

**CRITIQUE OF THE CONSTITUTIONALITY OF THE LAW OF SUCCESSION ACT
AND INHERITANCE RIGHTS OF WOMEN IN KENYA**

BY

NAME: MARIA GORETTI NYARIKI

REG. NO. G62/66332/2010

**UNIVERSITY OF NAIROBI
SOL LIBRARY**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE AWARD OF THE DEGREE OF THE MASTER OF LAWS (LL.M) IN LAW,
GOVERNANCE & DEMOCRACY, UNIVERSITY OF NAIROBI**

NOVEMBER, 2014

University of NAIROBI Library



0413776 6

DECLARATION

I, **MARIA GORETTI NYARIKI** Registration Number **G62/66332/2010** do hereby declare that to the best of my knowledge this project report is my original work and has not been submitted either in part or in whole and is not being currently submitted for a degree in any other University. No part of this thesis may be reproduced without the prior permission of the author.

Maria Goretti Nyariki

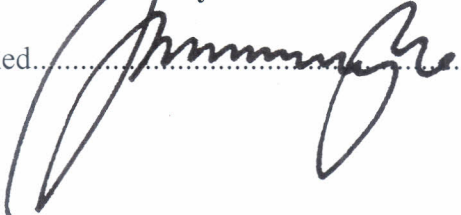
G62/66332/2010

Signed..........

Date:.....**03.12.2014.**.....

This thesis has been submitted with my approval as the University Supervisor.

Hon. William Musyoka J.

Signed..........

Date:.....**4/12/14**.....

DEDICATION

I dedicate this thesis to my daughter Stacey Magoma Vulahi who is the love of my heart, the beauty and strength of my existence.

This work is an inspiration of hard work and determination which I trust will also inspire you to scale great heights and become what you want to be in life. I wish you success in all your endeavours and may God bless you abundantly.

ACKNOWLEDGEMENT

I thank the Lord Almighty for the energy, health and enthusiasm to pursue the LLM degree despite the busy schedule in my life.

I am greatly indebted to my supervisor Honourable Justice William Musyoka for his dedication, guidance, patience, invaluable contribution, effort and encouragement when reviewing and discussing the work and ensuring that the thesis was well done in spite of his busy schedule.

Once again I thank him for his valuable time and thoughts in supervising this work and ensuring the correct spellings, grammar and sentencing.

I am greatly indebted to my parents Prof. Marcel Ohanga Odhiambo and Mrs. Anastasia Cecelia Magoma Odhiambo and to my aunt Helen Kwamboka Ombati for being my inspiration.

I thank everyone who contributed directly and indirectly to the success of this thesis. To my classmates and colleagues at work, thank you for the support during the one academic year at the School of Law, University of Nairobi.

May God bless you all.

ABSTRACT

The Constitution of Kenya, 2010 has brought in a paradigm shift in the treatment of every person in Kenya. Through its equality provision, the Constitution, 2010 abhors discrimination against either gender by providing an equal platform to the issues of property ownership and inheritance. In fact, Article 27(3) reinforces this point by providing that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Property inheritance, which was the subject of this study was hitherto controlled and managed to the benefit of the male gender through archaic legislations. The Law of Succession Act, the Islamic Sharia Law and the Customary Laws were couched in patrimonial terms thus making it difficult for the female gender to inherit property in Kenya. This thesis thus proceeds on the basis that the role of courts under the new constitutional dispensation is crucial in giving effect to the equality clause under the constitution, 2010. Courts through interpretative role can either declare a given act or provision of the law unconstitutional or read in a right into the discriminatory laws through its new mandate of developing the law to conform to the dictates of Constitutionalism. Accordingly and in conclusion, the thesis urges the society as a whole through its stratified segments to be vigilant and vibrant in ensuring that constitutional means such as litigation are encouraged to ensure that past discrimination against women in property ownership and inheritance are totally eliminated.

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENT	iv
ABSTRACT.....	v
LIST OF ABBREVIATION AND ACRONYMS	ix
LIST OF STATUTES.....	x
LIST OF INTERNATIONAL CONVENTIONS AND FOREIGN LAWS.....	xi
LIST OF CASES.....	xii
CHAPTER ONE	1
THE FRAMEWORK OF THE STUDY.....	1
1.1 Background of the Study	1
1.2 Objectives of the Study	9
1.3 Research Questions	10
1.4 Research Hypotheses	10
1.5 Justification of the Study.....	11
1.6 Literature Review.....	12
1.7 Theoretical Framework	23
1.8 Conceptual Framework	30
1.9 Research Methodology.....	31
1.10 Limitation of the Study	31

1.11 Chapter Outline32

CHAPTER 2.....34

THE CURRENT STATE OF KENYA’S DISCRIMINATORY LAWS ON INHERITANCE RIGHTS OF WOMEN.....34

2.1 Introduction.....34

2.2 Discrimination under African Customary Law35

2.3 Discrimination under the Islamic Law42

2.4 Discrimination under the Law of Succession Act.....44

2.5 Conclusion49

CHAPTER THREE.....51

THE PLACE OF COURTS IN ENHANCING EQUALITY IN INHERITANCE RIGHTS IN KENYA51

3.1 Introduction.....51

3.2 Declaratory order of invalidity51

3.3 Development of the Law57

3.4 The international law friendly approach59

3.5 Negative and Positive Obligations-the duty to observe, respect, protect, promote and fulfill.....62

3.6 Conclusion63

CHAPTER FOUR64

CONSTITUTIONALITY AND APPLICABILITY OF THE LAW OF SUCCESSION ACT UNDER THE NEW CONSTITUTION.....	64
4.1 Introduction.....	64
4.2 Courts' application of freedom against discrimination.....	65
4.2.1 Jurisdiction.....	65
4.2.2 The Threshold Test.....	70
4.2.3 The Locus Standi.....	71
4.3 The application of international law in the Constitutional setting.....	71
4.4 Conclusion.....	73
5.1 Conclusion.....	74
5.2 Recommendations.....	75
SELECTED BIBLIOGRAPHY.....	77

LIST OF ABBREVIATION AND ACRONYMS

- 1. ADR.....Alternative Dispute Resolution
- 2. CEDAW.....Convention on Elimination of All Forms of Discrimination Against Women
- 3. FIDA-Kenya.....Federation of Kenya Women Lawyers
- 4. ICESCR.....International Convention on Economic Social
and Cultural Rights

LIST OF STATUTES

1. The Constitution, 2010
2. The Law of Succession Act Cap 160 of the Laws of Kenya
3. 1981 Magistrate's Jurisdiction (Amendment) Act, Cap 10 of the Laws of Kenya
4. Indian Succession Act 1865
5. The Hindu Wills Act 1870 of India
6. The Probate and Administration Act 1881
7. The African Wills Act 1961
8. The Administration of Estates by Corporations Act
9. The Commonwealth Probate Act
10. The Colonial Probate Act 1892
11. The African Customary Law
12. Islamic Law
13. The Hindu Customary Law
14. The Civil Procedure Act
15. The Civil Procedure Rules, 2010
16. The Evidence Act

LIST OF INTERNATIONAL CONVENTIONS AND FOREIGN LAWS

1. The Universal Declaration of Human Rights
2. the International Convention on Economic Social and Cultural Rights (ICESCR)
3. The Convention on the Elimination of Forms of Discrimination Against Women (CEDAW)

LIST OF CASES

1. Anarita Karimi Njeru Vs Attorney General [1979] KLR 154.
2. Beatrice Wanjiru and Anor. V. Hon. Attorney General and Anor Milimani HCPT No. 190 of 2011
3. Cyprian Kubai Vs Stanley Kanyonga Mwenda Nairobi High Court Miscellaneous Application Number 612 of 2002.
4. Diamond Trust Kenya Limited v. Daniel Mwema Mulwa Milimani HCCC No. 70 of 2012(unreported)
5. Otieno v Ougo (2008) 1 KLR (G&F) 918.
6. Wambui Otieno case
7. Mary Rono vs. Jane Rono and another Eldoret CACA No. 66 of 2002
8. In the Matter of the Estate of Mwaura Gathari (deceased) Nairobi HCSC No. 1678 of 1999
9. Martha Gukiya Thui & Another v. Kibugi & another (2010) e KLR.
10. R.M. V ATTORNEY GENERAL, (Suing Thro' Next Friend) JOSEPHINE KAVINDA & ANOTHER V THE ATTORNEY GENERAL NBI HCCC NO. 1351 OF 2002 R.M.
11. HARKSEN V LANE NO OTHERS 1997(3) SA 1012 (CC)
12. UNITED STATES V ARMSTRONG(1996) 134 L Ed 2D 687 At P. 699,
13. Re Zipporah Wambui Mathara Milimani Bankruptcy Cause No. 19 of 2010(Unreported).

CHAPTER ONE

THE FRAMEWORK OF THE STUDY

1.1 Background of the Study

Women are now active in virtually every economic sector.¹ However, despite that, they are frequently denied the right to inherit property. The inheritance rights of women are harboured by various cultural, social and political factors.² These factors combined with discriminatory legal framework for inheritance mean that women do not enjoy equal rights of inheritance in comparison with their male counterparts.³

Further, limitations in inheritance rights translate into lack of control over both productive and non-productive resources which place women at a strong disadvantage in terms of accessing economic opportunities and maintaining independence.⁴ For example, due to lack of land titles and real property ownership among women, they are disadvantaged in their ability to access loan and credit from financial institutions to start businesses or improve their lot in life. In any case, they have virtually no collateral with which to obtain loans and credit. These factors exacerbate women's generally low status and high levels of poverty when compared to men and limit efforts to realize gender equality. Further, the limited inheritance rights are also linked to development-

¹ International Finance Corporation [IFC] & World Bank, "Voices of Women Entrepreneurs in Kenya" 1 (2006); available at: [http://www.ifc.org/Voices of women Ent_Kenya.cdr](http://www.ifc.org/Voices%20of%20women%20Ent_Kenya.cdr) (accessed on 20/02/2011).

² International Women's Human Rights Clinic Georgetown University Law Center and The Federation of Women Lawyers: Kenya "Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation", 40 *Georgetown Journal of International Law* 66 (2009).

³ *Ibid.*

⁴ FIDA-Kenya, "Women Land Rights in the proposed Land Policy Reforms", FIDA Unpublished Policy Brief, 2007.

related problems faced by countries across the globe, including low levels of education, hunger, and poor health.⁵

Therefore, it is important to secure women's inheritance rights especially to both development and equality.⁶ While a lot of progress has been made in this respect, several barriers to change still exist. These include inadequate laws and systems of enforcement and the prevalence of traditional attitudes and practices, many of which directly contradict statutory laws and established civil rights. This inequality is perpetuated by the continued widespread discrimination against women in the inheritance of property.⁷

Thus, although the Law of Succession Act seems to give some protection to women, it is the case that many women are still unable to inherit property from their spouses, fathers, and other relatives. Indeed, the reality is that women in Kenya are hardly allowed to inherit anything when their husbands die or even when their parents die. This is due to non-strict implementation of the Law of Succession Act, as well as the continuing use of African custom to determine succession matters. For instance, the Law of Succession Act provides that a woman forfeits her interest in the husband's estate if she remarries whereas the reverse does not apply for a widower.⁸ In fact, the government of Kenya has recognized, "The area in which most customary laws disadvantage women is in respect of property rights and inheritance. Under the customary law of most ethnic

⁵ *Ibid.*

⁶ *Supra*, note 2, p. 70.

⁷ *Ibid.*

⁸ Section 36 of the Law of Succession Act.

groups in Kenya, a woman cannot inherit land and must live on the land as a guest of male relatives by blood or marriage.”⁹

In recognition of its commitments as a party to the various international treaties and conventions providing for rights of women and inheritance rights in particular, Kenya has declared that it will align itself with those nations that respect the rule of law, the equal rights of the individual, and the moral and legal obligation of all states to treat their citizens with equal dignity and respect. Kenya has also undertaken to deliver on its obligation to “abandon cultural practices that bar women from inheriting family land.”¹⁰

However, despite the above promises and undertakings, discrimination of women on matters of inheritance is still prevalent in many forms. Women upon the death of their husbands still face the threat of being violently evicted from their homes. Others are made to go through dangerous and unwanted cultural practices in order to receive their inheritance, such as widow “cleansing” or widow inheritance. The law of succession also excludes some groups of women from its safeguards, for instance, on the basis that they either live in an agricultural area that is exempted from coverage or because of their status as Muslims. The Act also denies widows the right to remarry and maintain the life estate in their former husband’s inheritance. It also denies mothers all inheritance rights to their deceased children’s property if the fathers are alive. The Act also fails to provide inheritance rights for children whose unwed fathers avoid their parental responsibilities. In general, the Act fails to grant widows full ownership rights of property

⁹ Republic of Kenya, *Combined fifth and sixth periodic reports to the Committee on the Elimination of Discrimination Against Women* (39th Sess., 2007), para. 81, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (accessed on 20/02/2011).

¹⁰ *Ibid.*

inherited from their husbands, provides inadequate protection for polygynous families, and excludes many children born out of wedlock. These deficiencies are costly in that they have meant the disinheriting of women and exposure to poverty and violence as a result of their inadequate protection. The deficiencies are also very costly to the economy of Kenya given that they dis-empower women who are key contributors to the economy.¹¹

Court of Appeal Honorable Justice J. Shah (as he then was) commenting on the discriminatory provisions of the Act said, the “[t]ime has come where the idea of men only inheriting, male offspring only inheriting should be discarded.... The Parliament should enact a comprehensive law to cover women’s rights on inheritance, the rights on divorce.”¹² The current state of succession law in Kenya contributes to the impoverishment of the country, allows for rampant violations of women’s human rights, and is inefficient and ineffective. There is, thus, need to review the succession laws to make them in line with the rights of all citizens, obey international legal norms, and allow for greater economic prosperity.¹³

Most of the discriminatory provisions in the Law of Succession Act owe their existence to the state of the old constitutional order in Kenya. Although the now old constitution purported to guarantee the right to equal treatment and non-discrimination, it limited that right with respect to “personal law.” Section 82(1) provided that “no law shall make any provision that is

¹¹ *Supra*, note 2, p. 69.

¹² Interview with The Honorable Justice J. Shah, Court of Appeal, in Nairobi, Kenya (Apr. 4, 2008), cited in *Supra*, note 2, p. 71.

