction between cultural perceptions or biases, and a government policy keen on entrenching an individualized private property regime.

The following scenario illustrates this heightened insecurity. In the case of *Elizabeth Wangari Wanjohi & Elizabeth Wambui Wanjohi v*

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<sup>22</sup> Consolidation involves offering an adjoining piece of land to a person who holds pieces of land that are not adjacent to one another in exchange for one that is far away. It is a kind of a swap that is supposed to result in land holding units of an economically viable size. Consolidation as a mandatory policy was abandoned in 1968 as a result of social and political resistance. It is now treated as optional. See Okoth-Ogendo, *Reforming Land Tenure in Africa: Conceptual, Methodological and Policy Issues* 12 (1996) (unpublished).

<sup>23</sup> One registration official was asked why they registered only men. He replied, "It is customary that men hold land in our societies; therefore it stands to reason that they should hold land titles as well". See Achola O. Pala, *African Women in Rural Development: Research Trends and Priorities* 3 (OLC Papers No.12, December 1976).

<sup>24</sup> See Land Adjudication Act, Chapter 284 of the Laws of Kenya (1970, revised 1977) Land Consolidation Act, Chapter 283 of the Laws of Kenya (1964, revised 1977). On male bias in registration see Achola O. Pala, *supra* note 23; Kivutha Kibwana, *supra* note 9.

*Official Receiver and Interim Liquidator (Continental Credit Finance Limited)*<sup>25</sup> two brothers mortgaged the family's piece of land. Unfortunately, they both died before they had completed the loan repayment. The financial institution that had advanced them the loan went into liquidation, and the official receiver sought to auction the piece of land to recover the outstanding amount. Their widows tried to stop the auction from proceeding, arguing that their rights as occupants under customary law had not been taken into account. The Court of Appeal (the highest court in Kenya), in deciding the case, made a general ruling that a wife's rights of access under customary law, acquired solely by virtue of marriage, are extinguished upon registration of her husband as sole proprietor.<sup>26</sup> On the general question of the effect of registration of land on customary law-based claims of family members however, the Kenyan judiciary has issued conflicting judgements. One line of cases has maintained that the process of registration frees the land from customary practices, and therefore customary interests are extinguished upon registration.<sup>27</sup> On the other hand, another line of cases holds that any person registered as sole proprietor of land previously held under 'communal' customary tenure must be presumed to be registered as trustee.<sup>28</sup> The Court of Appeal in the case I have summarized above endorses the first view, that registration extinguishes all pre-existing interests based on customary law, or all interests not subsequently noted on the register. The widows' claims as wives under customary law were therefore overridden by the claims of the financial institution.

Thus, examining the interaction of custom with formal legal institutions, rather than treating them as separate systems, yields a more complete picture, since it forces us to examine both the institutional policy-making level and the household/community relations level, and ways in which they interact and affect each other.

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<sup>25</sup> CIVIL APPLICATION NAI. No.140 of 1988.

<sup>26</sup> *Id.*

<sup>27</sup> Examples of cases that have taken this approach include *Obiero v. Opiyo* (1972) East Africa Law Reports, 227; *Esiroyo v. Esiroyo* (1973) East Africa Law Reports, 388; *Belinda Murai v. Amos Wainaina* CIVIL APPEAL NO.45 NAIROBI (1977).

<sup>28</sup> Examples of cases that have taken this approach include *Muguthu v. Muguthu* HIGH COURT CIVIL CASE NO. 377 NAIROBI (1968, Unreported); *Samuel Thata Misheck v. Priscilla Wambui & Wanjiku*, HIGH COURT CIVIL CASE NO. 1400 NAIROBI (1973, Unreported); *Allan Kiama v. Ndia Muthunya & others*, CIVIL APPEAL NO. 42 NAIROBI (1978, Unreported).

This interaction affects social and interpersonal relationships, including gender relationships at the household and community levels. Analysis at this level enables us to examine crucial questions such as the effect of the introduction of statutory land registration on the obligations of the person so registered as land holder, and on who controls women's labour in the altered relations to the land.<sup>29</sup> This analysis is important in understanding the basis upon which gender roles and property relations have been defined both within the context of land held under customary tenure and land registered under statutory land law.

### ***B. Inadequate Understanding of Power Relations in Shaping Custom***

The second shortcoming of the legal imposition school is that the scholars present pre-existing customary law arrangements in a somewhat functional manner, as a structural entity which is stable and precise, almost as 'the natural order of things'. They present customary tenurial arrangements as an internally coherent and closed system, which the 'imposed institutions' sought to supplant and replace.<sup>30</sup> Among these scholars, only Okoth Ogendo has a somewhat problematized presentation of customary land tenure, that refers to the existence of 'internal conflicts' in indigenous property law.<sup>31</sup> However, the meaning he attaches to internal conflict is somewhat narrow, simply to concede to the fact that notions akin to 'private ownership' had already begun to emerge in a predominantly

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<sup>29</sup> On the question of women's labour in the altered relations to land, a Ugandan author observes that women experience adverse consequences of the combination of negative customary attitudes on 'ownership' of land by women with specific doctrines in English property law that state that whoever owns the land owns whatever is attached to the land. This makes it difficult, for instance in situations of inheritance, for women to claim entitlement to developments they have effected on land that was legally owned by their husbands, and to enforce these claims against the legal (male) heir, particularly where the legally recognized heir under customary law is not in the widow's immediate family. See Lilian Ekirikubinza Tibatemwa, *Property Rights, Institutional Credit and the Gender Question in Uganda*, 2 EAST AFR. J. PEACE & H. RTS. 68, 70-71 (1995).

<sup>30</sup> See especially Okoth-Ogendo, *Imposition* supra note 10, at 157:

The imposition of English property law and institutions had important consequences for the stability of the situation [of African land tenure] described above.

See also Rudi W. James, *supra* note 14; Bondi Ogolla, *supra* note 14; Gibson K. Kuria, *supra* note 14.

<sup>31</sup> Okoth-Ogendo, *Imposition*, *supra* note 10, at 160.

communal system. What I am concerned with uncovering is the 'conflict' involved in the processes of determining what gets to be accepted as one's position in customary tenure arrangements, or one's entitlement under it.

The classic legal imposition approach evades the complex issues regarding the contested nature of customary law, and the power dynamics at play in defining and shaping 'taken-for-granted' or officially accepted notions of customary law. This comes out clearly in the imposition scholars' descriptions of the manner in which 'property rights' are/were assigned to various people under customary tenure. In a later article, Okoth-Ogendo argues that African land tenure relations are more usefully understood as being based on the "production functions . . . assigned to individual members of society at different points in the social cycle".<sup>32</sup> He goes on to argue that access to power to control land is "attached to membership of some unit of production".<sup>33</sup> Therefore, the extent of a person's property in land will be determined by his/her membership status. What I find disturbing is that there is no mention of the exercise of power implicated in the 'assigning of production functions'. There is no discussion about who gets to decide one's membership status within the relevant land-holding unit, be it a family, clan, lineage or community at large. Furthermore, this analysis takes for granted the differences in membership status, as though these are predetermined and fixed. That issues of gender would be implicated in such an inquiry goes without saying. The reality of constant and dynamic negotiation and conflict over these statuses is totally absent from this analysis. Therefore, property law scholarship as a whole is oblivious to the ways in which women subversively challenge notions of their position in customary tenure arrangements.

The idea that customary law of land tenure is a continually contested concept and continues to be an arena of struggle has been written about by some legal anthropologists and African historians. There are accounts that show that customary law, particularly as it relates to land tenure, was initially shaped and articulated within the

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<sup>32</sup> Okoth-Ogendo, *Some Issues of Theory in the Study of Tenure Relations in African Agriculture* supra note 10, at 6, 10.

<sup>33</sup> *Id.*



context of a struggle - the struggle against colonial expropriation of land belonging to African communities.<sup>34</sup> Such analyses show how those with power are able to construct customary land tenure in their favour.<sup>35</sup> Yet the effect of gendered relations of power is not acknowledged in the construction of customary law.

