



UNIVERSITY *of the* WESTERN CAPE

The Socio-economic Impact of Land Reform on Women's Rights to Access Land in South Africa.

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ACKNOWLEDGEMENT

Chronicles 29:13: "And now we thank you, Our God, and praise your glorious name." I would first like to thank the Lord God Almighty, who is my strength and my saviour, for giving me the strength and endurance through this process. I love you Lord. First and foremost, I want to express my gratitude to God Almighty for providing me with the chance and direction I needed to fulfil my aspirations. My father has given me more than I could have ever asked for, I'm grateful that you've surrounded me with caring people. You have blessed me with family and friends that uplift me daily with their actions and words.

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DEDICATION

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Abstract

The Minister in the Presidency, Dr. Dlamini-Zuma, stated in her 2018 land reform dialogue that development in the absence of women is bound to be hollow.¹ The purpose of land reform is to create and enhance sustainable development of the people, and without a proper and well-oiled redistribution programme, it will impact negatively on the economic development of the people. This dissertation aims to review the impact and application of legislation when it comes to women's access to land and ending gender inequalities. Property is a broad concept that includes the right of access to land for agricultural and residential purposes. This dissertation will therefore outline the challenges facing women in accessing land, considering the historical context of legislations and its impact on South Africa. It will unpack what international legal frameworks say on inequalities and women's rights to access land. Most of the country's landless population are poor women, so an effective land reform programme must recognise the centrality of women's needs and interests.

The dissertation will examine the advancement of women's land rights from 1994 to date. Land reform is one of the many priorities of the post-apartheid government in South Africa, but the question is whether land reform has been beneficial to black women, the most marginalised group in society. The paper further aims to look at the socioeconomic impact of land reform on black women in South Africa. Land reform aims to redress the inequalities of the past suffered by black people due to the distribution of land under the Native Land Act of 1913; however, land reform has thus far failed to redress the issue of black women and land ownership in particular, as there has been no radical implementation of land redistribution for women. Land reform, unfortunately, is fraught with corruption, fraud, and maladministration.

The role that culture has on equality will be explored, as power rights have always been entrusted to men, thus resulting in the socioeconomic rights of women being handled on their behalf. Land reform has to date failed in empowering women to economically sustain themselves through access to land, thus reducing their constitutional, agricultural, and economic rights.

Keywords: Land Reform, women's rights, socioeconomic rights, access to land, gender-responsive, implementation, transformation, economic security, gender equality, customary.

CHAPTER 1

1.1 PROBLEM STATEMENT

¹ Dr Dlamini-Zuma, *women and youth on land reform keynote address* (2018)

Since the 1910 Native Land Act, women have not benefited from land ownership or socioeconomic development. Land dispossession became one of the critical agendas of the post-apartheid government, addressed through land redistribution; yet until now there has been no significant progress for women or black women in particular. This research examines land reform in South Africa and whether land reform is beneficial to women and has or might enhance the socioeconomic status of women. Economic and social transformation in Africa cannot be achieved in isolation from the transformation of women; these concepts or ideals speak to each other, as they have a common purpose. The realisation of constitutional democracy will be achieved through the achievement of equal rights for women, and then economic equality will follow. Women have become vulnerable in society because they have not been equal partners in the economic hub. Mishra and Sam state that economic theories predict that access to assets such as land gives financial security to women, improves household bargaining power, and reduces discrimination, as women have more control over decisions.² The lack of socioeconomic transformation is a challenge that Africa faces, along with poverty, globalisation, violence, HIV, and access to land. Society is still suffering from the history of gender stereotyping and gender roles.

According to Mokgoro J in the case *Du Plessis and Others v De Klerk*, the unique and stark reality in South Africa is that decades of injustice associated with apartheid gave rise to gross socioeconomic inequalities that persist at every level of our society.³ Access to land brings about the realisation of socioeconomic rights, which should bring about economic development and human dignity. Khoza has stated that socioeconomic rights are positive rights that impose an obligation on states, necessary for human beings to lead a dignified life.⁴ According to the third Land Reform Dialogue Commission, the chairperson stated that access to land must be so inclusive that even language must reflect such.⁵ It is unfortunate that women's access to land does not seem to be the highest priority for policy-makers.

Land reform has been one of many priorities of the post-apartheid government, as can be seen in the Department of Land Affairs's 1997 White Paper, which called for gender transformation, but progress in land reform has been slow and controversial. There is no clarity on whether land reform has been beneficial to black women, as policies are not implemented to go a step further and prioritise the rights of women. According to the 2017 Land Audit, men own a large amount of land in South Africa, with individual males owning 72 per cent of farms and females a mere 13 per cent. This is a concern as women have suffered triple inequalities in South Africa based on gender, race, and class. Blom has stated that land reform could be one

²Mishra K and Sam A, 'Does Women's Land Ownership Promote their Empowerment? Empirical Evidence from Nepal' (2016) vol.78 *Elsevier* 360-371

³*Du Plessis and Others v de Klerk and Another* 1996 3 SA 850 (CC). Para 168

⁴Khoza S *Socio-Economic Rights in South Africa: a resource book* 3rd Ed, (2007) 20.

⁵Rural Development and Land Reform Land Reform Dialogue Commission 3, Land, our Heritage, Women and Youth (2018) para 6

way to achieve a more equitable society. This has been accomplished in Costa Rica, where women's share of land increased from 12 to 45 per cent through land reform.⁶

The redistribution of land for women holds the potential to advance African women's economic position. Pheko has found that, based on international experience, success is dependent on sound, gender-aligned policy reform and a well-directed land transfer programme.⁷ Therefore, for land reform to truly be effective, gender must be the pillar of such reform.

South Africa is deeply affected by insecure tenure. The 2017 research report on security of tenure found that labour tenancy in South Africa is controversial and complex. The issue is controversial in that it currently reflects a struggle over access to land and tenure security that spans more than a century.⁸ Insecurity of tenure is prevalent in South Africa given the number of farm evictions that are taking place. This concern was also highlighted by the Minister in the presidency Dr Dlamini-Zuma, who stated in her 2018 land reform dialogue speech, that ' farm evictions are at the centre of further dispossession and impoverishment, with the department of Rural development and Land Reform recording about 2 million farm workers or dwellers have been evicted over the past ten years and about 77% of these being women'.⁹ This highlights the need for a better-structured land reform process that addresses women's access to land and creates security of tenure.

The negative relationship between the risk of rural poverty and lack of access to land is well established. Land can provide both direct and indirect benefits. Direct advantages stem from growing crops, fodder, or trees. Indirect advantages take various forms: owned land can serve as collateral for credit or as a mortgage or saleable asset during a crisis.¹⁰ The purpose of land reform is not achieved just by women being given the land rights in their names. It also requires government to create legislation that will enable skills transfer, so that the women are empowered with the knowledge of how to utilise the land for their economic benefit and that of society at large. Although land reform benefits men, there is no skills transfer, and this leads to the land being sold or leased.

⁶ Blom L *Land Reform and Gender Equality in South Africa*. (Master's Thesis, Lund University, 2006) 11.

⁷ Pheko L *The Institute for Justice and Reconciliation, Policy brief 16: women, land and livelihoods in South Africa's Land Reform Programme* (2014) 11

⁸ Cowling M, Hornby D and Oettle L Research report on tenure security of labour tenants and former labour tenants in South Africa. *Commissioned report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an Initiative of the Parliament of South Africa, Parliament of South Africa*. (2017) p6

⁹ Rural Development and Land Reform, *Land Reform Dialogue Commission 3, Land, our Heritage, Women and Youth (2018) para 8*

¹⁰ Twala C 'Land Rights and the Gendered Path of Agrarian Transition within the African National Congress (ANC) Government in South Africa: Two Sides of the Same Coin?' (2014), *Journal of Human Ecology*, 45:20

The biggest benefit that women get from land at present is being employed on it as labourers and providing for their families; but this does not come with job security, and so limits the basic rights of women to proper health care, housing, food security, and education.

As more men shift to non-farming livelihoods, an increasing number of households will become dependent on women to bear the larger burden of farm management.¹¹ The economic benefits for women are that land access can be used as collateral and hence facilitate access to credit, which can be used for investment in the land.¹²

If women's access to and control of land can be increased through land reform, and if this can be supported to become an effective anti-poverty asset for poor rural women, then rural development can begin to occur from the bottom up. The government needs to fill the huge gap between policies and their implementation.

1.2 RESEARCH BACKGROUND

History, cultural norms, and legislation have all contributed to black people in South Africa having been denied their land rights, which prevents them from participating fully in the country's economic engine and denies them the right to land and food security. On 19 June 1913, the government enacted the Native Land Act 27/1913. The act defined a native as any person, male or female, who is a member of an aboriginal race or tribe of Africa.¹³

The most catastrophic provision of the 1913 Act for Africans was the prohibition on buying or hiring land in South Africa.¹⁴ Section 1(1)(a) of the Native Land Act states that a 'native shall not enter into any agreement or transaction for the purchase, hire or other acquisition from a person other than a native'.¹⁵ In essence, Africans, despite being greater in number, were confined to ownership of seven per cent of South Africa's land. Of the seven per cent given to Africans, no data indicates what percentage of that was given to African women. As much as this act impacted gravely on the rights of African men, women got the short end of the stick. The restriction of land rights that was created by the previous government had a great impact on the lives of black African people, as they were crammed into small living spaces and few had access to agricultural land.

¹¹ Twala C 'Land Rights and the Gendered Path of Agrarian Transition within the African National Congress (ANC) Government in South Africa: Two Sides of the Same Coin?' (2014), *Journal of Human Ecology*, 45:20

¹² Blom L *Land Reform and Gender Equality in South Africa*. (Master's Thesis. Lund University 2006) 8.

¹³ Towards a people's history, Land disposition, resistance and restitution, available at www.sahistory.org.za, (accessed 13-06-2018)

¹⁴ Towards a people's history, Land disposition, resistance and restitution available at www.sahistory.org.za (accessed 13-06-2018)

¹⁵ New Fiscal Divisions (Cape) Native Land Act 27 of 1913

The struggles of inequality have always existed for women of all races: women were deprived of many opportunities and were seen as unequal to men. However, the Constitution of South Africa has an equality clause, section 9(1) of which states that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’, while section 9 (3) provides that national legislation must be enacted to prevent or prohibit unfair discrimination.¹⁶

Equality and non-discrimination are vital to the well-being of women; principles of equality and non-discrimination represent the cornerstone upon which the structure of human rights law is established.¹⁷ Gender inequality is, nevertheless, clearly reflected in income and unemployment statistics. According to the 1996 population census, 60 per cent of rural and 48 per cent of urban African women were unemployed.¹⁸ It is worth noting that recognition and development of the concept of equality was demonstrated in the case of *Bhe and others v Khayelitsha Magistrate*, where the court found that equality takes precedence over cultural rights and male primogeniture.¹⁹ It is evident that gender equity is a consideration of the post-apartheid government; this can be seen in the ANC’s 1992 land policy document, which calls for special procedures to ensure that women gain equal access to land and participate in policy formulation. Other policy documents were the RDP 1996 Green Paper on South Africa’s land reform and the 1997 White Paper on Land Policy, which too recognised women’s rights.²⁰

According to an article by Janis Kinnear, women from across the country, dressed in black and green t-shirts emblazoned with the words ‘women guardians of seed, life and earth’, formed a circle on a field, chanting, ‘We want land now.’²¹ The majority of the country’s landless population are poor women, so an effective land reform programme must recognise the centrality of women’s needs and interests.²² The role of women is evident in the impact they had on the revolution and the fight for a transformative South Africa, including in the 1955 anti-pass campaign and the 1956 women’s march.²³

Political and economic pressures for land reform grew out of South Africa’s history of colonial dispossession in the 18th and 19th centuries and the racial pattern of land ownership successive white minority governments

¹⁶ Constitution of the Republic of South Africa, 1996

¹⁷ Amollo R *Women’s socio-economic rights in the context of HIV and AIDS in South Africa: Thematic focus on health, housing, property and freedom from violence*, (Unpublished Doctoral Thesis, University of the Western Cape 2011)

¹⁸ Weideman M *Land reform, equity and growth in South Africa: a comparative analysis*. (PhD. Thesis, University of Witwatersrand, 2004) 364

¹⁹ *Bhe and others v Khayelitsha Magistrate and others* 2005(1) BCLR 15(CC)

²⁰ Twala C ‘Land Rights and the Gendered Path of Agrarian Transition within the African National Congress (ANC) Government in South Africa: Two Sides of the Same Coin?’ (2014) 45 *Journal of Human Ecology*, 118

²¹ Kinnear J ‘Rural Women Marching out for Land’, 22 March 2015 available at www.iol.co.za/news/politics (accessed 13 June 2018).

²² Cross C. and Hornby D’ *Opportunities and Obstacles to Women’s Land Access in South Africa. A Research Report for the Promoting Women’s Access to Land Programme. National Land Committee’* (2002) .40

²³ *Women and the struggle against Apartheid* available at <https://www.sahistory.org.za/article/women-and-struggle-against-apartheid> (accessed 02/10/2019).

enforced after 1910.²⁴ It is evident that colonial governments created a legacy of denying black people not only civil and political rights but also socioeconomic rights.

When South Africa became a democratic country, the new post-apartheid government developed a land reform programme which focused on three important areas: 'land redistribution to address lack of access to land for productive and residential purposes; land restitution to restore the land to those who lost land due to previous discriminatory laws; and secure tenure to those whose tenure is insecure'.²⁵ South Africa is currently showing interest in the matter, and there are many debates in parliament and civil society on land reform and expropriation without compensation. There are even debates on amending the constitution to expropriate without compensation; but there is still a big gap in the debate on women's access to land. Women's substantial contribution continues to be systematically marginalised and undervalued in conventional agricultural and economic analyses and policies, while men's contribution remains central and often the sole focus of attention. Women are typically, and wrongly, still characterised as economically inactive in statistical surveys.²⁶

Regrettably, even after more than a decade into democracy effort to address land inequality have not prioritised women., in the 20 Years Review Paper on gender equality it is stated that 'continued patriarchal societal norms result in unequal power relations between men and women; although equality is affirmed in the legal domain, it is not widely extended to the private domain of South African family life and society, cultural norms and practices violate the rights of women'.²⁷ South Africa's land reform programme becomes an important tool aimed at ratifying the social, economic inequalities of the past²⁸ The South African land reform program is a crucial instrument for validating historical social and economic disparities, particularly when it comes to the issue of the socio-economic gap between men and women. The land reform program's flaw is that special legislation that addressed gender equality was never given enough attention, making it insensitive to gender.

The Constitution of South Africa recognises socioeconomic rights as rights, which the government has an obligation to protect. Section 25(5) of the Constitution states that the 'state must take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis'. While Section 25(6) further states that a person who is legally insecure as a result

²⁴ Walker C 'Piety in the Sky? Gender Policy and Land Reform in South Africa' (2003) *Vol.3 Journal of Agrarian Change* 116

²⁵ South African Human Rights Commission (3rd) *Economic and Social Right Report*. (2001) para279

²⁶ Twala C 'Land Rights and the Gendered Path of Agrarian Transition within the African National Congress (ANC) Government in South Africa: Two Sides of the Same Coin?' (2014) *45 journal of Human Ecology*, 17

²⁷ Twenty Year Review South Africa 1994 - 2014 Background Paper: Women's Empowerment and Gender Equality.pg26

²⁸ Kaarhus R, Benjaminsen T, Hellum A& Ikdahl I 'Women's Land Rights in Tanzania and South Africa: A Human Rights Based. Perspective on Formalisation.' (2005)32 *Forum for Development Studies*, 465

of past racially discriminatory laws and practices is entitled, to the extent provided by an act of parliament, either to tenure which is legally secure or to comparable redress'.²⁹ *Government of the Republic of South Africa and Others v Grootboom* affirmed in its judgement, that socioeconomic rights are justiciable, and entail that people have minimal needs which need to be met within available resources, and that, most importantly, everyone has socioeconomic rights.³⁰

Other dynamics that have influenced inequality are cultural practices and customary law. Although these are not all written down, they are mostly controlled by men as power was conferred to chiefs and headmen. The Black Administration Act regarded women as minors with no capacity to act. The impact of the act had far-reaching consequences for women farmers. Even after the repeal of this act, women still battle to be fully recognised as full-time farmers in a democratic South Africa.³¹ That is why Sachs J in the case of *Du Plessis and Others v De Klerk* stated that, sooner or later, the question of the relationship between the Constitution and customary or indigenous law will have to be confronted.³² The impact of custom was demonstrated in the case of *Mthembu v Letsela*, where the father of the deceased who had married his wife in terms of customary law claimed that the deceased left no sons and therefore he as the father was entitled to inherit the house in terms of rules of male primogeniture.³³ The court found that the principles of primogeniture discriminate against women and girls born out of wedlock.