¹³ Njoki Wamai, “Women and Poverty (Land Rights and Ownership)”, A Policy brief on the Kenyan situation prepared for the African Women Rights Observatory (AWRO); available at: awro.uneca.org/members%20Contributions.aspx; (accessed on 20/02/2011).

discriminatory either of itself or in its effect” while subsection 4 of the section exempted laws that made provision “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of *personal law*.” The subsection also excluded laws that provided “for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.” These exemptions to the protection against discrimination were buttressed by the Judicature Act which directed that the courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.⁴⁹ ¹⁴

In *Otieno v Ougo & Another, the Court of Appeal* stated that “the appellant as the deceased’s wife has to be considered in the context of all wives married to Luo men irrespective of their lifestyles who become subject to the customary laws.”¹⁵ In effect, this implied that a woman married to an African man was subjected to the customs of her husband and, specifically as the court suggested, was wholly subsumed into her husband’s culture. The effect of the holding was that custom dictated that a wife lost her autonomy and had no power to make decisions relating to the burial of her husband since customs ordained that the clan should take over. The Court rejected any insinuation that such practice was discriminatory on the ground that section 82(4)(b) allowed the application of customs in situations where they would otherwise be discriminatory. Hence, the above constitutional and statutory bases clearly served to legitimize the gender biases inherent in the customs to the detriment of women inheritance rights.

¹⁴ Section 3(2) of the Judicature Act, Chapter 8 of the Laws of Kenya.

¹⁵ *Otieno v Ougo* (2008) 1 KLR (G&F) 918.

The New Constitution of Kenya promulgated on 27th August, 2010 provides a paradigm-shift from the old order above and ushers in a new framework based on the values of social justice and respect for rights. The constitution upholds principles of gender equality and recognises in the Preamble that Kenyans aspire “for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:” The constitution proclaims national values and principles that include “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”¹⁶

Further, the Constitution features a Bill of Rights which has a rather expanded list of fundamental rights and freedoms which responds to the specific needs of women.¹⁷ The Constitution exhorts public institutions and agencies to avoid taking measures that discriminate against women and girls.¹⁸ It also sets up key institutions to oversee the implementation of the new gender responsive framework including a Gender Commission. The Bill of Rights is very clear on its prohibition of discriminative acts and decisions¹⁹ and further provides that “every person is equal before the law and has the right to equal protection and equal benefit of the law.”²⁰ Equality includes “the full and equal enjoyment of all rights and fundamental freedoms.” Further, for avoidance of doubt, the constitution provides that: “Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.”²¹

¹⁶ Constitution of Kenya, section 10.

¹⁷ Constitution of Kenya, Chapter 4.

¹⁸ *Ibid.*, section 27.

¹⁹ *Ibid.*

²⁰ *Ibid.*, section 27(1).

²¹ *Ibid.*, section 27(3).

The Constitution also bars discrimination in the private sphere including the family.²² The ban on discrimination extends to acts, laws, decisions and policies that are either themselves discriminatory or otherwise produce discriminative consequences when applied. Thus the ambit of activities transcends legal provisions and will capture the day to day public and private decisions. Article 20(1) specifically provides that “The Bill of Rights applies to all law and binds all State organs and all persons.”

With respect to civil and political rights, Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected. Dignity is defined as the quality or state of being worthy of esteem or respect.²³ Dignity has to do with a person’s self-worth and how they feel about themselves. To treat someone with dignity means to respect that person as a human being regardless of their situation. Further, the constitution in section 2(4) makes it clear that any law including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency. This clause read together with the Article 28 guarantees that any customary law that is not consistent with the human dignity of women is void.

The new Constitution also provides for the right to marry. Article 45 (2) provides that “every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.” Further, Article 45(3) guarantees the equality of parties providing that parties to marriage are entitled to equal rights. This implies that any provision of the law that accords an advantage to one spouse is void to the extent that it is inconsistent with the constitution. The provisions of the Law of Succession Act such as section 36 of the Law of Succession Act are

²² *Ibid.*, section 27(5).

²³ *The American Heritage Dictionary of the English Language* 507 (4th ed. 2000).

now obsolete. The section provides that if the surviving spouse is a woman then if she remarries, the life interest in her husband's property ends. There is no such termination if the surviving spouse is a man and remarries hence the section is directly discriminatory against women.²⁴

The new Constitution also changed the status of international law instruments ratified in Kenya into a source of law in Kenya. Prior to the promulgation of the new constitution, the sources of law on Kenya were the Constitution; Acts of Parliament; some specified UK Statutes; the Common Law, Doctrines of Equity and Statutes of General Application in force in England on 12th August 1897; and finally customary law.²⁵ Thus, international law and its principles was considered not to form part of Kenyan law unless they were domesticated. In other words, Kenya adhered to the dualist principle of international law. The new constitution has adopted a monist principle of application of international law. In this regard, the constitution provides that international treaties and conventions that are ratified by Kenya shall form part of the laws of Kenya.²⁶ Further, the general rules of international law form part of the law of Kenya. The implication of the monist approach is that the provisions of international law instruments providing for gender equality such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are now law in Kenya.²⁷

This study analyzes how the provisions of the Law of Succession Act and the applicable tenets of customary/personal laws on the inheritance rights of women in Kenya foster gender

²⁴ Clearly, this amounts to "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by ... sex...." See section 27(4) of the new Constitution.

²⁵ Section 3 of the Judicature Act.

²⁶ Constitution of Kenya, section 2.

²⁷ Maurice Oduor and Ruth Aura Odhiambo, "Gender Equality in the New Constitutional Dispensation of Kenya", (December 16, 2010). Available at SSRN: <http://ssrn.com/abstract=1726378> (accessed on 20/02/2011).

discrimination. Further, it explores the impact of the provisions of the new constitution on inheritance rights of women in Kenya if properly implemented and applied in promoting gender equality in Kenya. In this regard, the study critiques the constitutionality and applicability of the old succession law regime especially with respect to inheritance rights of women and how the implementation of the new Constitution stands to change it.

The above issues have precipitated the need for analysis of the constitutionality and applicability of the Law of Succession Act in the post-new Constitution era. It is also necessary to examine the changes necessary in the application of the Act in order to achieve the objectives of the enactment of the new Constitution in achieving the inheritance rights of women and gender equality in succession after death, in Kenya. However, before one can embark on the process of amending the Law of Succession to remove the provisions which are inconsistent with the constitution, it is necessary to review it, provision by provision, to find the status of each provision in comparison with the provisions of the new Constitution. This is because the Act embodies both implicit and explicit limitations to the inheritance rights of women some of which only an in-depth review can render apparent.

1.2 Objectives of the Study

The study sought to discuss the impact of the provisions of the Constitution, 2010 on the Law of Succession Act with regard to property ownership and inheritance rights of women in Kenya. In particular;

1. To analyze the provisions of the Law of Succession Act and customary/personal laws affecting inheritance rights of women in Kenya.

2. To review the legal framework on inheritance rights of women and application of international human rights instruments in succession matters in Kenya as provided for in the new Constitution.
3. To critique the effect of the new Constitution on the constitutionality, applicability and interpretation of the Law of Succession Act and inheritance rights of women in Kenya.

1.3 Research Questions

The study explored the following research questions:-

1. What is the impact of the provisions of the Law of Succession Act and customary/personal laws on the inheritance rights of women in Kenya?
2. How does the new Constitution address inheritance rights of women and application of international human rights instruments in succession matters in Kenya?
3. Do the provisions of the new Constitution on inheritance rights of women in Kenya promote gender equality?

1.4 Research Hypotheses

The study sought to answer the following two hypotheses:-

First, is that the current statutory legal regime with regard to property ownership and succession in Kenya is not adequate/water tight in addressing discrimination against women. This hypothesis is based on the fact that the provisions of the Law of Succession Act and the applicable tenets of customary/personal laws on the inheritance rights of women in Kenya foster gender discrimination.

The second hypothesis is that the provisions of the new constitution on inheritance rights of women in Kenya if properly implemented and applied will help promote gender equality. The consideration of the Constitution as the benchmark is based on its supremacy. The Constitution further has elaborate provisions on gender equity.

1.5 Justification of the Study

At present, Kenya is in transition. Legal reforms are at centre-stage given that we are now in the throes of implementing the Constitution promulgated on 27th August, 2010. With the new constitutional order, conformity with the constitution of the existing laws is needed.²⁸ There is also currently global movement towards engendering human rights practices in all systems to ensure that there is a human rights approach to executive, legislative and judicial activities in all States. The country is, therefore, at the moment a fertile ground for comprehensive research and scholarly out-look on the issues that are likely to be impacted by the new Constitution such as gender equality and property rights. The present study seeks to meet this need for comprehensive analysis of the constitutionality and applicability of the old succession law regime especially with respect to inheritance rights of women and how the implementation of new Constitution stands to change it.

While various researches have been undertaken in this field and there are quite a number of texts and scholarly articles which highlight the rights of succession of women in Kenya, none specifically addresses the issues of constitutionality and applicability of the law of succession after the enactment of the new constitution. In most cases, these studies are merely thematic and mainly intended on asserting a particular perspective. Other available materials are shallow and

²⁸ Article 2 of the Constitution, 2010.

transitional and aimed at creating a linkage between the law of succession and other areas of law such as family law, the transfer of property law, public trustee laws and land law.

Thus, there is a shortage of a comprehensive research in the field of succession and inheritance rights of women apart from those relating to gender issues; and to a smaller extent, on the rights of the child and minority rights in Kenya. This research, cannot realistically aim to cover all these aspects within the limits of this thesis. However, the discourse will create a background for further future research, that will comprehensively cover this area. The final research finding and discussion will also be relevant to legal practitioners, policy-makers, law reform agencies and gender advocates in Kenya and beyond seeking comprehensive analysis of the law of succession applicable to women in the post-new Constitution period.

1.6 Literature Review

One of the key literatures relevant to the present study is the Human Rights Report prepared by students and faculty of the International Women's Human Rights Clinic at Georgetown University Law Center in partnership with lawyers from FIDA-Kenya.²⁹ The central finding in the report is that women in Kenya continue to face enormous obstacles to achieving equality. This inequality is perpetuated by the continued widespread discrimination against women in the inheritance of property.³⁰ Despite provisions of the Law of Succession Act that apparently give

²⁹ International Women's Human Rights Clinic Georgetown University Law Center and The Federation of Women Lawyers: Kenya "Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation", 40 *Georgetown Journal of International Law* 66 (2009).

some protection to women, the interviews found that in practice, many women are unable to inherit property from their spouses, fathers, and other relatives.³¹

The study finds that the inability to inherit property is the result of several important deficiencies in the Law of Succession Act, as well as the continuing use of African customs to determine succession matters. It is argued that most customary laws disadvantage women in respect of inheritance. Under the customary law of most ethnic groups in Kenya, a woman cannot inherit land and must live on the land as a guest of male relatives by blood or marriage.³²

Nevertheless, the study finds that Kenya's Law of Succession Act has many provisions that recognize and embrace the idea that men and women should have the equal right to inherit property. The terms of the Act permit women to inherit. The Act treats male and female children the same in terms of their right to inherit property from their parents. Widows are permitted to inherit property and are given priority over brothers or other male relatives to become the administrators of the estates of their husbands.³³

However, despite these provisions, widespread discrimination of women in matters of inheritance persists in Kenya. The government of Kenya admitted as much in its 2007 response to the CEDAW Committee's questions stating that: "As much as the Kenya Law of Succession

³⁰ *Ibid.*, p.67.

³¹ *Ibid.*, p.68.

³² *Ibid.*

³³ *Ibid.*, p.69.

Act is meant to harmonize inheritance laws, in practice the transmission of land rights is largely done within customary laws which discriminate against women and children.”³⁴

The report documents some of the ways that the Law of Succession Act has failed to live up to the promise of a legal system that ensures equality for all citizens. It is argued that discrimination in Kenya on matters of inheritance takes many forms. For instance, interviews show that some women upon the death of their husband face the threat of being violently evicted from their homes. Others are made to go through dangerous and unwanted cultural practices in order to receive their inheritance, such as widow “cleansing” or widow inheritance. Some women are systematically excluded from the protections of the Law of Succession Act, either because they live in an agricultural area that is exempted from coverage or because of their status as Muslims. The Act also denies widows who remarry the life estate maintained by widowers who remarry. It also fails to provide inheritance rights for children whose unwed fathers avoid their parental responsibilities. Many others remain simply unaware of their rights to inherit property or are unable to redeem those rights in a court of law.

The report also attempts to demonstrate the costs of these deficiencies. This is cost measured both on the impact on lives of women who face poverty and violence as a result of their inadequate protection, as well as the cost to the economy of Kenya and to the next generation of Kenyan citizens. It is argued that with a few amendments, the Law of Succession Act can be made into a statute that is effective and fair to all Kenyan citizens. It is proposed, for instance, that widows be afforded greater legal protection from the violent abuse that is often connected to

³⁴ Republic of Kenya, *Combined fifth and sixth periodic reports to the Committee on the Elimination of Discrimination Against Women* (39th Sess., 2007), para. 81, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (accessed on 20/02/2011).

succession claims, through criminal penalties for the crimes of widow abuse, forced widow inheritance, and cleansing. Further, it is argued that the Law of Succession Act's coverage should be extended to all Kenyan citizens, regardless of their religion or location within the country.

The report argues that the amendments are necessary to ensure that the Law of Succession Act lives up to Kenya's international commitments. Moreover, these changes will promote the development of Kenya, reduce poverty, reduce social conflict, and ensure a more efficient legal system. In the long run, an improved Law of Succession Act will not only benefit the women of Kenya, but also their sons, brothers, business partners, neighbors, and husbands. In other words, an equal and effective administration of justice will benefit both the men and the women in Kenya, as well as future generations.

The report is relevant to the present study in that it confirms that, indeed, some of the provisions of the Law of Succession Act are problematic for being discriminatory to women. Further, it rationalizes the need for amendments to the Act as being both in the interest of women and all Kenyans in general and even our economy by demonstrating the costs of the discriminatory and oppressive provisions of the Act. However, it differs with the present study in that here the focus is an impassionate review of the Law of Succession Act to see how it measures up to the standards laid down under the New Constitution in upholding gender equality in Kenya. Further, the study herein goes beyond the analysis in the report to probe the constitutionality of all the key provisions of the Act. The findings in the Report are beneficial in that they form foundation

of the analysis in the present study by pointing out the potentially problematic provisions of the Act.