In the context of gender, men have had the upper hand since the colonial period when the application of customary law in courts made it necessary for customary norms to be formally articulated. The formal articulation of customary law into a legal category that could be cited in court proceedings has resulted in abstractions of custom into a rule-like structure that denies the flexibility and variation that exists in the practice at the local level.<sup>36</sup> Women have had little influence in this process of shaping and articulation of officially recognized customary law. It was predominantly men who served as informants, interpreters and, later, judicial officers in the colonial regime. Customary law during this period was therefore largely, but not exclusively, shaped by the attitudes and interests of male elders and the perceptions of the colonial administration officers.

[The] development of an area of customary law depended on a correspondingly appropriate image being available in the legal repertoire of the colonial rulers.<sup>37</sup>

The experience of Southern Africa illustrates this point. Colonial judges were influenced by English jurisprudence which did not, until 1882, recognize the capacity of married women to own property, and

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<sup>34</sup> Martin Chanock, *Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure*, in *LAW IN COLONIAL AFRICA* 61, 62 (Kristin Mann & Richard Roberts eds. 1991).

<sup>35</sup> Nancy O'Rourke, *Land Rights and Gender Relations in Areas of Rural Africa: A Question of Power and Discourse*, 4 *SOCIAL & LEGAL STUD.* 75 (1995).

<sup>36</sup> For further discussion on the flexibility and negotiability of customary law in its various aspects, including inheritance, see SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: CUSTOMARY LAW ON KILIMANJARO, 1880-1980* (1986). On flexibility regarding inheritance specifically, see SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGY APPROACH* 243 (1978):

Laws of inheritance that appear to be reproducing a social situation from generation to generation may in fact be accommodating changes that are not acknowledged as such. Declarations that there has been continuity of legal norms over the generations are not necessarily an indication that such has been the case. The past may be formally invoked to legitimize the present; yet the actual practices may be only selectively perpetuated, and change may be accommodated under the cloak of ancestral custom.

<sup>37</sup> Martin Chanock, *A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa*, 32 *JNL. AFR. HIST.* 65, 79 (1991).

Roman-Dutch law which barred women married under community of property from owning property in their own right. The idea that women should not own property was not unusual. Thus, through various court decisions, the 'African customary' rule that women could not inherit or own property was developed. In reality, flexibility abounds in the practice of the various African communities. This distorting ossification of customary law was not resisted by the African male informants who were in a position to do so, since it favoured them.

I am not suggesting that gender conflicts in defining custom, specifically with regard to property arrangements, only date back to the colonial period, or that such conflict was unknown in pre-colonial times.<sup>38</sup> Rather, as Chanock demonstrates, the colonial experience sharpened and redefined on-going gender struggles. Colonial institutions such as courts, simply provided new sites on which the numerous social conflicts and readjustments (including gender) were lived out. Men strove to portray themselves as having absolute power over women and other members of their families. They portrayed gender inequality as 'customary'.<sup>39</sup> The legal imposition school and other legal analysts of property relations in Kenya have overlooked legal anthropological analysis of customary law that points to the flexible and adaptive nature of custom.

### III. GENDER AND CUSTOM IN HUMAN RIGHTS AND 'WOMEN IN DEVELOPMENT' WORK

The human rights and 'women in development' schools of thought have developed largely from activist or 'practice oriented' perspectives, seeking to justify ownership and control of property by women. In doing so, they have utilized arguments from the human

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<sup>38</sup> Cf. OYERONKE OYEWUMI, *THE INVENTION OF WOMEN: MAKING AN AFRICAN SENSE OF WESTERN GENDER DISCOURSES* ix (1997). Oyewumi argues that the category 'gender' is a Western imposition that "simply did not exist in Yoruba culture prior to its sustained contact with the West". She would therefore rule out any gender-based conflict or tension in pre-colonial Yoruba society.

<sup>39</sup> MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* 38 (1985). See also T. Nhlapo, *Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously*, 1994-95 *THIRD WORLD LEGAL STUDIES* 49, 58-60. Nhlapo shows that in fact through 'officialized' customary law in the colonial setting, women were placed outside of the domain of law which, under the influence of Roman-Dutch law, recognized only the 'head of household' as the only true person in law.

rights arena and from the discourse on gender equity in development. In practice, however, in the Kenyan context, many writers combine both approaches without distinction. One common feature shared by the human rights and the women in development approaches is the idea that custom is an obstacle that needs to be overcome or eradicated.

In this part, I outline three strategies employed by these scholars and activists, namely constitutional arguments, utilizing international human rights instruments, and emphasizing women's control over resources in a manner commensurate with their productive roles in the development process. I will then critique these analyses in light of the two underlying assumptions I outlined in the introduction.

One strategy employed by human rights activists is to look to the Constitution for protection of women's land rights. Writers applying human rights approaches have made formal equality arguments based on a right to property and equal treatment under the Kenya Constitution and under international human rights law.<sup>40</sup> Using the Kenya Constitution they have argued that failure to recognize women's rights to inheritance and women's entitlement to a share of matrimonial property on the basis of women's non-monetary contribution violates both the constitutional protection of property rights and the guarantee of equal enjoyment of fundamental rights and freedoms under the Constitution.<sup>41</sup> However, relying on the Constitution or making constitutional arguments in the Kenyan context presents insurmountable problems. The operation of customary law as a legal category in contemporary Kenya is sanctioned by the Constitution and by the Judicature Act.<sup>42</sup> Section 3 of the Judicature Act addresses in a general manner the position of customary law in Kenya's legal system, and the criteria to be applied by courts in

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<sup>40</sup> See Kivutha Kibwana, *Women and the Constitution in Kenya*, 25 VERFASSUNG UND RECHT IN UBERSEE [LAW & POLITICS IN AFRICA, ASIA & LATIN AMERICA] 6 (1992); *Law and the Status of Women in Kenya*, *supra* note 9; Perpetua Karanja, *supra* note 9; Smokin Wanjala, *Towards a Uniform Law of Matrimonial Property in Kenya*, in WOMEN AND AUTONOMY IN KENYA: LAW REFORM AND THE QUEST FOR GENDER EQUALITY 236 (Center for Law and Research International (CLARION) Monograph No.1 1994); Timothy Mweseli, *The Law of Succession*, in WOMEN AND AUTONOMY IN KENYA: LAW REFORM AND THE QUEST FOR GENDER EQUALITY 258 (1994).

<sup>41</sup> See, for example, Kivutha Kibwana, *Women and the Constitution in Kenya*, *supra* note 40, at 15.

<sup>42</sup> Chapter 8 of the Laws of Kenya (1967, revised 1988).

determining the applicability of customary law in a particular case.<sup>43</sup> The constitutional provisions reserve the application of customary law in matters of personal law, such as marriage, divorce, devolution of property on death, custody and adoption of children and burial. These provisions [section 82 (3) and (4)] are of particular importance to a discussion on issues affecting women, and I use them to illustrate the way in which the Kenyan legal system has created a binary between law and custom, in such a manner as to impact women very significantly.

Section 82 is the section in Kenya's constitutional bill of rights that prohibits discrimination.<sup>44</sup> In defining discriminatory conduct, however, Section 82 does not list 'sex' as one of the constitutionally prohibited grounds for discrimination. In addition, section 82 (4) insulates practices carried out in accordance with customary law from constitutional scrutiny by providing as follows:

Subsection (1) [prohibition of discrimination] shall not apply to any law so far as that law makes provision --

(a) . . .

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) for the application in the case of members of a particular race or tribe of customary law.

Thus, sub-section 4 of section 82 introduces exceptions; instances in which the prohibition of discrimination will not apply. Only 2 of those exceptions [paragraphs (b) and (c)] are relevant for this discussion. The first exception is that the prohibition of discrimination will not apply to any law dealing with matters of adoption, marriage, divorce, burial, devolution of property on death or other matters of

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<sup>43</sup> Section 3 of the Judicature Act provides that customary law will be applicable in cases in which all or one of the parties to a dispute is subject to or affected by such customary law. In addition, customary law will not be applied if it contradicts a written law, and if it is repugnant to justice and morality.