1.3 RESEARCH OBJECTIVE /AIM OF STUDY

The purpose of this study is to

- express the importance of the socioeconomic rights of women and their access to land;
- highlight that women's rights are human rights and women, more especially black women, must be prioritised in the process of transformation; and
- explore the relationship between legislation and policy implementation in women's access to land, and the challenges facing black women in accessing land.

There are many calls and protests for women to be given access to land, for women to cultivate the land, and for them to have financial security. The government has also been making statements about land reform being gender inclusive. Land reform is currently a deeply discussed issue in South Africa, with emphasis on

²⁹ Constitution of the Republic of South Africa, 1996

³⁰ *Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169*

³¹ Twala C 'Land Rights and the Gendered Path of Agrarian Transition within the African National Congress (ANC) Government in South Africa: Two Sides of the Same Coin?' (2014) 45 *Journal of Human Ecology* 19

³² *Du Plessis and Others v de Klerk and Another 1996 3 SA 850 (CC). Para 189*

³³ *Mthembu v Letsela 2000 (3) SA 867 (SCA).*

expropriation without compensation, but not much is discussed or proposed about land reform prioritising women.

There is a causal nexus between women's land rights and socioeconomic development. The study aims to explore developments regarding women and land, while highlighting the positive impact land has on the rights of women. The objective is to review current literature and highlight the theoretical framework. This paper aims to contribute to the literature on women's access to land and to analyse the role of government in realising women's access to land.

1.4 RESEARCH QUESTIONS

The research question that needs to be answered is whether women's rights to access land have been adequately addressed by the current government, considering the socioeconomic background of African women in South Africa and their lack of equality.

This paper will ask the following research questions:

- Does women's lack of access to land violate international and domestic laws?
- What are the factors that hinder women's access to land in South Africa?
- What are the most effective ways to guarantee women's access to land in South Africa?
- What are the obligations of the South African government to ensure access to land for women?

1.5 PRELIMINARY LITERATURE REVIEW

Scholars have written comprehensively on land reform and the rights of women, amongst them Cross and Hornby, Mutangadura, Odeny, Walker and Agarwal, who broke down the factors that influence women's bargaining power. Women's access to land in South Africa is an area that still needs more research. Twala has stated that an understudied area in the literature on structural poverty is the challenge of access to land by women in a democratic South Africa; the question of women owning land or having access to land for agrarian purposes has not been an area of intensive academic study.³⁴

South Africa has national and international legislation guaranteeing women's rights and rights to land and socioeconomic rights. These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, known as the Maputo Protocol, the International Covenant on Economic,

³⁴ Twala C 'Land Rights and the Gendered Path of Agrarian Transition within the African National Congress (ANC) Government in South Africa: Two Sides of the Same Coin?' (2014) 45 *Journal of Human Ecology* 20

Social and Cultural Rights, and the African Charter on Human and Peoples' Rights, known as the Banjul Charter.

Logically South Africa needs stronger and enforceable legislative policies to guarantee economic freedom for women. Cross and Hornby found that research on women's land rights has also identified a disjuncture between ambitions stated in the land policy document and how gender issues are treated in practice.³⁵ Literature indicates that there is a great need for stronger accountability mechanisms and monitoring of policies, and Walker has stated that commitment to gender equality is not translated into a vigorous action on the ground.³⁶

On the other hand, research shows that people are gradually changing their practices when it comes to inheritance in favour of women, but that this favours mostly single women, while married women still suffer a great deal.³⁷ Barriers to transformation are a result of customary law, which is influenced by practices that are not written down but based on customs and culture. Progressive thinking that favours women is difficult because of the patriarchal structure of society. While this is a South African misfortune, other African countries have not made progress either. For example, Bhatasara finds that most rural women in Zimbabwe do not have the capability to claim rights to land in event of widowhood or divorce under customary marriages.³⁸

Unequal ownership and control of land have been identified as critical factors. Grabe and Grose write that the theory of gender and power postulates that institutionalised gender-based inequalities grant men disproportionate power in society and result in male dominance.³⁹ This maintains differences between men and women in terms of socioeconomic well-being and power.⁴⁰ Weidman discusses aspects of women's rights to land ownership extensively, and looks at the historical context of women and the socioeconomic and political impacts leading to minimal access to land. Throughout history women have always been more vulnerable than men, with no job security.

Research also shows that women's access to land is not a locally limited case. It is an African phenomenon, and one can briefly reflect on Zimbabwe. Bhatasara has highlighted the impact suffered by women in the

³⁵ Cross C. and Hornby D 'Opportunities and Obstacles to Women's Land Access in South Africa' A Research Report for the Promoting Women's Access to Land Programme. National Land Committee (2002)40

³⁶ Walker C 'Piety in the Sky? Gender Policy and Land Reform in South Africa' (2003) Vol.3 *Journal of Agrarian Change*, 116-114.

³⁷ Kaarhus R, Benjaminsen T, Hellum A& Ik Dahl I 'Women's Land Rights in Tanzania and South Africa: A Human Rights Based. Perspective on Formalisation.' (2005) 32 (2) *Forum for Development Studies*, 471.

³⁸ Bhatasara, S. 'Women, land and poverty in Zimbabwe: deconstructing the impacts of the Fast Track Land Reform Programme.' (2001) 13(1) *Journal of Sustainable Development in Africa* 324

³⁹ Grabe S & Grose R G, 'Women's Land Ownership and Relationship Power: A mixed Methods Approach to Understanding Structural Inequalities and Violence against Women Psychology of Women' (2015) vol 39 *Sage pub* 18.

⁴⁰ Kaarhus R, Benjaminsen T, Hellum A& Ik Dahl I 'Women's Land Rights in Tanzania and South Africa: A Human Rights Based. Perspective on Formalisation.' (2005) 32:2 *Forum for Development Studies* 444

process of fast-tracking land reform. Women farm workers were deprived of the ability to pursue a secure socioeconomic livelihood, this due to limited participation in land reform and to evictions and displacement.⁴¹

Bhatasara created a model to analyse the impact of the fast-tracking of land reform in Zimbabwe and the lack of gender-sensitivity that came with it. The government designed land models that targeted different beneficiaries. However, this became a basis of exclusion for women, as men own 82 per cent of the land whereas women own 18 per cent of it.⁴² The South African government aimed to transfer 30 per cent of the land back to Africans within a certain number of years. Unlike in Zimbabwe, there was no fast-tracking, yet it seems that women were not prioritised in the redistribution. Bhatasara's research is critical for this dissertation, as the study will critically analyse women's land rights in other African countries and compare the similarities, if any.

Blom discusses land reform and finds that it will not do much to improve gender inequalities or the status of women. He highlights the many obstacles that women face due to culture, politics, and social standing, and writes that land reform will not create a balance of power between men and women, even if women are given title to land. It is, he writes, important not to jump to conclusions about the final results, as there is a difference between the legal ownership of land and control over the same.⁴³ This notion is partly true in that access to land will not ultimately bring about equality, as equality is an ideal. One needs to consider that formal equality is not sufficient to prevent discrimination that the factual situation on the ground must be considered, and that land is only one of the many tools that can bring about equality.⁴⁴

Land reform, or women's access to land, may not instantly enhance women's status, but it may be a big step in the right direction by balancing power dynamics. Land is a commodity that provides equitable opportunity and access to a variety of resources, that is why

Grabe and Grose stated that land ownership for women may help to redress gendered imbalances. They highlight the link between land ownership and gender-based violence and note that land can lead to transformation.⁴⁵ They use the case of India as evidence, where 49 per cent of women who did not own

⁴¹ Bhatasara, S. 'Women, land and poverty in Zimbabwe: deconstructing the impacts of the Fast Track Land Reform Programme.' (2001) *Journal of Sustainable Development in Africa* 13(1): 319

⁴² Bhatasara, S. 'Women, land and poverty in Zimbabwe: deconstructing the impacts of the Fast Track Land Reform Programme.' (2001) *Journal of Sustainable Development in Africa* 13(1): 320

⁴³ Blom L *Land Reform and Gender Equality in South Africa*. (Master's Thesis. Lund University 2006) 16.

⁴⁴ Kaarhus R, Benjaminsen T, Hellum A & Ikdhahl I 'Women's Land Rights in Tanzania and South Africa: A Human Rights Based. Perspective on Formalisation.' (2005) 32:2 *Forum for Development Studies*, 444

⁴⁵ Grabe S & Grose R G, 'Women's Land Ownership and Relationship Power: A mixed Methods Approach to Understanding Structural Inequalities and Violence against Women Psychology of Women' (2015) *Sage pub vol 39* 18.

property experienced long-term physical violence, compared to 18 per cent of women who owned land.⁴⁶ So the impact that land has on the lives of women should not be left out of consideration.

The 1997 Department of Land Affairs White Paper approved of gender policies aimed at creating an enabling environment for women to access land and credit, yet principles and policies have been translated into practice only to an extent.⁴⁷ The government's land reform programmes have tended to prioritise national-level delivery goals over household-level anti-poverty interventions and social processes to meet these challenges.⁴⁸

Millicent states that an effective land administration requires that women's participation in policy formulation and implementation be equal to that of men.⁴⁹ Many writers, including Deininger, Mishra, and Sam, are in agreement that having land results in economic freedom which brings security and power, and that women suffer due to lack of equality. Deininger in his research notes that households where women control greater shares of assets and land at marriage have been shown to spend more on food and children's welfare and education.⁵⁰ This demonstrates that when women are prioritised and given land, the benefit multiplies for generations.

Millicent notes that gender has become a critical issue in women's land rights, because there is a direct relationship between accessing land resources, having secure land rights, and achieving food security and overcoming poverty.⁵¹ The importance of land for women cannot and should not be downplayed. It is a notion that requires more debate. The Advisory Panel on Land Reform and Agriculture Report stated that

Women must have access to land if land reform is to realise its developmental goals. The panel insists that the policy approach must purposefully redress gender imbalances in landholding by revising the existing rules of property in land under both customary and statutory law in ways that strengthen women's access to and control of land, while respecting family and other social networks. Commitments made at the AU 2003 Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as well as the 2004 Solemn Declaration on Gender Equality in Africa, must be delivered upon.⁵²

⁴⁶ Grabe S & Grose R G, 'Women's Land Ownership and Relationship Power: A mixed Methods Approach to Understanding Structural Inequalities and Violence against Women Psychology of Women' (2015) *Sage pub vol 39 18*.

⁴⁷ Kaarhus R, Benjaminsen T, Hellum A& Ik Dahl I 'Women's Land Rights in Tanzania and South Africa: A Human Rights Based Perspective on Formalisation.' (2005) *Forum for Development Studies,32:2 466*

⁴⁸ Cross C. and Hornby D 'Opportunities and Obstacles to Women's Land Access in South Africa' A Research Report for the Promoting Women's Access to Land Programme. National Land Committee (2002)40

⁴⁹ Odeny, M 'Improving Access to Land and strengthening Women's land rights in Africa. *Annual World Bank Conference on Land and Poverty*'. (2013) Washington, DC, April 8–11. 5

⁵⁰ Deininger, K 'Land Policies for Growth and Poverty Reduction' (2003) *Washington DC, World Bank.38*

⁵¹ Odeny, M 'Improving Access to Land and strengthening Women's land rights in Africa. *Annual World Bank Conference on Land and Poverty*'. (2013) Washington, DC, April 8–11. 3

⁵² Presidential advisory panel on land reform and agriculture *the final report of the presidential advisory panel on land reform and agriculture*, (2019)96

Mutangadura in his research has highlighted other African countries that are expressly taking decisive steps on women and land. Zambia's land policy reserves 30 per cent of land for women.⁵³ As long as South Africa lacks a document that clearly guarantees women land, women's access to land will merely be mentioned in speeches and workshops. It is submitted that the failure of land reform originates in a failure to prioritise women.

CEDAW General Comment 21 states that reports of states parties should include comments on the legal or customary provisions relating to inheritance laws as they affect the status of women as provided in the Convention and Economic and Social Council resolution.⁵⁴ It is argued that South Africa's customary provisions continue to be the most significant impediments to women's access to land. This is vividly illustrated in the instance of Winnie Madikizela-Mandela's claim to a property she held from her previous marriage, as well as her entitlement to the land as a woman. The Eastern Cape High Court appears to have maintained the patriarchal idea of property ownership in this case, denying Madikizela-Mandela her claim to the land.

Researchers and policymakers agree that successful land rights for women are critical for food security, gender equality, and the realisation of socioeconomic rights. Stone discovered that nine out of ten impoverished individuals in South Africa are black Africans, with 59 per cent being females.⁵⁵ The impact of poverty is significantly more acute and intense for women. Despite several statutory safeguards, women continue to face discrimination in South Africa when it comes to gaining access to land.

1.6 LIMITATIONS OF THE STUDY

Some limitations have impacted on the study. These include the fact that women's access to land is based more on the historical context; and there is limited literature.

The research is limited to the socioeconomic impact of land access and does not engage with debates on the land reform programme.

1.7 RESEARCH METHODOLOGY

This dissertation will analyse primary sources in form of international and regional instruments, as well as the domestic laws protecting women's rights to access land. It will analyse court judgements, as well as the Convention on the Elimination of all Forms of Discrimination against Women, ICESCR, the African Charter on Human and Peoples' Rights and Rights of Women in Africa (Maputo Protocol), section 25 of the South

⁵³ Mutangadura G 'Women and Land Tenure Rights in Southern Africa: A Human Rights-Based Approach.' (2004) 8

⁵⁴ Convention on the Elimination of all forms of Discrimination against Women, General Recommendation No. 21: Equality in Marriage and Family Relations, 1994 para 34

⁵⁵ Stone L 'two decades of jurisprudence on substantive gender equality: what the Constitution court got right and wrong' (2016) *Taylor and Francis vol 30 1 13*

African Constitution, land reform policy, and the 1997 Land Policy White Paper. The dissertation will also use secondary sources from various published articles and journals. It will review research literature as well as international conventions protecting women rights and women's rights to access land. Various published articles and journals will be consulted.

1.8 CHAPTER SYNOPSIS

Chapter 1 outlines the central argument of this research, and defines key terms used in the discussion. This chapter will also examine what exactly land reform and socioeconomic rights are, and the history behind land reform.

Chapter 2 analyses the international and regional frameworks to women's access to land and equality. The main sources will be CEDAW, ICESCR, human rights general comment 28, the Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa 2000, and the African Union Gender Policy of 2009.

Chapter 3 analyses the national framework based on the Constitution of the Republic of South Africa Act 108 of 1996, the Department of Land Affairs White Paper on South African land reform policy, 1997, and relevant case law on the rights of women to land and equality.

Chapter 4 examines women and land rights in South Africa, focusing on the impact of culture and religion on women's access to land. This chapter will look at the factors that prevent women's access to land and assess effective ways to guarantee women's access to land. The Department of Land Affairs White Paper will be analysed.

Chapter 5 focuses on a comparative analysis of land reform and women's access to land in Zimbabwe and Tanzania, doing so in order to assess the feasibility of land reform, the challenges that have been experienced, and how they were overcome.

Chapter 6 concludes and summarises the above chapters and analyses the socioeconomic impacts of land reform and women's access to land. The chapter concludes by highlighting possible remedies and recommendations on how women can become equal partners in the economic center through land access.

CHAPTER TWO

INTERNATIONAL AND REGIONAL FRAMEWORKS INFORMING GENDER EQUALITY AND ACCESS TO LAND

2.1 INTRODUCTION

There is a common phrase that says women's rights are human rights, and that land rights are also recognised as human rights.⁵⁶ This chapter will analyse international and regional legal instruments and the role and impact they have on women's socioeconomic rights, specifically the right of women to access land. The chapter also analyses the impact of land access on women's socioeconomic security and how the different frameworks provide women with protection against discrimination.

According to the United Nations Women report of 2013, women's access to use and have control over land is directly linked to the protection of their human rights, such as the right to life, housing, food and health.⁵⁷ This underlines the significance of women's land rights, the correlation between women's dignity, security, health and access to land, and the fact that the protection of women's rights is inextricably linked to their ability to use and control land.

