



EXAMINING THE EFFECTS OF INHERITANCE PRACTICES ON WOMEN'S SOCIO-ECONOMIC RIGHTS IN BURUNDI

Submitted in partial fulfilment of the requirements of the Master's degree in Human Rights and Democratisation in Africa (HRDA)

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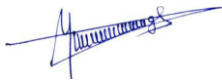
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Declaration

I, **Merveille Mugisha**, Student number u23953421 declare as follows:

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Date: 23 October 2024.

Dedication

To my dear mum and dad,

You have always been a source of joy, motivation, and unconditional love. I am forever grateful for your prayers and unwavering support. I love you.

Acknowledgment

I would like to extend my gratitude to Dr Crystal Mokoena and Susan Mutambasere, who supervised this dissertation from beginning to end. Their contributions and support were invaluable in the completion of this dissertation.

I want to thank my dear sister, brothers, and adorable nephews. Without your prayers, long calls, and emotional support, the experience would have been different.

I am extremely grateful to my brother, and mentor. I will never thank you enough for your support and mentorship.

I extend my heartfelt thanks to the Centre for Human Rights, University of Pretoria for giving me a great opportunity to fulfil my dream.

List of abbreviations and acronyms

AU– African Union

ACHPR– African Charter on Human and People’s Rights

CEDAW– Convention on the Elimination of All Forms of Discrimination Against Women

COMESA– Common Market for Eastern and Southern Africa

EAC– East African Community

ECCAS– Economic Community of Central African States

ICESCR– International Covenant on Economic, Social and Cultural Rights

ICGLR– International Conference on the Great Lakes Region

ILO– International Labour Organisation

FAO– Food and Agriculture Organisation

GBV– Gender-Based Violence

GDP– Gross Domestic Product

NGO– non-governmental organisation

OCHCHR– Office of the High Commissioner for Human Rights

RC– Rôle Civil

RCA – Rôle Civil en Appel

RCC – Rôle Civil en Cassation

RTC – Rôle Toutes Chambres

SDG– Sustainable Development Goals

UDHR– Universal Declaration of Human Rights

UN– United Nations

UNDP– United Nations Development Programme

USAID– United States Agency for International Development

WFP– World Food Programme

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CHAPTER 1 INTRODUCTION

1.1. Background

Historically, Burundi has maintained a patriarchal social structure. Patriarchy refers to the set of social relations between men and women which, although hierarchical, establishes or creates an independence and solidarity between men that enables them to dominate women.¹ Traditionally, the man embodies the authority of the household. He has the responsibility to provide for the household and holds the power to make important decisions in the family. The woman is in charge of domestic activities. She does all the housework and is expected to take care of the children and other family members. Thus, the man is the head of the household, and the woman is subordinate to him.²

During the Burundian monarchy, land was a collective asset that belonged to a lineage, specifically a group of relatives. It was only passed down through the patrilineal line.³ From an early age, a girl was raised to become someone's wife.⁴ She was therefore excluded from inheritance because, in principle, she should go to another family.⁵ However, depending on their marital status, women were given a portion of land. Married women were given a portion of land to cultivate during their parents' lifetime. This portion of land enabled them to maintain connections with their biological families since their parents could not always bring them presents to their in-laws.⁶

In her in-laws' family, the land was the husband's. And when her husband predeceased her, the family property was transferred according to whether the widow had children or not. When the widow had children, she would administer the property from her husband, if she did not add other children from another relationship. Land ownership reverted to the husband's family following the inheritance order set out above if the children of the decedent left were only daughters. The situation of the woman without children was very difficult because her fate

¹A Sultana 'Patriarchy and Women's Subordination: A Theoretical Analysis' (2011) *The Arts Faculty Journal* 3.

²République du Burundi 'Politique Nationale Genre' (Gender National Policy) (2012) 10.

³A Nzohabonayo and JDD Ndikumana 'La Succession Foncière de la Femme Burundaise Face à la Coutume' (2020) *European Scientific Journal* 230.

⁴G Ndayiragije 'Images de la femme au Burundi à travers les contes et les épithalames' Masters thesis, Université d'Oslo, 2011 16.

⁵A Manirakiza 'Le principe d'égalité et de non-discrimination dans le droit familial burundais : état des lieux, défis de mise en œuvre et perspectives de lege ferenda' PhD thesis, Universiteit Antwerpen 2020 181.

⁶Nzohabonayo and Ndikumana (n3) 229.

depended on the goodwill of her in-laws. They could force her to marry one of her brothers-in-law or force her to leave. For a single woman who failed to find a husband, or if a widow or divorcee returned to her parents, they were granted a portion of land with the brothers' prior consent.⁷ It was a lifetime usufruct that reverted to their families after their death.⁸

Due to the Colonisation, the law takes precedence over custom in various areas, except in matters of inheritance where there is no law to date.⁹

The State of Burundi has already ratified a wide range of regional and international instruments protecting women's rights. In addition, the different rights proclaimed by human rights instruments have been enshrined in the Constitution.¹⁰ Despite these steps already made, women are still excluded from inheritance.

1.2. Problem Statement

Despite the national laws of Burundi, coupled with regional, and international instruments ratified guaranteeing women's socio-economic rights, and gender equality, women and men are not treated equally concerning inheritance rights.

97.4% of women of working age work in agriculture, a dominant activity in the Burundian economy, contributing over 50% of GDP.¹¹ While Burundian women do most of the farming activities, such as cultivating, sowing, harvesting, transporting, conserving, transforming, and sales of crops, poverty in living conditions increases by 3.7% when a household is headed by a woman.¹² This begs the question of whether traditional inheritance practices affect the advancement of women's socioeconomic rights in Burundi.

1.3. Research Questions

To analyse the effects of inheritance practices on socioeconomic rights of women in Burundi, this paper will focus on key research questions as follows:

Main research question

⁷ Manirakiza (n5) 179.

⁸ S Bukuru 'La problématique de la succession de la fille (femme) au Burundi : Etat de la jurisprudence' Dissertation, Université du Burundi, 2003 quoted in E Nukuri 'La protection constitutionnelle du droit de propriété foncière en droit burundais' PhD thesis, KU Leuven 2019 13.

⁹Final Constitution of Kingdom of Burundi.

¹⁰ The Constitution of Burundi art 19.

¹¹A Niyonkuru 'Femme-agronomie-développement : le cas du Burundi' (2009) *Tropicultura* 253.

¹²Institut des Statistiques et d'Etudes Economiques du Burundi 'Rapport de l'Enquête Intégrée sur les Conditions de vie des Ménages au Burundi' 2021 4.

1. To what extent do inheritance practices affect women's socio-economic rights in Burundi?

Sub-research questions

1. What are the legal and institutional frameworks that govern women's socio-economic rights in Burundi?
2. What are the main factors that shape the status of women's socio-economic rights?
3. What lessons can Burundi learn from South African legal reforms and practices in advancing equality in inheritance rights?

1.4. Literature review

1.4.1 Inheritance practices in Burundi

In their study, Nzohabonayo and Ndikumana show that women's inheritance is subject to custom.¹³ For these authors, the effectiveness of inheritance rights presupposes the possible decline of inheritance custom and the evolution of the Burundian mentality (especially the men) to accept its effects. The co-authors conclude on a note of optimism because custom is not static. It reflects a society, that is constantly evolving.

Manirakiza shows that the inheritance rules governing the succession of children purely and simply excluded daughters from succession in favour of male successors.¹⁴ Burundian Courts have played an important role in changing the rules to take account of the principle of equality between children without any discrimination. The author refers to the inheritance of the deceased's property, that does not come from the family inheritance, where no difference in treatment between children is currently allowed. The children receive equal portions of this property and may exercise all the attributes of the right of ownership over these portions. However, in his view, the progress made in case law remains insufficient insofar as the inheritance rights of Burundian women are still limited compared to those of their brothers.

The author emphasises the different treatment of men and women by Burundian Courts in cases where the succession concerns inherited property, mainly land that the deceased received from his family by inheritance or gift. The author therefore concludes by asserting that there is direct discrimination in inheritance cases to the disadvantage of Burundian women because of the

¹³ Nzohabonayo and Ndikumana (n3) 224.

¹⁴ Manirakiza (n 5) 1.

differences in treatment concerning the guarantee of equality and non-discrimination. He asserted that the argument of keeping land within the family was not justified, for the simple reason that men who inherit land can sell it or transfer it to private individuals. Preventing women from inheriting their share of land alone will not stop the inheritance of family land from leaving the family.

Mwasumbi and others in their research examine the Women's access to land in Burundi.¹⁵ Their paper points out the shortcomings of land administration that affect women's access to land. The question of women's access to inheritance remains unanswered and is at the root of many family conflicts. These authors perceive the predominance of customary law in matters of inheritance and the absence of inheritance laws as social injustices that reinforce women's economic dependence.

Manirakiza also discusses the problem of implementing the principle of equality in Burundian women's inheritance rights.¹⁶ The author points out that equality is far from being effectively implemented as far as women's inheritance rights are concerned, although the country has a constitution that is progressive in terms of equality.

The author also talks about the non-existence of a written law on inheritance, patriarchal and patrilineal structures, and resistance to change as factors perpetuating this inequality. This article shows that Burundian judges can make a significant contribution to addressing these factors and calls on all Burundian judges to ensure consistency with the principles of equality and non-discrimination when called upon to rule on inheritance cases involving men and women. He concluded by pointing out that the principles of equality and non-discrimination are constitutional principles that must be applied throughout the territory of the Republic, and judges are obliged to ensure that the Constitution, the supreme Law of the Country, is respected.

1.4.2 Inheritance and property rights in South Africa

Banda examines women's rights in the SADC region.¹⁷ She shows the guarantees proclaimed by the various international and regional human rights instruments and embodied in the constitutions to prevent discrimination against women. Then, through case law on inheritance, it assesses the impact of existing laws on the enjoyment of women's rights. While the legal

¹⁵ A Mwasumbi and others (eds) 'A Comparative Study on Access to Land for Women in Eastern Africa' (2024) *ResearchGate* 10.

¹⁶ A Manirakiza 'La problématique de la mise en œuvre du principe d'égalité en droit burundais de la famille. Cas des droits successoraux de la femme' (2014) *KAS African Law Study Library – Librairie Africaine d'Etudes Juridiques* 705.

¹⁷ F Banda 'Women, Law and Human Rights in Southern Africa' 2006 *Journal of Southern Africa Studies* 13.

framework protecting women's rights already exists, the effective enjoyment of women's inheritance rights faces challenges such as the lack of will among states to ensure compliance with these rights in their respective countries, the lack of financial resources, the resistance of patriarchal societies, women's lack of awareness of their rights and, above all, women's limited ability to bring cases before the courts. The author assumes that a holistic approach to gender discrimination would lead to the change needed for human rights to genuinely become women's rights.

Masuku and others show that women's access to land and land ownership are key resource for food production in rural areas.¹⁸ Land ownership enables women to make a significant contribution to rural economies, through crop and livestock farming, which are their only means of subsistence. Traditionally, customary law has privileged men in terms of land ownership rights. For these authors, limiting women's access to land ownership implies marginalising or even excluding them from decision-making processes relating to production resources, thereby creating inequalities. The authors argue that gender-sensitive policies could address the challenge of inequality between men and women to remedy the inequitable distribution of land.

The literature indicates an exclusion of Burundian women from inheritance which violates the constitutional principles of equality and non-discrimination. This dissertation draws on the above-mentioned literature. It also provides relevant insights into legislative reforms and good practices put in place by South Africa to promote equality in property and inheritance rights. The burden of this study is therefore to examine the effects of inheritance exclusion on women's inheritance rights in Burundi.

1.5. Methodology

The study employs desktop-based research to gain a comprehensive understanding of the subject matter. It employs primary sources which include the domestic (Burundi and South Africa), regional, and international instruments that relate to the subject matter to examine the effects of inheritance practices on women's socioeconomic rights. It also uses secondary such as journal articles, books, and reports that deal with inheritance rights, gender equality, and women's socioeconomic rights.

¹⁸ M M Masuku and others 'Gendered effects of land access and ownership on food security in rural settings in South Africa' 2023 *Frontiers in Sustainable Food Systems* 1.