Odhambo and Oduor explore the provisions on gender equality in the new Constitution of Kenya.³⁵ In particular, their paper discusses how the new constitution incorporates gender equality within its framework. Further, it examines the approaches that the constitution has taken in a bid to promote the hitherto elusive equality between men and women in the law. The extent to which the new framework has sought to dismantle longstanding legal barriers on women is also explored.³⁶ They define gender equality as a social order in which men and women share the same opportunities and the same constraints in the economic, social and political realms of life. In this regard, they argue that the quest for gender equality is synonymous with the struggle for the emancipation of the entire Kenyan society.³⁷

With respect to inheritance rights, they argue that both testate and intestate succession, Kenyan law have routinely reinforced gender discriminative cultural practices. In the former case, it is their position that a court might be called upon to interpret the same in case of a dispute among the beneficiaries. However to the extent that the constitution allowed individuals to elect to be governed by personal law in matters such as inheritance, such individual might rely on their customs and exclude female children from the estate. In some communities, a married woman would only have a life's interest that ended as soon as she remarried. Even though courts

³⁵ Maurice Oduor and Ruth Aura Odhambo, "Gender Equality in the New Constitutional Dispensation of Kenya", (December 16, 2010). Available at SSRN: <http://ssrn.com/abstract=1726378> (accessed on 20/02/2011).

³⁶ *Ibid.*, abstract.

³⁷ *Ibid.*, p. 1.

interfered with a testator's discretion in the division of the estate they often followed applicable customary practices.³⁸

In addition, Odhiambo and Oduor trace the legal position of women throughout Kenya's history. They argue that in the pre-colonial and colonial period women had a more or less diminished legal status. This situation did not change much after independence and throughout the subsequent regimes women's legal status did not improve. The law discriminated against women either directly or in its effect. While multi-parties regime brought some gains, these were not significant enough to break off the legal and social chains that beset women in Kenya. The new constitution is a culmination of the incremental steps taken by the country to level the socio-legal terrain in favor of women. It provides the same opportunities for men and women. At the same time it seeks to rectify the imbalances that women have suffered throughout years of historical exclusion.³⁹

In their view, the new Kenyan Constitution gives a very critical treatment to gender. They argue that the new constitution represents a significant improvement in women's status in Kenya in all spheres of life. It seeks to repudiate the historical exclusion of women from the mainstream society. It strikes at the socio-legal barriers that Kenyan women have faced over history. They argue, further, that compared with the old constitutional order, the new legal framework not only creates space for women to maneuver their way in the private and public sphere on an equal footing with men, but also institutionalizes direct gender-specific measures that seek to correct the consequences of women's historical exclusion from the society.

³⁸ *Ibid.*, p. 7.

³⁹ *Ibid.*, p. 16.

The analysis in Odhiambo and Oduor's paper with respect to how the new Constitution addresses gender equality is applied in the present study. In particular, the paper's treatment of the provisions of the constitution on women's inheritance rights, application of customary law and international law is very relevant and helps point the way for analysis in the present study. However, the writers have merely enumerated the provisions in respect of these matters and not substantive analysis of the implications of the provisions for inheritance rights of women in Kenya is undertaken. Further, due to the wide nature of the topic of their paper, the writers have merely highlighted the key issues in a summary form. This study will go into details in analysis of the provisions of the new constitution with respect to the inheritance rights of women in Kenya and how these affect the Law of Succession Act.

Busalile's article aims to give an interconnection between land laws and the laws on property devolution by succession, with human rights law, as areas of joint application in a jurisprudential discourse.⁴⁰ The study is grounded on two legal regimes: On the land laws, and on the laws of proprietary succession and inheritance, which he argues that although distinct, are interrelated in their application to the subject matter of ownership, and passage of (immovable) properties.⁴¹

According to Busalile, the laws on land and laws of succession closely correlate with each other, and more so in countries where the economy, largely, depends on land use. Kenya being an agriculture dependent economy, the ownership and devolution of immovable property determines the polity and the very lifeblood of the economy. He argues that substantive law of

⁴⁰ Jack Mwimali Busalile, "The Practice in Land Law and Succession in Kenya: Constraints on the Full

Enjoyment of Human Rights", available at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1555122&fileId=1563554> (accessed on 20/02/2011).

⁴¹ *Ibid.*, p. 1.

land, registration, land contracts, and passage, are not just complementary, but also intertwined, and the study of land law without the study of the modes of conveyance, is incomplete.⁴² Further, he argues that although the land and succession laws are municipal in nature, they have great ramifications in relation to the fulfillment of national obligations in international human rights law, and are influenced by the provisions pertaining to both civil and political rights as well as economic, social and cultural rights. He highlights the interplay between land laws and laws governing succession and human rights dispensation in the application of the legal norms, focusing on how the practices on land ownership influence the enjoyment of human rights in Kenya.⁴³

Finally, Busalile discusses the rights of particular peoples and groups in the society that have been prone to violation of their ownership rights and claims over land by the shortcomings in the system in Kenya. The groups include women, children, people related through adoption, the poor, the illiterate, the minorities and the indigenous claimants over certain lands. He further discusses the application of human rights in aspects of land law and succession in relation to the international standards.⁴⁴ He offers observations and recommendations in the form of criticism on the shortcoming of the existing legal regime and the problems associated with the law and customs, and biased societal attitudes. In addition, he makes recommendations for changes and improvement to the legal regime on the land policy and on passage of property.⁴⁵

⁴² *Ibid.*, p. 30.

⁴³ *Ibid.*, p. 16.

⁴⁴ *Ibid.*, p. 67.

⁴⁵ *Ibid.*, p. 77.

Though the article is relevant to the instant study in terms of the discussion on land lands, land ownership and succession in Kenya, the same can be distinguished in several respects. First, the study was conducted before the promulgation of the new Constitution which now has a bearing on land laws and succession in that the Constitution now demands that all laws being in force before the effective date of the Constitution should be read with the necessary adaptation, alteration and modifications to give effect to the provisions of the Constitution.⁴⁶ The study shall thus be distinguishable in terms of its discussion on the relevance and the impact of the Constitution, 2010 to the old regime of land ownership and succession. Secondly, there are now new land laws enacted pursuant to the dictates of the sixth schedule of the Constitution. Accordingly, the present discussion shall be important in highlighting the relevance and the transformative nature of the legal texts to property ownership by either gender.

Njoki Wamai has undertaken a policy brief on the Kenyan situation with respect to women's land rights and ownership in Kenya and how they impact on incidences of poverty among women.⁴⁷ In other words, the paper is a situation analysis on how women's poverty in Kenya is related to land, the international and regional human rights instruments on land rights for women that Kenya has acceded to and policy issues which should be addressed in the proposed land policy to guarantee women land rights and ownership.⁴⁸

She argues that in Kenya, as in many parts of the world, poverty is inextricably related to lack of factors of production especially land. Land as the foundation of all human activities is crucial to the attainment of economic growth, poverty reduction and gender equity. She points out that

⁴⁶ Section 7 of the sixth schedule to the Constitution, 2010.

⁴⁷ *Supra*, note 13.

⁴⁸ *Ibid.*

women in Kenya contribute up to 80 % of the workforce yet they only hold 1% of registered land titles in their names and around 5-6 % of registered titles held in joint names. This has impacted heavily on poverty whose current rate is 46% in Kenya and women bearing a disproportionate larger burden of this 46 %. Although women constitute 52% of the Kenyan population they rarely own land and do not even make major decisions pertaining to allocation and use of land and inheritance.⁴⁹

In her view, women's right to land is a critical factor in social status, economic well-being and empowerment. This is because Land is a basic source of livelihood providing employment, the key agricultural input, and a major of women's access to other productive resources and services. Further, women's access to other natural resources, such as water, firewood and forest products is also crucial for food security and income, particularly as land becomes increasingly scarce and access becomes a growing problem.⁵⁰

Ms. Wamai cites research by Federation of Women Lawyers to show that women's rights to property are unequal to those of men in Kenya. She argues that their right to own, inherit, manage and dispose of property are under constant attack from customs, laws and individuals including government officials who believe that women cannot be trusted with or do not deserve property. She concludes that the effects of property rights violations including poverty, disease, violence and homelessness harm women, their children and Kenya's overall economy.⁵¹

⁴⁹ *Ibid.*

⁵⁰ FIDA 2007, Unpublished Women Land Rights in Kenya Policy Brief.

⁵¹ *Supra*, note 13.

According to her, gender discrimination is one of the factors that constrain sustainable use of land in Kenya. In many Kenyan communities, women have access to family land but lack control and ownership, which prohibits them from using land as a form of collateral, to access other resources. A land title deed remains the major form of collateral security required when requesting for credit. This has negative impact on women's socio economic status.⁵²

She argues that the recently concluded constitutional reform in Kenya stands to root out gender discrimination in Kenya if the provisions of the constitution are properly implemented and applied. The constitution's broad principles on land will go a long way in recognizing land as a principal source of livelihood and material wealth and not only as any other property. However, she argues that the provisions of the constitution need to be supported by constantly reviewed national policy which recognizes the principles of equitable access to land and associated resources and elimination of gender discrimination in regulations, customs and practices related to land and property in land is observed.⁵³

Njoki Wamai's paper is relevant to this research in that it successfully links inheritance rights to the poverty debate. It will, thus, be relied on in the analysis of the impact of the gender discrimination inherent in provisions of the Law of Succession Act. In addition, the paper will help in coming up with policy recommendations on how to reverse the negative effects of these provisions on the plight of women in Kenya.

⁵² *Ibid.*

⁵³ *Ibid.*

From the analysis of the various literature materials, the following gaps are identifiable which the present study shall seek to address;

- a. the impact of the new Constitution on the legal regime on property ownership and succession;
- b. the impact of the new Constitution in terms of the right based approach to property ownership and succession;
- c. the impact of the new land laws (Land Act and Land Registration Act) with regard to property ownership and transaction by either gender;
- d. The disconnect between the current legal regime on property ownership and succession with the current discriminatory practice.

1.7 Theoretical Framework

The present study is, in the main, theoretically grounded in feminist and positivist jurisprudence. Essentially, feminist jurisprudence represents the diversity of feminist philosophy and theory. Despite differences in approaches, feminists are united in the belief that "women are oppressed or disadvantaged in comparison with men and that their oppression is in some way illegitimate or unjustified." Feminism attacks the oppression and discrimination of women mainly by emphasizing equality of sexes on all fronts including political, economical and social sphere.⁵⁴ Feminism as a legal theory, therefore, endevours to identify and reform gendered components

⁵⁴ Wendy Harcourt, "Feminist Praxis: Women's Transnational and Place Based Struggles for Change", *GTI Paper Series No. 11*, available at: <http://www.gtinitiative.org/documents/PDFFINALS/11Feminism.pdf> (accessed on 10/02/2011).

and implications of seemingly neutral laws and practices to foster equality of men and women under the law.⁵⁵

According to feminists, male-written laws have cumulatively created a bias in the concepts of human nature, gender potential, and social arrangements.⁵⁶ This is because the structure and content of the law are male-created and serve to reinforce male values. They argue that the prevailing conception of laws project male characteristics as a "norm" and label female characteristics as deviation from the "norm." In effect, such laws merely serve to reinforce and perpetuate patriarchal power.⁵⁷

However, although feminists share common commitments to equality between men and women, feminist jurisprudence is not uniform. Feminism is not a single philosophical doctrine as within it are many interpretations of women and their oppression. Indeed, the only common string that runs among the diverse feminist philosophies is unity in their challenge of the "unfounded" belief that the difference in the biological make-up of men and women is such that one's behavior is affected by whether or not he is a woman or man.⁵⁸ According to feminists, gender is created socially, not biologically. In this regard, feminists argue that while sex determines such matters as physical appearance and reproductive capacity, it has no effect on psychological, moral, or social traits.

⁵⁵ Martha Albertson Fineman, "Feminist Legal Theory", 13(1) *Journal of Gender, Social Policy & the Law* 13 (2005) p. 14.

⁵⁶ Legal Information Institute, "Feminist jurisprudence", available at: http://topics.law.cornell.edu/wex/feminist_jurisprudence (accessed on 10/02/2011).

⁵⁷ *Supra*, note 3.

⁵⁸ *Supra*, note 4.

There are, thus, diverse schools of feminist jurisprudence. The liberal feminism marked the first wave of feminism. Liberal feminism was based on emancipatory theory in that it sought to dismantle the positive legal barriers that had denied women equal opportunity with men. In essence, although liberal feminists supported the values of liberal jurisprudence as imputed to law, they attacked the discrepancy between liberal values and legal practice, such that women are accorded parity with men. In their view, the rights of individuals as traditionally understood in a liberal society should transcend gender differences. Thus, it follows that law must be persuaded to apply these standards more rigorously in case of women or that liberal values must be revised to recognize gender as a source of social injustice. The main agenda of the liberal feminists was to seek for women genuine, as opposed to nominal, equal rights or, where their special social situation demands it, special rights.

The leading liberal feminist of her day was Susan Okin. The thrust of her theories was the demand for gender neutrality of the law as the means to the elimination of gender inequality.⁵⁹ She argued that, in order for law to apply equally to women as men, it ought to be rehabilitated to accommodate the equality of the sexes.⁶⁰

The third group of feminist jurists was a mild reaction to liberal theory in the form of cultural feminists. The cultural feminists' school of jurisprudence focuses on the differences between men and women and celebrates those differences. Carol Gilligan, the main proponent of the

⁵⁹ Almaz Zelleke, "Reconsidering Independence: Foundations of a Feminist Theory of Distributive Justice." Paper presented at the 12th BIEN Congress, Dublin, Ireland, June 20-21, 2008.

⁶⁰ Evelien Geerts, "An analysis of Susan Moller Okin's problematic approach to multiculturalism", available at: http://uu.academia.edu/eveliengeerts/Papers/379216/An_analysis_of_Susan_Moller_Okins_problematic_approach_to_multiculturalism._A_feminist_comprehensive_liberalism_gone_wrong(accessed on 10/02/2011).

theory draws attention to a contrast between an ethic of justice and rights and an ethic of care and relationship.⁶¹ She asserts that women emphasize the importance of relationships, contexts, and reconciliation of conflicting interpersonal positions, whereas men emphasize abstract principles of rights and logic. The goal of this school is to give equal recognition to women's moral voice of caring and communal values. She argues that those who view self as separate from others voice morality of justice while those who view self as connected to others voice morality of care.⁶²

Further reaction to liberal theory and development of cultural feminist theory led to the emergence in the 1980s of illiberal feminist legal theory. This theory which has come to be known as "radical feminism" urges women to renounce traditional notions of right and justice, now viewed as perpetuating male dominance. Radical feminists argue against gender neutrality proposed by liberal feminists charging that the reforms achieved by these "equality feminists" have dismantled protections beneficial to women while doing nothing to eliminate their disadvantages. They dismiss gender neutrality as insufficient on its own to eliminate gender inequality and call for recognition of gender "difference" which posits that traditional theories of right and justice ought to incorporate gender differences into their assumptions about the subject of law.⁶³

In other words, while acknowledging with liberal feminists the discrepancy between the liberal values imputed to law and law's treatment of women, radical feminists recognize the limitations of attempting to close the gap between liberal jurisprudence and legal practice either by making

⁶¹ Carol Gilligan, "Is There Now a Different Voice?" available at: <http://www.feminist.com/resources/artspeech/genwom/istherenow.html>(accessed on 10/02/2011).