Various international instruments speak to women's rights and gender equality. These include the Universal Declaration on Human Rights, with article 1 stating that all human beings are born free and equal in dignity and rights.⁵⁸ The Declaration calls for women's access to be equal and not be influenced by factors such as gender, sex, and race. These international instruments cement the obligations of state parties to acknowledge gender equality; this includes the Beijing Platform for Action, which held a women's conference in 1995 with the purpose of espousing gender equality and the empowerment of all women everywhere.⁵⁹ Chapter 3 of the Beijing Platform for Action has a critical area of concern, which states that the advancement of women and achievement of equality between women and men is a matter of human rights and a condition of social justice, and should not be seen in isolation to each other.⁶⁰ This means that a state cannot truly be said to have achieved full compliance with human rights principles if previously disadvantaged people, particularly women, have no privilege, no opportunity for economic security that will lead to other positive opportunities, and no wealth. The goal is to nurture and encourage equity.

⁵⁶ Women Rights Are Human Rights.pdf <https://www.ohchr.org/Documents/Events/WHRD/> accessed (09/07/2019)

⁵⁷ UN Women, realizing women's rights to land and other productive resources. www.ohchr.org/Documents/publications accessed (09/07/2019)

⁵⁸ Universal Declaration of Human Rights, 1948. *United Nations*.

⁵⁹ Sen, G. and Mukherjee, A., 'No empowerment without rights, no rights without politics: Gender-equality, MDGs and the post-2015 development agenda' (2014) *Journal of Human Development and Capabilities*, 15(2-3), pp.190

⁶⁰ Beijing declaration and platform for action.1995

Another area of concern that was highlighted was the inequality between men and women in sharing power and decision-making at all levels.⁶¹ These concerns highlight the importance of prioritising women's rights – to have a just and fair society at all levels, the discrepancy in the distribution of authority and decision-making between men and women must be addressed. The overall goal of this chapter is to link land access to democracy and the economic emancipation of women. As mentioned in the previous chapter, South Africa's historical background, coupled with stereotypes, plays a big role in the dispossession of women, and there is a need to explore the advantages of land reform for women in South Africa.

2.2 INTERNATIONAL FRAMEWORKS

2.2.1 The International Covenant on Economic, Social and Cultural Rights

International legal frameworks offer a solid basis for women's rights across the world, laying out what is expected of state parties and the obligations that governments must respect and the duty to implement these rights. Women can only fully enjoy all the rights guaranteed when they are empowered to use and to enjoy the land. Land has many social and economic benefits, hence various human rights instruments guarantee and call for state parties to recognise women's equal rights to access, use and control land.⁶² Significant changes were brought about by South Africa's Constitution, which, through the foundation laid by the international community, culminated in the integration of socioeconomic rights into it. (This will be explored in further detail in the next chapter.) The International Covenant on Economic, Social, and Cultural Rights established the cornerstone for equality for all, as well as a non-biased approach in all areas of governance, with article 2(2) of the covenant stating that 'Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status'. Article 3 affirms that states should ensure that men and women equally enjoy socioeconomic rights.⁶³ This article is clear about recognising gender equality, and states that such realisation is a matter of urgency. It is common cause that a state's conditions may not always be conducive to immediate realisation, so the realisation of socioeconomic rights becomes progressive under article 2(1). As a result, the Covenant's rights must be exercised without regard to preconceptions.

The Covenant on Economic, Social and Cultural Rights, General Comment 16, paragraph 28 requires state parties to recognise the rights of everyone to an adequate standard of living, including adequate housing and

⁶¹ Beijing declaration and platform for action. 1995

⁶² UN Women, realizing women's rights to land and other productive resources. www.ohchr.org/Documents/publications accessed (09/07/2019)

⁶³ International Covenant on Economic, Social and Cultural Rights, 1966

food.⁶⁴ Article 3 states that women have a right to own, use or otherwise control housing, land, and property on an equal basis with men, and to access the necessary resources to do so.⁶⁵ The covenant, through its general comments, acknowledges the vital role land plays in women's needs, since women give birth to children and require shelter, which is related to their dignity, while food is essential for human life. It is essential to note that land in South Africa plays an important role in human sustainability and women have become food providers for their families. As a result, any restitution programme devised by the government must comply with international standards and strike a balance between the amount and distribution of resources.

General comment 20 calls for non-discrimination in economic, social and cultural rights, while paragraph 1 goes a step further and states that discrimination undermines the fulfilment of economic, social, and cultural rights for a significant proportion of the world's population.⁶⁶ When it comes to economic success, discrimination puts women at a disadvantage. Women's economic hardship and lack of food security are intimately connected, and gender inequality in access to land is a key issue that contributes considerably to both. As a result, general comment 12 underlines the right to food security and urges that it be realised gradually, with certain elements being particularly important at this time. As it balances economic status and other rights violations, the ICESCR emphasises the importance of land and the difficulties of land access for women. An observation in General Comment 20 recognises non-discrimination but goes a step further by recognising discrimination based on assumptions, patriarchy, and culture, all of which are reinforced daily.

Through the adoption of the Covenant, the notion of 'sex' has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights.⁶⁷ Men and women have equal rights to enjoy these rights, and although some aspects of gender equality, such as equal access to land, are formally guaranteed, perceptions of gender discrimination remain. Non-discrimination would necessitate equal access to economic possibilities, which would lead to economic emancipation, education, poverty eradication, water, shelter, and food, implying that attaining one right leads to reaching another.

The lack of secure access to land rights can also be demonstrated by the evictions that black people are experiencing. Evictions exacerbate the level of uncertainty about women's secure access to land. General Comment No. 7 underlined the right to adequate housing. The committee highlighted the disproportionate impact of evictions on women. It stated that that women in all groups are especially vulnerable given the

⁶⁴ General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights Art. 3 of the Covenant, 2005

⁶⁵ General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights Art. 3 of the Covenant, 2005

⁶⁶ General comment No. 20: Non-discrimination in economic, social and cultural rights, 2009

⁶⁷ General comment No. 20: Non-discrimination in economic, social and cultural rights, 2009

extent of statutory and other forms of discrimination that often apply to property rights or rights of access to property or accommodation, and that they are at risk of acts of violence and sexual abuse when they are rendered homeless.⁶⁸ Women become vulnerable as a result of the level of violence used to carry out such evictions, and the repercussions of evictions on women are severe. Evictions affect the family as a whole and children, as well as food security and land access; they even affect physical health.

The Covenant gives hope to all people, especially women, of achieving socioeconomic justice. While many socioeconomic rights are progressive in nature and reliant on available resources, scarcity of resources cannot be used as an excuse for abandonment. The goal of land reform in South Africa was to alleviate the impact of the past on black people; however, restitution became overly focused on the racial impact of apartheid, with insufficient attention paid to the impact on women. For this reason, the ICESCR lays a well-structured foundation for remedial legislation.

2.2.2 Convention on the Elimination of Discrimination against Women

Another significant international pillar is the Convention on the Elimination of Discrimination against Women, which takes a firm stand on the primacy of women's right to equality, which must triumph against traditionalist religious or neoliberal concerns. CEDAW has made significant contributions to the rights of women through international acknowledgment of women's rights as human rights, as well as the establishment of national machinery for women's progress. CEDAW takes a firm stance on gender equality.

Emphasis is placed on the convention that underlines the importance of women's socioeconomic inclusion in land and food development, particularly for rural women who are disproportionately affected by bias. The convention also underlines the need for a separate piece of legislation that addresses women's concerns in rural development, particularly agriculture, with article 14(2) of the convention stating that state parties shall take all appropriate measures to eliminate discrimination against women in rural areas to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development.⁶⁹ The article's main point is that women must be able to equally participate in, and benefit from, rural development.

Article 16(1) emphasises the requirements for equality, especially when it comes to home and/or domestic affairs, and calls for measures to combat the discrimination against women in respect of their equality in marriage and home life.⁷⁰ This means that the convention pleads for more action to be taken in protecting the rights of women, and for more legislative policies to close the wide gender gaps that currently act as barriers. CEDAW recognises that home life has a great impact on the status of women's equal rights and that

⁶⁸ General comment 7: The right to adequate housing (Art.11.1): forced evictions

⁶⁹ Convention on the Elimination of all forms of Discrimination Against Women, 1979

⁷⁰ Convention on the Elimination of all forms of Discrimination Against Women, 1979

participation of women in the rural economy would result in economic freedom. Whether it would be a huge economic freedom is not relevant.

CEDAW aims to realise women's rights to equality and realise the possibility of non-discriminatory society and culture.⁷¹ The goal is to actualise equal rights for women and the potential of a non-discriminatory society and culture. As a result, state parties must devote more resources to achieving equality and non-discrimination. As a result, further work in the form of action-based legislation is necessary.

The CEDAW Committee's General Recommendation No. 21 emphasises the elimination of any form of discrimination against women in any matter relating to marriage and family relations, particularly in paragraphs 34 and 35.⁷² CEDAW acknowledges that in the past women were not treated equally to men but as children with no power over their belongings. Family relationships appear to have put women in a vulnerable position. As will be discussed further below, a major barrier to gender equality appears to be the disconnection between tradition and women's rights. The role customary law plays is critical and valuable, but, when weighed against the negative impact it has on women's equality, it leaves much to be desired. Article 5(a) of CEDAW states that parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women and to achieve the elimination of prejudices and customary and all other practices which are based on the idea of inferiority of either of the sexes or stereotyped roles for men and women.⁷³ Therefore, more action is needed to reshape the societal norms of conduct of men towards women and eliminate discriminatory practices based on the idea of the inferiority of either of the sexes.

In General Recommendation No. 21 on equality in marriage and family relations, the Committee understands that 'the right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence'. Paragraph 35 of General Recommendation 21 calls for the abolition of any laws and practices concerning inheritance and property that are discriminatory against women, resulting in women receiving smaller shares of the husband's or father's property at his death than would widowers and sons. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during the marriage. Such provisions contravene the convention and should be abolished.⁷⁴ Women's rights to have power over their possessions were never recognised; therefore, they could never dispose of or claim credit for them. Inheritance was also a difficulty since the regulations did not allow for it; this is still a concern, particularly in nations that are culturally and religiously diverse, such as South Africa. Maunatla has stated

⁷¹ Women and land, property and housing <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/Land.aspx> (accessed 03/05/2018)

⁷² Committee on the Elimination of Discrimination against Women General recommendation 21: Equality in marriage and family relations. *Thirteenth Session, February 4 (1994)*.

⁷³ Convention on the Elimination of all forms of Discrimination Against Women, 1979

⁷⁴ General Recommendation 21, Equality in marriage and family relations 1994

that the fact that, even in 2017, there were still court cases dealing with women seeking to be treated equally to men under customary law showed there was a problem.⁷⁵ As a result, the government must enact action-based law that strictly prohibits any kind of discrimination, including during the policy-making process.

2.2.3 INTERNATIONAL POLICIES AND GUIDELINES

2.2.3(A) Beijing Declaration and Platform for Action

The Beijing Declaration and Platform for Action was adopted by South Africa in 1995, with governments from every continent signalling their multilateral determination to ‘ensure women’s equal access to economic resources, including land as a means to further the advancement and empowerment of women and girls’. They acknowledged that ‘women’s poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources, including land ownership and inheritance’.⁷⁶ The Platform for Action reaffirms what has already been stated: equal access to resources will contribute to women’s development, and land will play an important role in this process. Access to land does not imply wealth, but rather freedom for women, because it affords more opportunities for them to flee abusive and degrading living situations.

Recommendation 13 of the Beijing Declaration speaks to women’s empowerment, as well as the full participation of women based on equality in all spheres of society, including participation in the decision-making process and access to power. This is fundamental to the achievement of equality, development, and peace.⁷⁷ To guarantee that everyone is serviced, gender mainstreaming should be prioritised in decision-making. More women are needed in decision-making structures; such structures require a sophisticated, gender-responsive framework. Gender mainstreaming in decision-making should be addressed in order to guarantee that everyone is served.

Women’s equality and socioeconomic independence are important for domestic development and growth and constitute a vital part of sustained development and democracy. The economic empowerment of women is just not about their spending power – it is about more equitable ownership, control and management of the economy, reduction of income inequality and expanded access to opportunities.⁷⁸

⁷⁵K.R Maunatlala *The role of male Primogeniture and role of women to inherit under Customary Law of Succession* (unpublished LLM Thesis, University of Pretoria, 2019)19

⁷⁶Beijing At 20 – How the Visionary Platform Works for Womens land rights today <https://www.landesa.org/beijing-at-20-how-the-visionary-platform-works-for-womens-land-rights-today> (accessed 16/06/2021)

⁷⁷ Beijing Declaration and Platform for Action the Fourth World Conference on Women 1995

⁷⁸ Department of Women, Youth and Persons with Disabilities (DWYPD) 2019, ‘Beijing +25 – South Africa’s Report on the progress made on the implementation of the Beijing Platform for Action 2014-2019’, https://static.pmg.org.za/190828National_Beijing_25_Report.pdf, accessed 7 April 2021.

2.2.3(B) REPORT OF THE UNITED NATIONS CONFERENCE ON HUMAN SETTLEMENTS (HABITAT II)

The Human Settlement Conference spoke of providing legal security of tenure and equal access to land to all people, including women and those living in poverty; and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and ownership of land and other property, credit, natural resources, and appropriate technologies.⁷⁹ CEDAW specifically underlines the need for inheritance law to be developed in a way that helps women, and the HABITAT conference called for land access remedy to be mindful of women's deprivation, and the necessity for legislation to be direct in providing such access.

This was accentuated by the Plan of Action of the World Food Summit, with objective 1.3 on gender equality and empowerment of women calling for the promotion of women's full and equal participation in the economy. To this end, it called for gender-sensitive legislation providing women with secure and equal access to and control over productive resources including credit, land and water, and ensuring that institutions provide equal access for women.⁸⁰ These demands for equal and guaranteed access to land for women promote wide economic involvement while supporting secure land access and governance.

2.3 REGIONAL FRAMEWORK

2.3.1 PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (Maputo Protocol)

Africa is on the right track, following in the footsteps of the international community and confirming many human rights instruments, as exemplified by the Protocol to the African Charter on Human and Peoples' Rights, and Rights of Women in Africa, where article 2 affirms the elimination of discrimination against women through appropriate legislative, institutional, and other measures. Article 6 emphasises that men and women have equal rights and are equal partners in marriage.⁸¹ These articles advocate for non-discrimination and reform, particularly in society's patterns of behaviour about gender roles, and seek to ensure women's access to property, whether by inheritance or statutory means. The protocol aims to eradicate gender imbalances and find more suitable measures and actions for redress.

⁷⁹ Report of the United Nations Conference on Human Settlement (HABITAT II) 1996

⁸⁰ Report of the World Food Summit, 1996 [www.http://www.fao.org](http://www.fao.org) (accessed 15 June 2021)

⁸¹ Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa, 2003 Art 2

The Maputo Protocol was acutely aware of family contexts that contain a negative narrative about women's equal position, and as a result of this, that women would be denied their rights to joint spousal property following separation. Hence article 7 speaks to the equal rights of men and women in their property and states that, in case of separation, divorce, or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.⁸² Men and women have equal property rights, so in the event of a divorce, women can claim for their proportionate part of the property, which cannot be unfairly refused.

General Comment 6 of the African Commission went a step further to recognise marriages and the implications they have for the rights of women. Paragraphs 22 and 23 of the General Comment state that for women, marital property rights and marital property regimes are of particular importance during the course of the marriage and become even more important in the context of divorce.⁸³ The Protocol drew directly from the foundation laid by CEDAW and was strengthened by General Comment 21, which, as previously stated, speaks to the influence of family dynamics on women's enjoyment of certain rights.

The equitable entitlement of property rights for women is critical, not only because of its importance for the socioeconomic well-being of women, but also because women deserve them.⁸⁴ Women's property rights are vital not only for economic prosperity but also because they are deserved by women. Marital property rights and rules are critical during a marriage, and they become much more important during a divorce. This indicates that more deliberate policies and execution are needed to guarantee that women enjoy the social and economic benefits to which they are entitled, both through marriage, and in society. Policies that are more gender aligned will result in better development, which entails putting an end to discriminatory practices and the gender stereotypes that perpetuate patriarchy.