1.6. Structure

This dissertation is divided into five chapters. Chapter one contains the background, the problem statement, the literature review, and the methodology. Chapter two examines the international, regional, sub-regional, and domestic legal and institutional frameworks protecting women's socioeconomic rights in Burundi. This chapter also assesses their implementation and effectiveness in Burundi. Chapter three analyses the factors that shape the status of women's socioeconomic rights in Burundi. Chapter four identifies best practices in advancing equality in property and inheritance rights in South Africa and draws lessons therefrom. Chapter five is made up of conclusion and recommendations.

1.7. Limitation of the Study

The timeframe for this mini dissertation does not allow fieldwork, limiting the study to existing data (Government reports, NGO studies), which may not capture the full range of women's experiences. Furthermore, data on inheritance practices, particularly court cases are difficult to obtain due to the lack of an online database of judgments in Burundi. The Supreme Court and the ordinary high court, which previously published their judgments, no longer do so for undisclosed reasons.

To address these limitations, the study will draw on the findings of scholars who have conducted field research, as well as reports and studies by reputable NGOs and United Nations agencies.

Burundi is a francophone country where domestic laws (except the Constitution), government reports, and many publications of different authors do not have an official English version. Although the author can translate, references in English are not available.

CHAPTER 2

INTERNATIONAL, REGIONAL, SUB-REGIONAL AND DOMESTIC FRAMEWORKS ON WOMEN'S SOCIO-ECONOMIC RIGHTS

2.1. Introduction

Throughout history, the protection of economic, social, and cultural rights has not always been consistent. The International Labour Organisation (ILO) adopted conventions in the early 20th century to enhance global labour standards, but it wasn't until after World War II that socio-economic rights were integrated into international human rights instruments.¹

This chapter examines the global, regional, and national framework that safeguards women's socio-economic rights in Burundi. The research analyses the various international, regional and sub-regional instruments that Burundi is party to. It also assesses national laws and policies of the country. For international human rights instruments, this research focuses on the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), and the ICESCR, given that the provisions of these instruments protect socio-economic rights in general and women's socio-economic rights in particular.

2.2. International legal framework

The Universal Declaration of Human Rights asserts and safeguards human rights including social and economic rights, such as the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, education, and other entitlements.² It specifies that these rights must be protected without distinction of any kind, such as race, colour, sex, language, religion, political opinion, national or social origin, property, birth, or other status.³

The State of Burundi became a member of the United Nations on 18 September 1962.⁴ It subsequently adhered to Universal Declaration adopted and proclaimed by the UN National Assembly in its Resolution 217 A (III) of 10 December 1948.

¹ D Ahmed and E Bulmer 'Social and Economic Rights' (2017) *International Institute for Democracy and Electoral Assistance second edition* 8.

² UDHR arts 25 (1) and 26.

³ UDHR art 2(1).

⁴ UN Member States <https://www.un.org/en/about-us/member-states> (accessed 16 August 2024).

To reaffirm its commitment to upholding and promoting human rights, the State of Burundi has enshrined Universal Declaration in the Constitution.⁵

The State of Burundi ratified CEDAW and made it an integral part of the Constitution.⁶ In ratifying the CEDAW, the State of Burundi committed to condemning discrimination against women in all its forms.⁷ To this end, the State has undertaken to respect various obligations set out in Article 2 (a),(b),(c),(d),(e), and (f). Furthermore, the State of Burundi is bound to enact appropriate legislation in the political, social, economic, and cultural domains to ensure the full development and advancement of women. This is aimed at guaranteeing women the exercise and enjoyment of human rights and fundamental freedoms on an equal basis with men.⁸ Additionally, within the context of this Convention, Burundi must also address the specific challenges faced by rural women and recognise their significant roles in the economic well-being of their families, particularly through their contributions to non-monetized sectors of the economy.⁹

The State of Burundi ratified ICESCR on 14 March 1990.¹⁰ This Covenant holds constitutional rank.¹¹ It calls upon States Parties to guarantee the exercise of the rights protected by the Covenant without discrimination of any kind.¹² Additionally, the State of Burundi should ensure that men and women have equal right to enjoy all economic, social, and cultural rights specified in ICESCR.¹³

Like other UN member states, the State of Burundi signed up to the Sustainable Development Goals (SDGs), also known as the Global Goals, in 2015. 17 SDGs have been adopted to end poverty, hunger, AIDS, and discrimination against women and girls within 15 years.¹⁴

To promote women's socioeconomic rights, the State of Burundi is called upon to take appropriate measures to implement goal 1(target 4), goal 2 (target 2.3), goal 5 (targets 5.1, 5.5, 5.a, 5.c), goal 8 (target 8.5), goal 9 (target 9.3) and goal 10 (target 10.1,10.2. and 10.3).¹⁵

⁵ The Constitution of Burundi art 19.

⁶ As above.

⁷ CEDAW art 2.

⁸ CEDAW art 3.

⁹ CEDAW art14.

¹⁰ Republic of Burundi 'Codes et Lois du Burundi' (2006)153.

¹¹ The Constitution of Burundi art 19.

¹² ICESCR art 2(2).

¹³ ICESCR art 3.

¹⁴ SDG <https://sdgs.un.org/goals> (accessed 16 August 2024).

¹⁵ As above.

Burundi has also signed the Beijing Declaration and Platform for Action, a global policy framework for women's empowerment, adopted following the Fourth World Conference on Women in September 1995 in China.¹⁶ To achieve the goal of establishing gender equality and human rights for women and girls everywhere, the Beijing Declaration and Platform for Action focuses on 12 areas, including poverty, education and training, health, armed conflict, the economy, power and decision-making, institutional mechanisms, human rights, the media, the environment, and the girl child.¹⁷

The Beijing Platform of Action identifies many critical areas among them: the persistent and increasing burden of poverty of women; violence against women; inequality in economic structures and policies, in all forms of productive activities, and in access to resources; inequality between men and women in the sharing of power and decision-making at all levels; and lack of respect and promotion of the human rights of women.¹⁸ Governments are therefore called upon to take strategic actions depending on the area since sustainable development is possible only through improving the economic, social, political, legal, and cultural status of women.¹⁹

2.3. Regional legal framework

Socio-economic rights are similarly guaranteed by the African Charter on Human and People's Rights (ACHPR).²⁰ Burundi became a member of the AU on 25 May 1963.²¹ It ratified ACHPR on 27 July 1991,²² and integrated it into its Constitution.²³

ACHPR promotes equality and non-discrimination.²⁴ It further emphasises that 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'²⁵

The principle of equality is also enshrined in the Constitutive Act of the African Union (AU).²⁶ To reaffirm its commitment to promote gender equality, the State of Burundi has signed the Solemn Declaration on Gender Equality in Africa which calls upon the member States to

¹⁶ Beijing Declaration and Platform for Action 'The Fourth World Conference on Women' (1995).

¹⁷ As above.

¹⁸ (n 16) para 41.

¹⁹ (n 16) para 56.

²⁰ https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf#page=2.00 (accessed 21 August 2024).

²¹ AU Member States https://au.int/en/member_states/countryprofiles2 (accessed 22 August 2024).

²² Republic of Burundi 'Codes et Lois du Burundi' (2006)173.

²³ The Constitution of Burundi art 19.

²⁴ ACHPR art 2.

²⁵ ACHPR art 19.

²⁶ Constitutive Act of the AU art 4(a).

‘actively promote the implementation of legislation to guarantee women’s land, property, and inheritance rights including their rights to housing.’²⁷

Moreover, the AU Agenda (Agenda 2063) a collective vision and a roadmap for the next 50 years, aspires to an Africa with a universal culture of gender equality and respect for human rights.²⁸ It commits to achieving full gender parity in public and private institutions, and the removal of all forms of gender discrimination in the social, cultural, economic, and political spheres.²⁹

It is to be noted that Burundi has signed the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol) but has not yet ratified it.³⁰

In this regard, under the Vienna Convention on the law of treaties, the State of Burundi should refrain from acts that would defeat the object and the purpose of the Maputo protocol.³¹ Specifically, the State of Burundi should refrain from any action that would violate women’s guarantee of equal opportunities in work, career advancement, and other economic opportunities.³² In addition, the State must also ensure that it does not infringe on women’s access to and control over productive resources, such as land, and guarantee their right to property,³³ and their right to inherit in the same way as their brothers from their parents’ properties in equitable shares.³⁴

2.4. Sub-regional legal framework

Burundi has signed on to four sub-regional economic integration organisations.³⁵ Both of them acknowledge the significant contributions of women to development, support gender equality and protect the socio-economic rights of women.

The East African Community (EAC) (EAC Treaty) which Burundi joined on 1 July 2007,³⁶ emphasises the role of women in the socio-economic development of Partner States.³⁷ It also

²⁷ AU, Solemn Declaration on Gender Equality in Africa para 7.

²⁸ Agenda 2063 para *k*. 17.

²⁹ (n 28) para 28

³⁰ Centre for Human Rights ‘Country status’ <https://www.maputoprotocol.up.ac.za/countries/countries-table> (accessed 22 August 2024).

³¹ Vienna Convention art 18 (a).

³² Maputo Protocol art 13.

³³ Maputo Protocol art 19 (c).

³⁴ Maputo Protocol art 21 (2).

³⁵ 2024 Investment Climate Statements: Burundi <https://www.state.gov/reports/2024-investment-climate-statements/burundi/> (accessed 21 August 2024).

³⁶ EAC Partner States <https://www.eac.int/eac-partner-states> (accessed 21 August 2024).

³⁷ EAC Treaty arts 121 and 122.

integrates gender issues into all EAC interventions.³⁸ Partner states are therefore committed to adhering to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as recognition, promotion, and protection of human and people's rights.³⁹ Furthermore, the EAC Gender Policy provides guidelines for mainstreaming gender in EAC policies and programmes.⁴⁰

Burundi is also a member of the Economic Community of Central African States (ECCAS) whose treaty recognises, promotes, and protects human rights under the provisions of ACHPR.⁴¹ To reaffirm its commitment to promote equality,⁴² the Community has adopted a Declaration on the equality of men and women,⁴³ providing a framework for coordinated efforts to promote gender equality at national and sub-regional.

Burundi is a member of the Common Market for Eastern and Southern Africa (COMESA) whose treaty recognises, promotes, and protects human and people's rights in accordance with the provisions of ACHPR.⁴⁴ Besides, COMESA acknowledges the role of women in development and business and mandates Member States to take legislative and other measures to achieve the full participation of women.⁴⁵

Burundi is a member of the International Conference on the Great Lakes Region (ICGLR) whose Pact calls upon member states to condemn and eliminate all forms of discrimination and discriminatory practices.⁴⁶ Moreover, member states recognise and promote women's empowerment, right to development and peace in society. To this end, member states undertake to establish appropriate mechanisms to eliminate discriminatory practices against women in accordance with appropriate national, regional and international standards in force.⁴⁷

Finally, the State of Burundi recognises Dar Es Salaam Declaration that pledged to empower women and girls by removing barriers that prevent women and girls from accessing education, healthcare and economic opportunities.⁴⁸

³⁸ EAC Treaty art 5(3).

³⁹ EAC Treaty art 6(d).

⁴⁰ EAC Gender Policy.

⁴¹ Revised ECCAS Treaty art 3 (e).

⁴² ECCAS Treaty arts 78 and 79.

⁴³ CEEAC 'Déclaration sur l'Égalité Entre les Hommes et les Femmes, 2004.

⁴⁴ COMESA Treaty art 6 (e).

⁴⁵ COMESA Treaty arts 154&155.

⁴⁶ ICGLR Pact art 8 b).

⁴⁷ ICGLR Protocol on Democracy and Good Governance art 44.

⁴⁸ Dar Es Salaam Declaration para 17 (C).

2.5. National legal framework

Burundi is a monist country in the sense that multilateral treaties enter into force after being duly ratified and in accordance with the conditions for their entry into force.⁴⁹ After ratifying and acceding to various international, regional, and sub-regional instruments protecting women's socio-economic rights, Burundi took steps to implement these instruments. This section will analyse the national laws and policies in force.