⁶² See Grace Clement, *Care, Autonomy, and Justice: Feminism and the Ethic of Care* (Westview Press, 1996).

⁶³ Michèle Barrett and Anne Phillips' introduction to their edited volume *Destabilizing Theory: Contemporary Feminist Debates* (Polity Press, 1992), pp. 1-9.

law apply legal principles more scrupulously in the area of gender or by revising liberal principles. They propose that instead feminists focus on dismantling "patriarchy", that is, the male dominated social structure. Radical feminists argue that liberal jurisprudence can make no impact on law's treatment of women so long as categories, such as crime or family law, and legal concepts such as provocation or marriage, embody male norms and accordingly fail to address women's experiences. They propose the transformation of legal categories and concepts to address women's social position and experiences. In so doing, they criticize liberal principles such as neutrality of law, equality and individual autonomy for their "patriarchal" roots.⁶⁴

MacKinnon, a main protagonist of this stream asserts, "the greater the prima facie neutrality of law, the more effectively 'neutrality' works as a key mechanism for masking the male domination for example by requiring women to fit into an economic system which denies them substantive equality." Law is seen as an instrument to "change the distribution of power", which requires not equal treatment but "an asymmetrical approach that adopts the perspective of the less powerful group with the specific goal of equitable power sharing among diverse groups".⁶⁵

Essentially, radical feminist jurisprudence advocates for looking beyond goals of gender equality and related rights. Their analysis of law usually takes the form of pointing out that law as enacted and implemented by state agencies are biased against women and are in favour of men. It is also

⁶⁴ Michael Weiss and Cathy Young, "Feminist Jurisprudence: Equal Rights or Neo-Paternalism?", Cato Policy Analysis No. 256 published on June 19, 1996; available at: <http://www.cato.org/pubs/pas/pa-256.html>(accessed on 07/02/2011).

⁶⁵ Nidhi Gupta, "Success of Feminist Jurisprudence in India: A Critical Analysis from the Point of View of Implementation", available at: <http://www.dhdi.free.fr/recherches/droithomme/memoires/memoirgupta.htm> (accessed on 20/02/2011).

claimed that the creation of a 'new corpus' of rights for women ignores the ideological power of law to mask social reality and obstruct social change. In view of the demonstrated ineffectiveness of legal rights in ending oppression of women, some western feminists and legal scholars are now abandoning rights based claim altogether.⁶⁶

Indeed, given the above contentions, there is no consensus about what needs to be done. However, the differences in the arguments made by the various schools of jurisprudence merely serve to make the debate regarding women's oppression abstract and theoretical, taking it far away from reality, especially in African context. It can, thus, be argued that the feminist objections to gender equality or negative role of law are not of much relevance in developing countries like Kenya.⁶⁷

The feminist authors who point to the drawbacks of law reforms all live in societies in which women have already gained formal equality. Their concerns have shifted beyond law reforms and legal rights only after they had virtually achieved legal equality with men. Women who do not enjoy equal rights with men on areas such as divorce, maintenance, custody, guardianship and inheritance cannot realistically be expected to make demands for the autonomy to control their sexuality or the right to the inviolability of their bodies. It is the almost equal legal status of women which has enabled them to focus on alternative strategies for ending the oppression of women. They can afford to reject law reform if it no longer yields sufficient gains.⁶⁸

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

In Kenya today, however, women still do not have equal legal rights. Most women often do not have the option to step out of oppressive family situations and therefore cannot afford to ignore law reform as one of the strategies in their struggle against oppression. Thus, the feminist jurisprudence that is relevant in Africa and Kenya in particular is largely the first wave of feminism because legal equality is still the major concern.⁶⁹

As such, law cannot be rejected as a tool of reform in spite of its limitations. Nevertheless it is important to note that the demands made by the second wave feminists are not altogether absent or irrelevant in Kenya. For instance, the demands for rejecting traditional norms of femininity and sexuality and need for change in legal concepts and legal categories to deal with problems specific to women have also gained ground. The fact of the situation is that feminists in the country are trying to strike a balance between both kinds of so called waves of feminisms and law as a social reformer can neither be accepted nor rejected in its totality.⁷⁰

The present study intends to examine the role of law in perpetuation and/or elimination of discrimination against women especially in the area of inheritance and succession. It is argued that law is an important institution as it regulates, controls and in other ways pervades almost every aspect of people's lives. Indeed, law has a double significance for women – it may help in maintaining discrimination or it may modify or mitigate discrimination. The law should, therefore, be constantly reviewed to ensure that it does not play the dual role by professing on the

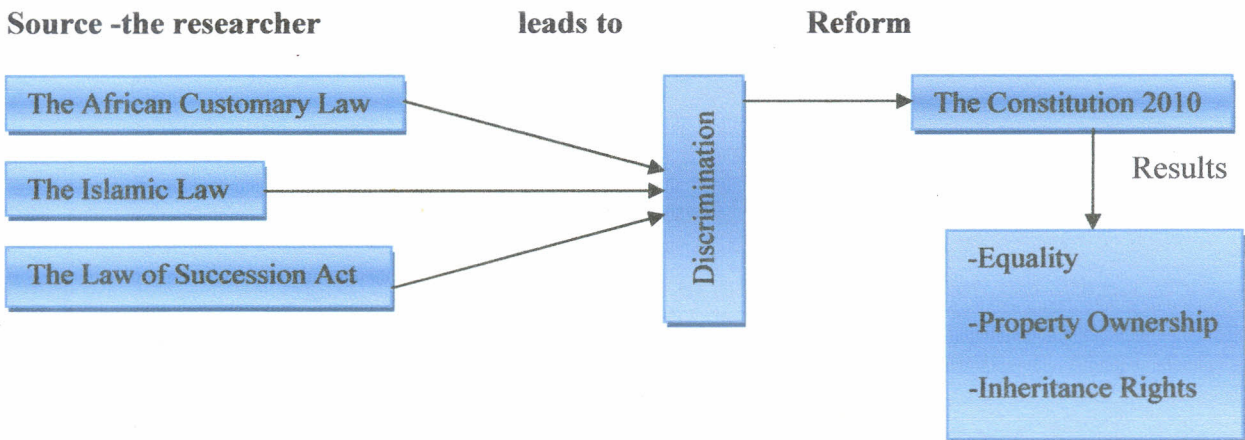
⁶⁹ *Supra*, note 13.

⁷⁰ *Supra*, note 27.

one hand the ideals of equality and dignity of individual, while tolerating blatant discrimination against women in personal laws.⁷¹

1.8 Conceptual Framework

The conceptual framework for this study may be summarized in the following diagram.



The conceptual framework of this study as represented by figure 1 above provides that the source of discrimination in the property ownership and inheritance are the three current laws (the African Customary Law, the Islamic Law and the Law of Succession Act) in terms of their textual construction and enforcement mechanisms. Accordingly, there is need to ensure that the laws are revised to conform to the Constitution as provided by Article 2 of the Constitution of Kenya, 2010. With these reforms, it is envisaged that the fruits of equality, property ownership and inheritance rights will be realized.

1.9 Research Methodology

The study adopted a desk research methodology whereby based on the hypothesis of the existence of discrimination of women on inheritance rights, the explanations for the same

⁷¹ *Supra*, note 63.

1.9 Research Methodology

The study adopted a desk research methodology whereby based on the hypothesis of the existence of discrimination of women on inheritance rights, the explanations for the same become key. This explanation can only be identified from the various literature materials and the laws of Kenya on the subject matter. As such this study was basically library oriented. The study utilized both primary and secondary sources of information. The primary sources included the Constitution of Kenya and other Acts of Parliament. Important also were global and regional treaties, charters, conventions, protocols and declarations in the field of human rights especially touching on inheritance rights of women. Textbooks, journals and articles on the subject were also of primary importance as was the case laws of respective courts. In addition, Magazines, newspaper reports and journals were also used. Some of the materials used were in raw form, which is, being unpublished. Reliance was also made on the internet and on-line libraries as secondary sources.

1.10 Limitation of the Study

The researcher anticipated a number of challenges in carrying out the study. The key one was that the research was not, realistically, able to cover all these aspects within the scope of the subject matter of the thesis. The study, therefore, analyzed a section of the provisions of the Law of Succession Act especially those touching on inheritance rights of women in Kenya. It did not review all discriminatory inheritance cultural practices practiced in Kenya but mainly highlighted a few to make a case for the need to implement the Constitution in the interpretation of Law of Succession Act and application of personal laws in succession matters. Finally, due to

time constraints, only a handful of relevant international law instruments and general principles were analyzed among these relevant and applicable to inheritance rights of women in Kenya.

1.11 Chapter Outline

This study is arranged in four chapters. An introduction on the background information into the research, including the justification, statement of the problem, definition of key concepts used in the study, theoretical framework and literature review and the methodology used is provided.

Chapter One: Law of Succession Act and Women's Inheritance in Kenya

The chapter analyses the provisions of the Law of Succession Act and customary/personal laws applicable to situations of succession and devolution where women are beneficiaries. The Chapter also analyses the jurisprudence of how the court has over time, applied the laws in inheritance in select cases involving women especially with respect to applicability of discriminatory customary laws in succession matters.

Chapter Two: Legal Framework on Inheritance Rights of Women in Kenya under New Constitution and International Law

Chapter three analyses the legal framework on inheritance rights of women in Kenya as has been provided for in the new Constitution. The application of international human rights instruments in succession matters as provided for in the new Constitution is also analyzed.

Chapter Three: The place of Courts in enhancing equality in inheritance rights in Kenya

This chapter analyzes the special jurisdiction of the courts in ensuring that equality rights to inheritance are attained.

Chapter Four: Conclusion and Recommendations

Finally, Chapter Five entails conclusion of the study as well as observations and recommendations in the form of criticism on the shortcoming of the existing legal regime and the gender discrimination problems associated with the current succession law regime in Kenya. It also offers some recommendations for changes and improvement to the legal regime on the land law and policy in order to achieve gender equality in succession in the country.

CHAPTER 2

THE CURRENT STATE OF KENYA'S DISCRIMINATORY LAWS ON INHERITANCE RIGHTS OF WOMEN

2.1 Introduction

Discrimination against women is so pervasive that it sometimes surfaces on bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst women. Inheritance laws depending on their construction and application have the potential to exclude women from inheriting the property that they had access to while their husbands or fathers were still alive.⁷² This has been worsened by the ever increasing economic decline and poverty traps.⁷³ It seems that this discrimination is so deep and systematic that it has placed women at the receiving end.⁷⁴ The patterns of inheritance and succession, based on the pluralist legislative and judicial systems in Kenya particularly under the customary law, the Islamic law and the Succession Act⁷⁵ which are major pieces of laws governing provisions are very discriminative in their application.

⁷²Cooper, E. (2008). 'Inheritance Practices and the Intergenerational Transmission of Poverty: A Literature Review and Annotated Bibliography'. CPRC Working Paper 116. Manchester, UK: Chronic Poverty Research Centre (CPRC). Available at: http://www.chronicpoverty.org/uploads/publication_files/WP116_Cooper-annotatedbiblitreview.pdf

⁷³Bird, K. and Pratt, N. with O'Neil, T. and Bolt, V. (2004). 'Fracture Points in Social Policies for Chronic Poverty Reduction'. Chronic Poverty Research Centre Working Paper 47, Overseas Development Institute Working Paper 242. London: Overseas Development Institute (ODI) and Chronic Poverty Research Centre (CPRC). Available at: <http://www.chronicpoverty.org/publications/details/fracture-points-in-social-policies-for-chronic-poverty-reduction/ss>

⁷⁴ 174th Report on "Property Rights of Women: Proposed Reforms under the Hindu Law", Law Commission of India, May 2000.

⁷⁵ Cap. 160 Laws of Kenya.

Until 1st July 1981, there were four systems of law of succession in Kenya applicable to the four different socio-ethnic groups of people in Kenya-the Bantus, the Cushitic, the Nilotes and the Europeans. These were (a) English law which was applied through several statutes, namely; the Indian Succession Act 1865, the Hindu Wills Act 1870 of India, the Probate and Administration Act 1881, the African Wills Act 1961, the Administration of Estates by Corporations Act, the Commonwealth Probate Act and the Colonial Probate Act 1892, (b) the African customary law, (c) Islamic law and (d) the Hindu customary law. The Law of Succession Act was passed with the intention of merging and consolidating all the four systems of law of succession and their support legislation into one comprehensive statute in order to give Kenya a uniform law of succession applicable to all sections of the Kenyan population. However, as shall be seen in this discourse there are exceptions to the application of the law of Succession Act which therefore still leave Kenya to be a pluralist state in the practice of the law of succession.

This section of the research shall therefore review and analyse the discrimination against women under the three legal regimes governing succession/inheritance: the customary law; the Islamic law; and the Succession Act, Cap 160 of the Laws of Kenya.

2.2 Discrimination under African Customary Law

Customary law is given legal stature in the Constitution, 2010 albeit with a proviso on its applicability.⁷⁶ The preambular text of the Constitution captures the commitment of the Kenyan

⁷⁶ Article 2(4) of the Constitution, 2010.

people to nurture and protect the well-being of communities which is the foundation of customary law based on the differing cultural backgrounds.⁷⁷

Specifically, the role of customary law within the Kenyan legal system is spelled out in section 3(2) of the Judicature Act, stating that “*African customary law*” shall govern in “*civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law....*”.⁷⁸ This proviso resonates well with the Constitution which provides that the application of traditional dispute resolution methodology, the product of customary law, shall not contravene the Bill of Rights, shall not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution, 2010.⁷⁹

In practice, however, the “repugnancy” exception to the application of customary law has rarely been invoked successfully in cases dealing with women’s equal rights. Despite the “repugnancy” exception to the application of customary law, there has been inconsistent jurisprudence in establishing how the law is applied. These inconsistencies reflect the troubling lack of clarity persistent in Kenya’s pluralist legal system.⁸⁰ Indigenous customary law developed rules of inheritance for intestacy through the traditional canon of descent, as adapted over the years to changes in the society and the rule of natural justice as applied by the courts. Intestate succession under customary law in Kenya has almost as many variations as there are ethnic groups in the

⁷⁷ Article 11 of the Constitution, 2010.

