

# RECONCILING INDIGENOUS AND WOMEN'S RIGHTS TO LAND IN SUB-SAHARAN AFRICA

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## I. INTRODUCTION

In August and September of 2013, Botswana's courts delivered two different rulings relating to customary property rights. The first ruling denied Botswana's indigenous Kalahari Bushmen the opportunity to challenge government restrictions on their customary rights to hunt and gather on their ancestral land.<sup>1</sup> The Bushmen's customary law rights to the land have been and continue to be subject to vulnerable intrusion because such rights are not protected by Botswanan law.<sup>2</sup> Less than a month later, elsewhere in Botswana, women celebrated a judgment of the Botswana Court of Appeal holding that the Ngakwetse customary law could no longer be used to prevent women from inheriting family property.<sup>3</sup> While indigenous groups and advocates lamented the deterioration of customary rights to land, women's rights advocates cheered the court's willingness to modify a different set of customary property rights.

In sub-Saharan Africa and globally, these battles for rights relating to customary law are common. Indigenous groups throughout the African continent are fighting to maintain access to lands they hold in customary tenure as competition for land increases, while women fight against application of customary laws that deny them rights to attain or control property. Elsewhere around the globe, indigenous groups, particularly those in resource-rich areas, are vulnerable to land grabs from investors and governments. In the Americas,<sup>4</sup> Europe,<sup>5</sup> and Asia,<sup>6</sup> indigenous groups face

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<sup>1</sup> *Botswana: Access Case Dismissed – Final End for Bushman Hunters?*, SURVIVAL INT'L (Sept. 13, 2013), available at <http://allafrica.com/stories/201309160669.html>.

<sup>2</sup> Although Botswana is considered to be quite progressive in its recognition of customary forms of land tenure, the hunting/gathering lifestyle of the Bushmen is excluded from customary law protection. *Botswana: Culture under threat – Special Report on the San Bushmen (II)*, IRIN (Mar. 10, 2004), available at <http://www.irinnews.org/report/49005/botswana-culture-under-threat-special-report-on-the-san-bushmen-ii>.

<sup>3</sup> Richard Lee, *Botswana: Victory for Women's Rights in Botswana*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA, available at <http://allafrica.com/stories/201309040359.html> (discussing *Ramantele v. Mmusi*, [2013] BWCA 1 (Bots.); see also *infra* note 75).

<sup>4</sup> *E.g.*, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, ¶ 331, U.N. Doc. A/57/18 (Jan. 11, 2002); Concluding Observations of the Human Rights Committee: Suriname, ¶ 21, U.N. Doc. CCPR/CO/80/SUR (May 4, 2004); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador, ¶ 278, U.N. Doc. E/2005/22 (June 7, 2004).

<sup>5</sup> *E.g.*, Concluding Observations of the Human Rights Committee: Finland, ¶ 17, U.N. Doc. CCPR/CO/82/FIN (Dec. 2, 2004); Concluding Observations of the Human Rights Committee: Sweden, ¶ 15, U.N. Doc. CCPR/CO/74/SWE (Apr. 24, 2002).

threats to their lands and natural resources. While indigenous rights activists call for government recognition of indigenous land rights and livelihoods, the “women question,” or, how to ensure the protection of indigenous women’s rights, remains an open question. In this Article, I consider how African state governments can legally recognize customary land tenure in a manner that protects indigenous groups while still affording property and other rights to women. Because of the global nature of these problems, any resolution in sub-Saharan Africa is certain to have implications worldwide.

It is worth noting here that although the discussion of customary tenure involves a discussion of indigenous rights, the battles do not necessarily fall along racial or ethnic divides, as is often the case in American or European countries. Many in sub-Saharan Africa who advocate for and are governed by individualized, formal land tenure systems have ancestors whose land was once under a customary tenure system. They admittedly are advocating the implementation of a “white” system, but speaking purely in terms of the actors, the statutory versus customary battle does not equal white versus indigenous. Indeed, the term indigenous itself is contested, as both rural and urban Africans can be considered indigenous to their country.<sup>7</sup> In this Article, the term “indigenous” in Africa is currently used to describe tribal groups continuing to engage in traditional livelihoods and continuing to live under customary forms of tenure.

African indigenous groups operating under customary systems of land tenure are particularly vulnerable to the various pressures on land. Because these indigenous groups do not operate under the de Soto-style formal tenure systems preferred by the West and African state governments, their tenure is insecure against outside interests. These groups suffer well-documented land grabs by their own governments, who grant access rights to industries (especially extractive or timber industries) or use land for their own development purposes. Indigenous groups sometimes also clash with conservationists seeking to limit humans’ use generally of lands that have historically been used by indigenous groups. Women’s rights are particularly vulnerable in these instances, as their rights are not as secure as men’s rights under systems of customary tenure.

The impact of land scarcity on indigenous groups adds one dimension to an already multi-dimensional debate in sub-Saharan Africa about how to

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<sup>6</sup> *E.g.*, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Fiji, ¶ 14, U.N. Doc. CERD/C/FJI/CO/18-20 (Aug. 31, 2012).

<sup>7</sup> See discussion *infra* Part III.A.

reconcile customary law with women's rights. Recent reports on land tenure and land grabs have suggested that attempting to enforce formal systems of individual tenure is counterproductive, and that governments should protect customary forms of tenure.<sup>8</sup> This would serve to protect the groups continuing to live under customary systems; such groups must be approached directly by anyone interested in their land if customary land tenure is legitimized as "ownership" by the state. On the other hand, in sub-Saharan Africa, women's rights activists resist the push toward state recognition of customary land tenure, arguing that their human rights are violated under such systems.

"Customary tenure," as a term, describes the types of property relations that have historically existed and continue to exist among indigenous groups in sub-Saharan Africa. It is certainly not uniform across groups; by its nature it varies from one group to another. However, there are some commonalities that exist across groups. In this Article, I refer to Fitzpatrick's definition of customary tenure, which he describes as:

shorthand for property arrangements which are characterized generally by the following elements: overarching ritual and cosmological relations with traditional lands; community 'rights' of control over land disposal (sometimes delegated to traditional leaders); kinship or territory-based criteria for land access; community-based restrictions on dealings in land with outsiders; and principles of reversion of unused land to community control.<sup>9</sup>

Customary tenure falls under the broader umbrella of customary law, the informal system of norms that have governed all aspects of life, including property relations, marriage, inheritance, the righting of wrongs, and the settlement of disputes.

The debate between customary tenure and women's rights can be framed in any number of ways, among them: the right to self-determination and culture versus women's rights; laws reflecting lived realities versus laws

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<sup>8</sup> United Nations, Food & Agric. Org., *Statutory Recognition of Customary Land Rights in Africa: An Investigation Into Best Practices for Lawmaking and Implementation* 5–8 (2010) (Rachel S. Knight), <http://www.fao.org/docrep/013/i1945e/i1945e01.pdf> [hereinafter *FAO Report*].

<sup>9</sup> Daniel Fitzpatrick, 'Best Practice' Options for the Legal Recognition of Customary Tenure, 36 *DEV. & CHANGE* 449, 454 (2005).

creating new ones; cultural relativism versus universalism; rural versus urban. Some have argued that such dichotomies are unhelpful, and that time would be better spent locating opportunities for women within the interaction between statutory and customary law.<sup>10</sup>

This Article argues that women's rights and customary law conflict to such an extent that any legal system that both protects customary tenure and aims to protect women's rights to land ownership must, at some level, fundamentally alter customary systems of land ownership. In Part II of this Article, I provide a brief overview of how state governments, women's rights activists, and other prior supporters of formalized title systems have come to agree that some engagement with customary law is necessary. In Part III, I discuss the international indigenous rights framework and the women's rights framework, demonstrating how each approach suggests the reconciliation of custom and women's rights. In Part IV, I discuss how both customary governance and statutory governance in sub-Saharan Africa have failed women. In Part V of this Article, I analyze some of the suggested approaches to improve women's land rights under customary law, and conclude that any meaningful solution requires a fundamental disruption and redefinition of customary norms and processes.

## II. THE MOVE TO ENGAGE WITH CUSTOMARY LAW

Post-independence governments in sub-Saharan Africa, encouraged by aid agencies and other international actors, have developed reforms to formalize the process of land tenure, using the system of land titling so common in the West. Justifications for these reforms are tied to economic development, predictability, and fairness in enforcing rights.<sup>11</sup> More recently, in part because of the persistence of and preference for customary tenure, especially in poor or rural communities, many have come to agree

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<sup>10</sup> Aninka Claassens & Sindiso Mnisi, *Rural Women Redefining Land Rights in the Context of Living Customary Law*, 25 S. AFR. J. ON HUM. RTS. 491, 493 (2009); Celestine Itumbi Nyamu, *Achieving Gender Equality in a Plural Legal Context: Custom and Women's Access to and Control of Land in Kenya*, 15 THIRD WORLD LEGAL STUD. 21, 33–34 (1999); Ann Whitehead & Dzodzi Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary*, 3 J. AGRARIAN CHANGE 67, 95 (2003).

<sup>11</sup> Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14 WORLD BANK RES. OBSERVER 247, 249–50 (1999).

that an effective system of governance must engage with customary law.<sup>12</sup> A survey of the African continent shows that all but three nations provide some measure of recognition for customary land rights.<sup>13</sup> However, the extent of protection varies among nations and can be quite weak when pitted against outside interests in the land.<sup>14</sup>

Outright replacing customary tenure with formal title has proved exceedingly difficult for authorities and sometimes detrimental to the people impacted by the changing tenure system. In many sub-Saharan African countries it is not statutory law, but customary law, which reflects the lived realities of land use.<sup>15</sup> Customary authorities are accessible and available to the rural poor who otherwise might not have access to any state authorities or statutory legal enforcement arenas.<sup>16</sup> These customary authorities often fill the gaps in the administration of land tenure regulation by state authorities.<sup>17</sup> However, where both customary law and statutory law can be applied to certain parcels of land, the plural possibilities for legal application can lead to forum-shopping, non-predictability, and generally a weakening of either system's authority.<sup>18</sup> Finally, government refusal to recognize customary rights can weaken the rights of vulnerable groups. Requiring titling when rural groups do not recognize that form of tenure can lead to vast amounts of untitled land which, in all other respects, belongs to the communal group living upon and using it. "When the rural poor's customary land claims are not considered to be valid because they lack formal recognition, then only the rich and the legally adroit, have tenure security."<sup>19</sup> The Food and Agricultural Organization of the United Nations specifically points out that even women may lose out in this way: "while richer, more educated urban and peri-urban women may gain from laws allowing women to own land

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<sup>12</sup> *Id.* at 248; Gordon R. Woodman, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 28 (Jeanmarie Fenrich et al. eds., 2011) ("[I]t is now quite widely recognized by policy makers that the observance of customary laws cannot be suppressed, even if this were desired.").