This Constitution of Burundi gives constitutional force to the international texts concerning human rights regularly ratified.⁵⁰ It promotes and protects the principles of equality and non-discrimination.⁵¹ It also mandates Burundi to guarantee to all Burundians, the option to live in Burundi sheltered from fear, discrimination, disease, and hunger.⁵²

It should be emphasised that the Constitution is the supreme law that must be respected by the legislative, executive and judicial bodies. Thus, any law that does not conform to the Constitution is struck and nullified.⁵³

Burundi signed the Arusha Accords (Tanzania) on 28 August 2000 to put an end to the 12-year civil war.⁵⁴ This is an instrument of the utmost importance in the promotion of women's socio-economic rights, to the extent that the Burundian Constitution reflects the principles set out in this agreement.⁵⁵

The Personal and Family Code recognises the same rights, obligations, and powers of spouses.⁵⁶ However, it contains a provision establishing the husband as the head of the marital household,⁵⁷ and does not regulate the ownership of spouses' property.⁵⁸

Since 2016, Burundi has passed a law on the prevention, protection of victims and repression of GBV, which identifies economic violence as one of the forms of GBV commonly observed in Burundi.⁵⁹ The law also reflects the government's commitment to eradicating all cultural practices and stereotypes based on the idea of women's inferiority through awareness-raising

⁴⁹ The Constitution of Burundi art 279.

⁵⁰ The Constitution of Burundi art 19.

⁵¹ The Constitution of Burundi arts 13 and 22.

⁵² Constitution of Burundi art 17.

⁵³ Constitution of Burundi art 48.

⁵⁴ Arusha Peace and Reconciliation Agreement for Burundi (2000).

⁵⁵ Preamble of the Constitution of Burundi.

⁵⁶ Personal and Family code arts 121 to 138.

⁵⁷ Personal and Family code art 122.

⁵⁸ G Gatunange 'Le régime matrimonial de droit commun en droit burundais' (2015) *Revue Burundaise de Droit et Société* 36.

⁵⁹ Loi portant prévention, protection des victimes et repressions des violences basées sur le genre (GBV) Act 13 of 2016 art 2(s).

campaigns.⁶⁰ The law emphasises the equal rights of spouses over household assets and criminalises economic violence as well as preventing the surviving spouse from benefiting from household assets.⁶¹

In 2012, Burundi revised its national gender policy to address gender disparities. The policy acknowledges the challenges women face in accessing opportunities and participating equally in the country's development. It sets out the objectives, guidelines, and strategies to overcome these disparities and promote sustainable development in Burundi.⁶²

Burundi has a Vision 2025, an instrument for strategic and policy planning for sustainable development.⁶³ Vision Burundi 2025 intends to set up a proactive policy for the promotion of women through the improvement of their access to education by eliminating the disparities, especially at the secondary and higher levels. It is also aimed at ensuring a significant increase in the participation of women in the economic development of the country.⁶⁴

To implement Vision 2025, the Government of Burundi has introduced a second Strategic Framework for Growth and the Fight against Poverty (Cadre Stratégique de Croissance et de Lutte contre la Pauvreté- CSLP II), which notes that women are disproportionately affected by poverty due to limited access to credit, land, and formal employment.⁶⁵ To this end, the government intends to strengthen the institutional framework for the implementation of existing laws promoting equality and also to create favourable conditions for women's economic development.⁶⁶

To respond to the persistent challenges in the economic and social areas, the State of Burundi has put in place a National Development Plan for Burundi 2018-2027. It is a guideline instrument that the different sectors will have to draw on to contribute to the country's development.⁶⁷ The State's strategic objectives include consolidating the rule of law and human rights, which will be achieved through the promotion of human rights, the promotion of justice accessible to all, and the eradication of inequality in all its forms.⁶⁸

⁶⁰ GBV Act (n 59) art 5.

⁶¹ GBV Act (n 59) arts 7,50 & 59.

⁶² Republic of Burundi 'Gender National Policy' (2012) 2.

⁶³ Republic of Burundi 'Burundi Vision 2025'.

⁶⁴ As above.

⁶⁵ Republic of Burundi 'Cadre Stratégique de Croissance et de Lutte contre la Pauvreté' (2012) 15.

⁶⁶ (n 65) 65.

⁶⁷ Republic of Burundi 'National Development Plan Burundi (2018).

⁶⁸ (n 65) 95.

2.6. Implementation of the protection and promotion of women's socioeconomic rights in Burundi

To ensure the enforcement of the laws safeguarding the protection and the promotion of women's socio-economic rights in Burundi, the State established a Ministry of Human Rights, Social Affairs, and Gender as well as Gender units in all Burundian government Ministries. The Ministry's responsibilities include promoting gender equality and contributing to the drafting, implementation, and enforcement of laws, covenants, conventions, and platforms for action to protect human rights in general, and women's rights in particular.⁶⁹

In response to the specific situation of women in Burundi, the Ministry has a General Direction for the Promotion of Women and Gender Equality, comprising the Department for the Promotion and Empowerment of Women, the Department for Gender Equality, and the Department for the Prevention of Sexual and Gender-Based Violence and Holistic Care for Victims.⁷⁰ This General Direction is specifically tasked with monitoring and reporting on the implementation of CEDAW and the Beijing Platform for Action; mobilising resources for the implementation of the National Gender Policy and its various operational tools and spreading laws related to the promotion of women and gender equality.⁷¹

To fulfill women's rights and empowerment, Burundi has a National Programme for Strengthening the Economic Capacities of Women (2019-2027) that implements the National Gender Policy and promotes women's economic participation in development.⁷² This programme has a fund and helps women members of active associations with income-generating activities. These associations can become cooperatives if they meet the required conditions.⁷³

⁶⁹ Loi sur les missions, organisation et fonctionnement du Ministère de la Solidarité Nationale, des Affaires Sociales et du Genre Act 12 of 2020 arts 1 13 and 14.

⁷⁰ (n 69) art 12.

⁷¹ (n 69) arts 30 and 31.

⁷² UN General Assembly 'Women in development, Report of the Secretary-General' 2024 para 18

⁷³ 50 million African Women speak 'Women's Economic Empowerment Program'

[https://www.womenconnect.org/web/burundi/empowerment/-/asset_publisher/O7GbVVJk4RxE/content/autonomisation-de-la-femme-et-programme-national-de-renforcement-des-capacites-economiques-de-la-femme-2019-2027-bujumbura-burundi-juillet-2019-\(accessed 23 August 2024\).](https://www.womenconnect.org/web/burundi/empowerment/-/asset_publisher/O7GbVVJk4RxE/content/autonomisation-de-la-femme-et-programme-national-de-renforcement-des-capacites-economiques-de-la-femme-2019-2027-bujumbura-burundi-juillet-2019-(accessed%2023%20August%202024).)

2.7. Effectiveness of the legal framework protecting women's socio-economic rights in Burundi.

Whilst the State has made significant progress in proclaiming the socio-economic rights of women in Burundi, through the ratification and operationalisation of international instruments, challenges persist. This sub-section will highlight some of them.

Although Burundi has legal and institutional frameworks in place to promote women's rights, matrimonial regimes, and liberalities that would give women access to land are lacking.⁷⁴ Moreover, Burundian culture still burdens Burundian women and girls, and a lot of men still operate under a patriarchal culture that undermines women's rights.⁷⁵ (this matter will be developed further in Chapter 3).

In addition, the promotion of gender equality and the application of gender-related laws are hampered by a lack of financial resources to implement the action plans of the policies.⁷⁶ The National Gender Policy is a relevant example. It was revised in 2012 to achieve its various objectives by 2025. The National Gender Policy indicates that the National Gender Council, the Steering Committee (a body responsible for monitoring the implementation of the NGP), and the Technical Implementation Committee are planned for implementation of that policy.⁷⁷ To date, these bodies have not yet been set up,⁷⁸ and achieving the results of the National Gender Policy 2012-2025 depends on the effectiveness of the institutional framework put in place, which requires the commitment of all the actors involved in its implementation.⁷⁹

Concerning the institutional framework, although the Ministry responsible for gender does exist, it is not very effective, given the several portfolios it must manage.⁸⁰ The first Ministry for Gender was set up in 1982 to implement the recommendations of the 1975 Mexico World Conference. In 1991, it became the Ministry for Social Action and the Advancement of Women. Since then, its structure has lost its specificity because it has been burdened with two portfolios.⁸¹ Today, this Ministry has new responsibilities such as National Solidarity, Social Affairs, Human Rights, and Gender.⁸²

⁷⁴ Republic of Burundi '6th National Report on the implementation of the Beijing Declaration and Platform for Action' (2024) 12.

⁷⁵ (n 74) 42.

⁷⁶ (n 74).

⁷⁷ (n 62) 34 and 35.

⁷⁸ Republic of Burundi 'Country Gender Equality profile' (2023) 23.

⁷⁹ (n 62) 31.

⁸⁰ (n 78).

⁸¹ (n 78) 22.

⁸² (n 74).

The effectiveness of the Ministry's interventions is challenged by the complexity and broad scope of the sectors under the same umbrella; insufficient resources to be effective and meet the expectations of the population in general and women in particular; inadequacy between ambitions and human resources dedicated to achieving these ambitions; the lack of key strategic structures in the gender mechanism.⁸³ The gender units, except those at the Ministry of the Interior and Public Security and the Ministry of National Defence and Ex-combatants Affairs, are powerless and ineffective.⁸⁴

While the laws and policies promoting women's socio-economic rights in Burundi are not effectively implemented, it is worth highlighting the fact that gender budgeting is barely integrated into planning.⁸⁵ The gender ministry ranks 9th out of 15 ministries in the Burundian government, with a budget of less than 1% of the annual state budget.⁸⁶ In other words, an allocation of BIF 86,386,000,000 (BIF 21,167,311,360 billion from national resources and BIF 65,218,680,000 billion from external resources) out of a total of BIF 3,923,195,545,193. The Ministry could not effectively carry out its missions with such a budget

2.8. Chapter Conclusion

From an analysis of international, regional, and sub-regional human rights instruments, as well as national laws and policies, the country has the relevant legislation in place to protect and promote the socio-economic rights of women in Burundi. However, there is a gap in national legislation as there are no specific laws on succession and matrimonial property. This study reveals that the commitment of the State of Burundi to the promotion of gender is more theoretical than practical, given the budget allocated to this sector.

⁸³ (n 78) 9.

⁸⁴ (n 78) 23.

⁸⁵ (n 34)12.

⁸⁶ Loi budgetaire du Burundi 2023/2024 Act 16 of 2023 para 88.

CHAPTER 3

EFFECTS OF INHERITANCE PRACTICE ON WOMEN'S SOCIOE-CONOMIC RIGHTS IN BURUNDI

3.1. Introduction

This chapter illustrates the historical background and evolution of traditional practices governing inheritance in Burundi from the pre-colonial period to date. It also examines how these practices affect women's socio-economic rights, specifically the right to access to land, the right to food, and women's empowerment. Finally, this research assesses inheritance practices from a human rights perspective.

3.2. Overview of inheritance practice

3.2.1. Historical background

Burundi is a country governed by a patriarchal and patrilineal social system.¹ Girls and boys were not considered to be equal in inheritance matters. Traditionally, the family went beyond the nuclear family (spouses and children) and was made up of the descendants of a common ancestor, known as a lineage.² Due to the patrilineal principle, only the son was involved in continuing his father's lineage.³ Land was a collective asset that belonged to a lineage, specifically a group of relatives and it was only passed down through the patrilineal line.⁴

Girls, from an early age, were expected to become someone's wife and would have to go to another family.⁵ Once married, they were considered to defer to their in-laws regarding the inheritance of land.⁶ The traditional Burundian inheritance model dictated a hierarchy of five orders for succession.⁷ Girls and women occupied the 5th position in the order of inheritance. They could inherit in the absence of the deceased's male descendants (first order), ascendants, such as the deceased's father and mother (second order), the deceased's brothers and their

¹ Republic of Burundi 'Gender National Policy' (2012) 10.

² A Manirakiza 'Le principe d'égalité et de non-discrimination dans le droit familial burundais : état des lieux, défis de mise en œuvre et perspectives de lege ferenda' PhD thesis, Universiteit Antwerpen 2020 180.

³ As above.

⁴ A Nzohabonayo and JDD Ndikumana 'La Succession Foncière de la Femme Burundaise Face à la Coutume' (2020) *European Scientific Journal* 230.

⁵ Manirakiza (n 2) 181.

⁶ A P Niyonkuru 'Gender and access to justice in Burundi: conflicting norms, gaps in the law and the role of judges' (2021) *The Journal of Legal Pluralism and Unofficial Law* 576.