Article 16 states that women shall have the right to equal access to housing and acceptable living conditions in a healthy environment,⁸⁵ and state parties shall grant to women, whatever their marital status, access to adequate housing.⁸⁶ The Maputo Protocol is a crucial instrument as it solidifies three important things, namely, elimination of discrimination, equality of men and women, and equal access for women. These three concepts are the basis of establishing the socioeconomic advancement of women in land reform.

⁸²Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa, 2003 Art 7

⁸³General Comment No 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2020

⁸⁴General Comment No 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2020

⁸⁵Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa, 2003 art 6 and 16

⁸⁶ Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa. 2003

There are calls for more work to be done to improve women's land security and property rights, not just through legislation but implementation. Article 19(c) is extremely important as it states that women shall have the right to fully enjoy their right to sustainable development. In this connection, the state parties shall take all appropriate measures to promote women's access to and control over productive resources such as land and guarantee their right to property.⁸⁷ Sustainable development allows women to develop their knowledge and broaden their access, which benefits a country by ensuring economic and social stability. Moreover, Article 14 of CEDAW corresponds to article 19(c) of the Maputo Protocol, in that both require member states to deal with hindrances as identified by rural women. The states are to act to ensure that women specifically have equal access to land, as well education and training.⁸⁸

The Maputo Protocol is an instrument that aims to protect the rights of African women; one of the many aims of the Maputo Protocol is to spearhead the path to cultural transformation to the benefit of women.⁸⁹ The Protocol affirms the primacy of women's rights to non-discrimination and it requires states to eliminate cultural and traditional practices that discriminate against women. The Protocol therefore provides a framework for the promotion, protection, and respect for rights of women in Africa.⁹⁰ This instrument is progressive in affirming the equal status of women in all aspects of society, including the position in the economic centre.

The Maputo Protocol on the rights of women further validates the rule of non-favouritism regarding land and food security, as it requires the state to boost women's access to these.⁹¹ This means that women must be empowered economically through support and social cohesion, thus closing the wide gender gaps that exist.

2.3.2 The African Charter (Banjul Charter)

According to the preamble of the African Charter, the fulfilment of the genuine goals of the African peoples requires the pursuit of 'freedom, equality, justice and dignity as essential objectives for the achievement of the legitimate aspirations of the African peoples'.⁹² The pursuit of freedom and equality is enshrined in article 1 of the Universal Declaration of Human Rights, which states that women, like men, have the right to freely receive any information leading to access to land for credit once that land is acquired, and that this freedom

⁸⁷ Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa, 2003 art 19 c

⁸⁸ Moyo, Kerbina *Women's Access to Land in Tanzania: The Case of the Makete District*. (PhD diss., Kungliga Tekniska högskolan, 2017)

⁸⁹ Kombo, B., Sow, R. & Mohamed, F. J. (Eds.). 'Journey to Equality': 10 Years of the Protocol on the Rights of Women in Africa (2013) SAWR: *Equality Now*. Pg. 20

⁹⁰ Kombo, B., Sow, R. & Mohamed, F. J. (Eds.). 'Journey to Equality': 10 Years of the Protocol on the Rights of Women in Africa (2013) SAWR: *Equality Now* Pg. 20

⁹¹ Moyo, Kerbina. *Women's Access to Land in Tanzania: The Case of the Makete District*. (PhD diss., Kungliga Tekniska högskolan, 2017)

⁹² The African Charter on people and human rights, 1981

must be based on equality,⁹³ providing opportunity, land access, and economic justice. Poverty-reduction equals justice: women's worth and value must be acknowledged and reinforced as essential; only then can we say that women have justice and dignity.

The African Charter guarantees property rights under article 14. The article allows the infringement of the right to property only if it is in the interest of the public or through the application of the law.⁹⁴ As a result, factors such as cultural beliefs, norms and practices, and patriarchal thinking cannot be invoked to justify the denial of women's rights. The charter mandates states to develop and ensure equality for all citizens, including equality in legislation and behaviour, as well as cultural traditions. Therefore, the notion of males being superior to women should be obsolete. This is reaffirmed by article 19, which states that all peoples shall be equal, shall enjoy the same respect, and shall have the same rights. Nothing shall justify the domination of a people by another.⁹⁵

2.3.3 African Union Agenda 2063

The African Union aims to transform the African region and promote economic sustainability and the inclusion of human rights. Goal 17 calls for gender equality in Africa, intending to empower women and children and eliminate all forms of discrimination.⁹⁶ This regional framework builds on the international foundation set by the United Nations Sustainable Development goal number 5, which advocates for gender equality, entailing that opportunities are available for all without any discriminatory elements and thus creating a conducive society for all.

2.3.4 REGIONAL RESOLUTIONS

According to the recommendations of the AU Declaration on land issues in Africa, governments need to review their policies to ensure gender-sensitive and responsive legal frameworks for promoting and protecting women's land rights. In this regard, there is an urgent need for gender-disaggregated data to ascertain the situation of women and track implementation of the 30 per cent target for women's land rights.⁹⁷ As mentioned above, the policies that are put in place by the government must, as guided by the declaration, conform to gender-mainstreaming processes. However, in most African countries this is not the case. As will be discussed in the chapter below, this is also not the case in South Africa, where there is currently no direct legislation that protects women's socioeconomic access to land.

⁹³ Universal Declaration on Human Rights 1948

⁹⁴ The African Charter on People and Human Rights 1981

⁹⁵ The African Charter on People and Human Rights 1981

⁹⁶ African Union Commission. *Agenda 2063*. The African Union Commission, 2015.

⁹⁷ African Union on Declaration on Land Issues and Challenges in Africa 2009

The declaration resolved to ensure that land laws provide for equitable access, including by the youth and landless and vulnerable groups such as displaced persons, and strengthen the security of land tenure for women, which requires special attention.⁹⁸ This resolution implies that larger manpower will be needed in terms of financial support for policy evolution, as well as a better policy-implementation and progress-monitoring system.

The same notion of transformation by state parties was called upon in the Resolutions on Women's Right to Land and Productive Resources, which called on state parties to organise sustained public sensitisation and information campaigns for community and religious leaders, to transform the socio-cultural patterns that keep women deprived.⁹⁹ This will be explored in depth in the next chapters since cultural behaviour has a detrimental influence on women's rights to access land, suggesting that more needs to be done to correct this injustice.

2.4 CONCLUSION

In conclusion, international and regional institutions provide a legal framework on women's access to land and the underlying principles that underpin these protections. The ability of women to utilise and manage land is closely related to the preservation of their human rights. Women's economic hardship and lack of food security are inextricably linked, and gender disparity in land access is a major problem. The International Covenant on Economic, Social, and Cultural Rights in article 28 requires parties to recognise that everyone has the right to an adequate standard of living for themselves and their family.¹⁰⁰ The Maputo Protocol mandates that women and men have an equal fair share of property in the case of divorce or separation. African countries must ensure equality and non-discrimination while also changing traditional norms.¹⁰¹

This chapter has examined international and regional legal instruments, as well as their role and influence on women's socioeconomic rights, notably their right to access land. Women's rights and gender equality are addressed in these frameworks. The obligations of state parties to acknowledge gender equality are formalised in several international treaties, and, in Africa, reinforced by regional frameworks. This means that a state cannot truly claim to be a complete state that guarantees human rights principles if previously disadvantaged people, particularly women, have no privilege and no opportunities for economic security, which will bring about other positive possibilities.

The goal is to nurture and encourage equity, and the main objective is to establish a relationship between land access and women's economic empowerment, thus fulfilling economic justice. South Africa's historical

⁹⁸African Union on Declaration on Land Issues and Challenges in Africa 2009

⁹⁹Resolutions on Women's Right to Land and Productive Resources 262 ,2013

¹⁰⁰The International Covenant on Economic, Social, and Cultural Rights

¹⁰¹Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa,2003 art

context, combined with preconceptions, has had a significant part in women's dispossession, and there is a need to investigate the benefits of land reform for women in South Africa.

International legal frameworks spell out what is required of state parties and the duties that governments must accomplish to protect and implement these rights, providing a firm basis for women's rights around the world. Women have a harder time achieving economic change due to discrimination. Men and women have equal rights to economic, social, and cultural rights under the Covenant.

CEDAW maintains an unwavering position on the priority of women's equality rights, which must triumph. There have been significant accomplishments that may be ascribed in great part to CEDAW. The objective is to realise women's equal rights and the possibilities of a non-discriminatory society and culture. As a result, governments of state parties must devote more resources to achieving the objective of equality and non-discrimination, and further work in the form of action-based legislation is necessary.

Greater investment in women's socioeconomic rights is needed, as this would provide women with more chances to acquire land through action-based policy models and to develop women more through workshops.

CHAPTER 3

NATIONAL LEGAL FRAMEWORKS

3.1 INTRODUCTION

Balance and consistency require legal frameworks; national laws provide a foundation for this balance. National legislation strives to achieve balance and includes monitoring and assessment systems to promote justice and equality. All legislation in South Africa is based on the Constitution, which is in accordance with international standards. The principles of equality and non-discrimination are at the heart of South African legislation. This chapter will look at the role of women in South Africa's Constitution and the Promotion of Equality Act, as well as the amount of protection that they have.

3.2 THE CONSTITUTION OF SOUTH AFRICA

The foundation for land reform, and the preservation of property rights, is provided by the Constitution of the Republic of South Africa. Section 25(5) states that the 'state must take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis'.¹⁰² The basis of South Africa's constitutional democracy can only have genuine significance if society safeguards the whole constitutional democracy of South Africa, through the guidance of international law. Section 39 of the Constitution requires domestic courts to look at and apply international laws and precedents of other countries when deciding on a case.¹⁰³ South Africa is compelled to implement globally recognised human rights laws as a result of being a signatory to various international and regional frameworks.

National legislation and policies must be construed in line with the international legal framework. While a global statement implies that everyone is equal, this may not be the truth in every situation. Due to its significant use of customary norms, South Africa may find it difficult to implement international law fully. Chapter 1 of the Constitution states that 'South Africa is founded on the values of human dignity, equality, and advancement of human rights and freedom, non-racialism, and non-sexism'.¹⁰⁴ This means that dignity and equality are intimately intertwined and cannot be separated. Equal opportunity is based on equality, which takes into consideration the various barriers we all face.

Section 9 of the Bill of Rights is a very important section in the Constitution as it reaffirms the significance of equality before the law and highlights the right to equal protection and benefit under the law. The section

¹⁰²Constitution of the Republic of South Africa,1996

¹⁰³ Constitution of the Republic of South Africa 1996

¹⁰⁴Constitution of the Republic of South Africa 1996

states that (1) everyone is equal before the law and has the right to equal protection and benefit of the law, and that (2) equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect, or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.¹⁰⁵

Section 9 calls for fair opportunity and states that land reform must benefit all equally and that equality must be the cornerstone of all redistribution. The Protocol to the African Charter on Human and People's Rights, and the Rights of the Woman confirms this. This means that all legislative documents dealing with land reform and land distribution must pass the constitutional test.

The equality clause assures women that all are equal and must be treated as such. The concept of equality also has an impact on the enjoyment of the right to dignity, as mentioned in section 10 of the constitution, because when women are regarded as equal partners to men, their worth in society is reinforced. These are critical components in South Africa's quest for equal access to and utilisation of resources.

Women's access to land is referenced in speeches and women's day commemorations, but a broader platform is required where drastic legislation is recommended to effectively address women's access to land, including programmes that would facilitate women's access to land. Sections 25 and 9 impose a duty on the state to ensure that land is distributed equally, but there is still a lack of political will to support this undertaking. Section 25(5) creates a justiciable socioeconomic right to gain access to land on an equitable basis.¹⁰⁶

Section 25(6) states that 'a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws and practices, is entitled to the extent provided by an act of parliament, either to legally secure tenure or to comparable redress'.¹⁰⁷ This was the issue in the *Rahube v Rahube* case, which dealt with violations of women's rights to equality and access to land. The case involved the Upgrading Act which was part of legislative schemes enacted to correct the wrongs done by the colonial and apartheid regimes. The Constitutional Court found section 2(1) of the Upgrading of Land Tenure Act unconstitutional and in violation of women's rights to access land.

Section 26(1) states that everyone has a right to adequate housing. Section 25(7) calls for land restitution programme to address land claims.¹⁰⁸ As a result, this would imply that women should have a legal right to land access as a matter of principle. Land reform was one of the focus areas of this scheme because the

¹⁰⁵ Constitution of the Republic of South Africa 1996

¹⁰⁶ *Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) para 50*

¹⁰⁷ Constitution of the Republic of South Africa, 1996

¹⁰⁸ Constitution of the Republic of South Africa, 1996

systemic deprivation of the African majority's rights in land and property was a main feature of the apartheid system.¹⁰⁹

3.3 NATIONAL POLICY FRAMEWORKS

Government had some policies within the national sphere that aimed at address land issue and issues of gender. Such policies included the White Paper on Land Policy and drafting of a Land Reform Gender Policy, both these policies aimed to promote gender equity by removing legal restrictions on women's access to land, and by providing for gender-sensitive participatory methodologies, financial assistance for women, and registration of redistributed land in women's names, prioritise women applicants for grants.¹¹⁰ These policies reinforce the idea that government, through legislation, should go a step further in securing any insecure rights of women, not through claims of equality, but rather by taking into account factors that result in lack of equality and are detrimental to women.

3.3.1 THE PROMOTION OF EQUALITY AND PREVENTION OF DISCRIMINATION ACT 4 OF 2000

Section 6 of Act 4 of 2000 states that neither the state nor any person may unfairly discriminate against any person.¹¹¹ It is common cause that any law, whether from the past or newly created, cannot discriminate against women's land access, nor can it have conditions that limit such access; section 8 prohibits any policy or conduct that unfairly limits the access of women to land rights, either by the state or by a person.¹¹² As a result, women's interests are safeguarded, and this protection must be manifested and brought to life via execution and the setting up of precedents that make the laws effective. Act 4 of 2000 reiterates that women's rights to access to land cannot be taken away or limited, and these rights must be exercised freely and fairly.

The Customary Marriages Act 20 of 1998 recognises and ensures equality in all elements of a customary marriage between men and women. Any customary law aimed at oppressing women is not enforceable, which means that, unlike in the past, women can inherit from their husbands' estates. This will be expanded on in the chapter below.

3.3 CONCLUSION

The foundation of land reform, and the preservation of property rights, is provided by the Constitution of the Republic of South Africa. Land reform must be of equal benefit to everybody and equality must be the cornerstone of redistribution. South Africa's Constitution states in section 9 that all are equal and must be

¹⁰⁹*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) para 38*

¹¹⁰Food and Agricultural organisation of the United States <http://www.fao.org/gender-landrights> (accessed 04-02-2020)

¹¹¹ The Promotion of Equality and Prevention of Discrimination, Act No. 4 of 2000

¹¹² The Promotion of Equality and Prevention of Discrimination, Act No. 4 of 2000

treated as such. A broader platform is required, with drastic legislation changes and implementation, to address women's access.

Most national legal frameworks emphasise gender equality as a goal and promote the prioritisation of women for land access, demonstrating clear efforts to promote gender equality and gender-neutral access. South Africa's Constitution lays the groundwork for land reform and the protection of property rights under section 25, with subsection (5) stating that the 'state must take reasonable legislative and other measures within its available resources to foster conditions that enable citizens to gain equitable access to land'.¹¹³

Section 9's equality provision informs women that they are all equal and must be treated as such. Equality has an impact on the enjoyment of the right to dignity because, when women are recognised as equal partners with men, their value in society is reaffirmed.

South Africa is compelled to implement globally recognised human rights laws as a result of being a signatory to international and regional frameworks. The problem in South Africa is that it sometimes finds it difficult to fully apply international law due to its extensive use of customary standards. While a global statement seeks to ensure that all people are equal, this may not be the case. The Promotion of Equality and Prevention of Discrimination Act 4 2000 says, in section 6, that neither the state nor any person may unfairly discriminate against any person.¹¹⁴ This means that no law, either from the past or newly created, can discriminate against women's land access or have conditions that limit such access. Women's interests are safeguarded, and this protection must be manifested and brought to life via execution, and the setting of precedents that make the laws effective.