<sup>13</sup> EMILY POLACK ET AL., INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, *ACCOUNTABILITY IN AFRICA'S LAND RUSH: WHAT ROLE FOR LEGAL EMPOWERMENT?* 20–21 (Apr. 2013), available at <http://pubs.iied.org/12572IIED.html?c=law/globgov>.

<sup>14</sup> *Id.*

<sup>15</sup> FAO Report, *supra* note 8, at 5.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 7.

(and for land to be sold) the vast majority of poor, rural women will only lose out as land becomes commoditized.”<sup>20</sup>

When customary land tenure lacks adequate governmental recognition or protection, groups living under customary tenure systems are at risk of land grabs perpetrated by their own governments or outside actors. Even where laws grant customary rights the same status as other land rights, such as in Tanzania and Mozambique, groups living under customary tenure find themselves subject to encroachment of their land and resources.<sup>21</sup> The African continent is teeming with examples of indigenous groups losing land for any number of self-serving or even seemingly benevolent reasons. Indigenous peoples have been evicted to benefit corporations<sup>22</sup> and to create conservation areas.<sup>23</sup> Oxfam International (Oxfam) has documented the evictions of those with both communal tenure and formal title to benefit programs that allow western corporations to offset their carbon emissions.<sup>24</sup> Pastoralists in Tanzania have complained of evictions, resulting in loss of access to local water sources, to accommodate foreign game hunters.<sup>25</sup> Land grabs affect both indigenous and non-indigenous groups in sub-Saharan Africa, but indigenous groups seem to be particularly susceptible.

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<sup>20</sup> *Id.* at 33.

<sup>21</sup> POLACK ET AL., *supra* note 13, at 20–21.

<sup>22</sup> For example, the Cameroonian government leased forest land to private companies without first consulting with the indigenous peoples living on that land. Elias Ntungwe Ngalame, *Cameroon's Forest Dwellers Lose Out as Land Handed to Developers*, ALERTNET (Mar. 28, 2013), available at <http://www.trust.org/alertnet/news/camerouns-forest-dwellers-lose-out-as-land-handed-to-developers>.

<sup>23</sup> Kenya, for example, began a program of clearing Ogieks from their land with the stated goal of protecting the Mau Forest. Chelsea Purvis, *Kenya: Displacement and Resistance – the Ogiek of Kenya*, THINK AFRICA PRESS (Mar. 22, 2013), available at <http://allafrica.com/stories/201303250089.html?viewall=1>. As of March 15, 2013, the evictions were ordered to cease by the African Court of Human and Peoples' Rights. *In re African Comm'n on Human and Peoples' Rights v. The Republic of Kenya* [African Court on Human and Peoples' Rights], Application No. 006/2012, Order of Provisional Measures (Mar. 15, 2013), available at [http://www.african-court.org/en/images/documents/Orders-Files/ORDER\\_of\\_Provisional\\_Measures\\_African\\_Union\\_v\\_Kenya.pdf](http://www.african-court.org/en/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf).

<sup>24</sup> MATT GRAINGER & KATE GEARY, OXFAM INTERNATIONAL, *THE NEW FORESTS COMPANY AND ITS UGANDA PLANTATIONS* (2011), available at <http://www.redd-monitor.org/wordpress/wp-content/uploads/2011/09/cs-new-forest-company-uganda-plantations-220911-en.pdf>. The authors of this report estimate that 22,500 people in Uganda were evicted as part of this program. *Id.* at 3.

<sup>25</sup> FEMINIST ACTIVIST COALITION (FEMACT), *FEMACT LOLIONDO FINDINGS* 3, 8 (2009), available at <http://letstalklandtanzania.com/s/loliondo-femact-eviction-fact-finding-report/#.UXXfTyv72p0>.

While indigenous groups fight to protect their customary practices, feminists have criticized the gendered norms driving many customary practices, which deprive women of many rights, including access to land.<sup>26</sup> Under customary law, women typically have fewer rights than men in marriage, and have extremely limited rights of inheritance.<sup>27</sup> With little to no access to family or marital property, women's rights to land are limited. Women also lack opportunity to meaningfully participate as decision makers or leaders in customary systems. Many African feminists have preferred state law to customary law, seeing in it greater opportunity to achieve equality.<sup>28</sup> Still, as customary laws and practices persist, and as recognition of customary tenure is touted as a means of protecting against land grabs, many scholars note the need for governments to embrace customary tenure.

### III. LEGAL FRAMEWORKS

The languages of the international indigenous rights framework and the international women's rights framework<sup>29</sup> reflect the opposing positions of the customary law debate, and thus are directly at odds with one another. Whereas the former emphasizes the protection of cultural institutions and group rights, the latter calls on state institutions to alter norms and practices, essentially mandating state interference. Neither adequately responds to the socioeconomic and cultural problems facing indigenous women. While the international indigenous rights framework emphasizes respect for cultural institutions and cultural authority, it does not delve deeply into women's lack of rights relative to men under traditional norms. On the other hand, while the international women's rights framework focuses exclusively on the legal empowerment of women, it privileges the state to a degree that may serve to disenfranchise rural women living under customary systems.

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<sup>26</sup> See discussion *infra* Part III.B.

<sup>27</sup> See discussion *infra* Part IV.A.

<sup>28</sup> Whitehead & Tsikata, *supra* note 10, at 90.

<sup>29</sup> I do not suggest that certain domestic human rights groups around the world have been unable to address the issues of women's rights and indigenous rights in a manner that avoids some of the shortcomings described in this section. However, the discourses of *international* indigenous rights and international women's rights are at odds with one another and, at both an international and domestic level, can lead to a feeling a disenfranchisement in women generally by the former framework, and in indigenous women by the latter framework.



*A. International and Regional Indigenous Rights Frameworks*

Indigenous rights language, included in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the non-binding United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), emphasizes the rights of “peoples” to “self-determination” and the ability to “freely dispose of their natural wealth and resources.”<sup>30</sup> With respect to land, the Declaration calls on states to “give legal recognition and protection to these lands . . . with due respect to the . . . land tenure systems of the indigenous peoples concerned.”<sup>31</sup> The non-binding Declaration also states that indigenous peoples have, *inter alia*, “the right to autonomy or self-government in matters relating to their internal and local affairs,”<sup>32</sup> “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions,”<sup>33</sup> and “the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership.”<sup>34</sup> The International Convention on the Elimination of All Forms of Racial Discrimination also applies to indigenous groups, and the Committee on the Elimination of Racial Discrimination (the CERD Committee)

calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>35</sup>

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<sup>30</sup> International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; United Nations Declaration on the Rights of Indigenous Peoples art. 3, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 13, 2007) [hereinafter UNDRIP].

<sup>31</sup> UNDRIP, *supra* note 30, art. 26(3).

<sup>32</sup> *Id.* art. 4.

<sup>33</sup> *Id.* art. 5.

<sup>34</sup> *Id.* art. 26(2).

<sup>35</sup> Comm. on the Elimination of Racial Discrimination, General Recommendation XXIII: On the Rights of Indigenous Peoples, ¶¶ 1, 5, U.N. Doc. A/52/18 (1997).

Regionally, the African Charter on Human and Peoples' Rights (the Banjul Charter) similarly grants "peoples" the right to self-determination,<sup>36</sup> the right to "freely dispose of their wealth and natural resources,"<sup>37</sup> and the right to "their economic, social and cultural development with due regard to their freedom and identity."<sup>38</sup> The Working Group on Indigenous Populations/Communities in Africa (the Working Group), a special mechanism of the African Commission on Human and Peoples' Rights, was tasked in part with identifying who exactly qualifies as "indigenous" or "peoples" in sub-Saharan Africa. In sub-Saharan Africa, the right to self-determination was historically framed in terms of decolonization and the right of peoples to self-govern an independent state. The "peoples" in that context were the-then colonized peoples, now the citizens of the various sub-Saharan states. As such, the term "indigenous" is now contested by those who argue that all Africans are indigenous,<sup>39</sup> and that the term is an anachronism of subjugation created by European colonists.<sup>40</sup> The Working Group has argued that the term indigenous in the African context must apply to groups whose cultures and livelihoods differ from the dominant groups in society, whose "cultures are under threat," and for which "survival of their particular way of life depends on access and rights to their traditional lands and natural resources thereon."<sup>41</sup>

Despite the contestation over the term, the conversation in sub-Saharan Africa has effectively moved from the topic of independence to topics of self-governance, protection of livelihoods, and protection of resources of hunter-gatherer and pastoralist groups. The UN special rapporteur on the rights of indigenous people has reported on the loss of land and resources of

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<sup>36</sup> African [Banjul] Charter on Human and Peoples' Rights art. 20, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

<sup>37</sup> *Id.* art. 21.

<sup>38</sup> *Id.* art. 22.

<sup>39</sup> INDIGENOUS PEOPLES IN AFRICA: THE FORGOTTEN PEOPLES? 12 (2006), available at [http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr\\_wgip\\_report\\_summary\\_version\\_eng.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf) [hereinafter THE FORGOTTEN PEOPLES].

<sup>40</sup> In a statement to the UN Permanent Forum on Indigenous Issues, Tanzanian representative Ramadhan M. Mwinyi asserted that the term indigenous was used to "belittle" communities during the colonial period. Press Release, United Nations Economic and Social Council, Chronic Marginalization, Fragmentation, Encroachment, Lack of Land Rights Make Pastoralists in Africa Among Poorest in World: Intergovernmental Organizations, United Nations Agencies Weigh in on Relationship between Governments, Pastoralists, UN Press Release HR/5135 (May 23, 2013), available at <http://www.un.org/News/Press/docs/2013/hr5135.doc.htm>.