⁷ J Bukera, 'La dévolution successorale en droit burundais' (1971) *Revue Administrative et Juridique du Burundi* 90 quoted in Manirakiza (n 2) 179.

ascendants (third order), the deceased's paternal uncles and their male descendants (fourth order).⁸ Daughters were simply excluded from the succession in favour of the other male successors, as it was rare for daughters to inherit.⁹ This exclusion from succession applied to both intestate and estate succession.¹⁰

Admittedly, women or girls could enjoy some limited rights insofar as they were not equivalent to those granted to men.¹¹ An unmarried girl was entitled to a portion of land (*icibare* in the local language). Married women were entitled to a portion of the land representing the gifts they received from their parents.¹²

Even if women were considered to belong to their in-laws' families as far as inheritance of land is concerned, they did not inherit in the husband's family.¹³ Once divorced, the woman was obliged to leave her marital home and the land before returning to her father's family; she was only entitled to take her personal belongings.¹⁴ She could also take unwanted children, such as daughters as they were not much wanted for the simple reason that they did not perpetuate their father's line.¹⁵ And when her husband predeceased her, the family property was transferred according to whether the widow had children or not. Where the widow had children, she would administer the property from her husband, under strict conditions of not engaging in another relationship and not having other children afterwards. The land property reverted to the husband's family following the inheritance order set out above if the children the decedent left were only daughters. The situation of the woman without children was very difficult because her fate depended on the goodwill of her in-laws; they could force her to marry one of her brothers-in-law or force her to leave. For a single woman who 'failed to find a husband', or if a widow or divorcee returned to her parents, they were granted a portion of land with the brothers' prior consent.¹⁶

⁸ Manirakiza (n 2) 179.

⁹ R Bourgeois 'Banyarwanda et Barundi' (1954) quoted Manirakiza (n 2) 179.

¹⁰ C Mabushi *La succession testamentaire en droit coutumier burundais* quoted in E Nukuri 'La protection constitutionnelle du droit de propriété foncière en droit burundais' PhD thesis, KU Leuven 2019 13.

¹¹ A Manirakiza 'La problématique de la mise en œuvre du principe d'égalité en droit burundais de la famille. Cas des droits successoraux de la femme' (2014) *KAS African Law Study Library – Librairie Africaine d'Etudes Juridiques* 712.

¹² S Bukuru 'La problématique de la succession de la fille (femme) au Burundi. Etat de la jurisprudence'. Dissertation, Université du Burundi 2003 quoted in A Manirakiza (n 11) 712.

¹³ Niyonkuru (n 6).

¹⁴ As above.

¹⁵ As above.

¹⁶ Nzohabonayo & Ndikumana (n 4).

3.2.2. The evolution of traditional inheritance practice

Women's inheritance rights have evolved through jurisprudence in the course of time.¹⁷ In 1945, the Tribunal de la Chefferie in *Barusasiyeko* delivered a judgment in favour of women.¹⁸

This tribunal declared that

Boys inherit from their father to the exclusion of daughters. The father may, however, in a public ceremony, reward his daughter for a meritorious act, making her his 'son' and heir to his property on his death¹⁹

This decision challenged the principle whereby only male heirs were eligible for intestate succession. Consequently, a daughter could inherit if her father appointed her as a legatee.²⁰ Despite recognising women's rights for the first time, this decision entrenched the superiority of males in the sense that a daughter should be declared a 'son' for inheritance purposes.

After recognition of the inheritance rights of daughters in the event of a will, the principle according to which daughters could only inherit in the absence of any male heir in the paternal line was challenged by the Tribunal of the *Mwami* (the *Mwami* being the King in the national language). It was around the 1960s that the Mwami's Court decided that even in the absence of a will, daughters could henceforth inherit if they were not in a competitive situation with their brothers.²¹ In the case, Ruterakagayo was the only daughter of Bugirigiri. When her father died, Ndikumwami, the daughter's paternal uncle and brother of the deceased, based his decision on the customary rules, which stipulated that in the absence of male descendants and privileged ascendants, the estate of the deceased would devolve to the privileged relatives (brothers),²² grabbed all the cows belonging to his brother Bugirigiri. Ruterakagayo (the daughter) decided to take her case to the Mwami Court, asking that her father's cows be returned to her instead of being the property of her uncle. In its decision, the Mwami's Court categorically rejected the customary rule and clearly stated the new rule as follows:

¹⁷ Manirakiza (n 2) 182.

¹⁸ As above.

¹⁹ Manirakiza (n 2) 183.

²⁰ E Lamy 'Observation sous Tribunal du Mwami du Burundi, 9 février 1960' (1961) *Revue Juridique de droit écrit et coutumier du Rwanda et du Burundi* 104 quoted in Manirakiza (n 2) 183.

²¹ Manirakiza (n 2) 184.

²² C Mabushi 'La succession testamentaire en droit coutumier burundais' (1972) *Revue Juridique de droit écrit et coutumier du Rwanda et du Burundi* 149 quoted in Manirakiza (n 2) 184.

Whereas the custom to be applied is that a child, even a girl, in the absence of boys, must enjoy his father's property if the latter has not decided otherwise.²³

This decision introduced a new inheritance rule. 'In Burundi, in case of intestate succession, daughters in the absence of sons are entitled to inherit their father's property'.²⁴ This was an innovation by the Mwami's Court. From then, daughters could inherit their fathers' property in the absence of boys. Before this decision, unless they were the beneficiaries of a testamentary gift, daughters had no claim to the estate if there were male successors, even if they were not descendants of the deceased.²⁵

The Courts and Tribunals of Burundi then extended the inheritance rights of daughters by recognising their right to inherit even in the presence of their brothers.

In 1964, the Burundi Court of Cassation (now the Supreme Court) recognised for the first time that Burundian daughters could inherit even in the presence of their brothers.²⁶ The case concerned an unmarried daughter. The brother had taken over part of the land that their father had granted to his daughter during his lifetime. He argued that his sister, being a woman, had no inheritance rights to assert when she was in the presence of a brother. The daughter appealed to the High Court of Muramvya, which declared the claim unjustified. Unsatisfied, the daughter appealed to the Court of Cassation. The Court of Cassation ruled that the appeal was well-founded.²⁷

The fact that she is a woman does not change her status as heir, and for the rest, Burundian custom recognises that daughters who have not been able to get married, have the right to part of their father's inheritance for their maintenance in the same way as male descendants

Consequently, it is accepted that 'under Burundian customary law, unmarried or divorced daughters are entitled, in the same way as male heirs, to a share of the paternal inheritance.'²⁸ This right is recognised not only if their parents have provided for it in a will, but also in the event of intestate succession.²⁹

²³ Tribunal du Mwami du Burundi, *Revue Juridique de droit écrit et coutumier du Rwanda et du Burundi* quoted in Manirakiza (n 2) 184.

²⁴ Lamy (n 20) 184.

²⁵ Manirakiza (n 2) 184.

²⁶ Manirakiza (n 2) 185.

²⁷ Cour de cassation du Burundi (1964) *Revue Juridique de droit écrit et coutumier du Rwanda et du Burundi* 22 quoted in Manirakiza (n 2) 185.

²⁸ As above.

²⁹ Manirakiza (n 2) 186.

This judgment was innovative in so far as it granted unmarried daughters and divorced women the right to inherit from their fathers in the same way as their brothers. Indeed, these women have never enjoyed equal treatment with their brothers. Although they can now inherit their parents' property, in most cases they do not have the right to transfer it, either gratis or for financial gain, unlike their brothers.

In accordance with customary rules, they only have usufruct rights, which expire once they die or give up living near their paternal family.³⁰

3.2.3. Women's inheritance rights: an ever-present challenge

Although the courts played an active role, the evolution of customary rules remains incomplete.³¹ Even today, depending on the nature of the assets to be inherited, women are treated quite differently from their brothers.

According to Bukera,³²

The estate of the deceased may consist of lineage property and property of the deceased's own. Lineage property consists of all the property that the deceased received from his paternal family by gift or inheritance. These assets are known as family assets and must remain in the paternal family. Personal property consists of all property acquired by the deceased by any means other than family inheritance. These are possessions that he bought, or even received from people outside the family. They are due to his efforts and work.

Based on this distinction between lineage property and personal property, the Courts and Tribunals often argue that daughters may not inherit equal portions as their brothers if the inheritance relates to the land of lineage origin. Conversely, personal property can be shared between all the children without distinction.³³

In the case RC 753/2009 between nine married women and their seven brothers, the Tribunal of first instance of Kirundo decided that

The land property belonging to the lineage shall be divided into eight equal parts: seven parts for the seven sons and one part common to the nine married women, over which they shall exercise only a right of usufruct, but that all the land property purchased by Rwa (their father) during his lifetime shall be divided equally between all his children: his sons and daughters.³⁴

³⁰ J Bukera 'Dévolution successorale' (1980) *Revue Juridique du Burundi* 94&95 quoted in Manirakiza (n 2) 186.

³¹ Manirakiza (n 2) 185.

³² Bukera (n 7).

³³ Manirakiza (n 5) 187.

³⁴ RC 753/2009 quoted in Manirakiza (n 2) 187.

The Tribunal of first instance of Gitega went down the same road in a case between two married women and their brother. The women were seeking equal division of their father's estate. The tribunal, after distinguishing between lineage land and personal land (land purchased by the father), decided that ‘the land purchased during the lifetime of the deceased will be divided into three equal shares; on the lineage land, the women will have a right of usufruct’.³⁵

When the estate devolves, property that does not come from the lineage property is divided equally without distinction and the heirs exercise the rights of *usus*, *fructus*, and *abus* over them.³⁶ Gatunange shows that personal property ‘is recently acquired and does not come from the family inheritance’.³⁷ In most cases, such property consists of acquests such as houses, plots of land, cars, bank accounts, and company shares.³⁸

In urban areas, the situation has changed considerably. Conflicts over inheritance occur but judges uphold the principle of equality regardless of the heirs' sex.³⁹ In the case, RCC 30127, 7 heirs including four boys and three girls, were to share the estate comprising four plots of land (two of which were in dispute) located in Bujumbura, as well as rural land, in compliance with the deceased's will and family agreements.⁴⁰

As they failed to settle, they brought the matter before the Tribunal of first instance of Kinama, which annulled the will and other agreements the family had made. The Court ordered that the daughters should receive the plots under dispute.⁴¹ Not satisfied with the judgment, the three sisters appealed to the High Court of Ntahangwa, which upheld the judgment of the High Court of Kinama. Finally, they appealed to the Supreme Court's cassation chamber, which was expected to rule on the question of whether the surviving children inherited the property left by their father on an equal basis.⁴² According to the judge, all children are equal. The case was subsequently overturned and referred back to the trial judge for a ruling on the division of the estate into equal shares for the deceased's children, without discrimination on the grounds of gender.⁴³

³⁵ E Kimararungu ‘La jurisprudence des tribunaux de résidence en matière successorale : cas des tribunaux de Résidence de Gitega’ Dissertation, Université du Burundi 2009 43 quoted in Manirakiza (n 2) 187.

³⁶ A Manirakiza (11) 188.

³⁷ G Gatunange ‘Plaidoyer pour une loi sur les successions au Burundi’ (2015) *Revue de l’Université du Burundi* 63 quoted in Manirakiza (n 2) 188.

³⁸ Manirakiza (n 2) 188.

³⁹ Manirakiza (n 11) 714.

⁴⁰ RCC 30127 quoted in Cour Suprême ‘Recueil de jurisprudence foncière’ 12.

⁴¹ As above

⁴² (n 40).