<sup>44</sup> There has been debate concerning sub-section 3 of section 82, which defines 'discriminatory'. The sub-section does not list sex as one of the factors on the basis of which it is unlawful to discriminate. Yet section 70 guarantees equal enjoyment of the rights contained in the constitution regardless of race, tribe, place of origin, as well as sex. In response to pressure from various sectors of the Kenyan public, a process is being put into place to carry out comprehensive constitutional reforms, focussing on Kenya's governance structure. A women's political caucus has taken advantage of this process to include among these reforms an amendment to include the word 'sex' in section 82 (3) of the constitution.

personal law. In summary, this provision reserves the application of the various customary and religious laws (termed 'personal' laws) in the areas of family law and succession. It makes it possible for these multiple and disparate systems to continue operating, without offending the constitutional prohibition of differential treatment or discrimination.

The second exception applies to any law that is intended 'for the application in the case of members of a particular race or tribe of customary law' with respect to any aspect not covered in a law that is generally applicable to all Kenyans with respect to a particular matter. The meaning of this provision is illustrated by one aspect of the *S.M. Otieno case*.<sup>45</sup> The case involved a burial dispute between a widow and her husband's clan, represented by her brother-in-law and a clan official. She wanted him buried in the Nairobi area, in the sub-urban home where the family lived. Her husband's clan wanted him buried in Nyanza, at his parents' 'ancestral' home. The only Kenyan law that addressed burial issues was the Public Health Act, which only deals with the hygienic disposal of dead bodies. It contains no legal provision on who is the person entitled to conduct burial. Therefore, Luo customs on burial were applied, over the widow's objections that these customs were discriminatory as they left her with no say in her husband's burial. The widow herself did not belong to the Luo ethnic group, and this heightened the tension in the case, and in political discourse in the country at the time.<sup>46</sup> The court invoked the exception in section 82(4) to rule that the customs in question were outside the purview of the anti-discrimination provisions, and that therefore it was proper to apply Luo burial customs in this case.

These exceptions make it impossible for people to challenge treatment justified on customary or religious law, which they consider to be unfair. By foreclosing people's ability to challenge unfair treatment justified on customary law grounds, Kenya's constitutional jurisprudence sets up a separate realm of custom that is beyond legal challenge. Any norms or practices that can be described as being in

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<sup>45</sup> *Virginia Edith Wambui Otieno-v- Joash Ougo & Omolo Siranga*, HIGH COURT CIVIL CASE NO. 4872 NAIROBI (1986); 1 KENYAN APPEAL REPORTS 1049 (1982-88).

<sup>46</sup> On the political debate that the case generated at a national level, and the influence of the case on national politics (including the politics of the Kenyan judiciary), see BLAINE HARDEN, *AFRICA: DISPATCHES FROM A FRAGILE CONTINENT* (1990), Chapter 3, "Battle for the Body".

accordance with customary law (or any other 'personal law' for that matter) are shielded from constitutional scrutiny. In effect, the state is taking a 'hands off' attitude toward customary law, and portraying it as something that happens in a private sphere or cultural space in which the state cannot intervene. This attitude masks the law's responsibility for women's disadvantaged position in various situations, by obscuring the ways in which formal legal institutions and processes, on the one hand, and prevailing notions of custom, on the other, interact and, in some cases, reinforce each other. This set-up has potential negative implications for any attempt to confront exclusionary notions that invoke custom to bar women from control of economic resources.

On its surface, it appears that the constitutional provision in section 82(4) is necessary to prevent unjustified state interference with traditional and religious laws of various groups. However, this ignores the ways in which the state has been active, both in the colonial and post-colonial period, in shaping customary law. Understanding the interactions/interdependence/ between the state and customary law would help to make it clear that custom is not some elusive culture out there, but a legally sanctioned entity. This would enable us to argue that it is hypocritical for the state to turn around, as section 82(4) does, and say that customary law is purely in the private sphere, and that the state cannot intervene on behalf of people who claim to have been treated unfairly on the basis of custom. The notion of non-intervention is highly suspect. In fact, the stance of the state in Section 82(4), far from being non-interventionist is highly interventionist, in the sense that the state has already set up a framework that endorses or ensures the continuing existence of a particular *status quo*. The state is never a neutral actor.<sup>47</sup> We would then call upon the state to open up this avenue in order for people to exercise the option of challenging their own cultural norms without the overarching state norms telling them that they cannot.

A second strategy of human rights activists is to rely on international human rights arguments to demonstrate the inadequacy of

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<sup>47</sup> For a powerful critique that shows that state non-intervention, particularly in the 'private sphere' of the family, is a myth, see Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497-1578 (1983). See also Frances Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J. LAW REFORM 835-864 (1985).

national laws and institutions.<sup>48</sup> This strategy is based on the principle of non-discrimination, and on the duties imposed by the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on governments to abolish or modify laws and customs which constitute discrimination against women.<sup>49</sup> Their arguments have relied primarily on the principle of non-discrimination in article 2, particularly article 2(f) which imposes obligations on states parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>50</sup>

Human rights arguments also make reference to article 16(h) which exhorts governments to ensure, on the basis of equality of men and women "The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property..."<sup>51</sup>

Further, article 14, which deals with the particular problems faced by rural women, is also helpful. In particular, article 14(g) requires states to guarantee women equal access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform, as well as in land resettlement schemes.

To a smaller extent, writers have also sought to rely on regional human rights instruments, such as the African Charter on Human and Peoples' Rights.<sup>52</sup> Florence Butegwa bases her argument for women's access to property on the non-discrimination principle, tracing it to the African Charter's provisions on discrimination against women. Within international human rights scholarship on women's rights broadly, however, the question of control of economic resources such as land by women has not gained prominence. This is illustrated by the fact that when the issue of equal inheritance by girls and boys, and

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<sup>48</sup> Jane B. Knowles, *Women's Access to Land in Africa*, 1991 THIRD WORLD LEGAL STUDIES 1 [citing the Universal Declaration of Human Rights and CEDAW's provision in Article 14 (g) on rural women's right to equal treatment in land and agrarian reforms]; Marsha Freeman, *Women, Law and Land: Claiming Women's Human Rights in Domestic Legal Systems*, 16 HUM. RTS. Q. 559 (1994).

<sup>49</sup> U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Article 2 (f). UN Treaty Series, Vol. 1249 No. 20378 (1979).

<sup>50</sup> CEDAW art. 1(f). I have used this argument in previous work. See Celestine Nyamu, *Rural Women in Kenya and the Legitimacy of Human Rights Discourse and Institutions*, in LEGITIMATE GOVERNANCE IN AFRICA 263 (E.K. Quashigah & O.C. Okafor eds. 1999).

<sup>51</sup> For work that uses this argument see Jane Knowles, *supra* note 48.

<sup>52</sup> See Florence Butegwa, *supra* note 9.

women's access to economic resources became one of the most heavily contested issues at the Beijing Conference<sup>53</sup> it was more a concern of the Economic Justice caucus, and other smaller caucuses such as the African Women's caucus and the Rural Women's caucus, than the Human Rights caucus. The Economic Justice caucus was made up mostly of NGOs that do social justice, development and aid related work, while the Human Rights caucus was composed mainly of mainstream international human rights groups, with some representation of national human rights NGOs from developing countries.<sup>54</sup>

A third strategy is adopted by women in development activists who have argued that women should have rights to land commensurate with their producer roles in the economy. They argue that exclusion of women from land ownership, and therefore from effective participation in economic development defeats the economic goals of the country:

An empowered and flexible woman in property matters, even within the strictures of matrimony, is certain to make a qualitative and more enduring contribution to the expected vibrancy of the economy and the social good.<sup>55</sup>

This argument emphasizes overall national economic well-being, rather than women's entitlement to control of resources and participation in the development process *as a matter of right*.<sup>56</sup> I

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<sup>53</sup> See *Statement by Mrs. Gertrude Mongella*, *supra* note 4. On the compromise reached on the question of inheritance and women's access to economic resources see Beijing Declaration and Platform for Action, *supra* note 6, paragraph 62 (f) and 63 (b).

<sup>54</sup> Within the Economic Justice caucus there was a lobby of groups concerned with the issue of counting women's unpaid work in national statistics (GNP and GDP or in satellite accounts). They were at the forefront in monitoring the negotiations to ensure that clauses on women's access to resources were retained in strong language in the Platform. They recognized that valuation of women's unpaid labour would have positive implications for women's property rights and ownership of the products of their labour, and could be used as a yardstick in the division of marital property after divorce or during inheritance. This is a campaign that had been launched 10 years earlier, at the Third UN World Conference on Women in Nairobi in 1985, and the lobby saw the outcome in Beijing as a huge success. See Dzodzi Tsikata, *supra* note 3, at 9.