<sup>41</sup> THE FORGOTTEN PEOPLES, *supra* note 39, at 10.

tribal groups or sub-groups within African nation states, rather than the entire native population of said states.<sup>42</sup> The Working Group has detailed the various rights violations experienced by hunter-gatherers, pastoralists, and agro-pastoralists, asserting that the loss of land and access to resources caused by the creation of conservation areas and the activities of extractive industries amounts to violations of peoples' rights to recover their access to natural resources and to economic, social, and cultural development.<sup>43</sup> Even more daunting is the threat of extinction faced by certain hunter-gatherer groups, violating peoples' "right to existence" guaranteed by the Banjul Charter.<sup>44</sup>

To protect against encroachment on lands or other resources, the commonly proposed solution calls for government recognition of communal land rights and the creation of consultation requirements. In its general recommendation 23, the CERD Committee requires that "no decisions directly relating to [indigenous peoples'] rights and interests [be] taken without their informed consent."<sup>45</sup> This duty to consult is also articulated by the International Labour Organization (ILO) in its Convention No. 169,<sup>46</sup> by the Human Rights Committee,<sup>47</sup> and the UN Special Rapporteur on the rights of indigenous peoples.<sup>48</sup> Most recently, the Inter-American Court of Human Rights held that this duty to consult has become "a general principle of international law."<sup>49</sup> The idea that indigenous groups have a right to be

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<sup>42</sup> See, e.g., Special Rapporteur on the Rights of Indigenous Peoples, *The Situation of Indigenous Peoples in the Republic of the Congo*, ¶¶ 7–9, U.N. Doc. A/HRC/18/35/Add.5 (July 11, 2011) (by James Anaya) (discussing the rights of the ethnic groups more commonly known as "Pygmies" in the Republic of Congo); Special Rapporteur on the Rights of Indigenous Peoples, *The Situation of Indigenous Peoples in Botswana*, U.N. Doc. A/HRC/15/37/Add.2 (July 19, 2010) (by James Anaya).

<sup>43</sup> REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES 20 (2005), available at [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/African\\_Commission\\_book.pdf](http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> Comm. on the Elimination of Racial Discrimination, *supra* note 35, ¶ 4(d).

<sup>46</sup> Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 6(1)(b), June 27, 1989, 1650 U.N.T.S. 383 [hereinafter Convention No. 169].

<sup>47</sup> Human Rights Comm., General Comment 23, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

<sup>48</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries Operating Within or Near Indigenous Territories*, ¶ 79, U.N. Doc. A/HRC/18/35 (2011) (by James Anaya).

<sup>49</sup> Lisi Brunner & Karla Quintana, *The Duty to Consult in the Inter-American System: Legal Standards After Sarayaku*, ASIL INSIGHTS (Nov. 28, 2012), <http://www.asil.org/pdfs/insights/insight121128.pdf> (internal quotations omitted).

consulted has taken hold beyond the rights community, and has begun to impact the behaviors of actors working outside of human rights. The International Finance Corporation, for example, strengthened its Sustainability Framework with respect to indigenous peoples by explicitly calling on clients to engage in “Informed Consultation and Participation” with indigenous peoples affected by a project.<sup>50</sup>

However, even to the extent consultations are occurring, in Africa, women’s voices within those consultations lack consideration. In a comprehensive report examining land grabs in Ethiopia, Ghana, Mali, Mozambique, Senegal, and Tanzania, Oxfam notes that women’s voices are marginalized in consultations, both resulting from and contributing to their tenure insecurity.<sup>51</sup> Women’s issues fail to be adequately represented in these consultations, due in part to unequal power dynamics that deny women a meaningful voice in group decision-making or that relegate women as secondary users of land that is ultimately controlled by men.<sup>52</sup> In some instances, consultations or land deals result in land that is underused, unproductive, or otherwise “marginal” being taken for the purpose of allowing investors to improve the seemingly useless land.<sup>53</sup> However, these lands are sometimes the only lands available to and set aside for women who are widowed or divorced, and taking such land deprives these women of their strongest rights to land.<sup>54</sup>

The “woman question” in light of protecting indigenous land rights has been acknowledged by global human rights bodies, although not very strongly. The ILO Convention 169 points out that indigenous peoples “have the right to retain their own customs and institutions, *where these are not incompatible* with fundamental rights defined by the national legal system and with internationally recognized human rights.”<sup>55</sup> The Declaration explicitly specifies that the rights contained therein apply to both males and

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<sup>50</sup> International Finance Corporation, Performance Standard 7: Indigenous Peoples (Jan. 1 2012), *available at* [http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES).

<sup>51</sup> See TINYADE KACHIKA, OXFAM INTERNATIONAL, LAND GRABBING IN AFRICA: A REVIEW OF THE IMPACTS AND THE POSSIBLE POLICY RESPONSES, <http://www.oxfamblogs.org/eastafrica/wp-content/uploads/2010/11/Land-Grabbing-in-Africa.-Final.pdf> (last visited Apr. 23, 2013).

<sup>52</sup> *Id.* at 10–11.

<sup>53</sup> *Id.* at 22.

<sup>54</sup> *Id.* at 44.

<sup>55</sup> Convention No. 169, *supra* note 46, art. 8 (emphasis added).

females,<sup>56</sup> and the special rapporteur, in its mandate, is invited “to take into account a gender perspective while in carrying out her/his mandate, paying special attention to discrimination against indigenous women.”<sup>57</sup> On the other hand, although the various UN mechanisms on indigenous rights are consistently on-message about prior and informed consultation with indigenous groups, the importance of considering indigenous women in these consultations gets only sporadic attention. The special rapporteur’s annual reports do not make explicit mention of the need to include women in consultations or consider how to improve women’s access to land.<sup>58</sup> In

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<sup>56</sup> UNDRIP, *supra* note 30, art. 44 (“All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.”).

<sup>57</sup> Comm. on Human Rights Res. 2001/57, Human Rights and Indigenous Issues, 57th Sess., March 19–April 27, 1001, U.N. ESCOR, Supp. No. 3, U.N. Doc. E/CN.4/RES/2001/57, at 2 (Apr. 24, 2001).

<sup>58</sup> Of the ten annual/thematic reports published since 2008, only one discusses women’s issues at any significant length. In his 2012 report, Special Rapporteur James Anaya discusses at length the issue of violence against indigenous women and girls, tying it to the discrimination and inequality faced by indigenous peoples generally. Special Rapporteur on the Rights of Indigenous Peoples, ¶¶ 21–28, U.N. Doc. A/HRC/21/47 (July 6, 2012) (by James Anaya). Although the general term “violence against women” is easily inclusive of structural violence—that is, the unequal distribution of wealth and power, including land when it is a source of both—the report is not specific about the types of violence the UN system should address with respect to indigenous women. Anaya’s recommended solution involves strengthening indigenous institutions to adequately address violence against women, with no specific mention of the need to include women in developing and implementing institutional solutions, although he does note that “indigenous peoples must challenge and combat any existing patriarchal social structures, continued attitudes of superiority of men over women and supposed justifications based on culture for battering or discriminating against women.” *Id.* ¶¶ 29–33. Interestingly, immediately after this discussion, Anaya discusses his continuing work on the rights of indigenous people in relation to extractive industries, where he makes no mention of indigenous women’s ability to access land and natural resources. *Id.* ¶¶ 34–76. In addition, while he emphasizes the need to consult with indigenous peoples and consider the impact of extractive industries on their lifestyles, he does not call for the inclusion of women in such consultations. *Id.* In three earlier reports mentioning women, Anaya refers to indigenous women primarily to note where they are mentioned in his mandate and in the indigenous rights legal framework, briefly mentioning that the Declaration requires indigenous institutions to pay particular attention to the needs of women, and to discuss global efforts to reduce violence against indigenous women. Special Rapporteur on the Rights of Indigenous Peoples, *Second International Decade of the World’s Indigenous People*, U.N. Doc. A/HRC/64/338 (Sept. 4, 2009) (by James Anaya); Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/34 (July 15, 2009) (by James Anaya); Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, U.N.

country-specific reports, the special rapporteur has reacted positively to indigenous women's advocacy and efforts among groups to include women in decision-making processes, but does not in a broader sense actively advocate for the inclusion of women in consultations or otherwise increase their access to land.<sup>59</sup> It is worth noting that the United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues have collaborated to produce a briefing note on Indigenous Women, advocating for gender consideration and mainstreaming in all indigenous rights policies and approaches.<sup>60</sup> On the one hand, the note identifies women's vulnerabilities with respect to land and natural resources and calls for inclusion of women in consultations.<sup>61</sup> On the other hand, it is paltry in comparison to the overall discourse on indigenous rights. Indeed, other than the focus on violence against indigenous women, indigenous women appear to be mere footnotes to the various UN mechanisms on indigenous rights.

#### *B. Formalism in the Women's Rights Legal Frameworks*

In contrast to the indigenous rights framework's emphasis on utilizing and strengthening cultural and indigenous institutions, both international law and domestic African women's rights activists have privileged the state as provider and guarantor of rights. Internationally, the language of women's human rights emphasizes the state because human rights systems generally emphasize state accountability and responsibility. Domestically, many African feminist attorneys have preferred the state to customary structures

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Doc. A/HRC/9/9 (Aug. 11, 2008) (by James Anaya). Finally, in his most recent report, he briefly encourages indigenous institutions to develop some gender balance, but does not go into any greater detail than a two sentence prescription. Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, ¶ 70, U.N. Doc. A/HRC/24/41 (July 1, 2013) (by James Anaya).

<sup>59</sup> See, e.g., Special Rapporteur on the Rights of Indigenous Peoples, *The Situation of Kanak People in New Caledonia, France*, ¶¶ 90–91, U.N. Doc. A/HRC/18/35/Add.6 (Nov. 23, 2011) (by James Anaya); Special Rapporteur on the Rights of Indigenous Peoples, *Report on the Situation of Indigenous Peoples in Nepal*, ¶ 95, U.N. Doc. A/HRC/12/34/Add.3 (July 20, 2009) (by James Anaya).

<sup>60</sup> U.N. Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Gender and Indigenous Peoples* (2010), <http://www.un.org/esa/socdev/unpfii/documents/Briefing%20Notes%20Gender%20and%20Indigenous%20Women.pdf>.

<sup>61</sup> *Id.* at 8–10.

for the promotion of women's rights,<sup>62</sup> pushing for the eradication of customary tenure.<sup>63</sup> This reliance on state-centered approaches has been criticized for ignoring both the disenfranchisement of certain women at the hands of the state and the role that customary law plays in African women's lives.

The Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW) throughout its text calls for state action to protect women's rights, and relies upon structures of the formal legal system. The CEDAW calls on States Parties to "adopt appropriate legislative and other measures," and "establish legal protection of the rights of women."<sup>64</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) also calls on States Parties to "enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination. . . ."<sup>65</sup> To the extent it refers to cultural and customary practices, the CEDAW requires elimination or modification of those practices that discriminate against women.<sup>66</sup> The Maputo Protocol similarly calls on States Parties to reform "existing discriminatory laws and practices in order to promote and protect the rights of women,"<sup>67</sup> and also goes further by calling for the prohibition of specific customary practices.<sup>68</sup> Article 21 of the Maputo Protocol provides very specific rights with respect to land and property, providing that widows have the right to inherit property from their husbands, the right to remain in the marital home after their husbands' deaths, "and 'the right to inherit, in equitable shares, their parents' properties.'"<sup>69</sup>

When confronted with specific customary law norms negatively impacting women, the Committee on the Elimination of Discrimination

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<sup>62</sup> Ambreena S. Manji, *Imagining Women's 'Legal World': Towards a Feminist Theory of Legal Pluralism in Africa*, 8 SOC. & LEGAL STUD. 435, 440 (1999); Whitehead & Tsikata, *supra* note 9, at 90.

<sup>63</sup> Aili Mari Tripp, *Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda*, 7 AFR. STUD. Q. 1, 2 (2004).

<sup>64</sup> Convention on the Elimination of All Forms of Discrimination against Women art. 2, Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>65</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 2(1)(b), Sept. 13, 2000, *reprinted in* 1 AFR. HUM. RTS. L.J. 40 [hereinafter Maputo Protocol].

<sup>66</sup> CEDAW, *supra* note 64, pmb. & arts. 2(f), 5(a).

<sup>67</sup> Maputo Protocol, *supra* note 65, art. 8(f).

<sup>68</sup> *Id.* arts. 2(2), 5.

<sup>69</sup> *Id.* art. 21.

Against Women (the CEDAW Committee) has called for state action to eliminate these norms. In Zambia, the CEDAW Committee expressed concern over the fact that both statutory and customary law governed marriage and family relations, noting that “customary law is mostly unwritten and often administered by male justices without a legal background, and that discrimination against women is not addressed in their decisions.”<sup>70</sup> It suggested that customary law be both revised and codified.<sup>71</sup> Similarly in Uganda, the Committee expressed “concern that customs and traditional practices, prevalent in rural areas, prevent women from inheriting or acquiring ownership of land and other property.”<sup>72</sup> Tanzania’s customs were also taken to task for perpetuating discrimination against women, and the Committee urged Tanzania to “put in place without delay a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women. . . .”<sup>73</sup> To address the problems women face in customary forms of landholding, the Committee generally recommends the adoption of laws of intestate succession which codify the principle of equality as between men and women and limit discriminatory customary practices.<sup>74</sup>

Many African women’s rights groups work within the frameworks set out by international women’s rights law and statutory law. Women’s groups do work directly with tribal groups to empower women and encourage change through traditional structures, but there is also a great deal of emphasis placed on formal legal action. Information gathered from advocacy efforts and fact-findings in rural areas often forms the basis of shadow reports

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<sup>70</sup> Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Zambia*, U.N. Doc. A/57/38 (June 21, 2002) ¶ 250, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/ZambiaCO27.pdf>.

<sup>71</sup> *Id.* ¶ 251.

<sup>72</sup> Comm. on the Elimination of All Forms of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Uganda*, U.N. Doc. CEDAW/C/UGA/CO/7 (Oct. 22, 2010) ¶ 41, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-UGA-CO-7.pdf>.

<sup>73</sup> Convention on the Elimination of All Forms of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Republic of Tanzania*, U.N. Doc. CEDAW/C/TZA/CO/6 (July 18, 2008) ¶¶ 117–118, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.TZA.CO.6.pdf>.

<sup>74</sup> Comm. on the Elimination of Discrimination against Women, *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶¶ 50, 53, U.N. Doc. CEDAW/C/GC/29 (Feb. 26, 2013).



submitted to the CEDAW Committee and other human rights bodies. In addition to working with various international human rights bodies, women's groups have also focused on state judicial and legislative action. Succession under customary law, for example, has been the subject of lawsuits in Botswana,<sup>75</sup> Tanzania,<sup>76</sup> and South Africa,<sup>77</sup> among others.

This state-philic approach has been criticized as being phallogocentric in its reliance on a legal centralist model<sup>78</sup> and hegemonic in its reliance on western-style systems.<sup>79</sup> That is, by working within the parameters of the state and focusing on outcomes produced by formal state institutions, these activists are accused of continuing to operate within a patriarchal model and failing to take into account the lived realities of certain women. Despite these accusations, many women do have a preference for state court systems and statutory law, in part because they anticipate better results from the state system. Additionally, the women's human rights framework in international and regional treaties is meant to include all women, including those in indigenous or rural communities.

Yet while some women have indicated a preference for statutory courts over customary institutions,<sup>80</sup> others found no comfort in the statutory law of the colonial and post-colonial African state, which served to codify

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<sup>75</sup> *Ramantele v. Mmusi*, [2013] BWCA 1 (Bots.), available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf> (providing that Ngwaketse customary law of inheritance, which traditionally only permitted intestate succession of a parent's estate to male heirs, should be interpreted to reflect modern views and applied to permit female children to inherit parents' property intestate).

<sup>76</sup> *Ephraim v. Pastory*, [2001] AHRLR 236 (HC) (Tanz.) (holding that the sale of clan land by a female was valid, in spite of the Haya customary law which prohibited women from inheriting and selling clan land); *Stephen & Charles v. Attorney-General*, Miscellaneous Civil Cause No. 82 of 2005 (HC) (Tanz.) (unreported) (acknowledging that customary law prohibiting women from inheriting and selling clan land was discriminatory, but refusing to strike it down nonetheless).

<sup>77</sup> *Bhe v. Khayelitsha*, 2005 (1) SA 580 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2004/17.html> (holding the African customary law of male primogeniture, to the extent it excludes women and extra-marital children from inheriting under intestate succession, is unconstitutional and invalid).

<sup>78</sup> Manji, *supra* note 62, at 439–40 (“The feminist focus on the state has meant that in both the west and in emerging third world feminist theorisation, law reform has taken pride of place on the agenda of feminist groups . . . Arthurs has argued convincingly . . . that the reliance on the constitution is the epitome of legal centralism. . .”).

<sup>79</sup> Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381, 393–94 (2000) (noting that the abolitionist approach, which favors statutory law over custom, has been accused of cultural imperialism).

<sup>80</sup> Tripp, *supra* note 63, at 10.

oppression of women for many years.<sup>81</sup> Not only was statutory law providing no new protections, in some ways it was even defraying the limited protections women had under customary law. The customary system of laws, on the other hand, was both more familiar and perceived as more legitimate. Critics, characterizing the state-centered approach as abolitionist, argue that it fails to acknowledge the dynamic nature of customary rights, and the possibility that there may be a place for human rights norms within a customary construct.<sup>82</sup>

In addition, for some indigenous women, effective remedies cannot necessarily be provided by mechanisms at the center. Women who use formal courts are sometimes seen as betraying their cultural values.<sup>83</sup> Some women find that to ensure their actions are perceived as legitimate, it is in their best interest to use traditional settlement mechanisms that are acceptable to the men in their community.<sup>84</sup> Furthermore, formal courts may not be as accessible to women as local village-level bodies, and the use of formal courts is accompanied by time and money costs.

Women's preferences for state-supported or customary structures are mixed, complicating the discussion of what is the best system to protect women's rights. However, just as customary tenure persists because of its legitimacy and relevance to certain groups, so are customary institutions more palatable for certain groups of women. From this perspective, an approach of engagement, rather than eradication, is necessary.

#### IV. THE GENDERED DIFFICULTIES OF CUSTOMARY AND STATUTORY LAW

Customary tenure and statutory law, acting both separately and together, have failed women. For women, access to land under customary tenure is limited. Despite the variation of customary norms across groups, many scholars have noted some consistent similarities in women's rights: women's rights to land are dependent on their connection to family, typically to the men in the family. As competition for land increased, even the limited protections women were afforded began to be rejected by men and traditional authorities. The arrival of statutory law has unfortunately reinforced discriminatory norms and, in some ways, made them even more discriminatory. Although historically under customary law, women's rights

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<sup>81</sup> See discussion *infra* IV.B.

<sup>82</sup> Nyamu, *supra* note 79.

<sup>83</sup> Manji, *supra* note 62, at 449.

<sup>84</sup> Whitehead & Tsikata, *supra* note 10, at 99.

were inferior to men's rights, women did maintain some limited rights relating to land. Colonial and post-colonial laws established norms that ignored these nuances, eliminating the rights women did have.

*A. Women's Rights Under Pre-Colonial Customary Tenure*

Customary tenure systems privilege the needs of the household and community over the needs of the individual. Given the gender-specific roles that exist in these communities, the rights of men and women were, and still are, different. Land typically passed from male to male within a household; if the household line ended, the land would revert back to the community. Women typically had rights to access and cultivate land. Each community's practices were determined by the needs of the community and any other factors relating to the practice. Customary tenure is thus, in theory, dynamic and flexible, adapting to changes in the environment and changes in community views.

Certain gendered practices seem to be common across groups. All rights are tied to kinship networks, and a woman's rights are based on the men in her life. Land flows through the male members of households. With some exceptions and varying degrees of nuance, customary tenure tends to conform to the following practices.<sup>85</sup> During their lifetimes, women are able to access land through their fathers or male relatives and, later, through their husbands.<sup>86</sup> If a woman remains unmarried, her father, brother, uncle, or other male relative will ensure that she has access to some land.<sup>87</sup> If she does marry and later becomes widowed, she does not necessarily inherit the matrimonial property outright.<sup>88</sup> If she has young children, she may stay in

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<sup>85</sup> Although there are many common gendered practices under customary law, it cannot be overstated that not all customary systems are the same. Authors have found examples where women were, at least at one point, able to inherit land alongside men under some forms of customary tenure. *E.g.*, Ingrid Yngstrom, *Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems*, 30 OXFORD DEV. STUD. 21, 30 (2002).

<sup>86</sup> Sandra Joireman, *Entrapment or Freedom: Enforcing Customary Property Rights Regimes in Common-Law Africa*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 302 (Jeanmarie Fenrich et al. eds., 2011); Susana Lastarria-Cornhiel, *Impact of Privatization on Gender and Property Rights in Africa*, 25 WORLD DEV. 1317, 1322–23 (1997) (noting that in Ghana, daughters have cultivation rights to parcels of the land of their natal families, losing that right when their fathers die, but gaining cultivation rights to their husbands' land when they marry).