⁴³ As above

In rural areas, the situation has not improved as in most cases the estate consists of lineage property in most cases.⁴⁴ According to the courts, custom recognises that women should not inherit in the same way as their brothers, and in this case, the law enshrines a difference in treatment between women and their brothers, and this applies to all women regardless of their marital status.⁴⁵

However, the majority of the population acquires land ownership by inheritance; other forms of property acquisition, in a particular purchase, acquisitive prescription and acquisition through transfer by the State, are exceptional.⁴⁶ For instance, when married women demand the same treatment as their brothers, the most progressive courts grant them a small plot of land known as '*igiseke*' the size of which may or may not be specified, but which is always smaller than the size of the land received by their brothers.⁴⁷

An exemplary case is the judgment of the Tribunal of first instance of Kirundo cited above, which awarded the nine married women 1/8 of the inheritance of lineage land at a time when their brothers shared 7/8 of their father's estate equally.⁴⁸ Nevertheless, some Tribunals go so far as to decide that the married woman does not even have the right to the small piece of land known as '*igiseke*'. This situation is illustrated by a judgment of the Tribunal of first instance of Bugendana. A married woman claimed that the land left to her by her father should be shared between all her children without distinction based on gender. The Tribunal justified its decision to refuse this share-out by the fact that 'the woman was married and had no problems in her marital home.'⁴⁹

It is important to point out that even on these small plots of land granted to them by the so-called progressive courts, married women only exercise a right of life usufruct.⁵⁰ For instance, in the case RC 2910/2016, three married women took their father to the Tribunal after he had allocated shares of his family land to the boys only. The Tribunal of first instance of Mbuye ruled that their father was obliged to give each of his daughters a piece of land '*igiseke*' on the

⁴⁴ Manirakiza (n 11) 718.

⁴⁵ Manirakiza (n 2) 189.

⁴⁶ E Nukuri 'L'apport du nouveau code foncier en matière de résolution des conflits au Burundi' (2014) *KAS African Law Study Library* 737.

⁴⁷ Manirakiza (n 2) 187.

⁴⁸ RC 753/2009 quoted in Manirakiza (n 2) 187.

⁴⁹ RC771/86 quoted in G Gatunange 'Plaidoyer pour une loi sur les successions au Burundi' (2015) *Revue de l'Université du Burundi* 66 quoted in Manirakiza (n 2) 187.

⁵⁰ A Manirakiza (n 2) 190.

family estates, over which the women would only have a life usufruct right insofar as they could not transfer ownership on death or dispose of it in their lifetime.⁵¹

The Tribunal of first instance of Gitega delivered a similar judgment in the case RC1184/2010 between two married women and their brother. It was decided that the married women would have a life usufruct right to the inherited land.⁵²

The Supreme Court, the country's highest court, shares this view. An example of such a decision is the judgment RCC 10881/2005 of the Cassation Division of the Supreme Court of Burundi, which rejected an appeal brought by a woman against a judgment of the High Court of Mwaro granting her only a life usufruct over the 'igiseke' she had inherited. The Division of Cassation held that the High Court had applied a relevant custom that provides that a woman does not inherit in the same capacity as her brothers when she is married.⁵³

3.2.4. Inheritance rights of surviving spouses

Traditionally, women did not inherit from either their parents or their husbands.⁵⁴ In addition to inheritance, matrimonial regimes are not yet governed by any specific law. By definition, a matrimonial property regime is a set of rules governing the property status of spouses in their relations with each other and with third parties.⁵⁵ The current Personal and Family Code sets out the rights, obligations, and powers of spouses.⁵⁶ However, the management of spouses' property in the event of death or divorce is not yet regulated. This research does not deal with the different matrimonial property regimes that apply in divorce cases, because Burundi's courts and tribunals are not unanimous on the question of which regime to apply.⁵⁷ It will be limited to the treatment of surviving spouses.

In the absence of a law regulating matrimonial property regimes, women are treated differently from men in the case of widowhood. If the surviving spouse is a man and his predeceased wife has property of her own, there are two possibilities. If they had no children in common, the surviving husband receives all his wife's property and can transfer or even alienate it.⁵⁸ If they

⁵¹ RC 2910/2016 quoted in Manirakiza (n 2) 190.

⁵² RC 1184/2010 quoted in Manirakiza (n 2) 190.

⁵³ RCC 10881/2005 quoted in G Gatunange 'Plaidoyer pour une loi sur les successions au Burundi' (2015) 61 *Revue de l'Université du Burundi* quoted in Manirakiza (n 2) 191.

⁵⁴ Niyonkuru (n 6).

⁵⁵ G Gatunange 'Le régime matrimonial de droit commun en droit burundais' (2015) *Revue Burundaise de Droit et Société* 36.

⁵⁶ Personal and Family Code arts 121 and 138.

⁵⁷ Gatunange (n 55) 38.

⁵⁸ J Robbert *Le droit de la famille au Burundi : de l'organisation familiale traditionnelle au code des personnes et de la famille* (1996) 94 and 96.

did have children in common, the surviving spouse receives only a right of usufruct over his predeceased wife's property.⁵⁹

On the other hand, if the surviving spouse is a woman, she only has a right to usufruct, whether she has children in common with the predeceased husband.⁶⁰ For example, the High Court of Muramvya ruled that

In the event of widowhood of the wife, whether or not she has children, she continues to administer the landed property of her predeceased husband until her death, without however having the right to give it away as a gift or to dispose of it.⁶¹

Similarly, in its ruling, the Supreme Court of Burundi clearly states that

After the deceased's land estate has been divided into six equal shares (one share going to his wife), the latter 'may neither transfer nor sell the property in her share; on her death, this property will be divided between her children.'⁶²

The surviving wife's right to usufruct is subject to the condition that she does not remarry.⁶³ If she decides to remarry outside her deceased husband's family and has children in guardianship, case law recognises her right to continue administering her ex-husband's property for the benefit of those children.⁶⁴ The surviving wife therefore has legal enjoyment of her children's estate, and the family council often keeps a close eye on how she uses and enjoys this property.⁶⁵ All these conditions do not apply to men and are justified by custom as a way of keeping property in the family. It is assumed that if the surviving wife were allowed to take ownership of her husband's land, the property would leave the husband's family and belong to a person outside the family.⁶⁶

3.3. The effects of inheritance practices on women's socioeconomic rights

Having explained the rules followed by the Courts when they are called upon to rule matters of succession, the following paragraphs will show the effects of these practices on the right of access to land, women's empowerment, food security and right to education.

⁵⁹ As above.

⁶⁰ G SINARINZI 'Le régime juridique du conjoint survivant à la lumière du droit coutumier et du droit écrit' Dissertation, Université du Burundi, Faculté de droit 1979 36 quoted in Manirakiza (n 2) 207.

⁶¹ RCA 8896/2018 quoted in Manirakiza (n 2) 207.

⁶² RCC 10652/2005 quoted in Manirakiza (n 2) 207.

⁶³ Robbert (n 58).

⁶⁴ Manirakiza (n 2) 208.

⁶⁵ Robbert (n 58) 96.

⁶⁶ Manirakiza (n 2) 208.

3.3.1 Right to access land

The property right is guaranteed by UDHR,⁶⁷ ICESCR,⁶⁸ ICCPR,⁶⁹ ICERD,⁷⁰ CRPD,⁷¹ and the constitution of Burundi.⁷²

Nukuri distinguishes four options for the acquisition of land ownership in Burundi.⁷³ Firstly, land ownership can occur by succession. The provisional Constitution of 30 January 1962 conferred the right to property to Burundians.⁷⁴ Therefore, they had the right to transfer it to their successors, either by estate or intestate succession.⁷⁵

Land acquisition may also be by prescription, which means continuous possession for the required period and under other conditions specified by law.⁷⁶ The acquisition of property by prescription was introduced by the Belgian colonial legislator for land governed by written law and for a useful possession period of 15 years.⁷⁷ Currently, Burundians have the option of acquiring property by prescription in compliance with Land Act (Code Foncier) which extended the 15 years to 30 years.⁷⁸

Thirdly, land ownership can be acquired by transferring state-owned land. Cession is a contract for valuable consideration or gratis whereby the State transfers to a third party rights to land in its private domain.⁷⁹ Under Burundian law, anyone wishing to obtain the transfer of land in the State's private domain must submit a request to the competent authority.⁸⁰ Land in the private domain may be transferred or granted for valuable consideration, gratuitous consideration, or as an easement.⁸¹ As a result of the cession, ownership is transferred from the State to the private individual who is the beneficiary of the cession contract.⁸²

Finally, land may be acquired by purchase contract. Before colonisation, the King (*Mwami* in the national language) was the exclusive and absolute owner of the land in his kingdom, so

⁶⁷ UDHR art 2

⁶⁸ ICESCR art 3.

⁶⁹ ICCPR arts 2(1) and 3.

⁷⁰ ICERD art 1(1).

⁷¹ CRPD art 5(2).

⁷² The Constitution of Burundi art 36.

⁷³ E Nukuri 'La protection constitutionnelle du droit de propriété foncière en droit burundais' PhD thesis, KU Leuven 2019 12.

⁷⁴ Constitution provisoire du Royaume du Burundi Act 20 of 1962 quoted in Nukuri (n 73)12.

⁷⁵ As above.

⁷⁶ A Verbrugghe *Le régime foncier coutumier au Burundi* (1965) 64 quoted in Nukuri (n 73) 15.

⁷⁷ Nukuri (n 73)15.

⁷⁸ Code foncier Act 13 of 2011 art 22.

⁷⁹ Code foncier (n 182) art 218 (1).

⁸⁰ Code foncier (n 182) art 224.

⁸¹ Code foncier (n 182) art 217.

⁸² Code foncier (n 182) art 217 (4).

there was no such thing as individual land ownership.⁸³ The land was family property and was not subject to trade; it was collective property that had to be preserved in the interests of the family.⁸⁴ Today, Burundian law recognises the possibility of obtaining possession of the property through a contract such as a sale, exchange, or gift.⁸⁵ Even family property is the subject of commercial transactions.

Although there are options inheritance is the most common acquisition option, with other acquisition options being the exception.⁸⁶ As this dissertation has already shown, women and men are not treated equally regarding inheritance. In the absence of a specific law, customary rules still prevail. Consequently, women are restricted in their access to land. The most recent General Census of Population and Housing (2008) showed that 62.5% of the 80.2% of the population who own land are men and 17.7% are women.⁸⁷

3.3.2 Women's Economic Empowerment

'For many people, the land is a source of livelihood and a central economic right.'⁸⁸ According to ESCR Committee, secure and equitable access to, use of, and control over land can have direct and indirect implications for the enjoyment of ICESCR.⁸⁹

Women's economic empowerment is required to achieve women's rights and gender equality.⁹⁰ For this reason, the SDGs have enshrined gender equality and empowering all women and girls in Target 5, as one of the 17 targets to end poverty, hunger, AIDS, and discrimination against women and girls within 15 years.⁹¹ UNDP has outlined three key dimensions of women's economic empowerment.⁹² These include developing women's economic opportunities, improving the legal status and rights of women, and participation and inclusion of women in economic decision-making processes.⁹³

⁸³ O D Nimpagaritse 'Organisation foncière et disparité des statuts immobiliers au Burundi, arrière-plan historique, courbes de développements et nécessité d'intégrer un nouveau droit' PhD thesis, Bruxelles, 1983 49 quoted in Nukuri (n 73) 18.

⁸⁴ Nukuri (n 73) 17.

⁸⁵ As above.

⁸⁶ Nukuri (n 46) 737.

⁸⁷ Republic of Burundi 'Country Gender Equality profile' (2023) 64.

⁸⁸ OCHR and land and Human Rights <https://www.ohchr.org/en/land> (accessed 31 August 2024).

⁸⁹ ESCR Committee General Comment 26 on land and economic, social and cultural rights (2022) para 5.

⁹⁰ As above.

⁹¹ Sustainable Development Goals (SDG) <https://sdgs.un.org/goals> (accessed 10 September 2024).

⁹² UNDP 'Innovative Approaches To Promoting Women's Economic Empowerment' (2008) 9 <https://www.undp.org/sites/g/files/zskgke326/files/publications/INNOVATIVE%20APPROACHES.pdf#page=23.08> (accessed 10 September 2024).

⁹³ As above.

3.3.2.1 Access to productive resources

In Burundi, land is a precious asset for agricultural production.⁹⁴ Access to land includes the right to use the land for growing crops, the right to make decisions on how the land should be used and to benefit financially from the sale of the crops and the right to transfer or to sell it.⁹⁵ For women, land is an essential resource for satisfying subsistence needs and for accessing other goods and services, such as credit.⁹⁶

Due to customary inheritance practices that discriminate against women, they are particularly affected by the lack of access to land.⁹⁷ The lack of access to land hinders access to credit. Since they have no land to pledge as collateral, women especially those in rural areas cannot access credit.⁹⁸ Without credit, it is impossible to gather the capital needed for investment.⁹⁹

Since 2015, the Government of Burundi has put in place various initiatives enabling women to access microfinance loans.¹⁰⁰ Women have also been the first to integrate income-generating activities that enable them to access informal credit from local savings and credit groups. However, practice shows that they rarely control how these credits are used.¹⁰¹ Thus, Burundian women in rural areas will need their husband's permission to take part in different local saving and credit group activities, to have loans that they can use for household purposes, or to start a small business.¹⁰²

3.3.2.2 Economic dependence

In addition to the challenges of access to credit, women have very limited time to engage in income-generating activities. The division of roles and responsibilities within a household is inspired by Burundian norms and beliefs based on patriarchy and favouring men over women.¹⁰³

Burundian women are expected to take care of household activities such as looking after the children and other family members, fetching wood and water, cooking, and doing the washing.