<sup>55</sup> Smokin Wanjala, *supra* note 40, at 238. For similar arguments see also Achola Pala Okeyo, *supra* note 18; Fiona Mackenzie, *Gender and Land Rights in Murang'a District, Kenya*, 17 J. PEASANT STUDIES 609 (1990); Kivutha Kibwana, *supra* note 9, at 21-29; Florence Butegwa, *Women's Legal Right of Access to Agricultural Resources in Africa: A Preliminary Inquiry*, 1991 THIRD WORLD LEGAL STUDIES 45.

<sup>56</sup> The use of the 'national economic well-being' argument, and the emphasis on women's contribution to development, rather than women's entitlement from development is strategic. This



classify this approach as women in development (WID) because the writers focus on women's productive contribution to and integration into the development process, despite the fact that there has been a conceptual shift in the field to a 'gender and development' (GAD) approach. The focus of the gender and development (GAD) approach is on fundamental questioning of underlying assumptions of existing social, economic and political structures.<sup>57</sup> Since the mid 1980s, there has been deeper questioning of the systematic assignment of women to inferior roles both in the public and private sphere, and of the assumptions underlying social, economic and political structures. Most Kenyan scholars and activists who employ the women and development discourse, however, fit more within the WID approach. This may be as a matter of strategy, to appeal to the government by appearing simply to be seeking integration rather than appear to be calling for drastic restructuring of development institutions.

#### *A. Inadequate/Reified Understanding of Culture and the Law/Custom Dichotomy*

The human rights and the women in development approaches have two main shortcomings that parallel the shortcomings of the mainstream property relations scholarship. First, when responding to customary law-based challenges to women's capacity to own land, they, like the imposition school, treat customary law as a fixed reality,

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argument has been used by institutions such as the World Bank to be the sole justification for women's participation in the development process. The World Bank, for instance, supports measures for the integration of women's contribution in the development process on grounds that failure to do so would result in inefficient allocation of resources in the economy, and not because women are entitled to such recognition or participation as a matter of right. See Mark Blackden and Elizabeth Morris-Hughes, *Paradigm Postponed: Gender and Economic Adjustment in Sub-Saharan Africa* (Technical Department, Africa Region, The World Bank 1993).

<sup>57</sup> See Eva M. Rathgeber, *WID, WAD, GAD: Trends in Research and Practice*, 24 J. DEVELOPING AREAS 489 (1990); Shahrashoub Razavi & Carol Miller, *From WID to GAD: Conceptual Shifts in the Women and Development Discourse*, (United Nations Research Institute for Social Development (UNRISD), Occasional Paper No.1, UN Fourth World Conference on Women, 1995). Both articles trace this conceptual shift. The WID approach which originated in the early 1970s is rooted in modernization theory and the notion of development as a process of linear progress. It is an integrationist approach in that it seeks to integrate women into the development process. It takes existing structures for granted, except (third world) African traditions, which are viewed as obstacles that must be overcome so as to cure under-development. [On this point, see Brian Tamanaha, *supra* note 15] In the second half of the 1970s, there was a shift towards examining the question of women and development within the context of international and class inequalities, and on micro level structures and relationships between women and development processes, rather than simply on integrating women into the development process.

which they take for granted. They make no attempt to evaluate these challenges on their own terms. They do not attempt an informed analysis of the basis of those challenges from within customary law itself, for instance, to show that customary law is not a fixed system of rigid rules; that flexibility and negotiability are, and have always been, key characteristics of customary law. Instead, they respond with 'abolitionist' arguments.<sup>58</sup> I use the term 'abolitionist' to refer to the human rights and development schools' response to customary law based on external criteria: the human rights approach's characterization of customary law as 'unconstitutional' and/or a violation of human rights<sup>59</sup>; and the WID approach's characterization of customary law as being an obstacle to development. These responses create the impression that women's rights are a non-existent issue in the sphere of custom or local practice, and therefore that the solution lies in substituting custom and local practice with the 'progressive' solutions offered in national legislation or the human rights regime.<sup>60</sup> In these schools of thought, custom is the oppressor, and human rights, or inclusion of women in development, is the liberator.

This is the approach that has traditionally been adopted in legal literacy and legal awareness campaigns, and also in various human rights groups' approaches to legislative reform. The dominant approach has been to presume that homogenization or uniformization of the various personal law systems into a single statutory regime holds the answer, particularly for women. This was the thinking behind law reform efforts in the 1960s and 1970s aimed at uniformizing the laws on marriage, divorce and succession<sup>61</sup>, and on-

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<sup>58</sup> The term has been used by other writers critical of some approaches to human rights issues in Africa. See Makau Mutua, *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations* 17 MICH. J. INT'L LAW 591 (1996) (Book Review).

<sup>59</sup> Some analyses in this approach simply call for custom to be outlawed:

Customs and practices which discriminate against women should be declared repugnant to natural justice, equity and good conscience [and] must be outlawed.

Tibatemwa, *supra* note 29, at 79.

<sup>60</sup> Thandabantu Nhlapo, *Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons From the South African Constitutional Debate*, 9 INT'L J. LAW & FAMILY 208, 216 (1995).

<sup>61</sup> In 1968, two commissions were set up, one to review the laws relating to marriage and divorce, the other to review the laws on succession. Each was required, as part of its mandate, to draft, where possible, a single law applicable to all Kenyans. See *Report of the Commission on the Law of Succession* (1968), and *Report of the Commission on the Law of Marriage and Divorce* (1968).

going calls for such uniformization in the present context.<sup>62</sup> Legal awareness campaigns (also referred to as human rights education campaigns), for example with regard to succession, have focused on the statutory regime and have tended to assume that they are teaching women the 'better' system, which is a 'natural' choice over (oppressive) custom.

These arguments invite a backlash as these approaches, particularly the human rights approach, are easily seen as an external and frontal attack on African customs and identity. This backlash extends even to forums such as courts. An example of such backlash is perhaps the S.M. Otieno case. The widow's lawyer's strategy was to portray the deceased man, as well as his widow and children, as having shunned tradition and embraced modernity. He therefore focussed on showing how primitive and 'repugnant to justice and morality' Luo customs were, and how discriminative they were against women. This is a strategy that alienated many who were otherwise sympathetic to the widow's claim, in a country where the majority, including those who may be described as urbanized, see themselves as drawing a sense of identity and community, to varying degrees, from their tradition.<sup>63</sup>

Since abolitionist approaches characterize custom as the oppressor, they throw out, or fail to acknowledge whatever 'benefits' exist for women within (some) conceptions of customary tenure. There are, for instance, some 'moral' claims to certain forms of property, which are not legally enforceable at a formal level. Often, the sole basis for their existence is a set of relationships embedded in, or given meaning by, societal norms described as custom. One example is the claim of an unmarried or divorced daughter with children. In the Akamba community (my community), there has been a practice whereby [a] father allocates such a daughter a piece of land that she cultivates to feed her children. It is understood that she does not 'own' it, but her cultivation 'rights' to it are recognized. On her parents' death, when

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<sup>62</sup> See, for example, Kenya Law Reform Task Force on the Review of Laws Relating to Women, Preliminary findings on Marriage, Divorce, Matrimonial Property and Inheritance (unpublished, May 1996); Smokin Wanjala, *supra* note 40; Timothy Mweseli, *supra* note 40.