<sup>87</sup> Lastarria-Cornhiel, *supra* note 86, at 1321–22.

<sup>88</sup> *Id.* at 1322.

the matrimonial home to raise them until her sons are of age to manage the property.<sup>89</sup> If she does not, in some communities she may marry a relative of her husband and continue to stay on the land.<sup>90</sup> Otherwise, she can return home to her father or brothers, who will provide her with property.<sup>91</sup>

Several authors argue that these customary protections were once very strong; women never went without access to land because customary norms granting access were so heavily tied to customary norms of fairness and justice.<sup>92</sup> However, even if these protections were as strong as is claimed, it was during a time when there was less demand on land<sup>93</sup> and land did not suffer from the competition created by demographic pressures, the rise of cash crops, and competing interests in a global economy.

### *B. Women and Customary Tenure in the Colonial and Post-Colonial State*

Under the colonial state, customary leaders and elites twisted norms to their own benefit. During the colonial era, colonial governments amplified the role of traditional chiefs.<sup>94</sup> Colonial governments, even when applying a formal property system to white settlers, attempted to identify and apply customary “rules” of tenure to native Africans. In seeking to assess the nature of customary tenure, colonial governments sought out traditional authorities,<sup>95</sup> who inevitably presented their own versions of the customary rules.<sup>96</sup> This emphasis on traditional authorities as sources of law allowed these traditional authorities to assert an even greater level of control over women, younger men, and children than had been previously experienced by

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

<sup>90</sup> Aparna Polavarapu, *Procuring Meaningful Land Rights for the Women of Rwanda*, 14 *YALE HUM. RTS. & DEV. L.J.* 105, 110 (2011).

<sup>91</sup> For discussions of women’s rights under customary tenure in different countries, see *id.* (discussing customary tenure in Rwanda); Dr. Ben Kiromba Twinomugisha, *African Customary Law and Women’s Human Rights in Uganda*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 453–55 (Jeanmarie Fenrich et al. eds., 2011) (discussing women’s rights under customary tenure in Uganda); Tripp, *supra* note 63, at 6 (describing customary land tenure in Uganda, noting that men are able, but not obligated, to leave land to women); Joireman, *supra* note 86, at 302–04 (discussing, in both the text and footnotes, societies in West Africa, Uganda, Kenya, and Zimbabwe, among others).

<sup>92</sup> Whitehead & Tsikata, *supra* note 10, at 78.

<sup>93</sup> Joireman, *supra* note 86, at 303.

<sup>94</sup> *Id.* at 297; Manji, *supra* note 62, at 445; Polavarapu, *supra* note 90, at 109.

<sup>95</sup> Where there were no traditional authorities, the colonial state appointed one. Joireman, *supra* note 86, at 297.

<sup>96</sup> *Id.* at 297–98.

local communities.<sup>97</sup> Both colonial governments and tribal authorities were concerned about women's migration to urban centers, the latter particularly because it threatened the customary political authority.<sup>98</sup> As a means of controlling and stemming this flow, colonial governments enacted legislation empowering chiefs to control women's movements and, later, marriage and other personal laws, further increasing male control over women.<sup>99</sup> Under some governments, these unwritten rules became written, reflecting the European preference for written codes. The codification of these "customary rules" stunted the development and undermined the flexibility of customary law, rigidifying norms through legislation while granting traditional authorities the unprecedented power to create customary law by their word.<sup>100</sup>

Post-colonial governments have also been complicit in reinforcing norms depriving women of rights and limiting norms that granted women rights. After independence, the modern African state began implementing western-style formal land reforms, promoting individual ownership and titling. Influential international actors heavily supported this approach, considering such reform to be a key driver of economic development, legal clarity, and conflict resolution.<sup>101</sup> In their first iteration, these land reforms served to exclude women from any rights whatsoever with respect to land. Titling programs formalized title under the names of "heads of households," who were men.<sup>102</sup> Under such a system of formal title, private, individual rights of ownership were privileged over social normative rules, and women's use rights became increasingly insecure.<sup>103</sup>

Scholars have consistently argued that western models of tenure could not comprehend the "corporate tenure" that tended to characterize customary forms. Platteau, for example, has argued that,

[u]pholders of the "static" view have ignored or downplayed the dynamic potential of indigenous African land systems partly because they have failed to see that individual tenures can exist under a general system of corporate ownership; that

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<sup>97</sup> *Id.* at 297.

<sup>98</sup> Manji, *supra* note 62, at 444–45.

<sup>99</sup> *Id.* at 445.

<sup>100</sup> Joireman, *supra* note 86, at 298.

<sup>101</sup> Whitehead & Tsikata, *supra* note 10, at 80–81.

<sup>102</sup> Nyamu, *supra* note 79, at 396.

<sup>103</sup> *Id.*; Whitehead & Tsikata, *supra* note 10, at 73.

communal arrangements are genuine multi-tenure systems with different land uses calling for different tenures; and that land-use rights, most often to a specific plot of land, are held by individuals or households. Such systems are flexible enough to allow the proportion of lands held under relatively well-secured rights of individual possession to increase as the need arises for agricultural intensification and the accompanying long-term investments.<sup>104</sup>

Western conceptualizations understood this as ownership, from which other, lesser rights could be granted.

The western conceptualization is incomplete in that it does not incorporate the customary social structures which *require*, rather than *permit*, differing land rights to various groups, especially considering the needs of the community. Women, for example, were heavily involved in cultivation and, thus, the community depended on women having access to land:

In a context where labour is frequently a key limiting factor of production, and where women can and do provide a significant share of this, especially in terms of household food provisioning, the obligation by men to acknowledge their wives' contribution and to provide land for food is critical to the farming and household enterprise.<sup>105</sup>

The conjugal contract thus incorporated access to land in a way that western perceptions of "ownership" and "usufruct" do not. The impact of formal titling processes was to deprive women of these rights altogether: men as the primary decision-makers were understood to be "heads of household" and were given complete control over land plots, reducing the influence of community norms of fairness and justice which required granting access to women.<sup>106</sup> Thus, women's rights, which were once all but guaranteed, became truly usufructory. Lastarria-Cornhiel offers a similar conclusion: "It is under the increasing transformation of customary tenure systems to market-based, individualized tenure systems that women's limited but

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<sup>104</sup> Jean-Philippe Platteau, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment*, 27 DEV. & CHANGE 29, 33 (1996).

<sup>105</sup> Yngstrom, *supra* note 85, at 27.

<sup>106</sup> Whitehead & Tsikata, *supra* note 10, at 74.

recognized land rights may be ignored and consequently lost.”<sup>107</sup> The titling process encouraged clan groups to limit women’s access to title in order to keep land within the family.<sup>108</sup> In Kenya, for example, even where titling schemes were open to both the men and women in a household, male Kikuyu did not permit landholdings to be titled in women’s names because it would be subversive to the social structure.<sup>109</sup> Formal courts have also denied women’s informal rights to lands after land was titled. The Kenyan Court of Appeals, for example, denied a woman’s customary law-based claims to titled land, holding that the title registration extinguished a wife’s right of access.<sup>110</sup>

The post-colonial state also preserved certain aspects of customary norms to the detriment of women. Many early constitutions excepted customary law from being bound by constitutional provisions granting citizens the right to be free from discrimination and the right to equal protection under the law.<sup>111</sup> Even as these clawback clauses were struck from constitutions,<sup>112</sup>

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<sup>107</sup> Lastarria-Cornhiel, *supra* note 86, at 1329.

<sup>108</sup> Whitehead & Tsikata, *supra* note 10, at 74.

<sup>109</sup> *Id.* at 97–98 (citing Mackenzie).

<sup>110</sup> Nyamu, *supra* note 79, at 407 (citing to *Wanjohi v. Official Receiver and Interim Liquidator*, a 1988 Kenyan Court of Appeals decision).

<sup>111</sup> *E.g.*, CONSTITUTION, art. 33(5)(d) (1997) (reprinted 2002) (Gambia); CONSTITUTION, art. 82(4)(b)–(c) (1963) (amended 2008) (Kenya); CONSTITUTION, art. 18(4)(c) (1993) (Lesotho). Each of these provisions contains language carving out a customary law exception for the otherwise constitutionally-guaranteed right to equal protection under the law. The pre-2010 Kenyan Constitution, for example, states in article 82(1) that “[s]ubject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.” Article 82(4) goes on to state,

Subsection (1) shall not apply to any law so far as that law makes provision—

. . .

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

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons. . . .

<sup>112</sup> The current constitution of Kenya no longer contains a clawback provision for the benefit of customary law. Moreover, it makes clear that customary law must comply with constitutional guarantees: “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.” CONSTITUTION, art. 2(4) (2010) (Kenya). With respect to equality, however, this constitution is by no means perfect: it explicitly qualifies the provisions on equality for certain applications of Muslim personal law. CONSTITUTION, art. 24(c)(4) (2010) (Kenya) (providing, “[t]he provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’

some statutory laws continued to permit customary law to govern personal matters, such as inheritance, marriage, divorce, and burial rites. The result has been that even when statutory law granted women equal or even simply improved rights to land, under customary law as applied, women's access to land, which was typically governed by laws of inheritance, marriage, and divorce, remained limited.

In Tanzania, for example, the Indian Succession Act grants women equal property rights, but customary law is applied to certain specified communities.<sup>113</sup> Schedules to the Judicature and Application of Laws Act contain codifications of the customary law to clarify the exact rules to be applied. Under this law, a barren widow receives one twentieth of one half of the immovable marital property and may live in the marital home until her remarriage or death.<sup>114</sup> A widow who bore her husband children may reside in the marital home with her children, but may be asked to leave if she lives with a man who is not her deceased husband's relative.<sup>115</sup> The codified customary law of inheritance severely limits women's ability to inherit clan land while any male heir lives, stating: "[w]omen are allowed to inherit except clan land. They can use clan land without selling it during their lifetime. But if there are no men in that clan, a woman can inherit this land completely."<sup>116</sup> Similarly, Kenya's Law of Succession provides that the customary law of succession shall apply in specified districts in the country, with respect to agricultural land and livestock.<sup>117</sup> While Kenya's customary law has not been codified the way Tanzania's has, it has been unofficially codified in the Restatement of African Law, which judges access when attempting to ascertain customary law.<sup>118</sup> At least some statutory courts have

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courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.").

<sup>113</sup> Judicature and Application of Laws Act, 2002, c. 358, § 11 (Tanz.). For a discussion of how the various laws on succession work together, see Tamar Ezer, *Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters*, 7 GEO. J. GENDER & L. 599, 606–08 (2006).