⁷⁸ The Judicature Act, (1967) Cap. 8 s. 3(2) (Kenya).

⁷⁹ Article 159(3) of the Constitution, 2010.

⁸⁰ Cooper, E. (2010). ‘Inheritance and the Intergenerational Transmission of Poverty in Africa: Policy Considerations’. Working Paper 159. Manchester, UK: Chronic Poverty.

country, and many of the variations are discriminatory in practice.⁸¹ Women's rights and the discrimination against them that limits the scope of their rights in most countries is not an accident. The causes of women's subordination and unequal gender relation are deeply rooted in history, religions, culture, legal systems, political institutions and social attitudes.⁸²

Jurisdiction over customary law matters is also specifically vested in the magistrate's court by sections 5(2) and 9(a) of the Magistrates' Courts Act.⁸³ Under these provisions the magistrate's court has powers to exercise jurisdiction in proceedings of a civil nature where the proceedings concern a claim under customary law. A 'claim under customary law' is defined in section 2 of the Magistrates' Courts Act to include a claim concerning, intestate succession and administration of intestate estates, but only to the extent that such matters are not governed by any written law, such as the Law of Succession Act. The customary law claims as set out in section 2 of the Magistrates' Courts Act relate mainly to personal law matters.

While one cannot talk of one customary law of inheritance given the fact of existence of different laws for different communities, there are striking similarities.⁸⁴ Central to the customary law is the rule of male primogeniture which is inheritance by the eldest surviving male child. This issue has been challenged as being discriminative and unfair on the grounds of age, birth and

⁸¹Reginald AkujobiOnuoha, "Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue." Available on http://www.icnl.org/research/journal/vol10iss2/art_4.htm.

⁸²ObengMireku, "Judicial Balancing of Parallel Values: Male Primogeniture, Gender Equality and Chieftaincy in South Africa."p. 6.

⁸³ Cap 10 Laws of Kenya.

⁸⁴Cotran, E., Restatement on Kenya Customary Law, Volumes 1 and 2, Sweet and Maxwell, 1969.

gender.⁸⁵ Under most Kenya's ethnic customary laws women are prohibited from owning land. This fact makes it impossible for women to inherit property of their deceased husbands.⁸⁶ Women only have customary rights to access and cultivate land, and even those rights are dependent on men.⁸⁷ Daughters could not inherit land or livestock because they remained under their mother until they got married. If they remained unmarried, they would get cultivation rights and a life interest. On death or subsequent marriage, property reverted to their father's sons. If they had children out of wedlock, they would inherit the property.⁸⁸ This is further worsened by the popular understanding among many ethnic groups that daughters will marry into other families and therefore gain a home and access to land and property through their membership in the husband's family.⁸⁹

Many inheritance disputes pertain to land. The 1981 Magistrate's Jurisdiction (Amendment) Act⁹⁰ removed jurisdiction of certain land disputes from magistrates transferring it to panel of elders who apply customary law. Apart from the patriarchal nature of customary law, the panel in most cases consisted of men. Elders refer to persons in the community or communities to which the parties by whom the issue is raised belong, and who are recognised by custom in the community or communities as being by virtue of age, experience or otherwise competent to

⁸⁵Obeng Mireku, "Judicial Balancing of Parallel Values: Male Primogeniture, Gender Equality and Chieftaincy in South Africa."

⁸⁶CEDAW Report 2006, *supra* note 3, at para. 7; Interview with county clerk, Laikipia County Council, in Nanyuki, Kenya (Apr. 3, 2008); Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

⁸⁷AkinyiNzioki, The Effects of Land Tenure on Women's Access and Control of Land in Kenya, in *Cultural Transformation and Human Rights in Africa* 218, 228 (Abdullahi A. An-Na'im ed., 2002).

⁸⁸*Supra*, Foot Note 10.

⁸⁹Government of Kenya (GOK) (2006) Initial Report of States Parties to the Committee on Economic, Social and Cultural Rights (2007), U.N. Doc. E/C.12/KEN/1 (Sept. 7, 2006).

⁹⁰Cap 10 of the Laws of Kenya.

resolve issues between the parties which in most instances refer to men. This is discriminatory on women do not get representation in the composition of the tribunals.⁹¹

The other challenge faced by women is the issue of intra-women discrimination. The local contexts of customary governance and community dynamics, including the attitudes and roles of specific local leaders, to understand the kinds of opportunities and challenges individuals face in securing their inheritance have added pain to the situation. In a study on land rights in western Kenya⁹² it was found that individual women's specific qualities are perceived to be significant to women's vulnerability to land expropriation. A childless widow, and more specifically a widow who does not have a son or sons, is locally perceived as particularly vulnerable in retaining a claim to family land under customary law. A woman of 'bad character', which might include accusations of practicing witchcraft, being sexually promiscuous, taking alcohol or being rude or stubborn, particularly towards in-laws, is also perceived as vulnerable. A community study in western Kenya also found that young widows are more vulnerable than older widows in terms of land tenure security, probably because young widows had less time to secure their relationships among their in-laws.⁹³

Woman inheritance has also brought immense suffering among the women folks in Kenya. Upon her husband's death, a widow might be "inherited" by a male relative of her deceased spouse, thus becoming his wife and property along with the land and tangible property from her husband's estate. This custom arose as a way to protect widows and ensure their maintenance

⁹¹Kameri-Mbote, P. (2002). Gender Dimensions of Law, Colonialism and Inheritance in East Africa. International Environmental Law Research Centre. Available at: <http://www.ielrc.org/content/a0205.pdf>

⁹²Henrysson, E. and Joireman.S. (2009). 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii'. *Kenya, Law & Society Review*, 43(1): 39-60.

⁹³Aliber, M., et al. (2004). *The Impact of HIV/Aids on Land Rights: Case Studies from Kenya*. Cape Town: Human Sciences Research Council.

and survival upon the death of their husband who were perceived as providers. In the era of HIV/AIDS, however, the

custom allows further spread of the virus. In addition to “inheritance,” a widow is often first ritually “cleansed” through unprotected sex with a “*jater*,” a man paid to rid widows of evil spirits through the act of intercourse. A woman who refuses inheritance faces eviction or worse consequences. Mildred Ngesa, a Nairobi journalist, explains: “*There are one or two or three cases of some few brave women who refuse to be inherited, and because they refuse to be inherited, they are ostracized. The clan throws them out with the children, and they have nothing.*” A widow must often choose between “inheritance” by a male relative of her deceased husband or eviction. Upon the death of her husband, a widow sometimes has the choice of being inherited by a brother or male relative of her deceased husband, continuing to reside in the matrimonial home without entering into such a union (this is usually the case if a widow is past child-bearing age), or returning home to her father’s home. Although the original purpose of these customs was to protect and provide for widows and their children, they have since been perverted, devolving into the harmful practices of widow eviction, forced inheritance, and forced ritual cleansing.⁹⁴

The fact of marriage inhibits the property management and access among women in African Customary Laws. In the first place, for a widow to be entitled to property, she must be recognized as such, having gone through a marriage and got acceptance into the family or the community. The concept of marriage is greatly influenced by cultural practices and attitudes of the society in question, religion and modern practices. Among many Kenyan ethnic groups bride

⁹⁴For example in the Luo community. See Cotran, *Restatement of African Law: Kenya*, Vol. 2: Succession, at 167 (1969).

price ranked as the most important determinant of marriage. In fact among the Kikuyu, where bride price is not paid, a marriage is not recognized as such. This may jeopardize the position of the children of such marriage in regard to inheritance.⁹⁵ The Law of Succession Act caters for this by including a wide concept of marriage to include even former wives and cohabitantes.

The illustration of the discriminative tendencies of customary law is best captured by the now famous case of S.M Otieno and Wambui Otieno. This is a case that commenced in 1987 in which Wambui Otieno was taken to court by her dead husband's family in a sensational contest over the burial of his remains. The case culminated in a series of court cases, involving twelve separate court actions and concluding in May 1987 with a Court of Appeal ruling, awarded the custody of Otieno's remains to his clansmen for burial in his birthplace in Western Kenya according to Luo custom. The case exposed the dynamic nature of custom and tradition.⁹⁶ The case further exposed how the UmiraKager clan demonstrated through its actions the importance placed on the control of women. It advocated a customary funerary procedure and set of behaviours for widows designed to put Otieno's family and resources at the disposition of the patrilineage however, while the clan was able to win his body, they did not gain possession of his estate, as many of their pronouncements indicated they hoped to do.⁹⁷ Upon a prominent male elder's death, a Luo lineage would expect the resources of his estate to be redistributed within the lineage and the widow to acquiesce in the decisions of her brothers in law and sons.⁹⁸ In deed

⁹⁵NjeriKaruru: Property Inheritance Patterns in relation to Gender. A study of some communities in Kenya, E.A. Regional Symposium on Common Property Resource Management. Kampala 1996.

⁹⁶ Patricia Stamp, *Technology, Gender and Power in Africa* (Ottawa: International Development Research Center, 1989), 100-103.

⁹⁷ Patricia Stamp, "Burying Otieno: the politics of gender and ethnicity in Kenya," (Ottawa: International Development Research Center, 1991), 817.

⁹⁸Ibid.

Otieno's death represented too important a material opportunity for the lineage to pass up. A significant aspect of the clan's court challenge to Wambui's burial plans was its effort to gain control of Otieno's estate. Umira Kager's challenge to Wambui's appointment as sole executor of the estate was eventually dropped, but the clan's demurral was not the show of magnanimity that the press called it but rather the patrilineage was prevented from claiming the estate because all property had been registered jointly in Wambui and Otieno's names.⁹⁹

2.3 Discrimination under the Islamic Law

As is the case with African Customary Law, the root of the application of Islamic Law in Kenya is the Constitution of Kenya. Islamic Law is given Constitutional weight through the establishment of Kadhi's courts¹⁰⁰ with the jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.¹⁰¹ The bedrock of the establishment of Kadhi's courts flows from the Bill of Rights. Under the Constitution, 2010, every person has the right to freedom of conscience, religion, thought, belief and opinion.¹⁰²

It is envisaged under the Constitution, 2010 for Parliament to enact a law governing the application of Islamic personal law.¹⁰³ In the absence of such a law though, the Constitution

⁹⁹ Weekly Review (January 30, 1987),9.

¹⁰⁰ Article 169(1)(b) of the Constitution, 2010.

¹⁰¹ Article 170(5) of the Constitution, 2010.

¹⁰² Article 32(1) of the Constitution, 2010.

¹⁰³ Article 170(3) of the Constitution, 2010.

provides for the application of old laws with the necessary modification and adaptation.¹⁰⁴

Accordingly, the applicable law would be the Koran.

In 1990, an amendment to the Law of Succession Act¹⁰⁵ exempted Muslims from the substantive provisions of the Law of Succession Act – those relating to testamentary or intestate succession, thereby subjecting the estate of a deceased Muslim exclusively to Islamic Law. The Koran recognizes both testate and intestate succession. The Koran provides discriminative and unproportional division of the estate. Only a third of a deceased's estate can be dealt with by will. The remaining two thirds is distributed under intestacy rules laid down in the Koran which fixes shares allocated to persons recognized as heirs. The effect of these rules is that while a person can dispose of his property as he wills in his or her lifetime, he cannot by a will reduce or enlarge the shares of those who are permitted by law to inherit hence permanent discrimination.¹⁰⁶

The Koran provides that during succession, males are to receive double the property of females or equal kinship category and the widow to receive one quarter of a husband's estate. When a man dies leaving a wife and no children, the wife inherits one quarter of the net estate and if there are children, she takes one eighth. If it is a polygamous family the wives share the quarter or eighth depending whether there are children.¹⁰⁷ This formula is not consistent with the Succession Act which states equal division among sons and daughters. Recognition of the

¹⁰⁴ Section 7 of the sixth schedule to the Constitution, 2010.

¹⁰⁵ Statute Law (Miscellaneous Amendment) Act (No 2), 1990 (Act No 21 of 1990). Muslims are subject only to Islamic laws on succession.

¹⁰⁶ See case of *Ranee Khajoorunnissa v. Mussamut Roushan Jehan* (1876) L.R. 31. A. 291).

¹⁰⁷ Sura 4 Verse 11 of the Holy Koran.

Kadhis courts in the Constitution which leaves the authority of such inheritance divisions in place causes potential dispute because of its male dominated composition.¹⁰⁸

2.4 Discrimination under the Law of Succession Act

The Law of Succession Act was seen in its enactment as an attempt towards eliminating all forms of discrimination against women in the inheritance of property of their deceased husbands. Provisions of the Act that benefit women include Section 38, which states that in the absence of a will, male and female children shall inherit from their parents equally.¹⁰⁹ Section 2(1) of the Act states that “*the Act constitutes the law of Kenya in respect of and is of universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act.*” Section 99 of the Act repeals all the statutes on the law of succession in force before 1st July 1981, and these are listed in the 8th schedule to the Act. The Act has in its overriding objective, the elimination of discrimination and the equal inheritance rights for women and men, girls and boys whether in testate or intestate succession.

However, this has not been the case both in the text of the Act and the application of the Act itself. The discrimination under the Act is as a result of the interplay of several factors that had to be incorporated during the debate in the law. For example, the Law of Succession Act embodies the African customary law of succession in order to provide the Kenyan with a statute that translates his customary beliefs and practices into law. The Act embraces certain concepts which are purely African in nature and which are meant to reflect the ‘Kenyan-ness’ of the statute. There is, for example, reference to ‘wives’ and ‘co-wives’ and distant relatives in relation to the

¹⁰⁸ Supra Note 6.

¹⁰⁹ Law of Succession Act, (1981) Cap.160 s.38 (Kenya).

provisions pertaining to dependants.¹¹⁰ This is recognition of the concepts of polygamy and the extended family respectively, all common in traditional African communities.