<sup>63</sup> For further discussion of the case, see Nation Newspapers, S.M. Otieno: Kenya's Unique Burial Saga (1987). See also DAVID WILLIAM COHEN & E.S. ATIENO ODHIAMBO, BURYING S.M.: THE POLITICS OF KNOWLEDGE AND THE SOCIOLOGY OF POWER IN AFRICA (1992).

the land is divided up among the male heirs, usually her brothers, her cultivation rights will be taken into account and she will be allowed to continue using the land. I found it remarkable that all the people that I spoke with during my field research affirmed this claim, without exception.<sup>64</sup> Clearly, this is an arrangement that is heavily dependent on the nature of the existing family relationships. There have been cases of sibling rivalry, resulting in land disputes that may end in her eviction. The formal legal institutions do not count for much when it comes to securing or enforcing such a claim. In fact, there have been court decisions which, purporting to apply customary law, have made statements to the effect that unmarried daughters have no claim whatsoever, on their father's estate.<sup>65</sup>

Of course celebrating customary practices like this one would pose dilemmas for people working to achieve gender equality. Winning cultivation and occupancy rights for an unmarried or divorced daughter with children will, of course, bring immediate benefits to her. However, for gender equality this is not a real 'victory' because it is premised on women's perceived 'temporary' or 'transient' nature in their natal families. They do not achieve full control of resources on an equal basis with their brothers, who are seen as the 'real' or 'permanent' members of the family. Daughters are only accommodated in exceptional circumstances, namely when they fail to get married, or then their marriages fail. Gaining something for an individual woman in such circumstances still leaves the gender hierarchy in the system intact.

Nonetheless, calling for a wholesale rejection of customary law denies the reality of many women's lives. Some women draw a sense of self and community, as well as their (sole) expectation of social and economic security from this setting. Thus, an abolitionist approach devalues the meaning that the 'cultural sphere' has for many women.<sup>66</sup>

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<sup>64</sup> I am referring to field research that I conducted for my doctoral dissertation in Makueni district of Kenya between June 1998 and February 1999. This field research is not the subject of this article, and I only refer to it in an anecdotal manner here.

<sup>65</sup> Wambugi w/o Gatimu-v-Stephen Nyaga Kimani, 2 KENYAN APPEAL REPORTS 292 (1992).

<sup>66</sup> Karen Engle, in analyzing feminist critiques of the public/private dichotomy, criticizes overvalorization of the public sphere, which has resulted in undervaluing the meaning that some women attach to the private (domestic) sphere. See Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW, 143 (Dorinda G. Dallmayer ed. 1993).

It also amounts to asking women to choose between their gender identity as women, and their cultural identity.<sup>67</sup> No wonder the [human rights] message is alienating to many women, and an easy target for charges of Western imperialism. One of the undisputed facts about the women's rights movements in Kenya is that it has been unable to incorporate into the movement on-going active organizing by rural women at the grassroots.

***B. Inadequate Analysis of Redefinition of Gender Relations in the Struggle to Shape Custom***

The second shortcoming of the human rights and the women in development analyses is that they have not moved the discussion on women and land beyond material conditions for survival and formal equality, to a discussion on land as being about the very ability to define (women's) personal and social identities, roles and relationships.<sup>68</sup> This mirrors mainstream property relations scholarship's lack of attention to power relations in the shaping of custom. Women's struggle for land has been resisted through subtle redefinition and revision of the rules of inclusion and exclusion of membership from the vital group or network on the basis of which a person's access to land is determined. Ownership of land in most African communities is closely tied to one's membership and position in a group, for example a clan or lineage. Anthropological studies have shown that the conceptions of groups and networks are not fixed, and are adjusted in response to changes such as scarcity and increased competition for resources.<sup>69</sup> In response to women's struggle for land

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<sup>67</sup> A debate on how feminism approaches the intersection of gender and other aspects of identity such as race, ethnicity and class has gone on in US feminist circles as the 'essentialism' debate. The exchange between Catharine MacKinnon and Angela Harris is most instructive. The debate between them revolves around MacKinnon's comments on a case [*Santa Clara Pueblo-v. Martinez*, 436 U.S. 49 (1978)] in which a Native American woman challenged her tribe's constitutional provision on membership for requiring women to give up tribal membership once they married outside the tribe. Men retained membership even if they married out, and they could pass on membership to their children, unlike women who married out. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 63 (1987) ("Whose Culture? A Case Note on *Martinez v. Santa Clara Pueblo*"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>68</sup> Parker Shipton and Mitzi Goheen, *Understanding African Land-Holding: Power, Wealth and Meaning*, 62 AFRICA 307 (1992).

<sup>69</sup> PAULINE PETERS, *DIVIDING THE COMMONS: POLITICS, POLICY AND CULTURE IN BOTSWANA* (1994). [See especially chapter 8, "Dividing the Commons: Belonging and Difference in the Kgatleng"]

ownership and access, rules on group membership and acquisition of interests in land have been redefined in an *ad hoc* manner so as to exclude women. This experience is not confined to Kenya.<sup>70</sup> The legitimization of women's exclusion is not confined to land matters. It is applied consistently across several social and political domains. For example, the committees that adjudicate land claims during the land adjudication process (the process that leads up to titling and registration) are staffed exclusively by men. I observed this during my field research in Makueni district, between June 1998 and February 1999. The all-male composition of the Land Adjudication Committees and Arbitration Boards is justified on grounds that it is the knowledge of elders familiar with the history of landholding in the area that is relied on. Women are not elders, and they have no capacity to adjudicate on land matters, since they have no capacity to own land in the first place.<sup>71</sup>

My concern with the legitimization of women's exclusion goes beyond this concern with actual exclusion from political forums, such as land adjudication committees. I am concerned also with the resulting production of a particular image of women. Rationalizations that invoke customary law to exclude women from control of resources are applied in other contexts and gradually become constitutive. The attitudes created become central to the way in which gender identity and women's status is defined and perceived. Human rights and development critiques have not taken the debate to this level, and yet it is very crucial to do so.

An abolitionist approach does not employ a rigorous examination of custom, and the manner in which it is being continually shaped. As a result, critiques or initiatives that adopt this approach have failed to notice, let alone acknowledge, the efforts being made by women 'from within', so to speak, to improve the position assigned to women by

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<sup>70</sup> In colonial Zambia, for example, it was an accepted rule of land tenure in most communities that persons were entitled to land which they had cleared. However, although husbands successfully invoked this rule to retain rights in land which they had cleared, women who had cleared land could not do so. Husbands began to assert ownership over land cleared by women on grounds that the women had cleared the land as part of their wifely duties, and that the husbands owned their wives' labour. See Martin Chanock, *supra* note 34, at 73-74.

<sup>71</sup> See similar observations with respect to other parts of the country: Parker Shipton, *The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property*, in LAND AND SOCIETY IN CONTEMPORARY AFRICA, 91,106 (R.E. Downs and S.P. Reyna eds. 1988).

prevailing notions of custom, without necessarily appearing to confront custom. There is constant renegotiation of roles and entitlements within family and community, but this is difficult to notice without close and sustained observation. Thus, although the human rights approaches have been effective in giving visibility to the issue of women and property, ignoring the efforts of women at the grassroots level has had the inadvertent effect of portraying women (particularly rural women) as passive victims, bound up in oppressive tradition.

#### **IV. DEVELOPING ALTERNATIVE APPROACHES TO GENDER, CUSTOM AND PROPERTY RELATIONS IN A PLURAL LEGAL CONTEXT**

What does the foregoing discussion say, then, about struggles to secure women's access to land and other resources, in a context that makes it easy, or at least possible, to exclude women simply by invoking custom? One thing that is clear is that 'absolutist' and abolitionist statements about women's rights to property will not get very far, if they are phrased in such a manner as to suggest that human rights are alien to the immediate social context in which women live. They will also have little relevance unless they start from an informed understanding of tradition, and are willing to see openings within it, and to examine the ways in which women have used or have sought to use these openings. These struggles must not ignore the ways in which tradition has been influenced by the very same formal legal institutions and processes that, at a procedural level, guarantee equality. At the same time, we must not lose sight of the fact that these systems that guarantee formal equality are highly gendered too. Therefore, it is necessary to appreciate, as a starting point, that guarantees of equality in formal legislation and in the constitution and human rights documents do not present us with a clear cut solution or concrete and immediate benefits. The issue is complicated and our search for solutions will have to be multifaceted.

In my view, the effort to develop more meaningful approaches in dealing with gender and property relations in a plural legal context needs to embrace at least four elements. First, it must be grounded in an understanding of the interaction between formal law and custom.

Second, it must take account of the intersectionality of gender and culture. Third, it must engage the politics of the deployment of culture, or the politics underlying the deployment of the law/custom dichotomy. Finally, it must employ a 'critical pragmatic' approach to pluralism.