⁹⁴ FAO 'Agricultural income determinants among smallholder farmers' farming knowledge platform <https://www.fao.org/family-farming/detail/en/c/294543/>

⁹⁵ FAO and land Tenure studies 'Gender and access to land' (2002).

⁹⁶ ESCR Committee (n 89) para 14.

⁹⁷ Country Gender Equality Profile (n 87) 64

⁹⁸ Search for Common Ground & USAID 'Analysis of barriers to women's economic empowerment in Burundi' (2021) 23.

⁹⁹ As above.

¹⁰⁰ Search for Common Ground (n 98) 30.

¹⁰¹ USAID 'Burundi Gender Analysis' (2017) 65.

¹⁰² Search for Common Ground (n 98) 29.

¹⁰³ USAID (n 101) 24.

They also do farm work which is unreported and unpaid.¹⁰⁴ According to an FAO study, 97.4% of women of working age make a significant contribution to the agricultural sector, which accounts for more than 50% of the GDP.¹⁰⁵ Due to a lack of access to land, women cannot get security for the land upon which they work hard. In most cases they have neither access to and control over profits nor the decision-making power to decide how profits are to be used. This means that they cannot sell part of their harvest to support themselves or their children without the prior permission of their husbands. The reason often given is that the land that the women use to cultivate legally belongs to the husband.¹⁰⁶ In other words, since farms are generally owned by men, the women who do farm work are considered to be working for their husbands. Therefore, the income from the farms is the main household income which is managed and controlled by the husbands.¹⁰⁷

This grants men a financial advantage in deciding household finances and makes women economically dependent instead. Moreover, even large livestock are the property of the man, and women can own small livestock (such as goats, sheep, and chickens). However, even when women own livestock, their husbands are still allowed to use the livestock for whatever use(s) they consider necessary.¹⁰⁸

Traditionally, women manage household and farm activities alone even when they are pregnant or carrying a child on their back. As for the men, they are traditionally involved in activities linked to the production of cash crops (such as coffee, cotton, and tea) and banana plantations, which bring them profits. In addition, they are very likely to engage in trade and carpentry or to become employees.¹⁰⁹ To date, no data is available on the time allocation of women and men in Burundi.

Men and women agree that they all contribute to the family income, but most men argue that men should be solely responsible for providing for their families and therefore decide how the household income is spent. As for the women, they would like to be involved since their husbands decide on everything to do with money and often end up spending most of the money on personal items such as alcohol rather than on household needs.¹¹⁰

¹⁰⁴ As above.

¹⁰⁵ A Niyonkuru 'Femme-agronomie-développement : le cas du Burundi' (2009) *Tropicultura* 253.

¹⁰⁶ USAID (n 101) 25.

¹⁰⁷ Care International 'Norms and practices impeding gender equality in Burundian society' (2017) 6.

¹⁰⁸ USAID (n 101) 25.

¹⁰⁹ African Development Bank Group 'Profil Genre du Burundi' (2011) 19.

¹¹⁰ Care International (n 107) 21.

Besides making access to production resources easier, access to land also reduces women's exposure to violence.¹¹¹ Hence inheritance and access to land issues hinder women's economic independence, they are more vulnerable to gender-based violence (GBV) as they are economically dependent on men. In Burundi, economic violence is one of the most common forms of GBV. It takes the form of the denial of access to family resources or employment to one of the spouses.¹¹² In fact, denying access to or control over the benefits of household assets and the harvests from their agricultural production, as well as decision-making on household expenditure, constitute acts of economic violence. Men have been known to use household income to buy alcoholic beverages or to entertain their concubines, which is a form of economic GBV.¹¹³

Despite the enactment of specific legislation, gender-based violence is surrounded by a culture of silence. 42.80% of the women who took part in the survey conducted by Care International believe that women should not report the violence they experience.¹¹⁴ Their point of view shows how economic dependence limits their ability to leave abusive marriages and weakens them in terms of decision-making within the household. Their economic dependence forces them to endure all this violence to bring up their children. Although men say they do not support domestic violence, they still believe that such cases should not be reported to the police.¹¹⁵

GBV persists because the victims do not report it, and these cases are handled out-of-court by the community. In short, women who have access to land are less exposed to GBV because they can flee domestic violence and seek protection. They also have confidence in their abilities and are closely involved in family decision-making.¹¹⁶

Worldwide, women earn on average slightly more than 50 percent of what men earn and still, they are living in poverty and are often denied access to critical resources such as credit, land, and inheritance. Their labour goes unrewarded and unrecognised.¹¹⁷

¹¹¹ B Agarwal 'Women and Poverty: Reducing Domestic Violence, Enhancing Group Rights' (2007) people and policy paper 4.

¹¹² Loi portant prévention, protection des victimes et repressions des violences basées sur le genre (GBV) Act 13 of 2016 art 2(s).

¹¹³ GBV (n 112) art 2(r).

¹¹⁴ Care International (n 107) 24.

¹¹⁵ As above.

¹¹⁶ ESCR Committee (n 89) para 14

¹¹⁷

<https://www.un.org/womenwatch/daw/followup/session/presskit/fs1.htm#:~:text=The%20Feminization%20of%20Poverty&text=Worldwide%2C%20women%20earn%20on%20average,labour%20goes%20unrewarded%20and%20unrecognized> (accessed 11 September 2024).

This is particularly true since lack of access to land contributes to the feminisation of poverty¹¹⁸ insofar as women are more vulnerable and more likely to become poor, employed in precarious conditions, in poorly paid jobs, and are less likely to have access to land ownership rights, credit, and education.¹¹⁹

3.3.3 Food security

Access to use and control over land has repercussions on various rights enshrined in the ICESCR.¹²⁰ Land is essential to guarantee the exercise of the right to food.¹²¹ The right to adequate food is inseparable from the intrinsic dignity of the human person and is indispensable for the realisation of other fundamental rights.¹²²

41,2% of the population is affected by food insecurity,¹²³ making Burundi the second most food insecure country in the world.¹²⁴ The smallholder farmers are unable to produce enough for their families.¹²⁵ In Burundi, women are particularly vulnerable to food insecurity.¹²⁶ In sub-Saharan Africa, agriculture is the source of economic growth. However, alongside climate change, gender norms are one of the causes of low agricultural production.¹²⁷ In Burundi, although women make a significant contribution to agricultural production, they are constrained by a lack of access to land that limits their production resources.¹²⁸ Besides lacking access to land, women do not have the same access as men to agricultural inputs and are less involved in training on modern agricultural and livestock techniques.¹²⁹ Indeed, the power to decide which seeds, methods, and budget to use lies with men.¹³⁰ Although widows are at the head of the household, they are not unaffected either as their families-in-law keep an eye on the management of their resources.¹³¹

¹¹⁸ D Pearce *The feminization of poverty: Women work* (1978) 1.

¹¹⁹ S Mishra 'Feminization of Poverty and Dimension of Women's Agencies' (2018) *Asian Journal of Multidisciplinary Studies* 95.

¹²⁰ ESCR Committee (n 89) para 5.

¹²¹ ESCR Committee (n 89) para 6.

¹²² ESCR Committee (n 89) para 7.

¹²³ WFP 'Analyse Globale de la Vulnérabilité, de la sécurité Alimentaire et de la Nutrition au Burundi' 2023 29.

¹²⁴ A Keesler & others 'Mobilizing farmers to stop land degradation: a different discourse from Burundi' (2020) *Wiley Online Library* 3403.

¹²⁵ S Niragira and others 'Food for Survival: Diagnosing Crop Patterns to Secure Lower Threshold Food Security Levels in Farms Households of Burundi' (2015) *Sage* 196.

¹²⁶ WFP (n 123) 30.

¹²⁷ E Nchanji & others 'Gender norms and differences in access and use of climate-smart agricultural technology in Burundi' (2023) *Frontiers in Sustainable Food Systems* 1.

¹²⁸ As above.

¹²⁹ USAID (n 101) 65.

¹³⁰ As above.

¹³¹ F Iradukunda and others 'Understanding gender roles and practices in the household and on the farm: implications of banana disease management innovation processes in Burundi' (2019) *ResearchGate* 5.

Thus, inheritance practices hinder women's participation in agriculture and can exclude them from economic activities.¹³² In addition, the lack of decision-making power over harvests contributes to food insecurity within households. It is not uncommon for men to use household resources, particularly agricultural harvests, to buy alcohol or meat for themselves rather than using the harvests to feed the whole household.¹³³

It is worth to highlight that promoting women's access to production resources can have a positive impact on production growth. This would reduce malnutrition within households and communities.¹³⁴ Since Burundi is a member State of ICESCR, the right to food is to be guaranteed for every Burundian.¹³⁵

3.3.4 Right to education

The adoption of free primary education has enabled Burundi to achieve parity between girls and boys at the primary school level.¹³⁶ However, the country is still facing high rates of non-enrolment. Girls are 3% more likely than boys to be out of school. They are 4% less likely than boys to be enrolled in secondary education and 8% less likely to be enrolled in higher education.¹³⁷

Women are in favour of children's education insofar as female-headed households spend much more on education than male-headed households.¹³⁸ However, due to the lack of access to land, women lack economic independence and decision-making power. They rely on their husband's goodwill to provide for their children's schooling. In situations where the man is not responsible, the children's right to education is violated.

Poverty is the second biggest obstacle to girls' right to education in Burundi.¹³⁹ Although school fees have been abolished at the primary school level, families with limited financial means have difficulty obtaining uniforms and school supplies for their children. The tendency is therefore

¹³² Nchanji & others (n 127).

¹³³ USAID (n 101) 15.

¹³⁴ FAO 'Why is gender equality and women's empowerment central to the work of FAO' <https://www.fao.org/gender/background/en> (accessed 10 September 2024).

¹³⁵ ICESCR art 11.

¹³⁶ (n 1) 12.

¹³⁷ République du Burundi & UNESCO 'Analyse du secteur de l'éducation' (2021) 175.

¹³⁸ K Ndayikeza 'Analyse des facteurs influençant les dépenses d'éducation des ménages au Burundi' Masters thesis 2023 84.

¹³⁹ https://www.unicef.org/burundi/media/3376/file/UNICEF_Situation%20des%20enfants%20au%20Burundi_FR_2023.pdf (accessed 10 September 2024).

to prioritise boys over girls. In fact, after dropping out of school, girls help their mothers with household activities.¹⁴⁰

The poverty experienced by women in Burundi has an impact on access to menstrual hygiene kits. 70.2% of girls do not have access to a hygiene kit to manage their menstrual cycles.¹⁴¹ The lack of access to basic hygiene kits is also an obstacle to education, as it leads to repetitive absences and non-performance at school, which in most cases ends in drop-out.¹⁴²

Consequently, the illiteracy rate among women is 25% which affects their access to employment.¹⁴³ They mostly work in the agricultural sector, which is more exhausting and generates lower incomes.¹⁴⁴ While they account for 35.6% of the formal sector workforce, it should be specified that they are generally employed in positions that require low qualifications.¹⁴⁵ For instance, from 2014 to 2018, out of 16,581 people recruited into the Public Service, only 5,637 were women.¹⁴⁶

Ensuring girls education is key to the empowerment of women and girls, which is fundamental to promoting rapid and equitable economic growth and long-term stability at both community and national levels.¹⁴⁷

3.4. Inheritance practices from a human rights perspective

All the international human rights instruments that the State has ratified and incorporated into its constitution recognise the right to equality and non-discrimination. Under CEDAW,¹⁴⁸

discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

¹⁴⁰ Care International (n 107) 23.

¹⁴¹ M Sallami & T R Niyonzima 'Empowering Burundian girls: Leading the way in education' *World Bank Blogs* 23 February 2024 <https://blogs.worldbank.org/en/nasikiliza/empowering-burundian-girls-leading-way-education-afe-0224> (accessed 10 September 2024).