The Law of Succession Act allows the application of African customary law in a number of instances. The Law of Succession Act has also embodied the African Customary Law of Succession with the intention of providing Kenyans with a statute that translates the Kenyan customary beliefs and practices into law. More specifically, the Law of Succession Act allows for the application of African Customary Law in the following instances: Estates of persons dying before the application of the Law of Succession Act; Testamentary dispositions in accordance with African Customary Law; and The application of African Customary Law by Section 33 in the event of intestacy. Section 2(2) of the Law of Succession Act provides that the estates of persons dying before the commencement of the Act are subject to the written laws and customs applying at the date of death.¹¹¹ Prior to 1981, the intestate estates of deceased Africans were exclusively subject to African customary law, except for estates of those Africans who had made wills under the African Wills Act. At section 5(1), a testator can dispose of his property by reference to any secular or religious law. This would allow the testator to make a will, which provides that the estate should devolve in accordance with a particular customary law. For example, he may provide for devolution according to Kamba customary law. In such case, the court has to ascertain the requirements of the particular customary law. Section 32 and 33 of the Law of Succession Act exempts certain classes of property from the intestacy provisions in the Act. Section 33 of the Act provides as follows:

“The law applicable to the distribution on intestacy of the categories of property specified in

¹¹⁰ See section 29 of the Law of Succession Act

¹¹¹ See *In the Matter of the Estate of Gathererie Muturi (deceased)* Nairobi HCSC No. 2170 of 1999 (Koome J) and *Mbuthi vs. Mbuthi* ((1976) KLR 120 (Harris J)).

Section 32 shall be the law or custom applicable to the deceased's community or tribe as the case may be." Section 32 on the other hand provides as follows: "The provisions of this Part shall not apply to –agricultural land and crops thereon; or livestock, situated in such areas as the Minister may, by notice in the Gazette, specify."

The administration of estates, which are the subject of sections 32 and 33, is not under Part VII of the Law of Succession Act, relating to administration of estates, since section 44(1) of the Law of Succession Act provides that Part VII of the Act does not apply to intestate estates the subject of section 32 of the Act. The provisions of the Magistrates' Courts Act fill the gap. The estates so exempted from the provisions of the Law of Succession Act are administered in accordance with African customary law. Waki JA in *Mary Rono vs. Jane Rono and another Eldoret*¹¹² said that sections 32 and 33 of the Law of Succession Act make provision for the application of customary law in respect of agricultural land and the crops on such land. The application of the law or custom is, however, limited to such areas as the Minister may by gazette specify. By Legal Notice No. 94 of 1981 the Minister specified the various districts to which African customary law should apply.¹¹³ Similarly Rawal J in *In the Matter of the Estate of Mwaura Gathari (deceased)*¹¹⁴ found that the Law of Succession Act applies customary law to the intestate estate through section 33.¹¹⁵ The discriminative effect comes in various forms in these instances. The problem would arise for example under section 33 of the Act where the properties-agricultural land and livestock may be the only property owned by the deceased

¹¹²CACA No. 66 of 2002

¹¹³ The Districts include Wajir, West Pokot, Turkana, Tana River, Kajiado, Garissa, Marsabit, Isiolo, Mandera and Lamu.

¹¹⁴Nairobi HCSC No. 1678 of 1999

¹¹⁵ See also *In the Matter of the Estate of Benson Ndirangu Mathenge (deceased)* Nakuru HCSC No. 231 of 1998 (Ondeyo J).

person. This means that women in those areas cannot benefit from or seek protection under the provisions on intestacy which if properly implemented could elevate the status of women in Kenya. The exclusion of the law of succession to these areas amounts to legitimisation of discrimination against women as most Kenyan society is patriarchal. This discriminative trend was a subject of a court dispute in the case of Martha Gukiya Thui & Another v. Kibugi & another.¹¹⁶ This was an appeal from the decision of the superior court (Okwengu J.) given on 25th July, 2003, confirming the grant of letters of administration intestate issued to Kibugi Hingi and Warega Hingi for the estate of Wanuna Hingi alias Justus Wanuna who died on 21st May 1991. He was survived by two daughters, Martha Gukiya Thui and Margaret Wangui Kingori, the appellants. Those who were issued with the letters of administration were brothers of the deceased, the Respondents in the appeal. In her judgement Okwengu J. Held as follows:-

“Both the protestors (the appellants) being married they would not be entitled to inherit the deceased’s land-whether bought by the deceased or family land. The deceased not having been survived by any sons or unmarried daughters, his rightful heirs are his two brothers as the two administrators who survived him. The widow would not be entitled to inherit the deceased’s property as her husband did not survive the deceased....”

The effect of the decision was that both appellants though children of the deceased did not get any share of their father’s estate. Though the decision was overturned in appeal, it shows discriminatory tendencies and also shows the extent to which courts of law have misapplied customary law and misinterpreted the law of Succession Act and its applicability. In an appeal the central issue was whether the trial judge was right in applying the customary law to disinherit the appellants merely because they were married daughters. In their judgment the appellate court

¹¹⁶ (2010) e KLR.

affirmed that the application of the law of intestacy is excluded only in respect of agricultural land which falls within such areas as have been gazetted by the Minister and whether or not a particular agricultural land falls outside the provisions of Part V is a question of fact. It also stated that parliament did not intend that customary law applies to agricultural land, on intestacy, regardless of the result its application will give rise to.¹¹⁷

Sections 35 and 36, which guarantee the surviving spouse a life interest in the whole residue of the net intestate estate, thus protecting against the practice of widow eviction is important. However, that life interest guaranteed is terminable upon remarriage if the surviving spouse is a widow. Widowers, on the other hand, do not lose their life interest regardless of whether or not they remarry. A widow or widower who has a life interest cannot exercise the freedom of managing the property without the consent of the court.¹¹⁸

In the case of an intestate who dies and leaves behind no spouse or child, that person's property passes first to the father, and then in the case that there is no father, it devolves to the mother. Common misapplication of the Law of Succession further disadvantages women. The law is meant to supersede customary law except in cases of livestock, agricultural land, or crops located in exempted areas of land that have been specified in the Gazette, but in practice, it is applied much less often, especially in rural areas. This is because rural communities "remain unaware of statutory laws relating to property" and are instead "inclined to use customary laws in matters of inheritance." The misapplication of customary law is not limited to the uninformed. A justice in

¹¹⁷ Section 3(2) of the Judicature Act which provides that, "the High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in Civil cases in which one or more of the parties is subject to it or affected by it, so far as it is practicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice..."

¹¹⁸ Section 37 of the Law of Succession Act, Cap 160 of the Laws of Kenya.

Kenya's highest court, the Court of Appeal, stated, "*The Law of Succession Act can't apply [to rural land in general] because women are supposed to be married and go away.*"¹¹⁹ Widows also encounter difficulties inheriting property because of the Registered Land Act. The Act makes it highly unlikely that any of the marital property will be registered under a woman's name when her husband dies, giving greater weight to her in-laws' argument that she ought to receive very little, if any, of the marital property upon her husband's death. The negative impact of this common scenario would be lessened if the Law of Succession, which grants the surviving spouse a life interest in the estate, were enforced. There is no provision for additional protection of the property rights of spouses who were married for longer periods and contributed more towards accumulated property.

2.5 Conclusion

Inheritance is a mode of transmission of property that in most cases has followed the male line. Women in Kenya as has been discussed have been historically dispossessed of ownership of property and the widespread practice of inheritance by males ensures that women continue to be practically excluded from acquiring and controlling property. Widows do not exercise rights over management, disposal or alienation of property due to communal authority of the clan and the moral regard to the beneficial interests of the children. Inheritance however remains as one of the major ways by which persons acquire rights to property and it is therefore a significant area of concern since its mechanics affect the real lived experiences of women. The highlighting of the discriminatory practices as embodied in the various laws will go a long way in providing a fertile knowledge for a more comprehensive law that will not repeat these same practices. As more

¹¹⁹Human Rights Watch interview with Justice Richard Otieno Kwach, Justice, Kenya Court of Appeal, in Nairobi, Kenya (November 7, 2002).

women (daughters and widows) acquire property through - inheritance from their parents as well as from their husbands, they also acquire the power to dispose of it. This provides the key to reversing women's historical dispossession and their regaining real authority to manage and control property in the region.

CHAPTER THREE

THE PLACE OF COURTS IN ENHANCING EQUALITY IN INHERITANCE RIGHTS IN KENYA

3.1 Introduction

Discussions on previous chapters have shown that women's inheritance rights are affected by discriminative policies, practices and laws in our country. The new Constitution, 2010 has however, come in to outlaw discrimination unless justified depending on the circumstances of the case. Freedom against discrimination is therefore provided as a right in Kenya. Of critical additional issue is the fact of incorporation of the international laws as forming parts of the laws of Kenya.

This chapter therefore analyzes the role of courts in promoting equality in inheritance of property rights in Kenya. In this research, the scope of the role of courts in this instant shall be a four pronged: that of the traditional declaratory order of invalidity; that of development of the law; that of an international law friendly approach; and that of Negative and Positive Obligations-the duty to respect, protect, promote and fulfill.

3.2 Declaratory order of invalidity

Akin to any other order, invalidation of a law is a matter of jurisdiction which must flow from the Constitution or the law itself. In the Kenya Supreme Court decision in **Samuel Kamau Macharia & Anor vs Kenya Commercial Bank Limited & 2 Others**¹²⁰ the Supreme Court held that;

¹²⁰ Petition No.2 of 2012

“A Court's jurisdiction flows from the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents ... that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. Where the Constitution exhaustively provides for the jurisdiction, of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.”

In this instance, the jurisdiction of the Court to declare a law invalid flows from the Constitution, 2010 under several Articles. First, under the supremacy clause of the Constitution, 2010, the Courts are enjoined to invalidate any law to the extent of its inconsistent with the Constitution.¹²¹

That part of the Constitution emphasizes on the need for customary law to be consistent with the Constitution and accordingly shall be declared invalid to the extent of its inconsistency. The consideration of customary law in terms of its use in dispute resolution mechanisms is further mentioned under the chapter of exercise of judicial authority.¹²² The Constitution provides that traditional disputes resolution mechanisms shall not be used in a way that- contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

¹²¹ Article 2(4) of the Constitution, 2010.

¹²² Chapter Ten, Part 1 of the Constitution, 2010.

Secondly, the jurisdiction of the Court to invalidate a law is anchored as part of the jurisdiction of the High Court.¹²³ Under this, the High Court is given jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. A harmonized reading of this constitutional provision with Article 23 of the Constitution points to the exclusive jurisdiction of the High Court in such matter unless a specific legislation has been enacted by parliament to confer such a jurisdiction to a lower court.¹²⁴

In particular, Article 23(2) of the Constitution provides that;

“Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

Thirdly, in terms of the reliefs that the High Court can grant, the Constitution provides for inter alia, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights¹²⁵ and is not justified as a reasonable limitation of the right in issue.¹²⁶

Therefore, on a strict application of the concept of invalidating a law, High Courts can invalidate the highlighted provisions of the customary law, the Islamic Law and the Law of Succession Act which it finds discriminatory. In deed the Constitution provides that the constitution is the

¹²³ Article 165 (3) (b) of the Constitution, 2010.

¹²⁴ Article 23(1) of the Constitution, 2010.

¹²⁵ Article 23(3)(d) of the Constitution, 2010.

¹²⁶ Article 24 of the Constitution, 2010.

supreme law of the Republic of Kenya and binds all persons and all state organs at both levels of government.¹²⁷ The state organs include courts of law. The Constitution provides for equality and freedom from discrimination. It provides that every person is equal before the law and has the right to equal protection and equal benefits of the law.¹²⁸ It defines equality to include the full and equal enjoyment of all rights and fundamental freedoms.¹²⁹ The Constitution features a Bill of Rights which has a rather expanded list of fundamental rights and freedoms which responds to the specific needs of women.¹³⁰ The constitution exhorts public institutions and agencies to avoid taking measures that discriminate against women and girls.¹³¹ It also sets up key institutions to oversee the implementation of the new gender responsive framework including a Gender Commission. The Bill of Rights is very clear on its prohibition of discriminative acts and decisions¹³² and further provides that “every person is equal before the law and has the right to equal protection and equal benefit of the law.”¹³³ Equality includes “the full and equal enjoyment of all rights and fundamental freedoms.” Further, for avoidance of doubt, the constitution provides that: “Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.”¹³⁴

¹²⁷ Article 2(1) of the Constitution, 2010.

¹²⁸ Article 27(1) of the Constitution, 2010

¹²⁹ Article 27(2) of the Constitution, 2010

¹³⁰ Constitution of Kenya, Chapter 4.

¹³¹ *Ibid.*, section 27.

¹³² *Ibid.*

¹³³ *Ibid.*, section 27(1).

¹³⁴ *Ibid.*, section 27(3).

The constitution also bars discrimination in the private sphere including the family.¹³⁵ The ban on discrimination extends to acts, laws, decisions and policies that are either themselves discriminatory or otherwise produce discriminative consequences when applied. Thus the ambit of activities transcends legal provisions and will capture the day to day public and private decisions. Article 20(1) specifically provides that “The Bill of Rights applies to all law and binds all State organs and all persons.”

With respect to civil and political rights, Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected. Dignity is defined as the quality or state of being worthy of esteem or respect.¹³⁶ Dignity has to do with a person’s self-worth and how they feel about themselves. To treat someone with dignity means to respect that person as a human being regardless of their situation. Further, the constitution in Article 2(4) makes it clear that any law including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency. This clause read together with Article 28 guarantees that any customary law that is not consistent with the human dignity of women is void.

Even though the Constitution recognizes that every person has a right to use the language, and to participate in the cultural life, of the person’s choice¹³⁷ and also that a person belonging to a cultural or linguistic community has the right, with other members of that community to enjoy the person’s culture and use the person’s language or to form, join and maintain cultural and linguistic associations and other organs of civil society¹³⁸, it equally limits its application. It provides that a person shall not compel another person to perform, observe or undergo any

¹³⁵ *Ibid.*, section 27(5).

¹³⁶ *The American Heritage Dictionary of the English Language* 507 (4th ed. 2000).

¹³⁷ Article 44(1) of the Constitution, 2010.

¹³⁸ Article 44(2) of the Constitution, 2010.

cultural practice or rite.¹³⁹ This Constitutional provision is of particular importance especially because of the historical fact of culture having been abused to discriminate upon women especially on the issue of inheritance. This Constitutional provision resonates well with the Judicature Act which provides that the application of customary law which is the product of culture is void to the extent of its being repugnant to justice.¹⁴⁰

The new constitution also provides for the right to marry. Article 45 (2) provides that “every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.” Further, Article 45(3) guarantees the equality of parties providing that parties to marriage are entitled to equal rights. This implies that any provision of the law that accords an advantage to one spouse is void to the extent that it is inconsistent with the constitution. The provisions of the Law of Succession Act such as section 36 of the Law of Succession Act are now obsolete. The section provides that if the surviving spouse is a woman then if she remarries, then the life interest in her husband’s property ends. There is no such termination if the surviving spouse is a man and remarries hence the section is directly discriminatory against women.¹⁴¹

The Constitution establishes the Kenya National Human Rights and Equality Commission to ensure compliance and observance of the human rights including Women’s rights.¹⁴² It is important to read the Article on women’s rights with Article 24 of the Constitution which provides for limitation of the rights and freedoms. The Article provides that the limitation should be based on reasonable and justifiable grounds considering the nature and importance of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any

¹³⁹ Article 44(3) of the Constitution, 2010.