The first three elements are concerned with developing an appropriate conceptual framework for analysis: how can we describe and discuss this issue in a manner that more accurately and sensitively captures the social setting and the power relationships that we are writing about? The fourth element represents an attempt to propose a specific set of strategies that we can use to at least begin to address the issue.

### ***A. Conceptualizing Gender and Property Relations in a Plural Legal Context***

#### **1. Understanding the law/custom interaction**

I have identified the reification of a formal law/custom dichotomy as a major shortcoming of both legal imposition (mainstream property law scholarship) and human rights and development analyses. Thus, I find it necessary to develop a conceptual approach that enables us to talk about law and custom in a manner that is conscious of their interconnectedness, and of the fact that they reinforce each other. I have already used the example of the implementation of the land registration policy in Kenya to show how ideas of custom permeate and are used to justify the actions of the implementers of the policy, such as the registration of 'male heads of households' in spite of the absence of any statutory requirement to do so. This, together with the highly individualist and absolutist conception of ownership embodied in the Registered Land Act further weaken informal or unregistered interests in property, where the majority of claims by women lie. The intersection of formal law and official interpretations of custom provides the justification for valuing some claims to property more than others. One of the axes along which this asymmetrical assignment of value to interests in land occurs is gender.



When it comes to addressing gender inequality to benefit women, a rigid law/custom dichotomy is actually an inaccurate description of reality. In the actual experience of living in a plural context, people do not observe the boundaries between the various categories. People continually cross back and forth through boundaries whose existence is taken for granted in legal discourse, such as the boundary between 'customary' and 'official'. An example is the way in which the law on marriage is set up in the Kenyan legal system. A marriage can be governed either by statutory law<sup>72</sup> or by Islamic law, Hindu law or African customary law. But there is overwhelming evidence that the boundaries between these various systems are not really observed. It is common, for instance, to find that African Muslims practice a combination of Islam and some notion of customs of the group to which they belong, in regulating their interpersonal relationships.<sup>73</sup> Similarly, what may eventually be described as a statutory marriage because it was celebrated in church or before the Registrar of Marriages will often have been preceded by a series of family negotiations and probably marriage payments believed to be required under custom.<sup>74</sup> In advising a woman in such a setting on her marital property rights for example, it would be highly decontextualized and reductionist to pick on one system or the other, as the one that is responsible for her oppression, or as the one that offers her liberation. She inhabits both or all of these spheres, customary and official.

In understanding and trying to analyze this social reality, that people weave in and out of several spheres in constructing their relationships, I have found it helpful to borrow Sally Falk Moore's framework of the 'semi-autonomous social field'. This is a framework that she develops for the purpose of analyzing issues of law and social change. A social field is any entity that has the capacity to internally generate norms (rules, customs and symbols) that govern the conduct of people living and relating within that social sphere, but which at the

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<sup>72</sup> A statutory marriage may be celebrated either under the Marriage Act or the African Christian Marriage and Divorce Act. (Chapter 150 and 151 respectively, of the Laws of Kenya, 1962).

<sup>73</sup> Women and Law in East Africa (WLEA-Kenya), Research Report on Inheritance Laws and Practices in Kenya, (Okech-Owiti, Njeri Karuru, Winnie Mitullah & Kamau Mubuu eds. November, 1995).

<sup>74</sup> Janet Kabeberi-Macharia & Celestine Nyamu, *Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya*, in THE CHANGING FAMILY: INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW 197, 205 (John Eekelaar & Thandabantu Nhlapo eds. 1998).

same time is vulnerable to norms (rules and decisions) emanating from the larger social context by which it is surrounded.<sup>75</sup> She characterizes the relationship as one of semi-autonomy precisely because of the simultaneous existence of this internal capacity for norm generation and enforcement, as well as connection to a larger social matrix. The operation of customary law and other systems of personal law in contemporary Kenyan society may be characterized in these terms. Far from seeing customary law as an autonomous entity, this framework demonstrates the symbiotic relationship between custom and formal legal institutions and processes.

From a semi- autonomous social field perspective, we are then able to see that the state participates actively in the making and articulation of 'custom'. As the larger social matrix, it defines the context within which customary norms will be generated. Rules, decisions and legislative enactments emanating from the larger social matrix do have an influence on the social field. Legislative changes and other state-engineered measures can therefore bring about change in a social sphere in which custom operates, but this is not automatic, as Moore cautions: "[R]elationships long established in persisting semi-autonomous social fields are difficult to do away with instantly by legislative measures".<sup>76</sup>

In relating with each other, people in a semi-autonomous social field draw upon the internally generated norms, as well as the norms of the larger social matrix. Within this framework, it is therefore possible to conceive of people being able to strategically pick and choose from both spheres, positive elements that benefit them. Women, for example, could, in theory, utilize positive elements of both custom and legislative or administrative procedures that give them a voice in transactions involving marital property. In reality, however, this may not be the case, since factors such as women's lack of knowledge of the potentially beneficial measures under formal legislation come into play. Accessibility and the cost of pursuing formal legal remedies also

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<sup>75</sup> Sally Falk Moore, *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study*, in *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 54 (Sally Falk Moore ed. 1978). Moore draws on examples from two different contexts to illustrate this framework of analysis: the loose enforcement of labour regulations in the dress industry in New York, and the Chagga, a community living in the area around Mt. Kilimanjaro and their experiences with socialist policy in Tanzania.

<sup>76</sup> *Id.* at 74.

matter. There are also instances when resort to statutory measures is pre-empted, and the application of custom is the only legal possibility. For instance, section 32 of the Law of Succession Act makes the provisions of the statute inapplicable in certain districts (mostly districts occupied by pastoral and nomadic peoples). A woman in any of these districts does not have the option of statutory remedies. Using this framework (and our critiques of its shortcomings, for instance its silence on differences in knowledge and power, to invoke measures availed by the larger social matrix) therefore, makes us sensitive to structural constraints in the exercise of available options. It also directs us to ask who has voice or the ability to participate in the process of internal norm-generation, and consequently, whether it is possible in particular cases to expect that the semi-autonomous social field's self-reforming potential will be mobilized in favour of disadvantaged actors within it. With regard to a specific issue, do women exercise enough 'voice' in the articulation of custom, or can we expect that women will exercise enough voice to influence a change of customary law from within? This will draw our attention to an analysis of the power relations inherent in articulating customary law. Whose articulation or view of custom counts or is validated when it comes to proceedings, such as in courts or in national debate?

## **2. Taking account of the intersectionality of gender and culture**

An abolitionist approach that sees custom as the oppressor and human rights as the liberator runs the risk of throwing out under the 'custom' label even those aspects in a culture that do hold some benefits for some women. I referred to the sense of identity and belonging that women draw from their cultural identity, as well as tangible social and economic support from networks embedded in this 'cultural sphere'. I gave the example of an unmarried or divorced daughter's 'customary' right to land for cultivation, in the Akamba community.

At a conceptual level, an abolitionist approach presumes that it is possible to speak of the oppression of women 'as women', and culture as something outside of them, which oppresses them. Women are

being acted upon by culture, so to speak. Gender equality exists only outside of culture, and any woman challenging gender inequality must position herself outside of, against or in opposition to her culture. Such a woman must choose between her gender identity and her cultural identity, a choice that does not exist in reality. Such an approach stems out of a static view of culture as a system in which people (specifically women) are assigned specific fixed statuses and roles within it and over which they have no control. This is the view of culture implied both in legal imposition and human rights and development analyses.

Instead, we need an understanding of culture that is dynamic; one that views culture as being constantly negotiated. When we take this view of culture, we will recognize that most (if not all) women draw social and economic support from networks that are embedded in, and given meaning by this same 'cultural sphere'. 'Opting out' of our cultural identity is therefore not a viable measure. This realization makes us more alert to examine existing opportunities for women to exercise more 'voice' in articulating and shaping culture. It also makes us more attuned to women's voices in challenging norms and practices within that culture, even when those challenges are not framed in terms of 'opposition to culture'.