¹⁴² <https://www.amade.org/fr/missions/sante/dignite-pour-les-femmes/favoriser-au-burundi-loeacces-des-collegiennes-aux-protections-menstruelles.html> (accessed 10 September 2024).

¹⁴³ République du Burundi 'Analyse du secteur de l'éducation' (2021) 104 <https://unesdoc.unesco.org/ark:/48223/pf0000379789> (accessed 10 September 2024).

¹⁴⁴ UNDP 'Egalite des Genres' <https://www.undp.org/fr/burundi/projets/egalite-des-genres#:~:text=Au%20niveau%20institutionnel%2C%20le%20Burundi,au%20s%C3%A9nat%20et%20au%20gouvernement> (accessed 10 September 2024).

¹⁴⁵ Aa above.

¹⁴⁶ Yaga <https://www.yaga-burundi.com/turashoboye-quivolution-economique-femme/> (accessed 10 September 2024).

¹⁴⁷ Care International (n 107) 9.

¹⁴⁸ CEDAW art 1.

The Committee on the Elimination of Discrimination against Women clarifies that discrimination against women is not only merely different treatment explicitly based on grounds of sex. It can also take a form of law, policy, programme or practice which is neutral as regards men and women but has a discriminatory effect in practice on women insofar as the law or policy does not address pre-existing inequalities.¹⁴⁹

However, any difference in the treatment of men and women is not always discrimination. To constitute discrimination within the context of CEDAW, the difference in treatment should have the purpose of ‘impairing or nullifying a woman’s rights.’¹⁵⁰ Equal treatment may also constitute discrimination if it has the effect of impairing or nullifying a woman’s right.¹⁵¹ To constitute discrimination within the definition of CEDAW, the difference in treatment must infringe on a woman's rights, in other words, the human rights and fundamental freedoms of a woman enshrined in various human rights instruments.¹⁵²

This research has shown that, in the absence of a specific law, the Courts and Tribunals apply traditional practices that promote a difference in the treatment of men and women. From the human rights perspective, these practices constitute discrimination against women in terms of unequal treatment on the grounds of sex.

In addition, inheritance practices constitute discrimination because they limit women's fundamental rights and freedoms, such as access to land, access to food, access to productive resources and the empowerment of women.

As a member State of CEDAW, Burundi has joined other countries in eliminating all forms of discrimination against women to achieve gender equality.¹⁵³ The fact that a law on inheritance has not yet been established constitutes a breach of the State's obligation to guarantee formal equality. Burundi is bound not only to proclaim theoretical equality but also to take measures to ensure the full development and advancement of women and the full realisation of the rights set out in different human rights instruments to achieve substantive equality.¹⁵⁴ Substantive

¹⁴⁹ Committee on the Elimination of Discrimination against Women (CEDAW) General recommendation 28 on the core obligations of States parties under article 2 of the CEDAW (2010) para 16.

¹⁵⁰ CEDAW art 1.

¹⁵¹ CEDAW (n 149).

¹⁵² S Cusack & L Pusey ‘CEDAW and the Rights to Non-discrimination and Equality’ (2013) *Melbourne Journal of International Law* 8.

¹⁵³ CEDAW (n 149) para 4.

¹⁵⁴ CEDAW (n 149) para 8.

equality takes into account the biological, social, and cultural differences between men and women.¹⁵⁵

3.5. Right to access justice

The right to access justice is recognised by many instruments of Human Rights including ACHPR (African Charter).¹⁵⁶ Furthermore, the African Commission on Human Rights and People's Rights emphasises the

Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the Constitution, by law, or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.¹⁵⁷

In this context, women have the right to appeal to the Burundian courts and tribunals, since their exclusion from inheritance is inconsistent with the constitutional principles of equality and non-discrimination. Land conflicts account for 71.90% of disputes heard by courts and tribunals.¹⁵⁸ Burundians are so attached to their land that, in some regions, they would prefer to sell all their possessions to avoid losing a land case that represents both a pride of honour and a family tradition.¹⁵⁹

This section highlights the challenges faced by a woman seeking justice in a patriarchal society so tied to the land.

3.5.1. Legal challenges

Women seeking justice face various legal challenges. Firstly, the inferior courts (Tribunals of first instance and High Courts), which have jurisdiction to hear cases relating to inheritance, do not guarantee the equality of brothers and sisters in inheritance matters relating to land property.¹⁶⁰ The argument frequently put forward is the lack of a law on inheritance.¹⁶¹

The second factor is that Burundian judges make only limited use of international law.¹⁶² Although Burundian judges can apply international human rights treaties directly, the extent to which they apply these treaties is quite limited.

¹⁵⁵ As above.

¹⁵⁶ ACHPR art 7(1) a.

¹⁵⁷ ACHPR 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003) C (a).

¹⁵⁸ RCN justice et démocratie 'Statistiques judiciaires Burundaises, rendement, délais et typologie des litiges dans les tribunaux de résidence' (2009) 25.

¹⁵⁹ C Ntampaka 'Gouvernance foncière en Afrique Centrale' (2008) 5.

¹⁶⁰ Manirakiza (n 2) 193.

¹⁶¹ RC 8125/2017 quoted in Manirakiza (n 2) 193.

¹⁶² Manirakiza (n 2) 193.

The third factor is the non-existence of the rule of precedent in the Burundian legal system.¹⁶³

A judgment pronounced by one court, even the highest court in the Burundian judicial system, namely the Supreme Court, is not binding on the other courts, nor is it binding on the same court that pronounced it.¹⁶⁴

3.5.2. Accessibility

Women seeking justice experience several challenges in terms of accessibility. The first challenge is access to legal information. Few litigants are aware of the laws relating to State intervention in legal aid and legal assistance to enable people to defend their interests themselves.¹⁶⁵ In addition, the number of Courts is not sufficient to cover an entire country.¹⁶⁶ Each commune indeed has a tribunal of first instance, but to take an appeal, one must travel to the provincial administrative centre, and to bring an appeal in cassation, one must cross several provinces, which is very difficult for women with limited financial means and the burden of domestic work. This makes justice less equitable because the courts are concentrated in the country's former capital (Bujumbura) and the provincial cities. The third challenge is the delays in the administration of justice. When people go to court, they not only want their rights to be upheld, but they also want the judgement to be delivered within a reasonable time. Very often, judgements are issued several years after the case was brought before the court.¹⁶⁷

Another challenge concerns litigation costs. Justice is free if the applicant does not pay for the services of the judge and judicial officials.¹⁶⁸ Burundi does not yet have a legal text establishing that justice is free, and the registration of a case on the court's list is subject to a deposit by the applicant, which is reimbursed if the applicant wins the case.¹⁶⁹ This means that no case can be brought without a deposit unless the applicant presents a certificate of extreme poverty issued by the local administrator, stating that the person concerned does not have sufficient income to cover the legal costs, in which case all documents are issued to him as a debit.¹⁷⁰ Women, who in most cases do not have sufficient financial means to pay a deposit, find themselves excluded from the justice system.

¹⁶³ Manirakiza (n 2) 194.

¹⁶⁴ G Gatunange 'Plaidoyer pour une loi sur les successions au Burundi' (2015) *Revue de l'Université du Burundi* 65 quoted in Manirakiza (n 2) 195.

¹⁶⁵ M Masabo 'L'accès à la justice : le volet 'Commodités d'accès'' (2017) *Revue Burundaise de droit et société* 27.

¹⁶⁶ As above.

¹⁶⁷ Masabo (n 165) 29.

¹⁶⁸ As above.

¹⁶⁹ Code de procédure Civile du Burundi arts 399&400.

¹⁷⁰ Masabo (n 165) 43.

3.6. Chapter conclusion

The realisation of women's socio-economic rights in Burundi remains a dream, and one of the main reasons for this is inheritance practices based on patriarchy, which places Burundian women at a disadvantage. Burundian women have been excluded from inheritance, the main means of acquiring land, by custom. Even today, they are still subject to the weight of custom, since no law on inheritance has yet been promulgated. Burundi's courts and tribunals, which have the power and duty to apply the Constitution, favour customary law, which perpetuates discrimination against women.

This discrimination harms the economic empowerment of Burundian women, can lead to the feminisation of poverty, and the perpetuation of GBV. Yet women are fundamental agents of change in the fight against rural poverty, hunger, and malnutrition.¹⁷¹ This research argues that if women had the same access as men to productive resources, they could significantly increase the yields from their farms, and thus reduce the number of people suffering from hunger in Burundi.¹⁷²

¹⁷¹ FAO 'Empowering rural women, powering agriculture' (2018) 3
<https://openknowledge.fao.org/server/api/core/bitstreams/e31ea1b4-3378-499e-81da-85552d69ceeb/content>
(accessed 11 September 2024).

¹⁷² As above.

CHAPTER 4: PROMOTING GENDER EQUALITY IN INHERITANCE RIGHTS FOR WOMEN IN BURUNDI: LESSONS FROM SOUTH AFRICA

4.1. Introduction

South Africa has made significant strides in advancing women's inheritance and property rights, establishing a robust national legal framework to protect these rights. This chapter seeks to highlight the best practices and key lessons that Burundi can adopt to promote gender equality in property and inheritance rights for women.

The choice to analyse South African legal reforms is based on the fact that this country has customary laws, which, in the past, considered women to be legal minors under the guardianship of their husbands, fathers, or brothers. Under these precepts, women could not acquire or own land without the assistance or affiliation with their male relatives.¹ The country has succeeded in overcoming the injustices of the past by introducing gender-affirming and neutral legislation that seeks to promote equality among genders.

4.2. Constitutional safeguards

The Constitution of the Republic of South Africa enshrines the equality of all persons before the law. It proclaims equality which encompasses the full and equal enjoyment of all rights and freedoms.² Thus, it aims to achieve equality through ensuring that the domestic legislation is largely based on the aim to protect or advance persons, or categories of persons who have been previously or currently disadvantaged by unfair discrimination.³ The State and individuals have therefore a duty not to discriminate unfairly, directly or indirectly, on the grounds of sex.⁴

Section 9 of the Constitution states that:

Everyone is equal before the law and has the right to equal protection and benefit of the law.⁵

Furthermore,

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin,

¹ Women's Legal Centre 'Women's property rights under Customary Law' 2010 4.

² The Constitution of the Republic of South Africa, 1996 sec 9(2).

³ As above.

⁴ The Constitution (n 2) sec 9(3) and (4).

⁵ The Constitution (n 2) sec 9(1).

colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁶

The rights guaranteed by the Constitution of South Africa include property rights.⁷ Besides the guarantee against arbitrary deprivation of property and expropriation,⁸ the State of South Africa has an obligation to take legislative measures, within its available resources, to foster conditions that enable citizens to access land on an equitable basis.⁹

The Constitution of the Republic of Burundi also guarantees the right to equality and non-discrimination.

Article 22 of the Constitution stipulates that

All citizens are equal before the law, which assures them equal protection.

No one may be targeted of discrimination based on, notably: origin, race, ethnicity, sex, colour, language, social situation, religious, philosophical, or political belief, physical or mental handicap, HIV/AIDS status or having any other incurable illness.¹⁰

Moreover,

All Burundian people are equal in merit and dignity. All citizens enjoy the same rights and have the same protection of the law. No Burundian will be excluded from the social, political, or economic life due to their race, language, religion, sex, or ethnic origin.¹¹

In addition, the State of Burundi

Is tasked with the realisation of the Burundian people's aspirations, in particular to heal the divisions of the past, to improve the quality of life of all Burundians, and to guarantee to all the option to live in Burundi sheltered from fear, discrimination, disease, and hunger.¹²

However, in comparison to the Constitution of the Republic of South Africa, the Burundi Constitution does not explicitly provide for the introduction of legislative measures to protect women who continue to endure the disproportionate burden of poverty and culture.¹³ Moreover,

⁶ The Constitution (n 2) sec 9(3).

⁷ The Constitution (n 2) sec 25.

⁸ The Constitution (n 2) sec 25 (2).

⁹ The Constitution (n 2) sec 25 (5).

¹⁰ The Constitution of Burundi art 22.

¹¹ The Constitution of Burundi art 13.

¹² The Constitution of Burundi art 17.