¹⁴⁰ Section 3 of the Judicature Act, Chapter 8 of the Laws of Kenya.

¹⁴¹ Clearly, this amounts to “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by ... sex....” See section 27(4) of the new Constitution.

¹⁴² Article 59 of the Constitution, 2010.

individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. The justifiable reason is a matter of fact and evidence which should be based on a case to case basis. As such this provision is not a blanket limitation.

Courts in exercise of their jurisdiction are guided by several principles including: justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution; justice shall be administered without undue regard to technicalities; and the purpose and principles of the constitution to be protected and promoted.¹⁴³

In order therefore to ensure access to justice since the number of courts is limited, the Constitution provides that parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.¹⁴⁴

3.3 Development of the Law

One of the transformative characters of the new constitution is on the power of the courts to develop the law. However, the capacity of courts to exercise this mandate and evolve a coherent and principled approach to the interpretation of the Constitution is absolutely essential for the

¹⁴³ Article 159(2) of the Constitution,2010

¹⁴⁴ Article 23(2) of the Constitution,2010

legitimacy of constitutional democracy.¹⁴⁵ Decisions of courts cannot be *ad hoc* but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authority that apply to the instant fact situation.¹⁴⁶

In deed the Constitution requires Courts and other relevant authorities, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.¹⁴⁷ The Constitution provides that in applying a Bill of Right, the Court shall develop the law to the extent that it does not give effect to a right or fundamental freedom.¹⁴⁸ This is given effect through the reading in and reading out clauses.

The Constitution, 2010 provides thus;

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the constitution.”¹⁴⁹

¹⁴⁵ Githu Muigai, Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, East African Law Journal, Vol. 1 2004, P. 1

¹⁴⁶ See Wechsler, Towards Neutral Principles of Constitutional Law, 73 Harvard Law Review, 1 (1959). See also Richards D.A.J., Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication, 11 Georgia Law Review 1069 (1977)

¹⁴⁷ Article 20(4) of the Constitution, 2010.

¹⁴⁸ Article 20(3)(a) of the Constitution, 2010.

¹⁴⁹ Section 7 of the sixth schedule of the Constitution, 2010.

The application of this right thus can be given effect by courts that upon asserting right and declaring a particular law unconstitutional can proceed to insert necessary amendments without altering the intention of the legislature.

3.4 The international law friendly approach

The Constitution provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.¹⁵⁰ The first major decision by the courts was in the case of *Re Zipporah Wambui Mathara*¹⁵¹ where the court held that “principally I agree with the counsel for the debtor that by virtue of the provisions of Article 2(6) of the Constitution of Kenya 2010, international treaties, and conventions that Kenya has ratified are imparted as part of the sources of the Kenyan law.” Further, Justice Njagi in the case of *Diamond Trust Kenya Limited v. Daniel Mwema Mulwa*¹⁵² while declining to express a position on the application of international law said that while the Constitution is clear that international law is applicable in Kenya, it is the relationship between the international law instruments that Kenya has ratified and legislation that lacks clarity hence the dilemma unless resolved by a specific legislation.

More recently, Justice Majanja in the landmark decision in the case of *Beatrice Wanjiru and Anor v. Hon. Attorney General and Anor*¹⁵³ seems to have settled the matter. He held that the use of the phrase “under this Constitution” means that the international conventions and treaties

¹⁵⁰ Article 2(5) and (6) of the Constitution.

¹⁵¹ Milimani Bankruptcy Cause No. 19 of 2010(Unreported).

¹⁵² Milimani HCCC No. 70 of 2012(unreported)

¹⁵³ Milimani HCPT No. 190 of 2011

are subordinate to and ought to be in compliance with the Constitution. His reasoning was buttressed by the fact that Article 1 of the Constitution places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of the constitutional setup. He said that the provisions under the Constitution should not be taken as creating a hierarchy of law akin to the Judicature Act, but must be seen in the light of the historical application of international law where there was reluctance by the courts to rely on international instruments even those that Kenya had ratified in order to enrich and enhance the enjoyment of human rights.

There is no shortage of international human rights agreements and national constitutions specifying that women and men should have equal rights to access, own, control, and inherit land, housing and other property. Recent international treaties and conferences have emphasized the importance of women's rights and gender equality. The international community has a duty to enforce women's inheritance rights. International human rights treaties protect women's inheritance rights, and, therefore, each party to those treaties has a right to enforce them. Where denial of women's inheritance rights is willful, those treaties oblige party countries to affirmatively defend the rights. When countries fail to do so, the international community has a duty to intervene. Generally, a right is international if it is either customary international law, which binds all states, or if a country undertakes to protect the right by ratifying treaties that include promises to do so. At this point, women's inheritance rights do not rise to the level of

customary international law.¹⁵⁴ However, most countries have a treaty obligation to protect the right. Several widely ratified Conventions protect the economic and property rights of women, particularly the rights of women to ownership of property acquired during marriage.¹⁵⁵ The Universal Declaration of Human Rights, the International Convention on Economic Social and Cultural Rights (ICESCR)¹⁵⁶, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the African Women's Protocol all affirm the rights of women to an adequate standard of living and the right to own property. The conventions and their interpretation encourage governments to urgently prohibit and change laws, policies and customs

¹⁵⁴ In order to rise to the level of customary international law, a practice (in this case, the protection or implementation of a right to inheritance) must be both a widespread and consistent practice of states and followed by them out of a sense of legal obligation. Typically, a rule of customary international law does not need to have absolute consensus in order to be a rule of international law. In the case of women's inheritance rights, however, the "widespread" trend, at least in LDCs seems to be one of either ignoring the right or subordinating the theoretical right to social custom and traditional legal systems for inheritance. The very same failure of states to implement women's inheritance rights—either de jure or de facto—which makes the right of inheritance worth defending, more or less defeats the "widespread and consistent practice" element of CIL. Simply put, too many countries fail to protect the right of inheritance for the right to be clear-cut customary international law.

¹⁵⁵ See Manisuli Ssenyonjo, *Women's Rights to Equality and Non-discrimination: Discriminator Family Legislation in Uganda and the Role of Uganda's Constitutional Court*, 21 INT'L J.L. POL'Y & FAM. 341, 342 (2007).

¹⁵⁶ International Covenant on Economic, Cultural, and Social Rights (ICESCR), G.A. Res. 2200A (XXI), arts. 10(1), U.N.

GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), Preamble, available at <http://www2.ohchr.org/english/law/cescr.htm>.

that directly or indirectly prevent women from owning and inheriting land, property and housing.¹⁵⁷

In essence the above discussions have emphasized the applicability of international law as part of laws in Kenya and therefore Kenyans at large should not be afraid to utilize them in protecting and promoting women's rights to equal treatment in inheritance matters.

3.5 Negative and Positive Obligations-the duty to observe, respect, protect, promote and fulfill

The Constitution provides that it is a fundamental duty of the State and every State Organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.¹⁵⁸

The duty to respect essentially entails negative state action, requiring of the State not to interfere unduly. The duties to protect, promote, and fulfill places a positive duty on the State and may require positive action from the courts.¹⁵⁹ On a primary level, the duty to *respect* requires negative state action and the Courts will only expect the State not to unjustly interfere with a person's fundamental rights.¹⁶⁰ On a secondary level, all fundamental rights require the State to

¹⁵⁷ World Bank (2003) Gender Equality & the Millennium Development Goals Gender and Development Group, World Bank.

¹⁵⁸ Article 21(1) of the Constitution, 2010.

¹⁵⁹ K O'Regan, "Introducing Socio-economic Rights" (1999) *Economic and Social Rights Review* 2

¹⁶⁰ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights para II para 6; O'Regan, above, 2. However, positive action may be required where interference with a fundamental right has taken place: sufficient remedies should be provided by the State to deal with such interference. See also *Ex parte Chairman of the*

protect citizens from political, economic and social interference with their stated rights.¹⁶¹ It places a positive obligation on the State not to interfere in the fundamental rights of its citizens.

3.6 Conclusion

To the Kenyans, human rights defenders, the civil society, the government and the courts, this chapter has been an eye opener to new rejuvenated approach in litigating against the harsh, backward and discriminatory treatment against women in invoking their entitlement through inheritance of property. In deed the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. It delegates the sovereign power to among others the judiciary and independent tribunals which are to observe strictly the constitutional principles and the Bill of Right.

Having reviewed the role of courts in promoting equality in property ownership and inheritance, it is imperative though to stress that regardless of the kind of remedy adopted by the courts, the choice must be value loaded and justified in a democratic society. This goes also to the limitation of rights which must be proportional in the circumstances.¹⁶² In deed the Constitution provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individual communities and to promote social justice and the realization of the potential of human beings.¹⁶³

Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996 (1996) (4) SA 744 (CC) para 20.

¹⁶¹ Ibid.

¹⁶² Article 24 of the Constitution, 2010.

¹⁶³ Article 19(2) of the Constitution, 2010.

CHAPTER FOUR

CONSTITUTIONALITY AND APPLICABILITY OF THE LAW OF SUCCESSION ACT UNDER THE NEW CONSTITUTION

4.1 Introduction

Discussions on previous chapters have shown that women's inheritance rights are affected by discriminative policies, practices and laws in our country. The new Constitution has however, come in to outlaw discrimination unless justified depending on the circumstances of the case. Freedom against discrimination is therefore provided as a right in Kenya. Of critical additional issue is the fact of incorporation of the international laws as forming parts of the laws of Kenya. This chapter therefore analyzes the impact of the two concepts in terms of the court's applicability of freedom against discrimination and the place of international law vis aviz the constitutional provision. On strict application of the two concepts, courts can invalidate the Succession Act provision which it finds discriminatory.

The research proceeds on assumption that there is need for someone to move to court to invalidate the various unconstitutional provisions in the law of Succession Act based on inheritance rights. In deed the Constitution provides that the constitution is the supreme law of the Republic of Kenya and binds all persons and all state organs at both levels of government.¹⁶⁴ The state organs include courts of law. It further provides that any law, including customary law that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of the constitution is invalid.¹⁶⁵ Based on this, guidance on the law based on the decisions of the court shall be analysed especially on the forum to adjudicate on matters of infringement of constitutional rights to equal opportunity inheritance, the threshold

¹⁶⁴ Article 2(1) of the Constitution.

¹⁶⁵ Article 2(5) of the Constitution.

test for a constitutional question, rules of procedure in constitutional litigation, interpretational approach to the constitutional text, and *locus standi* to espouse constitutional matters.

4.2 Courts' application of freedom against discrimination

The capacity of courts to evolve a coherent and principled approach to the interpretation of the Constitution is absolutely essential for the legitimacy of the constitutional democracy.¹⁶⁶ Decisions of courts cannot be *ad hoc* but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authority that apply to the instant fact situation.¹⁶⁷

The Constitution provides for equality and freedom from discrimination. It provides that every person is equal before the law and has the right to equal protection and equal benefits of the law.¹⁶⁸ It defines equality to include the full and equal enjoyment of all rights and fundamental freedoms.¹⁶⁹ To determine whether the above constitutional provision can be applied to invalidate the various provisions of the law of Succession Act then the following shall be considered:-

4.2.1 Jurisdiction

The Judicature Act prescribes the jurisdiction of the High Court, the Court of Appeal and of all subordinate courts to be exercised in conformity with the Constitution.¹⁷⁰ This provision of the law mandates every court of law in Kenya to be mindful, and, therefore, apply or seek to

¹⁶⁶ Githu Muigai, Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, East African Law Journal, Vol. 1 2004, P. 1

¹⁶⁷ See Wechsler, Towards Neutral Principles of Constitutional Law, 73 Harvard Law Review, 1 (1959). See also Richards D.A.J., Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication, 11 Georgia Law Review 1069 (1977)

¹⁶⁸ Article 27(1) of the Constitution.

¹⁶⁹ Article 27(2) of the Constitution.

¹⁷⁰ Section 3(1) of the Judicature Act.

conform to the provisions of the Constitution in the exercise of their respective jurisdictions. It is my argument therefore that the section does not grant jurisdictions to the other courts. When a controversy arises in the interpretation or application of a particular section of the Constitution or the enforcement of a bill of rights the High Court is expressly vested with jurisdiction to resolve that controversy. The Constitution provides that the High Court has jurisdiction, in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.¹⁷¹ Article 165 of the Constitution establishes the High Court with jurisdictions to, inter alia, hear any question respecting the interpretation of the constitution including, inter alia, the question whether any law is inconsistent with or in contravention of the constitution; or the question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this constitution.¹⁷²

The Constitution grants relief that in case a party like in the instant case brings an application to challenge the constitutionality of the various provisions of the Law of Succession Act then the court is empowered to order a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of rights and is not justified under Article 24.¹⁷³ The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Article 24 of the Constitution recognizes this limitation. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and

¹⁷¹ Article 23(1) of the Constitution.

¹⁷² Article 165(3)(d)(i and ii) of the Constitution.

¹⁷³ Article 23(3)(d) of the Constitution.

democratic society based on human dignity, equality and freedom taking into account all relevant factors, including:

- (a) The nature of the right of fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Several case laws have dealt with this point. In the case of *R.M. v ATTORNEY GENERAL, (suing thro' Next Friend) JOSEPHINE KAVINDA & ANOTHER v THE ATTORNEY GENERAL*¹⁷⁴, the court dealt with the issue of discrimination in depth and held:-

“We further hold that the principle of equality and nondiscrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:-

- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and*
- (2) Are reasonable in the light of their legitimate aim.”*

In comparative constitutional study, the same point has been dealt with in other jurisdictions. In the case of *PRINSLOO v VAN DER LINDE & ANOTHER*¹⁷⁵ the Constitutional Court of South Africa stated:-

¹⁷⁴ *NBI HCCC NO. 1351 OF 2002 R.M.*

¹⁷⁵ *1997(3) SA 1012 (CC)*

“In regard to mere differentiation the Constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be unconstitutional with the rule of law and the fundamental premises of the Constitutional state. The purpose of this equality is, therefore, to ensure that the state is bound to function in a rational manner.”