<sup>114</sup> Local Customary Law (Declaration) Order, Government Notice (GN) 279/1963, Schedule 1, Laws of Persons [Sheria Zinazohosu Hali ya Watu] rule 77, in Judicature and Application of Laws Act (Subsidiary Legis.), 2002, C. 358 (Tanz.).

<sup>115</sup> *Id.* at rules 66A, 68.

<sup>116</sup> Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Schedule 2, Laws of Inheritance [Sheria za Urithi] rule 20, in Judicature and Application of Laws Act (Subsidiary Legis.), 2002, c. 358 (Tanz.).

<sup>117</sup> The Law of Succession Act, (2008) Cap. 160 §§ 32–33 (Kenya).

<sup>118</sup> For example, in a 2004 High Court of Kenya case involving an inheritance dispute under Kikuyu law, the judge cited to Eugene Cotran's Restatement of African Law, published in



refused to apply discriminatory customary norms, relying on statutory “repugnancy tests” which permit application of customary law only insofar as it is not “repugnant to justice and morality.”<sup>119</sup> However, this approach has not had the impact of altering the rigidified customary law or creating a more egalitarian customary law. The existing legal pluralism has created rifts between urban women, who were more likely to benefit from statutory law, and rural women, who continued to be governed by customary law.

Although South Africa has embraced the concept of a “living customary law,” in which norms are capable of being redefined by negotiation, which can work to the benefit of women, it has also continued to consolidate customary authority in men, who benefit from the status quo. The Communal Land Rights Act, which was declared unconstitutional in 2010,<sup>120</sup> consolidated communal land rights authority in traditional councils.<sup>121</sup> In doing so, it had been criticized as creating unfavorable conditions for women to negotiate for land rights.<sup>122</sup> The Traditional Courts Bill, still in Parliament, is criticized as doing the same by granting all-male traditional councils the ability to determine the substance of customary norms.<sup>123</sup>

The list goes on. The hybrid systems that currently exist continue to entrench discriminatory norms and deny women rights.

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1968, to support the grant of land to an unmarried daughter of a Kikuyu man. *Kaguara v. Mburu*, Civil Case 648 of 2004 (Kenya), *available at* <http://www.kenyalaw.org/caselaw/cases/view/14637/>. The language cited by the judge states:

Inheritance under Kikuyu Law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons the heirs are the nearest patrilineal relatives of the deceased, namely father, full brother, half-brothers and paternal Uncles.

*Id.*

<sup>119</sup> *See, e.g.*, The Judicature Act (1967) Cap. 8 § 3(2) (Kenya) (providing that, “[courts] shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.”).

<sup>120</sup> LEGAL RESOURCES CENTRE, *Communal Land Right Act Declared Unconstitutional* (May 11, 2010), <http://www.lrc.org.za/press-releases/1227-2010-05-11-communal-land-right-act-declared-unconstitutional>.

<sup>121</sup> Claassens & Mnisi, *supra* note 10, at 494.

<sup>122</sup> *Id.* at 509–10.

<sup>123</sup> *Id.* at 511; *South Africa: Minister Condemns Silencing of Women During Traditional Courts Bill Hearings*, ALLAFRICA.COM, May 20, 2012, <http://allafrica.com/stories/201205210023.html>.

Where customary law is not codified but still able to be flexible and dynamic, it is not necessarily changing for the better. While there are some examples of women negotiating within the customary framework to improve their rights, there are also examples in which women are unable to do so.<sup>124</sup> Women continue to struggle more than men to access land,<sup>125</sup> and existing women's protections under customary law face serious obstacles. Customary systems have been breaking down due to external factors which, in combination with privatization, have led to women losing their rights.<sup>126</sup> Over time, norms protecting women have broken down as resources become scarcer and as the monetary value of certain cash crops changes incentives. Where demographic pressure has increased stress on and demand for land, men began to cast off the protections they owe women.<sup>127</sup> In some instances, such demographic pressure has resulted in traditional authorities manipulating norms to remove the protections traditionally afforded to weaker groups, with women becoming more likely to lose out on land.<sup>128</sup> Where urbanization created an increased demand for food, men have recaptured rights to cultivate land in order to capture the increased value of food production.<sup>129</sup>

In addition to environmental changes, state governments have supported the exclusion of women from customary protections. Throughout the continent, alliances have developed between male political leaders and traditional chiefs<sup>130</sup> in a way that mimics the consolidation of tribal authority implemented by the colonial state. In political discourse, the term customary

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<sup>124</sup> Claassens & Mnisi, *supra* note 10, at 502; Joireman, *supra* note 86, at 304; Whitehead & Tsikata, *supra* note 10, at 102.

<sup>125</sup> Joireman, *supra* note 86, at 304; Whitehead & Tsikata, *supra* note 10, at 102.

<sup>126</sup> Lastarria-Cornhiel, *supra* note 86, at 1324–25; Abdulmumini A. Oba, *The Future of Customary Law in Africa*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW*, *supra* note 12, at 58, 71.

<sup>127</sup> Catherine André, *Rwandan Land: Access, Policy & Land Reform* 12 (Antwerp University, Centre for Development Studies, Working Paper Series 29, 1998), available at <http://www.grandslacs.net/doc/1450.pdf>; Lastarria-Cornhiel, *supra* note 86, at 1328–29 (noting that in Africa, customary tenure systems were no longer capable of providing women with access to sufficient land, due to factors such as land scarcity, HIV/AIDS, increasing poverty, and commercial agriculture).

<sup>128</sup> Joireman, *supra* note 86, at 306; Tripp, *supra* note 63, at 2.

<sup>129</sup> CHANGES IN “CUSTOMARY” LAND TENURE SYSTEMS IN AFRICA 20–21 (Lorenzo Cotula ed., 2007).

<sup>130</sup> Whitehead & Tsikata, *supra* note 10, at 101.

has been appropriated to serve the best interests of the traditional elders and to further sex discrimination.<sup>131</sup>

As protection of customary land tenure becomes an increasingly accepted policy measure to protect against unlawful land grabs, women's activists must be willing to engage with customary law to protect women's rights. Importantly, even if customary forms of tenure are to be protected, the hybrid statutory-customary law systems that exist cannot be permitted to continue. Such systems fail dramatically at protecting women, and while some engagement with customary systems seems necessary, legal protection of indigenous rights and customary law must better enhance and protect the rights of women.

#### V. A SYSTEM OF GOVERNANCE FOR BOTH INDIGENOUS PEOPLES AND WOMEN?

Any system of governance that will simultaneously protect indigenous groups and the women within those groups will be subversive of existing power structures. The suggestion that governments engage with and strengthen customary systems of land ownership is subversive in its own way, as it seeks to direct power from the government and wealthy urban groups to indigenous, often rural groups. Land in particular is an area in which governments prefer to retain control, as it is the gateway to accessing Africa's much sought-after natural resources. Inducing gender equality requires another layer of subversiveness, ensuring that the power within the indigenous groups does not remain concentrated in elder male elites but disperses among women and non-elites. Thus, any system of governance introduced to rectify the vulnerabilities caused by competition for land must have a certain amount of comfort with disruption.

But what does this disruption look like? What form of legal governance would protect these groups but also encourage systematic movement toward gender equality? Any effective governance would need to be endorsed by the people, in the same way that customary systems are, while still combating some of the inherently patriarchal norms that permeate customary systems.

A pure customary approach would be a clear step backward for women. A key aspect of customary land tenure is that norms are meant to be flexible and, thus, will change to meet community needs in response to external and

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<sup>131</sup> *Id.* at 101-02.

internal change factors. In theory, this would protect women. As the world changes, and society changes, groups will change the types of land rights and responsibilities. Unfortunately, this flexibility, combined with external factors, has been the cause of the disintegration of the limited rights women do have in customary systems.<sup>132</sup>

On the other end of the spectrum, just short of eradicating customary law, is the full incorporation of the customary system into statutory law by maintaining the customary trappings of an institution within the formal legal framework.<sup>133</sup> Under this approach, customary institutions are empowered with certain competencies by statutory law, and are entirely governed by statutory law. In states where people and customary institutions already reject statutory systems because they are deemed illegitimate, this more heavy-handed approach may not gain much traction.

Various approaches to strike the balance between supporting both indigenous sovereignty and women's rights include, *inter alia*, supporting women who negotiate within the customary law frameworks,<sup>134</sup> a critical pragmatist approach,<sup>135</sup> empowering women to participate in customary decision-making,<sup>136</sup> and providing a form of concurrent judicial review of

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<sup>132</sup> See *supra* Part IV.B.

<sup>133</sup> The Rwandan government's approach is a prime example of how customary systems can be adopted by the formal system and be governed by statute rather than customary law. The government has "formalized" informal, local institutions such as *gacaca*, local dispute resolution bodies, and *abunzi*, local mediation councils, by codifying their structure and purpose, as well as holding them accountable to statutory law. *Gacaca*, for example, began as an informal system to address inter- or intra-family disputes in Rwanda. After the 1994 genocide, the government considered local level dispute resolution and reconciliation mechanisms to address crimes committed during the genocide, eventually settling on *gacaca*. What began as an informal system was formalized via Organic Law No. 40/2000, which provides for, *inter alia*, the jurisdiction, makeup, and competencies of *gacaca* courts. Organic Law Setting up "Gacaca Jurisdictions" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994, Organic Law No. 40/2000 of Jan. 26, 2001 (Rwanda). For a discussion of the evolution of *gacaca* courts, see Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765, 777–89 (2007). The *abunzi*, similarly, are mediation councils based on traditional dispute resolution mechanisms and formalized by statutory law, which determines their powers, make up, and jurisdiction. Organic Law No. 31/2006 of 14/08/2006 on Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee.

<sup>134</sup> Claassens & Mnisi, *supra* note 10, at 494.

<sup>135</sup> Nyamu, *supra* note 10, at 26.

<sup>136</sup> Johanna Bond, *Women's Rights, Customary Law, and the Promise of the Protocol*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 467 (Jeanmarie Fenrich et al. eds., 2011).

customary decisions.<sup>137</sup> Each of these approaches seeks to find ways for customary institutions to maintain their integrity while engaging with international and constitutional rights norms. It is my argument that no approach will work unless the state is willing to fundamentally alter both the processes and substance of the customary tenure system and hold itself accountable for the functioning of these customary tenure systems. The negotiation and critical pragmatist approaches fail to create systematic change for women, instead allowing for pockets of change to occur for certain women. Increasing women's ability to participate in decision-making or establishing a form of judicial review is a move in the right direction, but in my view insufficient to create the type of broad change that will effectively alter women's rights to land generally. Instead, I advocate for an approach that draws from these approaches, but also mandates greater state involvement in decentralized customary land decisions.