One example from my field research experience illustrates how women may pose a challenge to cultural practices, without necessarily calling attention to the fact that this is indeed what they are doing. In many parts of rural Kenya, women have organized themselves into women's groups which undertake various social and income-generating projects. In Makueni and Machakos districts, where I did my field research, these groups are organized as *myethya*. *Myethya* are women's groups with old roots in traditional practices of labour exchange, whereby women would get together and help each other, in a rotational fashion, with household and farm tasks. The current practice of *myethya* is an example of traditional social resources put to new uses, in ways that challenge the 'traditional' distribution of control over resources. Today *myethya* have become powerful economic entities, and centers for social organizing for women. Some of them operate as rotating credit schemes, investing in livestock rearing, thus enabling their members to own assets. A few of them

have managed to invest in land, enabling their members to own land, either collectively or in individual sub-divided units, quite independent of family-based networks.<sup>77</sup> Recognizing this as a challenge to cultural attitudes, in this case toward women's ability to manage and control economic assets, pushes us to search for further avenues to expand the opportunities for 'voice' in the quest for gender equality in these settings.

Taking account of the intersectionality of gender and culture needs to have as its starting point a recognition of the need for "a dialogue which reflects the complexities of pursuing the goal (gender equality) in tandem with other goals (cultural diversity and autonomy)".<sup>78</sup>

### 3. Engaging the politics of culture

Which patterns of behaviour were accepted as legitimate customary law is a part of the political history of the colonial period and which patterns of behaviour are now put forward as representative of custom is likewise a matter of current politics.<sup>79</sup>

An approach that is willing to engage the politics of culture demands that we go behind every assertion of custom to examine the power relations behind it. It should lead us to ask questions like the following. What historical circumstances have led to the formation of the category we have now come to know as African customary law? Who has had a say in deciding what gets to be termed 'customary' law? What alternative views were or have been omitted in arriving at the prevailing idea of what is 'customary'? What use is made of customary law at any given historical moment, for instance, in setting up structures of local government, in the practice of courts, in constitutional jurisprudence and in local and national politics?

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<sup>77</sup> Information gathered from interviews with women and women's group leaders, and from observation, in Kathulumbi location, Makueni district, between July 1998 and January 1999. But women's groups are also plagued by problems, such as interference and exploitation by politicians, since they are a sound grassroots base for political support. Many of the leaders I spoke to saw the involvement of politicians as a weakening of the groups, and sought to distance themselves from it.

<sup>78</sup> Penelope E. Andrews, *Introduction: Women's Rights and Traditional Law: A Conflict*, 1994-95 THIRD WORLD LEGAL STUDIES ix.

<sup>79</sup> Martin Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT'L J. LAW & FAMILY 72, 86 (1989).

Various writings in legal anthropology and in legal history have examined these questions in discussing customary law in the context of other African countries. These writings can be summed up in three categories. First, some writings employ a Marxist inspired class analysis of the instrumental and ideological use of customary law, which allows the narrow interests of a particular class to be presented as the general interests of a community.<sup>80</sup> These writings seek to make a direct link between the production of customary law, and the "subordination of African social formations to capitalist relations".<sup>81</sup> Second, there are writings that avoid a Marxist analysis, but nonetheless, employ power relations and hierarchy as the lens through which they analyze the making of customary law. In particular, they take issue with the tendency to portray customary law (or indigenous institutions generally) as egalitarian and harmonious, and point out that these are "expressive not simply of communal life, but of a way of maintaining order and relations of power".<sup>82</sup> Customary law is one among the resources used in struggles over property, labour, power and authority. The third category of writings are those that acknowledge power asymmetries in the making and operation of customary law, but do not see this as the whole story. For example, the protection of a particular group's interests is not the only factor in explaining the presentation of customary law as rigid and unchanging. Rather, customary law is analyzed as part of a process of 'regularization'; a reconciliation between ideology (the way in which a community presents itself) and social reality. A process of producing seemingly durable customs, rules, symbols and categories, that in

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<sup>80</sup> This analysis is to be found most explicitly in the work of Francis Snyder. See FRANCIS SNYDER, *CAPITALISM AND LEGAL CHANGE: AN AFRICAN TRANSFORMATION* (1981); *Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal*, 19 J. LEGAL PLURALISM & UNOFFICIAL LAW 49 (1981).

<sup>81</sup> Francis Snyder, *Colonialism and Legal Form*, *supra* note 80, at 51.

<sup>82</sup> Martin Chanock, *supra* note 79, at 74. See also MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER*, *supra* note 39. Other writings in this mode include MAHMOUD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996); Kristin Mann & Richard Roberts, *Introduction: Law in Colonial Africa*, in *LAW IN COLONIAL AFRICA*, 3 (Mann & Roberts eds. 1991). Sally Falk Moore may be placed in this category since she disputes the presumed egalitarianism, and also stresses unequal power in people's ability to shape and manipulate, not just customary law, but law and social regulation broadly. Commenting on 'customary' practices relating to inheritance, bridewealth and obligations of 'gift-giving to kin', she writes, "But it is only the most prosperous who can afford to meet the traditional obligations of paternity. ... The well-to-do can be at once both more modern and more traditional than their less fortunate relatives... The poor cannot afford to be properly traditional and they certainly cannot afford to be modern." She then asks, "Who made the rules? Who set the measure of virtue in terms that only some could satisfy?" MOORE (1986) *supra*, note 36, at 300.

reality serve to mask the indeterminacy and changing nature of the social reality; the articulation of customary law in rigid and precise terms versus variation and conflict on the ground. This process takes place not only at the level of interpersonal relationships, but also in broader political contexts.<sup>83</sup>

I present this typology to show that there is a body of scholarship that has examined the power relations inherent in the history of the production of the category of customary law, both in the colonial and post-colonial setting. They deal with the macro-politics of producing customary law. I would like to take this analysis and apply it especially in situations where custom is cited as a basis for excluding women. In such situations we must cease to see custom or culture simply as a description of a way of life. Rather, we must see it as being about relations of power. Whose power is being placed beyond reach or beyond question, by the simple move of designating such exercise of power as customary or cultural? Is the label of culture being deployed to put an end to what should be an open political debate, and to preserve certain social arrangements? What power relations are made invisible?

Employing an abolitionist approach endorses characterizations or articulations of custom that are disadvantageous to women as an accurate description of reality. Rather than question the presentation of custom in this manner, an abolitionist response takes that presentation for granted, and replies in the language of human rights, thus ceding the ground of culture to those defining or articulating it so as to exclude or prejudice women. Engaging the politics of culture entails occupying the ground of culture and challenging such articulation of culture on its own terms, even going as far as pointing out existing or potential alternative accounts of culture.

Julie Stewart shows that this is not only possible, but is already been done by women's groups in Zimbabwe.<sup>84</sup> When the government proposed changes in the inheritance laws in 1996, representatives from women's organizations had a meeting with twelve chiefs from

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<sup>83</sup> I am referring specifically to the work of Sally Falk Moore. See, in particular, *Uncertainties in Situations, Indeterminacies in Culture*, in *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978). This is a framework that she employs generally in her longer work, *MOORE SOCIAL FACTS*, *supra* note 36.

<sup>84</sup> Julie Stewart, *Why I Can't Teach Customary Law*, in *THE CHANGING FAMILY: INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW* 217, 221-222 (J. Eekelaar & T. Nhlapo eds. 1998).

different ethnic groups and provinces and Ministry of Justice officials. Several court decisions had upheld the 'rule' that the eldest son was always his father's heir. When this position was stated to the chiefs, they disagreed, and stated that the underlying principle is that the family of the deceased person (and there could be varying definitions of which members constitute the family) must be provided for from the property left by the deceased person. However, this principle could be accomplished by a variety of arrangements, depending on specific family situations, and it is not always accomplished by passing property to the eldest son.<sup>85</sup>

Occupying the ground of culture also means challenging legal projects that have codified customary law, and that purport to give ready and complete answers to legal practitioners on what 'the custom' of a given ethnic group with regard to a particular matter is. One source that is referred to very often in Kenyan courts is Cotran's codification of the various customary laws on marriage and divorce.<sup>86</sup> These codifications give a very static and ossified version of custom, denying the reality that 'custom' is a matter of practice, and this is constantly evolving. Julie Stewart's suggestion is that we need to intervene in court processes, with empirical research work on current practices, and with empirical evidence of the variation in customary practice. We need to overcome the impression created by the codifications, that there is only one rigid notion of custom, and we can only do this by making the evidence to the contrary available to the judges.<sup>87</sup>

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<sup>85</sup> Stewart's paper is rich with examples from field research conducted on behalf of the Women and Law in Southern Africa (WLSA) Project that point to flexible practice that contradicts the 'customary law in the books' (case law). She quotes one headman:

One of my neighbours died and was survived by only female children. We distributed his many cattle and other property among his daughters. The brothers and other close relatives of the deceased decided on this and the rest of us and the community had no problems with it as it is our custom.