¹¹³ Constitution of the Republic of South Africa, 1996

¹¹⁴The Promotion of Equality and Prevention of Discrimination Act 4 2000

CHAPTER 4

WOMEN'S LAND RIGHTS IN SOUTH AFRICA AND THE IMPACT OF CULTURAL PRACTICES ON LAND

4.1 INTRODUCTION

During apartheid it was not true that all persons were born free and equal in dignity and rights. The oppression that the system meted out was felt no more acutely than by African women. Women were relegated to the status of perpetual minors and often forced to work in the unregulated domestic care sector to look after children who were not their own; they were also prevented from owning property, which left them permanently dependent on the male heads of their families to access the basic protection that a home provides.¹¹⁵

The apartheid era history of South Africa is also influenced by the role of women, although it appears as though the role women played in the fight for liberation is overlooked, as women's involvement is not as widely celebrated and documented as that of the men. The struggles of inequality have always existed for women of all races. Goliath AJ has stated that under apartheid the effects of patriarchy were compound by legislation that codified the position of African women as subservient to their husbands and male relatives.¹¹⁶

Women were denied numerous chances and were always viewed as inferior to males. The roles that African women played in political history, as well as the influence women had on the economy and on racial equality, are not given the same prominence as men's history. This might be because South Africa, like so many other nations, has a strongly patriarchal society in which women are solely seen as caregivers and individuals who need to be catered for, with decisions made on their behalf. Married women are often treated as people without rights in the land and are not consulted on decisions about land and women. They often do not participate in traditional institutions, such as tribal and village meetings, where important decisions about land rights are made.¹¹⁷ Odeny has stated that male members of families are allocated land on need, while female members are allocated land through male members; and such allocation would be temporary, because, once married, women are expected to live and access land at their spouses' home.¹¹⁸

¹¹⁵ *Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018).para74*

¹¹⁶ *Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018).para 26*

¹¹⁷ South Africa: women: a focus on land www.landportal.org(accessed 04-4-2020)

¹¹⁸ Odeny, M 'Improving Access to Land and strengthening Women's land rights in Africa. *Annual World Bank Conference on Land and Poverty*'. (2013) *the World Bank Washington, DC, April 8–11. 5*

The role of women can be seen from the impact they had on the revolution and the fight for a transformative South Africa during the 1955 Anti-Pass Campaign and 1956 women's march.¹¹⁹ South Africa did not recognise the rights of women, particularly black women, The apartheid government left a long legacy of misery, because it exemplified the technique of denial of rights for many Africans, robbing them of their dignity. This means it still has a tremendous impact on the rights of Africans; this includes being deprived of the right to access and own land, after the enactment of the 1913 Natives Land Act. Section 1(1)(a) of that act stated that a 'native shall not enter into any agreement or transaction for the purchase, hire or other acquisition from a person other than a native'.¹²⁰ The effects of apartheid also influenced the narrative of African people, as shown in the *Rahube v Rahube* case, where it was stated that property rights held by African people were distorted in favour of men under apartheid.¹²¹

According to G. Mutungadura, women in Southern Africa continue to face discrimination in accessing and owning land. Most women access farmland only through their husbands or fathers, as they are only granted usufructuary rights because land title passes through the male lines.¹²² The concept of equality is something that culture and religion fail to recognise; their customs are mostly discriminatory. Equality requires that people be treated consistently and without being influenced by stereotypes and theories of superiority; it requires that opportunities be provided at the same level with the same criteria, and equality can be formal or substantive. Article 16(1) emphasises the requirements for equality, especially when it comes to home and or domestic affairs, and calls for measures to combat the discrimination against women in respect of their equality in marriage and home life.¹²³ Even though women have been perceived as the weaker sex, this should not be the case, especially with the international safeguards that are available. More must be done to protect home lives and change community perceptions. Formal equality is when all persons in the same situation are accorded the same treatment and not treated differently on arbitrary grounds like race or gender. Substantive equality requires ensuring equality of opportunities and equality of results, and recognising cultural, political and legal choices.¹²⁴

4.2 WOMEN AND LAND ACCESS DURING APARTHEID

One needs to understand the historical context of women's rights in South Africa, particularly that of black women. Goliath AJ stated that during apartheid women were particularly vulnerable figures in society and

¹¹⁹ History of Apartheid in South Africa <https://www.sahistory.org.za/article/> (accessed 15/05/2019)

¹²⁰ Native Land Act 27 of 1913

¹²¹ *Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018 Para 28*

¹²² Mutangadura, Gladys. "Women and Land Tenure Rights in Southern Africa: A human rights-based approach." In *Presentation at Land in Africa: Market Asset or Secure Livelihood Conference, London, UK*. (2004)2

¹²³ Convention on the Elimination of all forms of Discrimination Against Women, 1979

¹²⁴ Commission on gender equality report 20-year review report *Reviewing the work and contribution of the Commission for Gender Equality in South Africa 1996-2016(2017)* pg.25

suffered threefold discrimination based on race, class, and gender.¹²⁵ When it came to socioeconomic justice, black women were disadvantaged, and they were subjected to subjection in all parts of society, particularly in the area of economic change. African women occupied the lowest place in the hierarchy and were in the most disadvantaged positions in society. Andrews has stated that the system of apartheid existed in South Africa since 1948, but previous periods of colonialism have left all South African women in a subordinated position.¹²⁶ Women's treatment has regrettably become a hereditary legacy that appears to be passed on from generation to generation, with the cycle lasting for many decades. The repercussions of such treatment are immeasurable, as women appear to have received no economic justice. The laws and policies bolstered by an apartheid ideology that insisted on the second-class status of women within African societies have cemented their inferior status, and this legacy will continue to haunt women for many generations.¹²⁷

The *Rahube v Rahube* case is a perfect demonstration of the impact of apartheid legislation when it comes to women rights and women's access to land. In this case, applicant Ms M Rahube and the respondent, Mr H Rahube, were siblings and had stayed in a property with other family members in the North West Province in the 1970s. It was common cause that the grandmother was the owner of the property, but there was no documentary proof of ownership.¹²⁸

The applicant married and lived in her marital home. She later came back to the family home after her marriage dissolved, and had lived in the property ever since with children and grandchildren, while the applicant's brother had moved out of the property in the 1980s and 1990s and the uncles had moved out in the 2000s.¹²⁹ In 1987 the family nominated the respondent to be the holder of the certificate of occupation, which gave him a deed of grant. The upgrading act was enacted in 1991 and converted property rights to ownership rights. This therefore meant that the respondent became the owner of the property.¹³⁰

The applicant claimed that she was legally unable to register her interests in the property because only men could be the head of the family. To test this submission, the court found it necessary to interpret the proclamation contextually and then establish whether the Upgrading Act, which relies on the position created by the proclamation, unfairly discriminates against African women.¹³¹

¹²⁵*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) para 2*

¹²⁶ Andrews P 'Gender Apartheid to non-sexism: the pursuit of women's rights in South Africa' (2001) CUNY school of law 694

¹²⁷ Andrews P 'Gender Apartheid to non-sexism: the pursuit of women's rights in South Africa' (2001) CUNY school of law 697

¹²⁸*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) Para 6*

¹²⁹*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) Para 7*

¹³⁰*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) Para 8-9*

¹³¹*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) Para 21*

The big contention in the *Rahube v Rahube* case was the proclamation, as it was widely and unapologetically gendered; this included what the proclamation defined as ‘family’. Goliath stated that the definition is crafted in gendered terms in that no provision is made for a husband, brother or non-dependent man to be a member of a family and describes the family only as the head of the family. The proclamation does not define ‘head of the family’; however, all references to the ‘head’ are made using masculine pronouns.¹³²

On a plain reading of these sections of the proclamation, it is obvious that it envisages a situation where only men could be the head of the family, with women relatives and unmarried sons falling under their control.¹³³ This gives males the impression that even if they do not occupy such land, and only a woman and her children do, they are still the owners of the land and lead that family.

According to Nhlapo, enthrone the male head of the home as the single true person in law, sole holder of family property, and the sole bearer of civil status rendered spouses, children, and unmarried sons and daughters invisible in a social and legal sense.¹³⁴ This would validate the narrative of women assuming secondary status in society, thus condemning women to an impuissant situation.

The court noted in the *Rahube v Rahube* case that the Upgrading Act was part of a programme of legislation designed to rectify the injustices committed by the colonial and apartheid regimes but ended up discriminating against women when it came to upgrading land rights to ownership. In most part, colonial and apartheid laws and practices limited, and at worst excluded women from accessing and controlling resources such as property, including land.¹³⁵

Goliath AJ stated that

African women under apartheid were systemically disenfranchised in several ways. It is important to recognise that the pervasive effects of patriarchy meant that women were often excluded even from seemingly gender-neutral spaces. The perception of women as the lesser gender was, and may still be, a widely held societal view that meant that even where legislation did not demand the subjugation of women, the practices of officials and family members were still tainted by a bias towards men. The prioritisation of men is particularly prevalent in spheres of life that are stereotypically masculine, such as labour, property, and legal affairs.¹³⁶

4.3 WOMEN AND LAND ACCESS POST-APARTHEID

¹³²*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018 para 30*

¹³³*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018 Para 32*

¹³⁴Nhlapo, T. R African Customary Law in the interim Constitution (1995).Pg162

¹³⁵ Kariseb K & Muhumuza N Apartheid, gender and property relations in South Africa: Some reflections from *Rahube v Rahube & Others* <https://www.lawfirms.org.za> (accessed 20-10-2020)

¹³⁶*Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018 Para 23*

Land redistribution is undoubtedly a prerequisite for social justice in South Africa, given the region's history of colonialism and land deprivation. There is mounting evidence that land reform is misguided, and failure of land reform can be seen in the lack of achieving the targets that were set by the government, of redistributing 30 per cent of the land to African people.¹³⁷ This is further evident from the recent land audit that was released, which showed that whites owned 72 per cent of agricultural land, while coloureds owned 15 per cent, Indians owned 5 per cent and Africans owned 4 per cent. The land audit went further to show that individual males own 72 per cent of total farms and females own just only 13 per cent while the agricultural holding of males and females is 2 per cent.¹³⁸

Access to land is crucial for combating discrimination and women who are denied such access tend to be disadvantaged, a pattern that results in economic powerlessness.¹³⁹ There is a growing number of women-headed households in South Africa and the poverty margin is becoming higher daily for women. According to the land portal, as many as 69 per cent of women living in rural South Africa are living in poverty.¹⁴⁰ This highlights the dire need for women's participation in land reform projects and access to land to guarantee food security.

Gender equity in land reform is critical to genuine democratisation and rural development and requires an enormous amount of commitment and effort to 're-form' the instituted geographies and institutional practices bequeathed by colonial and apartheid rule. 'Engendering' institutional reform is not an easy task but is the only way in which the government can genuinely transcend the legacies of apartheid and translate the promise of democracy and equal rights into practical realities for rural women in former bantustans.¹⁴¹ The transformation of women's land access has been based on the foundation of international law, which has been explored in the previous chapter.

Despite evidence of a reduction in poverty levels, women continue to represent the face of poverty, with poverty having different effects on men and women.¹⁴² Racism, apartheid and sexism are what have led to the current state of South Africa. The equality margins will not be fully realised until women have economic freedom. As the land portal wrote, when women own property, they are in a better position to improve their lives. They can use land as collateral, increase bargaining power, and have a secure place to live.¹⁴³

¹³⁷ C.Walker' elusive equality: women, property rights and land reform in South Africa' (2009) vol 25 no 3 *South African Journal on Human Rights* 467

¹³⁸ Land audit report, 2017 version 2. Private Land Ownership by Race, Gender and Nationality.

¹³⁹ Moyo, K. "Women's Access to Land in Tanzania: The Case of the Makete District. (PhD diss., Kungliga Tekniska högskolan, 2017)

¹⁴⁰ Women: a focus on land www.landportal.org (accessed 04-4-2020)

¹⁴¹ Rangan H and M Gilmartin, 'gender, traditional authority and the politics of rural reform in South Africa' (2002) *Development and Change*, - Wiley Online Library pg655

¹⁴² Background paper, women's empowerment and gender equality: twenty-year review 1994-2014

¹⁴³ South Africa: women: a focus on land www.landportal.org (accessed 04-4-2020)

One of the contributing factors that led to economic injustice was the legislation of the apartheid era that made it impossible for black people to acquire land to reside in and cultivate for food security and economic benefits. This was demonstrated by the Native Land Act of 1913. African people were faced with the triple challenges of poverty, unemployment, and inequality.¹⁴⁴ Black women became the most disadvantaged group because laws never regarded women as equal to men, and culture also perceived women as dependents of men. In the case of *Brink v Kitshoff*, it was stated that discrimination on grounds of sex is not as visible nor as widely condemned as that of race, and this has resulted in deep patterns of disadvantage which are particularly acute in the case of black women, as race and gender discrimination overlap.¹⁴⁵

The post-apartheid administration enacted a slew of measures to address the cruel inequalities caused by the 1913 Natives Act. Some of the initiatives that were implemented included the Reconstruction and Development Programme (RDP) which is an integrated, coherent socioeconomic policy framework.¹⁴⁶ The RDP sought to mobilise all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future.¹⁴⁷ This gave rise to the Department of Land Affairs White Paper, which aimed at dealing with access to land issues while making women a priority in land redistribution. In South Africa, there are currently no independent laws that allow for women's autonomous access to land; even the proposed Communal Land Bill lacks a clear direct clause that ensures that women are not discriminated against.¹⁴⁸

The right to housing and the right to access land are both guaranteed by the Constitution. Land distribution has been inequitable, so leaving women behind. Because of the country's historical context, men could always acquire property in South Africa, while women were not considered equal to males. The Commission on Gender Equality found that from 1994 to 2014, land redistribution implemented across the country has benefited only 21.6 per cent of women.¹⁴⁹ This shows the level of transformation and development thus far, and the big gap that still needs to be filled in addressing women's socioeconomic access to land.

The OXFAM International blog stated that current inequalities in land access also raise a human right issue, as the declaration of human rights recognises the right to property for all; so, challenging gender inequality in economic decision-making is one of the most powerful ways to change who benefits the most from the economy.¹⁵⁰ Law-makers must recognise that women's rights are human rights, and must be fully realised and

¹⁴⁴ Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. (2018). pg.74

¹⁴⁵ *Brink v Kitshoff NO.* (2017). para 44

¹⁴⁶ The Reconstruction and Development Programme (RDP) A Policy Framework www.sahistory.org.za (accessed 08/08/2019)

¹⁴⁷ The Reconstruction and Development Programme (RDP) A Policy Framework <https://www.sahistory.org.za> (accessed 08/08/2019)

¹⁴⁸ Mutangadura, G., 2004, November. Women and Land Tenure Rights in Southern Africa: A human rights-based approach. In Presentation at Land in Africa: Market Asset or Secure Livelihood Conference, London, UK.pg10

¹⁴⁹ Commission on gender equality annual report 2017/2018, pg. 48

¹⁵⁰ Gender Equality: its smart and its right, Oxfam international blog <https://blogs.oxfam.org/en/blogs> (accessed 20/06/2019)

prioritised to achieve a more transformational realisation of socioeconomic rights. As stated in the preceding chapters, the guarantee is outlined in international forums, and governments are responsible for ensuring that it is integrated into domestic legislation.

As was discussed in the previous chapter, international protection is guaranteed by CEDAW, article 14.2 of which requires that state parties take all appropriate measures to eliminate discrimination against women in rural areas to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development.¹⁵¹ This means that, while South Africa was based on the foundation of apartheid, more must be done to create equal opportunities for men and women.