#### *A. The Negotiation Method*

One approach to improving customary tenure conditions for women involves supporting women in individually negotiating for land rights within traditional dispute settlement or negotiation bodies.<sup>138</sup> In theory, this emphasis on negotiation within the system may in fact work better for women and for community groups than state law, because it would allow women to meet their needs while still preserving the underlying values of the customary tenure system. For example, a woman may not wish to inherit her matrimonial home and land, thus taking her deceased husband's land away from his family. Instead, she may negotiate for another item that meets her needs, such as a small plot of land elsewhere in the community, cultivation rights to a parcel of land, or a portion of the crop produced. These negotiations would help shape norms that increasingly recognize women in different roles and with different land rights. Further, positive outcomes for women would be afforded greater legitimacy when resulting from negotiation within the customary system than when resulting from state court intervention. State law, however, would be an important pillar of support for these women. Women would be able to rely not only on prior successful

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<sup>137</sup> David Pimentel, *Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review In South Sudan*, 2 H.J.R.L. 1 (2010).

<sup>138</sup> Claassens & Mnisi, *supra* note 10, at 493 ("We argue for an approach to rights that acknowledges their mutable nature and pays attention to processes of contestation around the content and definition of rights. . . .").

negotiations by other women<sup>139</sup> but also on constitutional articulations of rights.<sup>140</sup>

However, this method alone is unlikely to create systematic change without additional reforms. Even as there are examples of women successfully negotiating within clan groups, there are other examples where women fail.<sup>141</sup> Flexible norms will continue to be vulnerable to exploitation by those in power, just as much as they are open to being contested by women. In addition, the process of negotiation leaves in place the gender hierarchy. Women are required to negotiate for access to or ownership of land, rights for which men either do not need to negotiate or do not face as much difficulty in negotiating. The system of negotiation merely facilitates some effective challenges of sex-discriminatory norms, but does not even the playing field for all women. Furthermore, successful challenges do not guarantee greater fairness and justice for women going forward. Negotiation is simply reactive to the male-dominant system, rather than transformative.

### *B. Critical Pragmatism*

Celestine Nyamu, offering up the related approach of “critical pragmatism,” is fully aware of these drawbacks, but argues that failing to account for customary law is ineffective.<sup>142</sup> Under her pragmatic approach, both state and customary institutions should incorporate “social controls” to protect women.<sup>143</sup> Nyamu does not reject formal title. She instead argues that a pragmatic solution would promote a form of title that creates a responsibility in the titleholder to consider other socially recognized, but unregistered, property interests.<sup>144</sup> She also argues that feminists should engage with openings within customary law, using opportunities in local and formal dispute resolution mechanisms to argue for women’s rights of access or occupancy on the basis of norms of fairness and protection of kin.<sup>145</sup> As she notes, however, “[g]ains for individual women in such circumstances leave intact the gender hierarchy in landholding and the ineffective spousal support mechanisms in family law.”<sup>146</sup>

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<sup>139</sup> *Id.* at 502.

<sup>140</sup> *Id.* at 500.

<sup>141</sup> *Id.* at 502.

<sup>142</sup> Nyamu, *supra* note 79, at 416–17.

<sup>143</sup> *Id.* at 411–12.

<sup>144</sup> *Id.* at 411.

<sup>145</sup> *Id.* at 413.

<sup>146</sup> *Id.* at 416.

Even when this strategy co-exists with a strategy to update and reform statutory laws, as she suggests,<sup>147</sup> I argue that the transformative change necessary to have long-term equality is not met. On the one hand, it introduces the flexibility of customary law into the courts, and allows feminists to argue to courts that even as customary law should be respected, it must be construed in accordance with the norms of fairness. Courts embracing this approach are able to demonstrate respect for customary law while relying on its adaptability to apply it in a fair and equal manner.<sup>148</sup> This engagement with customary law translates to engagement with self-disenfranchised populations who prefer customary law, while still incorporating norms of fairness and equality. On the other hand, women fail to gain access to land on par with men via this approach. Rights of use and access, for which women would assert their claims, are limited in comparison to rights of ownership and inheritance, which men typically have under customary law. As with the negotiation approach, just as some cases may be successful, others will not, and the flexibility of customary norms can just as easily be used against women. The approach continues to be reactive because women begin their negotiation from an inferior position. Although this time in an adversarial setting rather than negotiation, this gendered power dynamic perpetuates key patriarchal systems of inequality.

### *C. Increasing Women's Participation in Decision-Making*

A more systematic approach includes increasing the presence of women in the decision-making councils where norms are negotiated and disputes are resolved. This, in theory, would allow women to equally shape the norm-making processes inherent in customary law. This is desirable in that it opens the door for women to actively change the current norm structure. It may also improve the outcomes of the informed consultations promoted by indigenous rights activists. The presence of women in decision-making councils could ensure that any consultations with the government, businesses, or environmental groups are effectively responsive to women's needs. Increasing the diversity of decision-making councils more generally could similarly increase the participation of other non-elites or households falling outside the consolidated power of the current decision-makers.

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<sup>147</sup> *Id.* at 416–17.

<sup>148</sup> In fact, the Botswana Court of Appeal relied on notions of fairness to construe the Ngwaketse customary law of inheritance in a manner that treats male and female children equally. *Ramantele v. Mmusi*, *supra* note 75.

Although not explicitly focused on land, Johanna Bond has suggested a similar procedural approach to improve women's status within customary law. Examining the value of various human rights treaties in developing and reforming customary law, Bond suggests that feminists take advantage of Article 17 of the Maputo Protocol,<sup>149</sup> which provides specifically for women's right to participate in cultural politics.<sup>150</sup> Acknowledging that power dynamics may control the ultimate outcome of such discourse, she points out that a significant benefit is the engagement of traditional leaders with international human rights norms.<sup>151</sup>

Unfortunately, while women in power may and often do advocate for previously ignored women's issues, women's increased presence in political structures does not always translate to a meaningful presence.<sup>152</sup> Many states in sub-Saharan Africa have constitutionally mandated quotas for women in their legislative bodies,<sup>153</sup> and women's caucuses have identified and successfully advocated for legislation addressing a number of key women's issues, such as preventing domestic violence and abolishing female genital mutilation.<sup>154</sup> At the same time, parties remain male-dominated, and governments are reluctant to enact other key pieces of legislation to promote women's rights.<sup>155</sup> One case study of local Village Councils in Tanzania

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<sup>149</sup> Bond, *supra* note 136, at 490–92.

<sup>150</sup> Maputo Protocol, *supra* note 65, art. 17. The relevant text states: “1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies. 2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.”

<sup>151</sup> Bond, *supra* note 136, at 492.

<sup>152</sup> Anne Marie Goetz, *Women in Politics & Gender Equity in Policy: South Africa & Uganda*, 76 REV. OF AFR. POL. ECON. 241, 243 (1998).

<sup>153</sup> Kenya's constitution, for example, mandates that forty-seven seats in the National Assembly be reserved for women. CONSTITUTION, art. 97(1)(b) (2010) (Kenya). Rwanda's constitution goes further and mandates that women be granted at least 30% of the seats in decision making bodies generally. CONSTITUTION, art. 9 (2003) (Rwanda).

<sup>154</sup> The Uganda Women Parliamentary Association (UWOPA), for example, is a caucus of women parliamentarians focused on raising awareness about women's issues and advocating for relevant legislation. UWOPA, in partnership with civil society groups across Uganda, successfully brought about the enactment of the Domestic Violence Act and the Female Genital Mutilation Act. Uganda Women's Parliamentary Assoc., Strategic Plan 2011–2016, available at [http://uwopa.or.ug/sites/default/files/Publications/Strategic\\_Plan\\_UWOPA.pdf](http://uwopa.or.ug/sites/default/files/Publications/Strategic_Plan_UWOPA.pdf) (last visited Oct. 31, 2013).

<sup>155</sup> Goetz, *supra* note 152; Anne Marie Goetz, *The Problem with Patronage: Constraints on Women's Political Effectiveness in Uganda*, in NO SHORTCUTS TO POWER: AFRICAN WOMEN IN POLITICS AND POLICY MAKING 110, 126–28 (Anne-Marie Goetz & Shireen Hassim eds., 2003). A telling example is the Uganda Marriage and Divorce Bill, which would eliminate important inequalities as between men and women in the areas of marriage and divorce. The



revealed that, “Women elected to these Councils are unlikely to demonstrate particular support for women’s land claims.”<sup>156</sup> It is also not a foregone conclusion that women will advocate for women’s rights or that women’s participation will be meaningful. Presence alone is insufficient.

#### *D. Collateral Review*

A more strong-armed approach involves a form of judicial review of customary decisions. Under a collateral review approach, the state judiciary would have the ability to review customary decisions not on their merits, but based on the compliance of the outcome or process with the minimal constitutional mandates.<sup>157</sup> This approach permits customary processes to maintain primary jurisdiction over certain areas of law, “maximizing” the role of customary institutions.<sup>158</sup> State court jurisdiction would thus be limited. Because state courts would remand overturned decisions,<sup>159</sup> customary authorities would have the ability to engage with human rights norms and adapt their decisions to comply with constitutional violations. The oversight of state courts adds some of the additional accountability to the state missing from the negotiation, pragmatism, and participation approaches.

This approach may work for customary law more broadly, but it can become quite unwieldy for smaller land decisions. Assuming that the formal court system is capable of handling the burden of hearing appeals of multiple land claims,<sup>160</sup> the formal courts still only intervene when a party takes the step to appeal. This of course raises accessibility concerns. An enormous benefit of the traditional, local-level dispute resolution bodies is that they are easier to access and do not require as many resources from the aggrieved parties. Appealing to a formal court may require travel, court fees,

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bill in its various iterations has been sitting in Parliament for over forty years. The bill was debated again in early 2013, was hotly contested by conservative members of Parliament, and eventually was set aside. *I Don't: Uganda's Controversial Marriage and Divorce Bill is Left on the Shelf*, THINK AFRICA PRESS (Sept. 19, 2013), available at <http://thinkAfricapress.com/Uganda/i-don't-controversial-marriage-and-divorce-bill-left-shelf>.

<sup>156</sup> Yngstrom, *supra* note 85, at 34.