*Id.* at 223.

<sup>86</sup> EUGENE COTRAN, *THE LAW OF MARRIAGE AND DIVORCE IN KENYA*, (Restatement of African Law series, 1968). See also EUGENE COTRAN, *CASEBOOK OF KENYA CUSTOMARY LAW* (1987).

<sup>87</sup> Julie Stewart, *supra* note 84.



### ***B. Employing a 'Critical Pragmatic' Approach to Pluralism***

In a critical pragmatic approach to pluralism, the concern will not be so much with identifying a particular component in the plural normative legal order as responsible for causing or remedying disadvantage. Rather, whatever system is operating, or when a particular disadvantage is occasioned by an interaction between or among the various normative orders, the question needs to be whether it produce consequences that further deepen gender inequality.

I borrow the term 'critical pragmatism' from Joseph Singer.<sup>88</sup> Pragmatism as a school of thought is concerned with the actual working of law in a social setting as the basis for evaluating law, rather than with conceptual neatness; a concern with results. Critical pragmatism, according to Singer, goes much further than this, to a concern with results for specific (oppressed) groups in society: When we ask ourselves whether a social or legal practice works, we must ask ourselves, 'works *for whom?*' Who benefits and who loses from existing political, economic, and legal structures?<sup>89</sup> [Emphasis in original]

Working for gender equality in property relations in a plural legal context requires a move toward focusing on results or consequences for gender hierarchies. In the specific context of property relations under Kenya's plural normative orders, this means evaluating from a critical pragmatic perspective: the consequences of presenting customary property arrangements in a static way that assigns fixed roles and statuses; the consequences of entrenching an individualist absolutist conception of private property in our land statutes; and the consequences of choosing to accommodate pluralism in such a manner as to set up a 'private sphere' of personal laws that is beyond constitutional challenge, as section 82(4) does.

On the constitutional issue, which is fundamental, a critical pragmatic approach would ask why it is that the exception in section 82(4) only extends to the issues of marriage, adoption, divorce, burial and devolution of property on death? Why does it not affect other

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<sup>88</sup> Joseph Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complicit Pragmatism*, 63 S. CAL. L.REV. 1821 (1990).

<sup>89</sup> *Id.* at 1841.

areas of operation of customary law? Marriage, divorce and death are key events for defining and reconstituting property rights, particularly for women and children, whose access to economic resources is heavily dependent on family networks, specifically their relationships to fathers or husbands. What are the consequences for pre-empting individuals' access to constitutional protection with regard to these matters? The result is to deny constitutional protection to women and children during moments when they may need it the most to resolve any conflicts that may arise with regard to their access to economic resources necessary for their survival.

We could go further and question the necessity of having a provision such as section 82(4) in the Constitution in the first place. Are there other ways to recognize cultural and religious pluralism and accommodate the operation of personal laws, without exacting such a heavy cost on some groups in society? The South African Constitution provides an alternative set up. It recognizes the validity and operation of traditional authority, as well as a right to enjoy and practice one's culture, but it makes the exercise of traditional authority and the operation of customary law subject to the constitution. This means that the exercise of traditional authority and the operation of customary law can be challenged under the Bill of Rights.<sup>90</sup> As Justice Yvonne Mokgoro of the South African Constitutional Court puts it, political necessity required the recognition of traditional authority, but justice demanded that the exercise of their powers be subjected to constitutional scrutiny.<sup>91</sup>

A critical pragmatic approach also calls for engagement at multiple sites. We need to recognize that both the 'traditional sphere' and formal legal institutions present difficulties and possibilities for women. The starting point would therefore be for women to examine

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<sup>90</sup> Section 211(1) states:

The institution, status and role of traditional leadership, according to customary law, are recognized subject to the constitution.

Section 211(3) states:

The courts must apply customary law when that law is applicable, subject to the constitution and any legislation that specifically deals with customary law.

See Constitution of the Republic of South Africa, as adopted by the Constitutional Assembly on 8 May 1996.

<sup>91</sup> Yvonne Mokgoro, *Traditional Authority and Democracy in the Interim South African Constitution*, 3 REV. CONST'L STUDIES 60 (1996). See also T. Nhlapo, *supra* note 39.

what options exist for them at a particular moment, with regard to a particular problem, and to take advantage of them.

For instance, activists for gender equality in property relations often focus on the laws of marriage and divorce and succession, and rarely take on the actual statutes dealing with land. Yet is it important both to identify sources of gender inequality in these apparently neutral statutes, as well as measures within the existing framework of the statutes that can be used to redress gender inequality.<sup>92</sup>

To a certain extent, there are groups that are already responding to the need to engage at multiple sites. Rather than present statutory measures and 'human rights', in a narrow sense, as alternatives to custom, their approach is one of options. I am referring specifically to the work of two regional African organizations; Women and Law in East Africa (WLEA) and Women and Law in Southern Africa (WLSA). Both organizations combine research and activism on legal and social issues affecting women in their respective regions. They carry out participatory research in both rural and urban areas, paying particular attention to the lived reality of women. In WLEA's methodology, emphasis is placed on "collecting empirical data on women's experiences in the context of both formal and informal laws including social custom, morals and practices".<sup>93</sup> On legal awareness programs, WLSA's position is that "it is vital that legal education and action programmes alert women to the alternative or other options open to them". They recognize that "empowerment for some women may even involve using informal customary structures in order to enforce the obligations [under] customary law".<sup>94</sup>

## V. CONCLUSIONS

This article started by appraising approaches to custom in considering gender and property relations. My appraisal focused on

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<sup>92</sup> I do not actually carry out such an analysis of property law statutes here, but see Celestine Nyamu, *Legal Research Report on Women, Marriage, and Management of Resources* (Women and Law in East Africa (WLEA-Kenya), (Internship assignment report on file with the author and with WLEA-Kenya, August 1997).

<sup>93</sup> Women and Law in East Africa, Discussion Draft for the Research Project on Women in Marriage and Resource Management 9 (1997).

<sup>94</sup> Women and Law in Southern Africa, *Beyond Research: WLSA in Action* 6 (Working Paper No.10, 1995).

the analyses presented by mainstream property law scholars and human rights and 'women in development' scholars and activists. I identified and discussed two major shortcomings of both schools, namely the reification of a dichotomy between custom and formal legal processes and institutions, and the failure to engage with the power relations inherent in the shaping of customary law. With respect to the first shortcoming, mainstream property law attributes gender inequality to 'imposed' Western institutions, thus glorifying an egalitarian 'customary' past in which women's property rights were protected. Human rights and development analysis, on the other hand, blames custom as the oppressor of women, and offers human rights and equal recognition of women's role in the development process as the liberator. With respect to the second shortcoming, both approaches, in failing to engage with the power relations of the shaping of customary law, also pay no attention to ways in which gender relations get redefined too in this process.

I have argued for a different strategy toward achieving the goal of gender equality with respect to property relations in a plural legal context. Such a strategy needs to be premised on an understanding of the interaction between custom and formal legal processes and institutions. It also needs to take into account the intersection of gender and culture, and be ready to meet assertions of rigid notions of custom with empirical evidence of the flexibility, variety and richness or contemporary local practice. This strategy, which I have labeled 'a critical pragmatic approach to pluralism', must recognize that the various normative orders in our plural legal context offer both setbacks to gender equality and the resources for challenging such inequality. A critical pragmatic approach to pluralism calls upon us to be willing to engage at multiple sites. The key focus of our engagement should be the consequences for vulnerable women and the effects on gender hierarchies.