Frequently the purpose of certain legislation was, seemingly, not to deprive women of access but rather to create time to rectify certain previous mishaps. As stated by the court in *Rahube v Rahube*, the purpose of the Upgrading Act was ‘to provide for the conversion into full ownership of the more tenuous land rights which had been granted during the apartheid era to Africans’. The proclamation gave some limited, subservient rights to certain African people, but because of the wording, African women were not included in that group.¹⁵²

The benefits of economic and social freedom cannot be viewed in isolation, as these benefits amount to freedom to make decisions over one’s life, freedom to access all resources within available means, and they mean freedom from poverty. The UNDP has stated that there is a high level of correlation between asset inequality and slow growth with initial inequality of assets having a negative and significant effect on subsequent growth.¹⁵³ Land is also a social asset that is crucial for cultural identity, political power and participation in decision-making. Women’s ownership of property extends their capabilities, expands their negotiating power and enhances their abilities to address vulnerability.¹⁵⁴

It cannot be overstated that economic justice leads to equality, security, democracy, and social freedom, which implies that individuals’ abilities are not constrained or limited, as people may make their own decisions, and the idea of patriarchy is eliminated. Evidence from around the world shows that when women have more influence over economic decisions (as is the case when they have secure land rights), their families allocate more of their incomes to food, health, education, children’s clothing, and children’s nutrition.¹⁵⁵

¹⁵¹ Convention on the Elimination of all forms of Discrimination Against Women, 1979

¹⁵² *Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018)* Para 38

¹⁵³ United Nation Development Programme *The impact of social and economic inequality on economic development in south Africa, (2014)* 16

¹⁵⁴ Rangan H and Gilmartin H ‘gender, traditional authority and the politics of rural reform in South Africa’ (2002 -) *Development and Change, Wiley Online Library* pg633

¹⁵⁵ Gender Equality: its smart and its right, Oxfam international blog <https://blogs.oxfam.org/en/blogs> (accessed 20/06/2019)

The Constitution, together with later policies and legislation, affirms a commitment to gender rights.¹⁵⁶ However, there has been little progress in South Africa in terms of gender rights and land access for women. Customary law and a lack of properly implemented gender-aligned laws have had a significant impact on women's tenure insecurity. Rangan and Gilmartin state that recent trends in gender awareness have led many governments around the world to provide constitutional guarantees of equality and proclaim gender equity in land reform as integral to rural development and democracy, but there is a large volume of literature that copiously documents their failures in translating such laudable aims into practice.¹⁵⁷

The right of women to access land in a non-discriminatory manner is a recognised right internationally, but the reality of implementing equality seems to be a myth. The commission on gender equality stated that women's rights to inherit housing and land are protected under international human rights norms that protect women's equality. Rights to non-discrimination exist in numerous conventions, covenants, and resolutions.¹⁵⁸

To achieve gender equality, it means that we need to let go of the social programming of the mind when it comes to gender, culture and race. This is why one finds that the concept of realising equality and gender transformation seems like a dream: it is always good on paper, but will always lack correct implementation. Gender transformation is not an event, but a process, in which people consciously and unconsciously appropriate for themselves new understandings about the essence of what it means to be equal before the law and before others.¹⁵⁹

With all this being noted, redressing the unequal suffering of women has been minimal. In a submission to the Department of Land Affairs (DLA) during the policy consultation process, the African Gender Institute (AGI) pointed out that 'the policy does not show how unequal power relations between women and men will be addressed ... and does not put in place mechanisms to ensure this'.¹⁶⁰

According to an article by the UN Office of the High Commission on Human Rights on women and adequate housing, it is estimated that 70 per cent of the world's poor are women in rural areas. Women are often responsible for food production and women produce 60 to 80 per cent of food in developing countries, yet rarely have rights to the land they cultivate.¹⁶¹ The same can be said in South Africa. A contributing factor to these findings is male discrimination against women. Women are viewed as being inferior to men, so men

¹⁵⁶ .Rangan H and Gilmartin H, 'gender, traditional authority and the politics of rural reform in South Africa' *Development and Change, 2002 - Wiley Online Library pg633*

¹⁵⁷ Rangan H and Gilmartin H' gender, traditional authority and the politics of rural reform in South Africa', (2002 -) *Development and Change Wiley Online Librarypg635*

¹⁵⁸Budlender G Opinion on the Communal Land Rights Bill. Annexure to the Commission on Gender Equality. *Submission to the Portfolio Committee on Agriculture and Land Affairs, (2003) 10(03)*.

¹⁵⁹ Commission on Gender Equality Report 2017, pg. 25

¹⁶⁰Cross C, and Hornby D. *Opportunities and obstacles to women's land access in South Africa*. Johannesburg: National Land Committee, 2002 pg.59

¹⁶¹Office of the High Commissioner United Nations Human Rights *Women and the right to adequate housing, (2012) pg. 35*

have the power to make decisions, and acquire property on behalf of women. In some cultures, it is believed that educating girl children is a wasteful and fruitless exercise as there will be husbands to take care of them. Rangan and Gilmartin have argued that the problem emerges in large part because most development theorists and policy-makers are unable to recognise the fact that the process of linking gender-equity with land reform involves bringing together two distinct kinds of geographical agendas.¹⁶² This discrimination makes the battle even harder, because even when the battle of equal access to land is won there will still be the challenge of funding, as the land will need resources to be cultivated.

Women's access to land has the potential of fast-tracking women's status in society, and economically. Walker wrote that women's access to land must be looked at by analysing socioeconomic rights, as there is a strong relationship between having land and increased social economic status.¹⁶³ She goes further to analyse the fourfold justification by Bina Agarwal, namely looking at the benefits that accompany land rights for women, by promoting women's status in the household and in society, increasing women's agricultural production and creating gender equality and empowerment.¹⁶⁴

4.3 GENDER EQUALITY

According to the 2006 world development report, gender inequalities exist in almost all societies. Relative to men, women tend to have less access to resources, rights, and voice. This disadvantage for women may exist even in cases where male outcomes are relatively poorer. Women's empowerment is closely linked with gender equality, because having the agency to choose among options is critically tied to having the options in the first place.¹⁶⁵

To enhance the access of women when it comes to land, one needs to ensure that equality and socioeconomic rights are implemented in such a manner that they co-exist. This belief was emphasised by Fredman when she stated that socioeconomic rights need to reflect the specificities of gender if they are to be capable of addressing disadvantages for women.¹⁶⁶

Gender equality is the desired outcome of many policies and legislations, as opportunities are increased and play a big role in bargaining power; consequently, redistribution of land to women holds the potential to advance their economic position. Based on international experience, success is dependent on sound, gender-

¹⁶² Rangan H and Gilmartin M' gender, traditional authority and the politics of rural reform in South Africa' (2002) *Development and Change*, - Wiley Online Librarypg637

¹⁶³ Walker C ' elusive equality: women, property rights and land reform in South Africa'(2009) vol 25 no 3 *South African Journal on Human Rights*468

¹⁶⁴ Walker C ' elusive equality: women, property rights and land reform in South Africa'(2009) vol 25 no 3 *South African Journal on Human Rights*468

¹⁶⁵ World development report *Equity and Development* (2006)

¹⁶⁶Sandra F. 'Engendering socio-economic rights' (2009) *South African Journal on Human Rights* 25, No 3 410

aligned policy reform and a well-directed land transfer programme.¹⁶⁷ When land reform is implemented in a gender-sensitive manner, the productivity and bargaining power of women is increased, and this will, in turn, have a positive effect on the economy of the country. The purpose of land reform is not just limited to women having land rights transferred to their names; it also needs the government to create legislation that will enable skills transfers, so that these women are equipped with knowledge on how to utilise the land for their economic benefits and that of society at large. It has been seen that, although land reform benefits men, there is no skills transfer, and this can lead to the land being sold or leased.

Gender discrimination, low incomes, and unemployment can make it difficult for women to access credit independently, especially in the case of women who are staying at home and often do not have collateral to secure credit.¹⁶⁸ This makes the dream of independence difficult to realise. The dependency on men cannot be easily undone, as it seems that there will always be a link between women's rights to access land and adequate housing, and men. The CEDAW Committee's General Recommendation No. 21 emphasises the elimination of any form of discrimination against women in any matter relating to marriage and family relations.¹⁶⁹ The notion that women's enjoyment of certain rights or benefits is dependent on a man must be a thing of the past and women must play a more proactive role if they wish to enjoy these rights.

According to Hall, there are two objectives in the Department of Land Affairs policy: equity and productivity. Equity can promote productivity, while productivity cannot promote equity.¹⁷⁰ This accordingly means that equity is focused on enhancing the socioeconomic life of people and finds a balance of equal rights, while productivity looks at changing and advancing agrarian livelihoods. It should be noted that this paper is not saying that land reform has left women destitute. Although land reform has primarily benefited men, as seen in the 2017 Land Audit, women have benefited by being employed on the land as labourers, and they can therefore provide for their families and take their children to school. Walker has stated that it is fair to say that the potential of a well-designed land reform programme to enhance the status and well-being of women, and more particularly of poor women, has not yet been properly tested.¹⁷¹

The submission is that the lack of land reform which focuses on women means that they will not have the same equal powers socially, economically, and politically. It would seem that current problems associated with gender equity and land reform in South Africa are the result of political strategies that attempt, on the one hand, to accommodate post-apartheid constitutional principles within the instituted geographies of rural

¹⁶⁷ Pheko L Women, Land and Livelihoods in South Africa's Land Reform Programme Policy Brief No 16 2014

¹⁶⁸ Office of the High Commissioner United Nations Human Rights *Women and the right to adequate housing*, (2012) pg43

¹⁶⁹ Committee on the Elimination of Discrimination against Women General recommendation 21: Equality in marriage and family relations. *Thirteenth Session, February 4 (1994)*.

¹⁷⁰ Hall R. A 'political economy of land reform in South Africa' (2004) *Review of African Political Economy* 31(100)454

¹⁷¹. Walker C' elusive equality: women, property rights and land reform in South Africa' (2009) vol 25 no 3 *South African Journal on Human Rights* 468

regions, while trying, on the other, to evade reform of institutionalised practices that have been shaped by previous colonial and apartheid regimes.¹⁷²

4.4 CULTURE AND RELIGION ON WOMEN AND ACCESS TO LAND

Throughout history, the rights of women have been secondary, and women's identity had to be attached to a male person as stated by Weideman, customary law excludes black women and relegates them to minority status as far as land rights and land ownership is concerned.¹⁷³

The influence of cultural norms may be seen when a woman is a widow or has separated from her husband. Because custom mandates that women cannot be heads of homes, this has a significant impact on women's dignity and security of tenure, as it leaves them more vulnerable to abuse in many ways. In the case of *Bhe and others v the magistrate of Khayelitsha and others*, where the case concerned the customary law of male primogeniture, the applicant submitted that this unfairly discriminated against her two children as it prevented them from inheriting. The courts found section 23(10)(a), (c) and (e) of the Black Administration Act and regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks unconstitutional and invalid.¹⁷⁴ This unconstitutionality resulted from the fact that section 23 was not only discriminatory but also violated sections 9 and 10, which are the equality and dignity clauses.

This would also have a significant and detrimental impact on children since, if the children are under-age, the mother would be chased away, leaving the children defenceless, and this would compromise their rights to education, health, and safety.

Although the Constitution guarantees equality and non-discrimination, and international agreements also ban discrimination, many unwritten practices are powerful because they encourage and embody prejudice and the limiting of women's rights. Gender attitudes are comprised of widely held beliefs, expectations, customs and practices within a society that define 'masculine' and 'feminine' attributes, behaviours and roles and responsibilities.¹⁷⁵

Traditional leaders and certain local officials tend to uphold customary norms that regulate property ownership and transfers, even when they are aware of the breaches. Cultural practices make it harder to execute laws aimed at redressing historical inequalities. The Commission on Gender Equality found that customary and constitutional law can be at odds with each other in terms of land redistribution. Statistics on women owning

¹⁷² Rangan H and Gilmartin M 'gender, traditional authority and the politics of rural reform in South Africa' (2002) *Development and Change Wiley Online Library*pg637

¹⁷³Weideman, M *Land reform, equity and growth in South Africa: a comparative analysis*. (PhD diss., 2004).

¹⁷⁴*Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17*

¹⁷⁵ The global coalition on women and Aids <https://gcwa.unaids.org/> (accessed 26/10/2020)

land in rural areas is limited because of the largely customary nature of land holdings.¹⁷⁶ That is why Ngcobo J believes that courts have an obligation under the Constitution to develop laws so as to bring customs in line with the Bill of Rights, and in particular the right to equality.¹⁷⁷

Women are the most affected in rural parts of the country when it comes to access to any kind of resource. This is because the government tends to allocate decision-making powers and procedures to traditional leaders, which has a negative influence on women's rights. This was demonstrated in the case study of UMnini, where Khuzwayo and others found that acquisition of land in the UMnini area was granted to the traditional leadership, who administered and allocated land transferred by the Ingonyama Trust.¹⁷⁸

The Ingonyama Trust, which has King Goodwill Zwelithini as sole trustee, demonstrates the impact of traditional leaders. The Trust was formed to acquire 2.8 million hectares of land in KwaZulu-Natal which were meant for white people who were unsure of their status post-apartheid.¹⁷⁹ There are many concerns that the Trust is unfair, and that it discriminates against women. According to the *Daily Maverick*, the chairperson of the Ingonyama Trust Board, Siphon Jerome Ngwenya, declared in Women's Month that a bill aimed at giving women access to land should not apply to land it controlled. He was supported by the KwaZulu-Natal House of Traditional Leaders, which agreed that giving land to women undermined 'African traditions'.¹⁸⁰ This is the sort of lack of transition that South Africa is experiencing, showing a clear and obvious unwillingness to gradually reform laws.

One of the greatest achievements for women, particularly black rural women, can be found in the *Rahube v Rahube* case, which, as previously stated, secures ownership of land previously denied to black women. The Trust, however, appears to want to act in contravention of the Constitution, as it is clear that the fine line between customary practices and the Constitution is blurred. The Ingonyama Trust is against the amending of the Upgrading of the Land Tenure Act and is calling for the bill not to apply to them as the trust.¹⁸¹ This is worrisome since it is founded on the notion of upholding tradition. According to Khuzwayo and others, this further implies that women continue to face challenges of traditional-political unlawful property acquisition

¹⁷⁶Commission on gender equality report 20-year review report *Reviewing the work and contribution of the Commission for Gender Equality in South Africa 1996-2016*(2017) pg. 48

¹⁷⁷*Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17*

¹⁷⁸Khuzwayo N Chipung L Magidimisha H and Martin Lewis. 'Examining women's access to rural land in UMnini Trust traditional area of KwaZulu-Natal, South Africa'(2019) *Town and Regional Planning* 75 37

¹⁷⁹Chembe J Kedibone P. 'The Ingonyama Trust and its implications for rural women regarding land acquisition: Sizani Ngubane responds to Kedibone Chembe'(2018) *Agenda* 32, no.4 92

¹⁸⁰De Haas M' South Africa: Ingonyama Trust's Stance On Women Accessing Its Land Is an Insult and Perpetuates Colonialism' <https://www.dailymaverick.co.za> (accessed 20 October 2020)

¹⁸¹De Haas M' South Africa: Ingonyama Trust's Stance on Women Accessing Its Land Is an Insult and Perpetuates Colonialism' <https://www.dailymaverick.co.za> (accessed 20 October 2020)

by the opposite gender, which limits their rights.¹⁸² Women's lack of equality in rural communities affects their social position in society, since they are frequently excluded from communal decision-making processes and the economic activity of the community and the country.

There is a tendency to accommodate customary laws and practices that discriminate against women because of cultural belief, and then proclaim that they fall under the protection of one's rights to cultural belief or religion.¹⁸³ With international legislation emphasising the preservation of women's rights and equality, it is evident that there must be a balance that is weighed in favour of the constitution. International instruments also emphasise constraints of cultural norms to be consistent with international law, and the need to avoid encouraging discrimination against or intolerance of women. Khuzwayo emphasises that there needs to be a clear balance between culture and the constitution. The power given to traditional leaders needs to be limited, especially in the rural sphere, because traditional leaders are appointed, not elected; they are undermining democracy and their powers are detrimental to women.¹⁸⁴

Some mechanisms could be put in place by the government to not only guarantee equality for women, but to specify the types of equality that women are guaranteed, and the effect if these are infringed. This can be observed in Tanzania, where the 1999 Village Land Act prohibits the application of customary law if it denies women lawful access to ownership, occupancy or use of land.¹⁸⁵ The Human Rights Committee's General Comment 28 states that state parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and equal enjoyment of all Covenant rights. State parties should furnish appropriate information on those aspects of tradition, history, cultural practices, and religious attitudes which jeopardise, or may jeopardise, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.¹⁸⁶ As a result, there are examples both internationally and regionally that might be followed in South Africa to achieve a harmonious balance of the two worlds of the imagined order. Human rights violations can be seen when it comes to inheritance where, in the name of religion or culture, women are not allowed to inherit the same share as a man, if at all. A man will most likely inherit the land or inherit a bigger share of the land.