<sup>157</sup> Pimentel, *supra* note 137, at 23.

<sup>158</sup> *Id.* at 25.

<sup>159</sup> *Id.*

<sup>160</sup> Disputes over land are very common, especially among family members and at the local level. See, e.g., Polavarapu, *supra* note 90, at 133 (“Land disputes are the most common types of disputes in Rwanda.”). Having these disputes heard twice, once at the local level and again in a formal court, can become very burdensome on the court system.

representation, and the freedom to take time away from home or work. Thus, not all negative outcomes will make their way to court. Even when they do, following up on court remands to ensure that subsequent customary decisions are compliant with the constitution would require even more resources. Non-governmental organizations and legal aid groups may be well-positioned to support aggrieved parties throughout this process, although the presence and funding required to impact communal groups around the country would be quite high. Without highly accessible formal court systems, this approach places a very high burden on those seeking to exercise land rights, reducing the likelihood that many customary land rights disputes will ever find their way to the formal courts.

*E. Fundamentally Altering Gendered Customary Practices*

The weaknesses of each approach described above illustrate the difficulty in maintaining a separate and sovereign customary system that is also accountable to equality and other human rights norms. Each carves out methods for women to begin contesting and changing customary norms to promote gender equality. However, each also suffers the risk that outcomes will continue to be shaped by gendered power imbalances because of the discretion available to customary institutions.

I suggest that an appropriate form of governance would draw from these approaches, supporting local-level norm creation with greater involvement from women, and would also incorporate greater state involvement at the norm-creation level. To facilitate women's negotiation for land rights, any constitutional exemptions for customary law must be eliminated, and statutory law must set foundational norms, including certain guaranteed rights in marriage and succession, to which decisions regarding land ownership and access must be bound. Such rights might include the right to inherit, the right to own property, the right to receive maintenance upon divorce, and recognized rights to marital property. These norms do not dictate how decisions are to be made but only that certain principles must be incorporated into the decision-making. Although such provisions would certainly intrude upon arenas typically covered by customary law, without them, women begin their negotiations from an inferior position. True movement toward equality must begin with some evening of bargaining power as between men and women.

Additionally, any power consolidated in single authority figures must be dispersed among community members, men and women. As Bond has

suggested, women can draw from their right to participate in customary decisionmaking as provided for in the Maputo Protocol. Just as they do with their parliamentary seats, states can, and should, go a step further and mandate that any customary decision-making bodies be made up of a certain percentage of women.<sup>161</sup> Again, this is state intrusion and, to some, co-optation of the sovereignty of customary institutions. However, if organically created norms are to move towards protection and respect of women's rights, there must be assurances that women are able to participate in the norm creation from a position of authority. In addition to having the opportunity to contest norms, women must also have the power to shape outcomes.

However, increasing the number of women in decision-making roles and improving statutory laws will be insufficient. Even as examples of successful negotiation within customary structures note that women sometimes relied on the principles of equality set out in the Constitution and statutory law,<sup>162</sup> these norms are just as easily rejected. Leaders in the political center and customary leaders often portray gender normative changes as going against tradition, culture, and custom. It is easy for them to argue that such change is inconsistent with the will of the people and thus illegitimate.

For any accountability to be felt by either customary or state actors, customary institutions must consistently be held accountable to state structures, and state structures must consistently be held responsible for the decisions of customary institutions. Although the collateral review approach nears this level of accountability, it requires women to take the extra step and expend the resources to appeal to the formal court system.

A more systematic approach would require the involvement of a state official in customary decision-making. For example, local-level officials, such as land commissioners, members of land boards, or registrars, can serve on customary decision-making bodies as part of their duties. In terms of logistics, a certain day of the week could be a designated day for land claims, on which day the state official would also sit on the decision-making body. They would also be involved during consultations between indigenous groups and outside actors to ensure that women's voices are being heard and their needs considered throughout the process. The involvement of state officials would serve to heighten state accountability for land decisions that

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<sup>161</sup> Rwanda, for example, requires that 30% of the *abunzi*, a type of village-level mediation council, be made up of women. Organic Law No. 31/2006 of 14/08/2006 on Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee, arts. 1–4 (Rwanda).

<sup>162</sup> Claassens & Mnisi, *supra* note 10, at 500.

are unconstitutional or that violate human rights norms to which the state is bound.

Although typically unwritten, decisions should be recorded. To preserve the flexible nature of customary law, these decisions would not be accorded precedential value, but would be recorded and thus subject to review by other government officials or independent women's rights and human rights groups. As with the collateral review approach, these state officials would not have the right to tell the customary decision-making body how to rule or what comprises the substance of customary law, but they would be empowered to ensure that outcomes complied with normative floors set by the constitution or by statute. An additional benefit of this approach is that it promotes consistent engagement between state and customary legal systems and encourages traditional leaders to grapple with human rights norms.

Of course, there is no guarantee that every state official will act in favor of women's rights. Indeed, one problem of the current plural system is that state officials have supported patriarchal practices when they are considered part of "custom." Additionally, in terms of consultation, the government sometimes facilitates land grabs or land deals with terms that are unfair to indigenous groups. Insofar as a state official is deputized to consider women's rights, said official may also have a conflict of interest. These drawbacks cannot be overlooked, but the important benefit of direct state involvement is that the state will be unable to claim that it had no hand in any rights violations occurring in the resolution of land claims or in the process of consultation. Rights groups and the international community will have the opportunity to hold states accountable.

The approach I outline above calls for much greater state intrusion into the customary space than the negotiation, critical pragmatism, women's participation, or concurrent review approaches. It certainly does not allow for the same amount of freedom to be afforded to customary institutions, and it requires customary institutions to make some key fundamental changes in the norm creation process by setting a normative floor, requiring women's participation as authority figures in norm creation, and requiring state involvement. This admittedly disrupts the existing customary system. On the other hand, it creates the most systematic accountability mechanism while still allowing customary institutions to maintain a level of control over the consideration of various social factors in its land tenure and dispute resolution decisions. The dynamism and legitimacy of customary tenure would be preserved, as rule-making would still belong to the people,

although the rule-making power would be simultaneously more widely-dispersed and bound by equality-promoting norms.

## VI. CONCLUSION

Without a doubt, finding a way for customary and statutory law to interact in a manner that protects both indigenous groups and women within those groups is a herculean task. An arrangement that perfectly balances the fine line between acknowledging the sovereignty of customary institutions and keeping said institutions in line with equality norms that bind the state may in fact be nothing more than a unicorn. However, the current hybrid system of statutory/customary law interaction is not working, requiring a rethinking of the model of legal pluralism.

Some suggest governments should protect customary tenure because it is the system that reflects lived realities; however, lived realities do not always reflect the will of each and every community member. Instead, the substance of customary norms is the output of negotiations and power relations within a community.<sup>163</sup> “In legal disputes or political debates, stated cultural norms are not neutral descriptions of a community’s way of life. Rather, such articulations should be read as competing efforts to preserve certain social, economic, and political arrangements.”<sup>164</sup> This is the very heart of the failure of the pro-culture argument. “Culture” is not singular, but is comprised of subcultures. The culture that comes out as the “normal,” the monolith, is the culture of those who control the narrative. As discussed in Part IV of this Article, socio-economic pressures, such as increased competition for land and unemployment, may cause increasingly exclusionary restatements of these norms.

The law does not only serve to reflect the currently lived realities of citizens; it embodies societal goals and influences behavior accordingly. Hardly anyone would suggest that communities that have traditionally engaged in bloody livestock raids should be permitted this activity simply because it has been the lived reality. It is easy to categorize this as behavior governments and society should not desire and thus to require its eradication. Why not so for such severe discrimination against women?

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<sup>163</sup> Whitehead & Tsikata, *supra* note 10, at 98 (noting, “[i]n the past, as today, norms were not universally held, but contested, especially by those whose needs were not met and who lacked voice in decision-making.”).

<sup>164</sup> Nyamu, *supra* note 79, at 405.

What the pro-customary argument always comes back to, however, is legitimacy. If statutory laws are too heavy-handed, they will be ignored. Both women and men in customary groups must be able to negotiate within structures they deem legitimate. But even where the customary system must exist in some form, the customary norm structure must be fundamentally altered to comply with equality norms. The notion that groups will wholeheartedly embrace such change when the time comes is true only in part. Global history has demonstrated that such times arrive only after consistent and concerted multi-prong efforts to change power structures. This requires advocacy from within, advocacy from without, and legal remedies.

Contemporary African governments have been willing to allow customary law to occupy a space that was largely unaccountable to the national government. Over the years, the constitutional exceptions for customary law were removed, and judges have become increasingly willing to overturn customary decisions but, for the most part, customary law remains unaccountable. National governments should not be permitted to abdicate responsibility for ensuring equality in this manner. If the state is the main arbiter and provider of justice, then it must hold customary systems accountable to its foundational norms, including the principle of equality. This would not require that the state govern all aspects of customary tenure but that it be willing to set a default floor for women's participation and substantive norms, and to serve as a backstop for women's rights.

Governance systems seeking to engage with customary law, while providing avenues to repair systematic inequalities—with respect to both women and non-elites—must be prepared to fundamentally alter some of the prevailing norms underlying customary systems of tenure. The customary/statutory hybrid that has existed to this point has not been successful and has perhaps done more harm than good for both women and indigenous groups. Certainly new systems of governance that are externally imposed or otherwise illegitimate to the governed will not “take.” A more palatable alternative, which would preserve the skeleton of customary land tenure while altering key aspects of its substance and process, can address some women's rights concerns. Of course, there would likely be resistance, especially from traditional authorities who have grown accustomed to being the source of customary norms. There is also no guarantee that norms would evolve quickly or in the most equitable manner. However, without both improving women's access to the customary political system and creating a

substantive floor to guide norm creation, women's rights under customary tenure remain insubstantial.

If, in the past, each statement of a customary norm was a *situs* of debate, customary law in the present has come to be defined by a single or few leaders. Subjecting norms to increased negotiation, by both men and women, with a chance to revisit each of the norms, would be more in line with the oft-described original driving force of customary law: to reflect the needs of the community. Increasing the number of women within decision-making bodies is more likely to ensure that the results of any consultations are more reflective of women's needs. Setting foundational norms will encourage male and female decision-makers to make fairer decisions and allow some measure of oversight. Additionally, a firm system of accountability is necessary to prevent customary institutions from operating outside constitutional and international rights requirements. Without such fundamental changes, women will be unable to achieve substantive equality under the customary system.