The said constitutional Court of South Africa laid down the enquiry needed to be done to determine whether differentiation amounts to unfair discrimination. In the case of HARKSEN v LANE NO OTHERS¹⁷⁶ it held:-

“Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

If the differentiation amounts to ‘discrimination, does it amount to unfair discrimination? If it has been on a special ground, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.”

In the United states of America, in the case of UNITED STATES v ARMSTRONG¹⁷⁷ the Supreme Court held that in cases under the equal protection clause, where indirect discrimination

¹⁷⁶ 1998(1) SA 300(CC) para 54

¹⁷⁷ (1996) 134 L Ed 2D 687 at p. 699,

is in issue, it is necessary to prove that the conduct complained of “*had a discriminatory effect and that it was motivated by a discriminatory purpose.*”

The summary of the above case laws is that in differential treatment, courts should find out whether the rationale of the motive behind the treatment is reasonably justifiable. This is an issue of fact and evidence based on a case to case basis. The application of Article 24 therefore involves the weighing of competing values and conducting an assessment based on proportionality but always bearing in mind that the purpose of the Constitution and particularly the Bill of Rights is to preserve the dignity of individual and to promote social justice and the realization of the potential of all human beings.

Courts in exercise of their jurisdiction are guided by several principles including: justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution; justice shall be administered without undue regard to technicalities; and the purpose and principles of the constitution to be protected and promoted.¹⁷⁸

In order therefore to ensure access to justice since the number of courts is limited, the Constitution provides that parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.¹⁷⁹

The import of the above is that it is only the high Court as it stands now has the right to hear matters of constitutional violations.

¹⁷⁸ Article 159(2) of the Constitution.

¹⁷⁹ Article 23(2) of the Constitution.

4.2.2 The Threshold Test

For a litigant who wants to challenge the Constitutionality of the provisions of the Law of Succession Act as being discriminatory then the following must be demonstrated: The precise complaint; the provision of the constitution infringed or likely to be infringed; and the manner in which the section is infringed or likely to be infringed. This test is intended to avoid raising purely statutory questions before the forum of the constitutional court. In the case of **Anarita Karimi Njeru Vs Attorney General**¹⁸⁰ the court held that:

“we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

Similarly, in the case of **Cyprian Kubai Vs Stanley Kanyonga Mwenda**¹⁸¹ the court held that:

“An applicant moving the court by virtue of section 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the section, but also to the subsection and where applicable the paragraph of the section out of 70 to 83, allegedly contravened plus relevant act of that contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare accordingly and also to know the exact extent and nature of the case it is handling.”

¹⁸⁰ [1979] KLR 154.

¹⁸¹ Nairobi High Court Miscellaneous Application Number 612 of 2002.

4.2.3 The Locus Standi

Before the enactment of the new Constitution the issue of *locus standi* in bringing in court constitutional petitions had been controversial. The Constitution now provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.¹⁸² In addition to a person acting in their own interest, court proceedings may be instituted by: a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.¹⁸³

It can therefore be concluded that an application challenging the constitutional validity of the Law of Succession Act in its various provisions can successfully be challenged.

4.3 The application of international law in the Constitutional setting

In chapter three I discussed the various international treaties and conventions relevant to inheritance rights of women. Of particular importance to those treaties were their various provisions giving equal opportunity to women in matters of inheritance rights. This section of the research shall therefore consider the courts applicability of international law, treaties and Conventions as part of Kenyan law as provided in the Constitution. The Constitution provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.¹⁸⁴

The first major decision by the courts was in the case of *Re Zipporah Wambui Mathara*¹⁸⁵

¹⁸² Article 22(1) of the Constitution.

¹⁸³ Article 22(2) of the Constitution.

¹⁸⁴ Article 2(5) and (6) of the Constitution.

¹⁸⁵ Milimani Bankruptcy Cause No. 19 of 2010(Unreported).

where the court held that “principally I agree with the counsel for the debtor that by virtue of the provisions of section 2(6) of the Constitution of Kenya 2010, international treaties, and conventions that Kenya has ratified are imparted as part of the sources of the Kenyan law.”

Justice Njagi in the case of *Diamond Trust Kenya Limited v. Daniel Mwema Mulwa*¹⁸⁶ while declining to express a position on the application of international law said that while the Constitution is clear that international law is applicable in Kenya, it is the relationship between the international law instruments that Kenya has ratified and legislation that lacks clarity hence the dilemma unless resolved by a specific legislation.

Justice Majanja in the recent landmark decision in the case of *Beatrice Wanjiru and Anor. V. Hon. Attorney General and Anor*¹⁸⁷ seems to have settled the matter. He held that the use of the phrase “under this Constitution” means that the international conventions and treaties are subordinate to and ought to be in compliance with the Constitution. His reasoning was buttressed by the fact that Article 1 of the Constitution places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of the constitutional setup. He said that the provisions under the Constitution should not be taken as creating a hierarchy of law akin to the Judicature Act, but must be seen in the light of the historical application of international law where there was reluctance by the courts to rely on international instruments even those Kenya had ratified in order to enrich and enhance the enjoyment of human rights.

¹⁸⁶ Milimani HCCC No. 70 of 2012(unreported)

¹⁸⁷ Milimani HCPT No. 190 of 2011

In essence the above discussions have emphasized the applicability of internal law as part of laws in Kenya and therefore Kenyans at large should not be afraid to utilize them in protecting and promoting women's rights to equal treatment in inheritance matters.

4.4 Conclusion

To the Kenyans, human rights defenders, the civil society, the government and the courts, this chapter has been an eye opener to new rejuvenated approach in litigating against the harsh backward and discriminatory treatment against women in invoking their entitlement through inheritance of property.

In deed the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. It delegates the sovereign power to among others the judiciary and independent tribunals which are to observe strictly the constitutional principles and the Bill of Right.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The concept of this study has revolved around the fact that there still exist discriminatory Laws on women inheritance that need to be amended in order to comply with the equality of men and women as enshrined in the Constitution. The new Constitution now provides a paradigm shift from the old order and ushers in a new framework based on the values of social order and respect for rights. The theory of the study was based on the evaluation of the various feminism theories which concluded that law has a dual role in either perpetuating and/or eliminating discrimination against women especially in the area of inheritance and succession.

Chapter two in particular identified the various laws that are discriminatory on women inheritance rights and included the Customary Law; the Islamic law; and the Law of Succession Act. It was never the intention of the chapter to completely discredit the role of these laws on succession matters but to identify the various aspects that if and when applied and practiced become discriminatory. Chapter three centered on the role of courts in promoting and realizing equality by making specific orders against the discriminatory legislations. The High Court under Article 165 of the Constitution has the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

5.2 Recommendations

Having established that sections of the Law of Succession Act are unconstitutional, my recommendations shall take a two pronged approach. One is to petition parliament to either repeal or amend the sections of the law that are discriminatory or petition court to declare them unconstitutional if the first option fails.

The right to petition parliament is anchored in the Constitution under Article 119 thereof. It provides that every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation. In deed working hand in hand with the right to petition Parliament is the right of public access and participation enshrined under Article 118 of the Constitution. It provides that Parliament shall conduct its business in an open manner, and its sittings and those of its committees shall be in public; and facilitate public participation and involvement in the legislative and other business of Parliament and its committees. The import of the provisions is to ensure that the public intentions are maintained and that the legislature through consultations is able to comprehend the will of the people which is enshrined under Article 1 on the supremacy of the Constitution.

If and when the Petition to Parliament fails, then I propose that any person otherwise aggrieved should Petition the High Court based on the discussions in this thesis as the guiding almer to declare the various sections including the sections that are discriminatory unconstitutional and invoke the option of developing the law as appropriate. This is an option to be undertaken by the now reformed judiciary which hopefully is well versed with the Constitutional issues of equality. Upon the success of either option, then I recommend that there should be a regular, structured

and sustained civic education on the new Constitutional order with respect to equality rights in general so that the practitioners of customary law, the Islamic law and the courts are able to appreciate these salient provisions.

SELECTED BIBLIOGRAPHY

1. Akinyi Nzioki, The Effects of Land Tenure on Women's Access and Control of Land in Kenya, in Cultural Transformation and Human Rights in Africa 218, 228 (Abdullahi A. An-Na'im ed., 2002).
2. Aliber, M., et al. (2004). The Impact of HIV/Aids on Land Rights: Case Studies from Kenya. Cape Town: Human Sciences Research Council.
3. Almaz Zelleke, "Reconsidering Independence: Foundations of a Feminist Theory of Distributive Justice." Paper presented at the 12th BIEN Congress, Dublin, Ireland, June 20-21, 2008.
4. *American Heritage Dictionary of the English Language* (4th ed. 2000).
5. Bird, K. and Pratt, N. with O'Neil, T. and Bolt, V. (2004). 'Fracture Points in Social Policies for Chronic Poverty Reduction'. Chronic Poverty Research Centre Working Paper 47, Overseas Development Institute Working Paper 242. London: Overseas Development Institute (ODI) and Chronic Poverty Research Centre (CPRC). Available at: <http://www.chronicpoverty.org/publications/details/fracture-points-in-social-policies-for-chronic-poverty-reduction/ss>
6. Carol Gilligan, "Is There Now a Different Voice?" available at: <http://www.feminist.com/resources/artspeech/genwom/istherenow.html>(accessed on 10/02/2011).

7. CEDAW Report 2006, *supra* note 3, at para. 7; Interview with county clerk, Laikipia County Council, in Nanyuki, Kenya (Apr. 3, 2008); Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).
8. Cooper, E. (2008). 'Inheritance Practices and the Intergenerational Transmission of Poverty: A Literature Review and Annotated Bibliography'. CPRC Working Paper 116. Manchester, UK: Chronic Poverty Research Centre (CPRC). Available at: http://www.chronicpoverty.org/uploads/publication_files/WP116_Cooper-annotatedbiblitreview.pdf
9. Cooper, E. (2010). 'Inheritance and the Intergenerational Transmission of Poverty in Africa: Policy Considerations'. Working Paper 159. Manchester, UK: Chronic Poverty.
10. Cotran, E., Restatement on Kenya Customary Law, Volumes 1 and 2, Sweet and Maxwell, 1969.
11. Evelien Geerts, "An analysis of Susan Moller Okin's problematic approach to multiculturalism", available at: http://uu.academia.edu/eveliengeerts/Papers/379216/An_analysis_of_Susan_Moller_Okins_problematic_approach_to_multiculturalism._A_feminist_comprehensive_liberalism_gone_wrong.
12. FIDA-Kenya, "Women Land Rights in the proposed Land Policy Reforms", FIDA Unpublished Policy Brief, 2007.
13. Government of Kenya (GOK) (2006) Initial Report of States Parties to the Committee on Economic, Social and Cultural Rights (2007), U.N. Doc. E/C.12/KEN/1 (Sept. 7, 2006).

14. Grace Clement, *Care, Autonomy, and Justice: Feminism and the Ethic of Care* (Westview Press, 1996).
15. Henrysson, E. and Joireman. S. (2009). 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii'. *Kenya, Law & Society Review*, 43(1): 39-60.
16. International Finance Corporation [IFC] & World Bank, "Voices of Women Entrepreneurs in Kenya" 1 (2006); available at: [http://www.ifc.org/Voices of women Ent_Kenya.cdr](http://www.ifc.org/Voices%20of%20women%20Ent_Kenya.cdr).
17. International Women's Human Rights Clinic Georgetown University Law Center and The Federation of Women Lawyers: Kenya "Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation", 40 *Georgetown Journal of International Law* 66 (2009).
18. Jack Mwimali Busalile, "The Practice in Land Law and Succession in Kenya: Constraints on the Full Enjoyment of Human Rights", available at: <http://lup.lub.lu.se/luur/downloadfunc=downloadFile&recordOid=1555122&fileOid=1563554>.
19. Kameri-Mbote, P. (2002). Gender Dimensions of Law, Colonialism and Inheritance in East Africa. International Environmental Law Research Centre. Available at: <http://www.ielrc.org/content/a0205.pdf>
20. Legal Information Institute, "Feminist jurisprudence", available at: http://topics.law.cornell.edu/wex/feminist_jurisprudence.

21. Martha Albertson Fineman, "Feminist Legal Theory", 13(1) *Journal of Gender, Social Policy & the Law* 13 (2005).
22. Maurice Oduor and Ruth Aura Odhiambo, "Gender Equality in the New Constitutional Dispensation of Kenya", (December 16, 2010). Available at SSRN: <http://ssrn.com/abstract=1726378>.
23. Michael Weiss and Cathy Young, "Feminist Jurisprudence: Equal Rights or Neo-Paternalism?", Cato Policy Analysis No. 256 published on June 19, 1996; available at: <http://www.cato.org/pubs/pas/pa-256.htm>.
24. Michèle Barrett and Anne Phillips' introduction to their edited volume *Destabilizing Theory: Contemporary Feminist Debates* (Polity Press, 1992).
25. Nidhi Gupta, "Success of Feminist Jurisprudence in India: A Critical Analysis from the Point of View of Implementation", available at: <http://www.dhdi.free.fr/recherches/droithomme/memoires/memoirgupta.htm>.
26. Njeri Karuru: Property Inheritance Patterns in relation to Gender. A study of some communities in Kenya, E.A. Regional Symposium on Common Property Resource Management. Kampala 1996.
27. Njoki Wamai, "Women and Poverty (Land Rights and Ownership)", A Policy brief on the Kenyan situation prepared for the African Women Rights Observatory (AWRO); available at: awro.uneca.org/members%20

28. Obeng Mireku, "Judicial Balancing of Parallel Values: Male Primogeniture, Gender Equality and Chieftaincy in South Africa."
29. Patricia Stamp, *Technology, Gender and Power in Africa* (Ottawa: International Development Research Center, 1989), 100-103.
30. Patricia Stamp, "Burying Otieno: the politics of gender and ethnicity in Kenya," (Ottawa: International Development Research Center, 1991), 817.
31. Reginald Akujobi Onuoha, "Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue." Available on http://www.icnl.org/research/journal/vol10iss2/art_4.htm.
32. Republic of Kenya, *Combined fifth and sixth periodic reports to the Committee on the Elimination of Discrimination Against Women* (39th Sess., 2007), para. 81, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/39sess.htm>.
33. Wendy Harcourt, "Feminist Praxis: Women's Transnational and Place Based Struggles for Change", *GTI Paper Series No. 11*, available at: <http://www.gtinitiative.org/documents/PDFFINALS/11Feminism.pdf>.
34. The Holy Koran.