During the African Commission on Human and People's Rights 54th session, there was a demand for state parties to organise sustained public sensitisation and information and education campaigns for community and religious leaders to transform socio-cultural patterns of conduct that deprive women of their security of

¹⁸² Khuzwayo N Chipungu L Magidimisha H and Lewis L 'examining women's access to Rural land in UMnisi Trust traditional area of KwaZulu-Natal, South Africa'(2019) *town and regional planning* 75

¹⁸³ Office of the High Commissioner United Nations Human Rights *Women and the right to adequate housing*, (2012) pg45

¹⁸⁴ Khuzwayo N Chipungu L Magidimisha H and Lewis L 'examining women's access to rural land in UMnisi Trust traditional area of KwaZulu-Natal, South Africa'(2019) *town and regional planning* 75

¹⁸⁵ The Village Land Act no 5 of 1999

¹⁸⁶ Human Rights Committee General Comment no 28 article 3

enjoyment of and equal access to property, land and adequate housing.¹⁸⁷ As previously said, the notion of women's access to land is firmly based on the concept of equality, which is connected to how culture reacts to women, as shown by the fact that women are more likely to obtain access to property through their husbands. Ben Cousins has stated that a woman who is fully married through customary processes has the most protection to her rights to land and property, even though this is realised more in theory than in practice.¹⁸⁸

General Comment 6 of the African Commission states that for women, marital property rights and marital property regimes are of particular importance during the course of a marriage and become even more important in the context of divorce.¹⁸⁹ Customary law is still finding it difficult to adjust to changing realities and is still very gendered. This gendered approach was contested in the *Mthembu v Letsela* case, in which the court found that the skewed power relations between men and women are the essence of gender discrimination and the opposite of gender equality.¹⁹⁰

It is important to analyse the extent to which current South Africa land reform programmes, laws, and policies address gender disparities, with a focus on providing women with equal access to land and security of tenure.¹⁹¹ The laws tend not to be fully enforced; sometimes the formulation of such laws plays a role on their strength and impact. Until then women will most likely submit to the will of men as they need to survive and look after their children.

4.5 CONCLUSION

It is clear that during apartheid black people were not born free or with equal dignity and rights. African women in particular were denied numerous chances and were often viewed as inferior to males. The influence that women had on the revolution and the struggles for a transformed South Africa demonstrates the power that black women possessed. Apartheid created an unfortunate legacy for black people, that continues to have a significant influence on Africans' rights. As discussed in the chapter, and according to G. Mutungadura, women in southern Africa continue to face discrimination in accessing and owning land. Black women were vulnerable figures in society under apartheid, and they faced prejudice based on their colour and gender.

From 1994 to 2014, land redistribution in South Africa benefited only 21.6 per cent of women, according to the Commission on Gender Equality. Women's rights must be fully realised and prioritised to achieve a more

¹⁸⁷ Africa Commission on People and Human rights [http:// www.achpr.org/sessions/54th/resolutions/262/](http://www.achpr.org/sessions/54th/resolutions/262/) accessed 20/10/2020)

¹⁸⁸Cousins B 'Women's land rights and social change in rural South Africa: the case of Msinga, KwaZulu-Natal.' (2013) *Acta Juridica* no. 1 75

¹⁸⁹General Comment No 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2020

¹⁹⁰*Mthembu v Letsela and Another (71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A)*

¹⁹¹ Khuzwayo N Chipungu L Magidimisha H and Lewis L 'examining women's access to Rural land in UMnisi Trust traditional area of KwaZulu-Natal, South Africa' (2019) *town and regional planning* 75

transformational realisation of socioeconomic rights.¹⁹² Economic and social justice has numerous advantages. The right of women to access land in a non-discriminatory manner is a recognised right internationally, but the reality of implementing this equality seems to be a myth. Women's rights to inherit housing and land are protected under international human rights norms that protect women's equality.

Women's engagement in land reform programmes and access to land is critical for ensuring food security. Women are in a better position to improve their lives when they own property. They can utilise the land as collateral to improve their bargaining power and provide a secure living environment.

South Africa needs to let go of the social programming of the mind when it comes to gender, culture and race, which is why one finds that the concept of realising equality and gender transformation seems like a dream. South Africa's land reform policy does not address unequal power relations between women and men. Women produce 60 to 80 per cent of food in developing countries, yet rarely have rights to the land they cultivate.¹⁹³ This is due to discrimination against women, as women are viewed as being inferior to men, and men are given the power to acquire property on behalf of a woman.

Women's empowerment is integrally related to gender equality because the ability to select among opportunities is dependent on having those options in the first place. The goal of land reform is not simply to transfer property rights to women's names; it also necessitates legislation that allows for the transfer of skills. Land reform must be able to teach women how to use the land for their economic gain, as well as the benefit of society as a whole. Women must be allowed to own property through land reform that focuses on them.

Even when they are aware of violations, traditional leaders and some local officials tend to support customary rules that govern property ownership and transfers. This makes enforcing legislation aimed at redressing historical inequities more difficult. The Ingonyama Trust, whose only trustee is King Goodwill Zwelithini, exemplifies the power of traditional leaders. Women's social status in society suffers as a result of their lack of equality in rural communities. Because of cultural beliefs, a vast number of customary rules and practices discriminate against women. Traditional leaders frequently undermine democracy, and their dominance is harmful to women. Customary law is struggling to adapt to the new dawn of reality, and customary law is still heavily gendered.

¹⁹²United Nations. Office of the High Commissioner for Human Rights, and U. N. Women. *Realizing Women's Rights to Land and Other Productive Resources*. UN, 2013.

¹⁹³Doss C Meinzen-Dick R, Quisumbing A and Theis S "Women in agriculture: Four myths." *Global food security* 16 (2018): 69-74.

CHAPTER 5

LESSONS FROM ZIMBABWE AND TANZANIA ON WOMEN'S ACCESS TO LAND

5.1 INTRODUCTION

Many African countries have inequities, and most of these hardships may be traced back to colonial oppression. The contradiction between customary law practices and modern individual rights represents a complex battleground for women and land in southern Africa, and calls for new feminist conceptualisations of the state as a vehicle for gender justice.¹⁹⁴ This chapter provides a brief comparative analysis of women's land access in Zimbabwe and Tanzania, as compared to South Africa. The chapter will look for any common traits between these three nations in terms of women's access to land, especially lack of access to land. It will examine how South Africa, Tanzania, and Zimbabwe have tackled the problem of women's land access, including legislative accomplishments, and will examine the obstacles that women face.

5.2 ZIMBABWE AND WOMENS LAND ACCESS

Pre-colonial Africa prided itself on adherence to diverse cultural affinities and traditional belief systems, which defined the place of women in respect to land access, use and ownership.¹⁹⁵ The prominent features of the acts passed before independence in Zimbabwe is that they discriminated against the black majority and gave fertile land to the white minority. After independence in 1980, another level of discrimination emerged, which was that of black men against black women.¹⁹⁶

Like South Africa, Zimbabwe had suffered from colonialism which affected many African people's land rights. Legislation that was formulated to redress the past, however, did not consider the displacement that was suffered by women. Between 1980, when Zimbabwe attained political independence, and 2003, the government had implemented two phases of land redistribution programmes, designed to transfer land from large-scale commercial white farmers to black farmers. However, the state paid scant attention to rural women's access to land.¹⁹⁷ The same notion seemed to have been attempted in South Africa, where the land reform programme was initiated, to address past land laws that created unequal land access, by distributing a certain amount of land to black people.

¹⁹⁴Pasura, D 'A gendered analysis of land reforms in Zimbabwe' (2010) *In Women's Studies International Forum*, vol. 33, no. 5, p444

¹⁹⁵Akinola, A O "Women, culture and Africa's land reform Agenda." *Frontiers in psychology* 9 (2018): 2234.

¹⁹⁶Mushunje M T. "Women's land rights in Zimbabwe." *Broadening Access and Strengthening Input Market Systems (BASIS): Madison, WI, USA* (2001).

¹⁹⁷Pasura, D 'A gendered analysis of land reforms in Zimbabwe' (2010) *In Women's Studies International Forum*, vol. 33, no. 5, p446

As in South Africa, women in Zimbabwe played significant roles in fighting oppression. This can be demonstrated by the case of the most famous Zimbabwean woman, Nehanda Nyakasikana, a spirit medium who led and organised the 1896-7 uprising against the white settlers. Nehanda's involvement in the anti-colonial struggle is an indication of the spaces that existed for women in pre-colonial Shona society, contrary to western generalisations that pre-colonial southern Africa was divided between a dominant class of married men and homestead heads, and a subordinate class of dependent women.¹⁹⁸ As stated in the preceding chapter, women were strong beings in their own right and deserved to be treated equally with males, not only for the well-being of family structures but also for economic justice and equality realisation, because the role that is contributed by women is equal to that of men.

Pasura has stated that under customary law in Zimbabwe, women do not own land or inherit the land; land is owned and inherited by males. The woman's role is to farm for their fathers and later for their husbands, and finally for their sons, on land that they do not own.¹⁹⁹ This highlights how women's access to land is obstructed by customary practices in Zimbabwe. The same is argued for South Africa. As Langa DCJ stated in the *Bhe* case, the exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy that reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.²⁰⁰ Gender discrimination and a lack of equality are how societies find order and control over possessions and social position, and this also appears to be an African tendency.

The legal and cultural apparatus of indirect rule and settler colonialism in Zimbabwe made an African woman a perpetual minor, dependent on a male relative or spouse for her legal status.²⁰¹ This remark has been debated in the context of South Africa, where the relationship between land deprivation and the function of custom is strong, while the impact is still felt elsewhere in Africa. Women were subjected to a purposeful denial of equality through traditions, conventions, or culture, which were utilised to dominate and subordinate them.

Constitutional Amendment Number 14 of December 1996 in Zimbabwe aimed to address the issue of equality and the Constitution prohibits discrimination on the grounds of sex.²⁰² Most initiatives aimed at redressing

¹⁹⁸Pasura, D. 'A gendered analysis of land reforms in Zimbabwe' (2010) *In Women's Studies International Forum*, vol. 33, no. 5, p450

¹⁹⁹Pasura, D. 'A gendered analysis of land reforms in Zimbabwe' (2010) *In Women's Studies International Forum*, vol. 33, no. 5, p448

²⁰⁰*Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17*

²⁰¹Pasura, D. 'A gendered analysis of land reforms in Zimbabwe' (2010) *In Women's Studies International Forum*, vol. 33, no. 5, p453

²⁰²Constitution of Zimbabwe Amendment (No. 14) Act: December 6, 1996

past wrongs attempt to put the previously disadvantaged in an equal position, but such programmes fail to address women's displacement as a separate goal rather than being grouped. Women's access to land was not prioritised as a matter of urgency in Zimbabwe, to the point that women were excluded from several land reforms; nevertheless, women's lobby organisations made their voices known, and women were eventually considered. Women and Land Lobby Group engagement in land policy debates also resulted in the President declaring in October 2000 that female-headed households would receive 20 per cent of redistributed land.²⁰³

Section 17(1) of the Constitution of Zimbabwe on gender balance states that the state must promote full gender balance in Zimbabwean society, while section 56 states that (1) all persons are equal before the law and have the right to equal protection and (2) women and men have the right to equal treatment, including the right to equal opportunities in politics, and economic, cultural, and social spheres.²⁰⁴

The implementation of the 1999 Draft National Land Policy, which sought to address gender equality in Zimbabwe's land reform programme, was not successful. The legislation, like South Africa's White Paper on Land Reform, aimed to redress the effects of the past; however, owing to legislators' lack of enthusiasm, the objective was not fulfilled. According to Mushunje, land underlies the bulk of Zimbabweans' economic, social, and political life. This includes women, as they are also a component of Zimbabwe's population. As a result, women must be able to exercise their rights to this limited resource.²⁰⁵ Women in South African customary law have greater access to land when they marry. The same argument was made in Zimbabwe, where once a woman had married and given birth to her first child, she was given a plot of land for her children and family, which also served as a source of security for the household.²⁰⁶

In Zimbabwe, despite the importance of land to women, the overriding feature in women's relationship to land is their lack of security of tenure. This is largely as a result of economic and social discrimination against women, more particularly gender-biased laws, policies, traditions, and colonial hangovers that prevent women from owning and inheriting land in their own right.²⁰⁷ Goebel argues that the current 'fast track' practices continue to privilege men as primary recipients of resettlement land, and the emerging role of traditional

²⁰³Pasura, D. 'A gendered analysis of land reforms in Zimbabwe' (2010) *In Women's Studies International Forum*, vol. 33, no. 5, p457

²⁰⁴Constitution of Zimbabwe Amendment (No. 14) Act: December 6, 1996.

²⁰⁵Mushunje, M T. "Women's land rights in Zimbabwe." *Broadening Access and Strengthening Input Market Systems (BASIS): Madison, WI, USA* (2001).

²⁰⁶Mushunje, M T. "Women's land rights in Zimbabwe." *Broadening Access and Strengthening Input Market Systems (BASIS): Madison, WI, USA* (2001).

²⁰⁷Mushunje, M T. "Women's land rights in Zimbabwe." *Broadening Access and Strengthening Input Market Systems (BASIS): Madison, WI, USA* (2001).

authorities in the land reform process marginalises women.²⁰⁸ As mentioned in previous chapters, women should be prioritised as a matter of urgency if the objective is to achieve social and economic equality.

Although women are the majority in terms of the Zimbabwean population, the government's policy document on land considers them as a special group. This shows that the government is deeply entrenched in a patriarchal ideology that treats women as an inferior group of people.²⁰⁹ The patriarchal system uses power to dominate and this is done through gender roles and an ideology deemed suitable for women. Women's lack of access to and control over productive resources such as land is directly related to their poverty in both the rural and urban areas. Some 70 per cent of the rural poor, 80 per cent of whom are women, rely on agriculture for survival.²¹⁰

Zimbabwe has signed several treaties and declarations, many of which prohibit gender discrimination in all spheres. This includes its signing of CEDAW in 1991. CEDAW was dealt with in chapter two, and Zimbabwe, like South Africa, is bound by the convention's provisions, which serve as the framework for local anti-discrimination law. Zimbabwe has also approved and is a signatory to the International Covenant on Economic, Social, and Cultural Rights. Zimbabwe, like South Africa, is a country built on customary rules, which impacts women's land rights. Mushunje states that usually customary law would be applied, meaning that African women are left at the mercy of traditional leaders because customary law is administered by the traditional leadership.²¹¹

5.3 TANZANIA AND WOMEN'S ACCESS TO LAND

Land deprivation is firmly ingrained in the history of most African countries; colonialism played a significant part in the lack of access for black people, which consequently damaged women's rights in Tanzania. Land policy in today's Tanzania remains rooted in the land regimes of the colonial era, initially established by the Germans in the 1880s, and later modified through the Land Ordinance passed by the British colonial government in 1923.²¹²

²⁰⁸Goebel A 'Zimbabwe's 'fast track 'land reform: What about women?' *Gender, Place & Culture* 12, no. 2 (2005): 145

²⁰⁹Pasura, D 'A gendered analysis of land reforms in Zimbabwe' (2010) *In Women's Studies International Forum*, vol. 33, no. 5, p453

²¹⁰Mushunje, M T. "Women's land rights in Zimbabwe." *Broadening Access and Strengthening Input Market Systems (BASIS)*: Madison, WI, USA (2001).

²¹¹Mushunje, M T. "Women's land rights in Zimbabwe." *Broadening Access and Strengthening Input Market Systems (BASIS)*: Madison, WI, USA (2001).

²¹²Kaarhus, R., Benjaminsen, T. A., Hellum, A., & Ikdahl, I.. "Women's land rights in Tanzania and South Africa: a human rights-based perspective on formalisation." *In Forum for Development Studies*, vol. 32, no. 2, pp. 443-482. Taylor & Francis Group, 2005.

Tanzania is among the most undeveloped nations in the world, where gender inequalities concerning accessing land are central problems.²¹³ From data and records, Tanzania is progressively moving in the right direction towards the transformation of women, with progressive legislation aimed at enhancing and balancing women rights. According to LANDESA in Tanzania, at least 25 per cent of seats in village councils must be held by women.²¹⁴

The legal framework for property rights to land and other associated rights is also well-defined in different statutes, with a foundation of international human rights instruments, such as the Constitution, and the 1999 Land Acts which states that that '[t]he right of every woman to acquire, hold, use and deal with, land shall to the same extent and subject to the same restrictions be treated as a right of any man'.²¹⁵ The Marriage Act, The Constitution of the United Republic of Tanzania and other laws concerning land issues recognise equality in accessing land for both genders, while instilling equality considerations in accessing land and other resources.²¹⁶

Tanzania, like South Africa and Zimbabwe, became a signatory to international human rights conventions that support property rights for women and girls, as well as equal rights for men and women. It has ratified the following instruments without reservation: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); CEDAW; the Convention on the Rights of the Child (CRC); the African Charter on Human and Peoples' Rights; and the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).²¹⁷ Another parallel is that, like South Africa and Zimbabwe, Tanzania is hampered by the impacts of customary law, because laws can be enacted but the execution is hampered. According to CEDAW Reports, In Tanzania, efforts to use legal recourse are being hindered by existing cultural norms, attitudes, and customary practices that have not changed.²¹⁸

The Land Act defines a variety of principles that contribute to the legal protection of women's land rights, including equitable land distribution and access, participative decision, and policy development. The Land Act provides that, in the case of any inconsistency or conflict between the provisions of the Act and any other law on a matter of land law, the Land Act prevails.²¹⁹ South Africa is committed to land reform, which

²¹³Moyo K. *Women's Access to Land in Tanzania: The Case of the Makete District* (PhD diss., Kungliga Tekniska högskolan, 2017)

²¹⁴ Jennifer D' 'Women's Land Rights Guide for Tanzania' www.landesa.org accessed 20/10/2020)

²¹⁵The Land Act 1999

²¹⁶Moyo K *Women's Access to Land in Tanzania: The Case of the Makete District*. (PhD diss., Kungliga Tekniska högskolan, 2017)

²¹⁷ Jennifer D' 'Women's Land Rights Guide for Tanzania' www.landesa.org (accessed20/10/2020)

²¹⁸ Committee on The Elimination of Discrimination against Women, Tanzania state report 1996.para 26

²¹⁹Jennifer D' 'Women's Land Rights Guide for Tanzania' www.landesa.org (accessed20/10/2020)

aims to provide land restitution, reduce inequality and empower the previously disadvantaged, yet land reform in South Africa is silent on equitable distribution of land to women.

The Village Land Act upholds customary rules on land but provides that the customary rule or any action dependent on the rules shall be void to the extent to which it denies women, children, or persons with disability lawful access to ownership, occupation, or use of any customary land.²²⁰ The balance between the customs of the community and gender equality was never prioritised, due to the perpetuated narrative of women. As in South Africa, Tanzania has legislation that speaks of equality, but the guarantee fails to be realised because of lack of will to implement equality.

There are many challenges in realising women's property rights in Tanzania. These challenges include the dualism of the property rights system; customary tenure operating alongside statutory tenure; inadequate knowledge about women's property rights by both women and men; negative attitudes towards women's influence, position, capability and reputation; outdated customs; archaic and conflicting interests in laws; and the lack of legal capacity (empowerment) as to property rights.²²¹

The Constitution of the United Republic of Tanzania of 1977, section 12, states that all human beings are born free and are equal and every person is entitled to recognition and respect for his dignity.²²² The formal legal rights protecting women's rights to property in Tanzania are strong. Women's socioeconomic and political rights are recognised and guaranteed in the Constitution, which serves as the foundation for all citizen rights. Article 9 of the Constitution guarantees equal opportunity for all people. Article 12 further states that all humans are born free and equal. Moreover, the Constitution supports women's property rights by prohibiting favouritism on whatever ground and emphasises the parity of all individuals.²²³

According to Kaarhus, both the Tanzanian and the South African cases represent efforts to merge and modify 'customary law' with principles of non-discrimination stated in the constitution. The Tanzanian land acts can be said to strengthen women's right to equal access to land through an approach combining the recognition of existing customary use with a non-discrimination clause.²²⁴

5.4 CONCLUSION

²²⁰Jennifer D' Women's Land Rights Guide for Tanzania' www.landesa.org (accessed 20/10/2020)

²²¹Moyo K *Women's Access to Land in Tanzania: The Case of the Makete District*. (PhD diss., Kungliga Tekniska högskolan, 2017)

²²²The Constitution of the United Republic of Tanzania of 1977

²²³Moyo K *Women's Access to Land in Tanzania: The Case of the Makete District*. (PhD diss., Kungliga Tekniska högskolan, 2017)

²²⁴Kaarhus, R., Benjaminsen, T. A., Hellum, A., & Ikdahl, I.. "Women's land rights in Tanzania and South Africa: a human rights-based perspective on formalisation." In *Forum for Development Studies*, vol. 32, no. 2, pp. 443-482. Taylor & Francis Group, 2005.

This chapter looked at how South Africa, Tanzania, and Zimbabwe have dealt with the issue of women's land access. The chapter sought to identify any similarities between these three countries in terms of women's access to land, sought to investigate legislative successes and the challenges that women face. It became evident in this chapter that customary norms impede women's access to land in the three nations. The exclusion of women from the ability to inherit property was consistent with a system ruled by firmly ingrained patriarchy. Gender discrimination and a lack of equality are how civilisations maintain order and control over their assets and social positions.

According to Goebel, women's access to land was not emphasised as a matter of urgency in Zimbabwe. She claims that the administration is strongly ingrained in patriarchal philosophy, which regards women as a lesser species.²²⁵ The present land reform procedures continue to favor men as major beneficiaries of resettlement land, while the increasing involvement of traditional authority in the land reform process marginalises women.

All three countries have adopted the international mechanisms outlined, which provide the framework for redressing the historical colonial influence on socioeconomic exclusion.

Tanzania's land policy is still based on the colonial era's land regimes, while Tanzania's constitution and other land-related legislation recognise equality in land access. Land reform in South Africa has been too silent on the equitable allocation of land to women. The constitutions of Zimbabwe and South Africa also call for non-discrimination and equality.

When it comes to the most significant barrier to rural women in all nations, the balance between customs and equality has never been prioritised. Tanzania has legislation that proclaims equality; nevertheless, the promise is not being fulfilled owing to a lack of will to carry it out. There is also a lack of understanding among both men and women about women's property rights, as well as negative attitudes about women's power and status in terms of property rights.

²²⁵Goebel A Gender and land reform: the Zimbabwe experience (2005) McGill-Queen's Press-MQUP,
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CHAPTER 6

6.1 CONCLUSION AND RECOMMENDATIONS

To attain a more transformative fulfilment of socioeconomic rights, women's rights must be completely realised and prioritised. The right of women's access to land without discrimination is an important concept which needs to be nurtured and respected. The goal of the thesis was to investigate land reform in South Africa and whether it is beneficial to women or has contributed to women's socioeconomic status, with the main goals being to express the importance of women's socioeconomic rights and access to land, as well as highlighting women's rights as human rights, so that women can be prioritised in the process of transition.

Scholars have written extensively on land reform and women's rights, intending to dissect the variables that impact women's negotiating power. Women's access to land in South Africa is an issue where further research is needed. According to Twala, an understudied topic in the literature on structural poverty is the difficulty of women's access to land in a democratic South Africa; and the subject of women owning property or having access to land for agricultural purposes has not been a focus of serious academic research.²²⁶

Land reform should have been predominantly focused on gender inequalities in land access as a serious matter that needs urgent intervention. Land reform should have more focus on the current norms of land rights under both customary and statutory law and promote the review of the legislation to improve women's access. Society is still suffering from the history of gender stereotyping and gender norms. Researchers and policymakers agree that successful land reform for women is critical for food security, gender equality, and the realisation of socioeconomic rights. Stone discovered that nine out of ten impoverished individuals in South Africa are black Africans, with 59 per cent being females.²²⁷ Poverty has a far more direct and severe impact on women, despite many statutory safeguards and women in South Africa continue to experience prejudice when it comes to acquiring access to land.

History, cultural practices and legislation have created a long legacy of black people in South Africa being denied their land rights, have prevented black people from fully participating in the economic hub of South Africa and have denied them the right to land and food security. On the 19 June 1913, the apartheid government enacted the Native Land Act 27/1913. The act defined a native as any person, male or female,

²²⁶ Twala C 'Land Rights and the Gendered Path of Agrarian Transition within the African National Congress (ANC) Government in South Africa: Two Sides of the Same Coin?' (2014) 45 *Journal of Human Ecology* 20

²²⁷ Stone L 'two decades of jurisprudence on substantive gender equality: what the Constitution court got right and wrong' (2016) *Taylor and Francis* vol 30 1 13

and who is a member of an aboriginal race or tribe of Africa.²²⁸ African women were at the bottom of the government's priority list, and they were in the most vulnerable situation. In the *Rahube v Rahube* case, Goliath AJ stated that during apartheid women were particularly vulnerable figures in society and suffered threefold discrimination based on their race, class and gender.²²⁹

Some of the legal frameworks that have guided transformation in South Africa include the South African Constitution, as this instrument became a guiding force in the realisation of social and economic justice for women by prohibiting discrimination and promoting equality, while recognising socioeconomic rights as rights; hence the government has to safeguard people's socioeconomic rights. Section 9 of the Bill of Rights is critical, as it reaffirms the importance of equality before the law and emphasises the right to equal protection and benefit under the law. Chapter 1 of the Constitution states that 'South Africa is founded on the values of human dignity, equality, and the advancement of human rights and freedom, non-racialism, and non-sexism'.²³⁰ This implies that dignity and equality are intimately connected and cannot be separated. Equal opportunity is founded on equality, which considers the various barriers we all encounter.

When South Africa became a democratic country, the post-apartheid government developed a land reform programme which focused on three important areas: 'land redistribution to address lack of access to land for productive and residential purposes; land restitution to restore the land to those who lost land due to previous discriminatory laws; and secure tenure to those whose tenure is insecure'.²³¹ Land rights are also provided for in section 25(5) of the Constitution, which establishes a justiciable socioeconomic right to achieve equitable access to land. Section 25(5) states that the 'state shall adopt reasonable legislative and other measures within its available resources to promote circumstances that enable people to gain equal access to land'.²³² Sections 25 and 9 put an obligation on the state to guarantee equitable land distribution, but there is still a lack of political will to support this endeavour.

Various international instruments speak to women's rights and gender equality. These include the Universal Declaration on Human Rights with article 1 stating that all human beings are born free and equal in dignity and rights.²³³ The declaration calls for women's access to be equal and not be influenced by dynamics like gender and race, among other things. These international instruments cement the obligations of state parties to acknowledging gender equality. They include the Beijing Platform for Action which held a women's

²²⁸ Towards a people's history, Land disposition, resistance and restitution, available at www.sahistory.org.za, (accessed 13-06-2018)

²²⁹ *Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018) para 2*

²³⁰ Constitution of the Republic of South Africa 1996

²³¹ South African Human Rights Commission *3rd Economic and Social Right Report*. (2001) 279

²³² Constitution of the Republic of South Africa 1996

²³³ Universal declaration of human rights, 1948. *United Nations*.

conference in 1995, with the purpose of gender equality and the empowerment of all women everywhere.²³⁴ The platform stated that women's poverty is directly related to the absence of economic opportunities and autonomy, and lack of access to economic resources, including land ownership and inheritance.²³⁵

It has been highlighted in the research that international legal frameworks provide a strong foundation for women's rights across the world, outlining what is expected of state parties as well as the duties that governments must respect to execute these rights. When women can utilise and appreciate land, they may fully exercise all of the rights granted to them. Land has many social and economic benefits, hence various human rights instruments guarantee and call for state parties to recognise women's equal rights to access, use and control land.²³⁶

In terms of attaining socioeconomic justice, the International Covenant on Economic, Social, and Cultural Rights provides all people, more especially women, with hope. While many socioeconomic rights are progressive in nature and rely on available resources, a lack of resources cannot be used to justify abandonment. The goal of land reform in South Africa was to alleviate the impact of apartheid on black people; however, restitution became overly focused on the racial impact of apartheid, with insufficient attention paid to the impact on women. As a result, the ICESCR lays a well-structured foundation for corrective legislation.

Article 14.2 of the Covenant states that state parties shall take all appropriate measures to eliminate discrimination against women in rural areas to ensure, on a basis of equality of men and women that they participate in and benefit from rural development.²³⁷ The article's fundamental point is that women must be able to participate in and profit from rural development on an equal footing. The convention highlights the importance of women's socioeconomic involvement in land and food development, especially for rural women who are adversely impacted by prejudice. The convention also shows the importance of enacting separate legislation to address women's issues in rural development, notably agriculture.

CEDAW aims to realise women's rights to equality and realise the possibility of non-discriminatory society and culture.²³⁸ The objective is to realise women's equal rights and the potential of a non-discriminatory

²³⁴Sen, G. and Mukherjee, A., 'No empowerment without rights, no rights without politics: Gender-equality, MDGs and the post-2015 development agenda' (2014) *Journal of Human Development and Capabilities*, 15(2-3), pp.190

²³⁵Beijing At 20 – How the Visionary Platform Works for women's land rights today. <https://www.landesda.org/beijing-at-20-how-the-visionary-platform-works-for-womens-land-rights-today> (accessed 17/07/2021)

²³⁶ UN Office of the High Commissioner on Human Rights and UN Women realising Women's Rights to Land and other Productive Resources, 2013

²³⁷ Convention on the Elimination of all forms of Discrimination Against Women, 1979

²³⁸'Women and land, property and housing' <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/Land.aspx> (accessed 03/05/2018)

society and culture. As a result, state parties must dedicate extra resources to promoting equality and non-discrimination. As a result, further work in the form of action-based legislation is required.

Africa is on the correct course, following in the footsteps of the international community and ratifying numerous human rights instruments, as exemplified by the Protocol to the African Charter on Human and Peoples' Rights, and Rights of Women in Africa, where article 2 affirms the elimination of discrimination against women through appropriate legislative, institutional, and other measures, and commits to men and women having equal rights and being equal partners in marriage, according to article 6. The article argues for non-discrimination and change, notably in the societal patterns of gender roles, and security of women's access to property, whether by inheritance or through statute. The Protocol has sought to eradicate gender imbalances and find more suitable measures and actions for redress.

The African Charter guarantees the right to property under article 14. The article allows the infringement of the right to property only if it is in the interest of the public or through the application of the law.²³⁹ As a result, factors such as cultural beliefs, norms and practices, and patriarchal thinking cannot be invoked to justify the denial of women's rights. The African Charter mandates states to develop and ensure equality for all citizens, including equality in legislation and behaviour, as well as cultural traditions. Therefore, the notion of males being superior to women should be obsolete. This is reaffirmed by article 19 which states that all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.²⁴⁰

In conclusion, reform in South African has not benefited nor contributed to women socioeconomic rights, If women's access to and control over land can be increased through land reform, and if this can be supported to become an effective anti-poverty asset for poor rural women, then rural development can begin to occur from the bottom up. The government needs to fill the huge gap that exists between policies and the implementations of such policies.

Gender equality is the desired outcome of many policies and legislations, as opportunities are increased and play a big role in bargaining power. Consequently, redistribution of land to women holds the potential to advance their economic position.

According to the research question posed in chapter one, women's lack of access to land violates international and domestic laws, because the denial of access is embedded in a foundation of discrimination and lack of equality. CEDAW, as discussed above, calls for non-discrimination in all aspects, which includes family settings and economic opportunities, while ICESCR advocates for equal access to opportunities that promote economic and social justice. The land reform programme violates the Constitution's equality and dignity

²³⁹ The African charter on people and human rights 1981

²⁴⁰ The African charter on people and human rights 1981

clause, while also not fully implementing section 25. it is also not in line with General Comment 6 of the African Charter and General Comment 21 of CEDAW.

6.2 RECOMMENDATIONS

As noted in earlier chapters, issues that inhibit women's access to land in South Africa include a lack of equality in society and households between men and women, and patriarchal traditional practices that deny women full access and opportunity. Another impediment to South Africa's potential growth is a lack of political will. Some of the recommendations are as follows:

- a) Civil society should raise awareness about the need for women's land access through workshops, special lectures, and even peaceful demonstrations. This necessitates that civil societies that campaign for women's empowerment and land rights must be given additional resources and assistance.
- b) Government needs to provide actual tangible laws that deal with land redistribution and implementation and the legislation needs to be more stringent. There is also a need for commissions to be set up to facilitate the transition of land to women and prevent abuse.
- c) The government should establish a specialised and robust review and monitoring system, to lay the groundwork for accountability in situations of abuse and corruption.
- d) The government must enact robust laws to secure women's land access and to address impediments generated by customary practices. These policies must also ensure that women are represented on land trusts or boards which are tasked with facilitating the transfer of property rights. Women's participation in land policy formulation is essential to increasing women's access to land.
- e) The government should have clear objectives and goals, as well as indicators, for equitable access to land, with stronger accountability measures, to ensure equal access to land for women, particularly women in rural areas.
- f) Local government needs to be given a bigger role in ensuring in women's land access.
- g) CGE must play a significantly larger role in ensuring women's equal access to land by pressing government and other stakeholders to be proactive in implementing gender-responsive land policies. CGE must challenge the unprogressive land laws in court, so that the courts can review the present land laws in relation to human rights.

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