¹³ Gender National Policy (n 2) 2.

while the Constitution of Burundi protects everyone's right to property and guarantees against arbitrary deprivation of liberty,¹⁴ it is silent on equitable access to land.

4.3. Domestic legislation's relationship with the Constitution

4.3.1. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 of South Africa

To enhance gender equality in property and inheritance rights, South Africa has introduced national legislation to safeguard women's rights. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted to give effect to the letter and spirit of the Constitution, particularly, the promotion of equality,¹⁵ the prevention of unfair discrimination, and the protection of human dignity.¹⁶

This act sets out the procedures for the determination of circumstances under which discrimination is unfair.¹⁷ Under the Act, discrimination against a person on the grounds of gender is a form of unfair discrimination.¹⁸ This may be a system of preventing women from inheriting family property,¹⁹ a policy or conduct that unfairly limits access of women to land rights, finance, and other resources,²⁰ or systemic inequality of access to opportunities by women resulting from the sexual division of labour.²¹

The case *MEC for Education: Kwazulu-Natal v Pillay* was interpreted and adjudicated in the context of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.²² The case was between the 'Department' and the 'Durban Girls' High School' and Ms Navaneethum Pillay who represented her minor daughter Sunali.²³

In 2002, Sunali was enrolled by her mother at Durban Girls' High School. She was admitted upon her mother's signature of the Code of Conduct of the school.²⁴

In September 2004, Sunali with her mother's permission, got her nose pierced and inserted a small gold stud. In October 2004, the mother was informed that her daughter could not continue

¹⁴ The Constitution of Burundi art 36 (2).

¹⁵ Act 4 of 2000 sec 2 (b) (ii).

¹⁶ Act 4 of 2000 sec 2 (b) (iv).

¹⁷ Act 4 of 2000 sec 2 (d).

¹⁸ Act 4 of 2000 sec 8.

¹⁹ Act 4 of 2000 sec 8 (e).

²⁰ Act 4 of 2000 sec 8 (f).

²¹ Act 4 of 2000 sec 8 (h).

²² *MEC for Education: Kwazulu-Natal v Pillay* 2007 2 SA 106 (CC) para 1.

²³ *MEC* (n 22) para 2.

²⁴ *MEC* (n 22) para 4.

to wear the gold stud because it was against the code of conduct.²⁵ However, special permission was given to allow the piercing to heal.²⁶ Ms Pillay explained that Sunali was to keep the gold stud as part of her cultural and religious practice.²⁷ In its decision, the Governing Body met and did not authorise Sunali to keep the gold stud during school hours.²⁸

Unsatisfied by the Governing Body's decision, Ms Pillay took the case to the Equality Court in July 2005.²⁹ The Equality Court was asked to decide whether the school's refusal to allow Sunali to wear a nose stud at school was unfair discrimination under the Equality Act.³⁰ In the Equality Court's decision, the discrimination was not unfair as the School Code aimed to promote uniformity.³¹

Ms Pillay appealed to the High Court in Pietermaritzburg, claiming that she was not satisfied with the Equality Court's decision. The High Court, relying on the Promotion of Equality and Prevention of Unfair Discrimination Act, ruled that the school's conduct was discriminatory.³² The Court therefore declared null and void the decision and order of the Equality Court.³³

The case was finally brought before the Constitutional Court following an application for leave to appeal. The Constitutional Court had to rule on whether the discrimination complained of by Ms Pillay stemmed from the Code or from the school's decision to refuse an exemption.³⁴ In its ruling, the Constitutional Court declared that

The decision of the Governing Body of Durban Girls' High School to refuse Sunali Pillay an exemption from its Code of Conduct to allow her to wear a nose stud, discriminated unfairly against her.³⁵

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 allowed the Constitutional Court to develop and advance the jurisprudence of equality in South Africa. This judgment highlights how the Act is central to preventing both direct and indirect discrimination and requiring institutions to reasonably accommodate groups or classes of persons.³⁶

²⁵ MEC (n 22) para 5.

²⁶ MEC (n 22) para 5.

²⁷ MEC (n 22) para 7.

²⁸ MEC (n 22) para 8.

²⁹ MEC (n 22) para 10.

³⁰ MEC (n 22) para 11.

³¹ MEC (n 298) para 14.

³² MEC (n 22) para 15.

³³ MEC (n 22) para 18.

³⁴ MEC (n 22) para 36.

³⁵ MEC (n 22) para 119 (3) and (1).

³⁶ MEC (n 22) para (46) and (117).

Furthermore, this Act provides for measures to facilitate the eradication of unfair discrimination on the grounds of gender, including education and public awareness on the importance of promoting equality and overcoming unfair discrimination.³⁷

Lastly, the Act defines measures aimed at improving the situation of people disadvantaged by unfair discrimination.³⁸ Hence, the State,³⁹ the persons operating in public domain,⁴⁰ all persons as well as non-governmental organisations, community-based organisations, and traditional organisations have the obligation to promote equality.⁴¹

The State of Burundi has a law on the prevention, protection of victims and repression of GBV, which criminalises economic violence as one of the forms of GBV.⁴² The law also sets out the government's determination to eradicate all cultural practices and stereotypes based on the idea of women's inferiority through awareness-raising campaigns.⁴³ The law promotes the equal rights of spouses over household assets and criminalises economic violence as well as preventing the surviving spouse from benefiting from household assets.⁴⁴ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 can inspire Burundi whose law on GBV is deficient in terms of explicitly criminalising discrimination against women concerning inheritance and other land rights one hand, and the introduction of measures to improve the situation of people disadvantaged by unfair discrimination on the other hand.⁴⁵

4.3.2. Laws of Succession Comparison

4.3.2.1. Wills Act 3 of 1953

South Africa has a law on succession, Wills Act 3 of 1953. A law enacted to consolidate the law relating to the execution of wills.⁴⁶ This act provides for the formalities required in the execution of a will,⁴⁷ the validity of certain wills executed in accordance with the domestic law of certain other states,⁴⁸ and the competency to make a will.⁴⁹

³⁷ Act 4 of 2000 sec 2 (e).

³⁸ Act 4 of 2000 sec 2 (g).

³⁹ Act 4 of 2000 sec 25.

⁴⁰ Act 4 of 2000 sec 26.

⁴¹ Act 4 of 2000 sec 27.

⁴² Loi portant prévention, protection des victimes et repressions des violences basées sur le genre (GBV) Act 13 of 2016 art 50.

⁴³ GBV Act (n 42) art 5.

⁴⁴ GBV Act (n 42) art 7, 50 & 59.

⁴⁵ Act 4 of 2000 sec 8 (e).

⁴⁶ Act 7 of 1953.

⁴⁷ Act 7 of 1953 sec 2.

⁴⁸ Act 7 of 1953 sec 3.

⁴⁹ Act 7 of 1953 sec 4.

Where a person dies with a valid will,⁵⁰ their estate is regulated in terms of their will. It is therefore a testate succession where the Wills Act is directly applied. However, if the deceased left an invalid will,⁵¹ a partially invalid Will, or a Will but failed to dispose of the whole estate,⁵² the rules of the Intestate Succession Act apply.

4.3.2.2. Intestate Succession Act 81 of 1987

In South Africa in cases where a person dies without a will, their estate is regulated according to the Intestate Succession Act to ensure that their estate is distributed fairly and justly among their surviving relatives. This Act establishes the order of heirs in the case of intestate succession.⁵³ The children inherit equally from their deceased parents' estate, while the spouse would also be posed to inherit equally. This form of succession in South Africa eradicates the unfair discrimination of women and girl children from inheriting fairly.

The case *Govender v Ragavayah* has been interpreted in the spirit of Intestate Succession Act.⁵⁴ In this case, the deceased died intestate leaving behind a wife to whom he had been married since 2004 under Hindu rites. He also left behind his father and mother, who did not contest the union.⁵⁵ After the death of his son in 2007, the father was appointed executor in the deceased's estate.⁵⁶

The applicant brought the case before the High Court of South Africa requesting that the term 'spouse' as defined under the Intestate Succession Act include the surviving to a monogamous Hindu marriage.⁵⁷

This case was essentially about who should inherit the estate given that if the applicant was successful, she would inherit the entire estate. Similarly, if the defendants won the case, they would inherit the entire estate in equal shares.⁵⁸

In the order granted by the Court, the applicant was declared a spouse under section 1 of the Intestate Succession Act. Accordingly, she was declared heir of the estate.⁵⁹ Prior to this Act,

⁵⁰ Act 7 of 1953 sec 2.

⁵¹ B Sember 'What makes a will invalid' <https://www.legalzoom.com/articles/what-makes-a-will-invalid> (accessed 07 October 2024).

⁵² J-L Koste 'Wills, Estate, and Trusts: Intestate Succession-What does it mean to die without a will?' <https://dkvg.co.za/wills-estates-and-trusts-intestate-succession-what-does-it-mean-to-die-without-a-will/> (accessed 07 October 2024).

⁵³ Act 81 of 1987 sec 1 (1).

⁵⁴ *Govender v Ragavayah* 2009 (3) SA 178 (D) para 1.

⁵⁵ *Govender* (n 54) para 12.

⁵⁶ As above.

⁵⁷ *Govender* (n 54) para 1.

⁵⁸ *Govender* (n 54) para 11

⁵⁹ *Govender* (n 54) paras 44 (2) and (3).

the Court set a legal precedent for cases involving the inheritance rights of surviving spouses in religious marriages or customary marriages.

In the cases where the deceased died intestate and neither has a spouse nor descendants, the estate is to be divided among his family members in accordance with the provisions of the Intestate Succession Act 81 of 1987 section 1(1) (d) (i) to section 1(1) (1) (f).

4.3.2.3. Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

South Africa has also adopted the Reform Customary Law of Succession and Regulation of Related Matters Act in 2009.⁶⁰ This Act prioritizes women's rights to property, as it protects extra-marital children and women whose unions are recognised under customary law. Hence, this act intends to 'clarify certain matters relating to the law of succession and the law of property.'⁶¹

This act governs certain aspects of the customary law of succession which used to be regulated by section 23 of the Black Administration Act. This section was amended because of the principle of male primogeniture which it contained.⁶² The principle discriminates against women insofar as it hinders women's access to land.⁶³

In Burundi, there is a legal gap in the inheritance field. No law comparable to those mentioned above exists yet. These different laws implemented by South Africa can inspire the Burundian legislator to fill this gap. The Wills Acts would help Burundi whose law on the establishment and management of the notarial profession is deficient as regards the validity and competence to make a will.⁶⁴

As for the Intestate Succession Act, it would help Burundi to establish the order of heirs and to ensure non-discrimination in the division of assets that constitute the estate. Finally, the law on the reform of customs would inspire the Burundian legislator to enact a specific law protecting children from extra-marital unions and would abolish customary rules that discriminate against women in terms of access to land.

⁶⁰ Act 11 of 2009.

⁶¹ As above.

⁶² Act 38 of 1927 s 23.

⁶³ *Bhe v Khayelitsa* 2005 1 BCLR 1 (CC) para 138.

⁶⁴ Organisation of notarial profession in Burundi art 67.

4.3.2.4. Matrimonial Property Act 88 of 1984

South Africa has a Matrimonial Property Act which regulates matrimonial property.⁶⁵ Due to the promulgation of this Act, marital power was abolished.⁶⁶ The marital power holds wives in a position similar to minors in relation to their husbands. Therefore, it limits women in their independent access to property, credit, reproductive health services, and inheritance.⁶⁷ Women's rights were thereby promoted to the point where they could now enjoy the same rights as men in terms of property ownership.⁶⁸

This Act recognises two types of marital property regimes marriage in community of property.⁶⁹ It also recognises marriage out of community of property.⁷⁰ If the couple chooses marriage out of community of property, a contract specifying whether the marriage is out of community of property with accrual or excludes expressly the accrual must be concluded.⁷¹ Otherwise, the marriage is automatically governed under the marriage in community of property regime.

When a marriage is dissolved upon the death of one of the spouses or divorce, the division of the estate is calculated according to the marital regime governing the marriage. The cases below show how this law protects and promotes the rights of the surviving spouse.

NS v MF case

The High Court has interpreted *NS v MF case* in the light of the Matrimonial Property Act. This case was between spouses married under the regime of community of property since 2015. They had had 2 children and wanted to bring their marriage to an end.⁷²

The Court had to rule on certain issues, including to whom the residence of 2 children will be awarded, the contact which should be awarded to the parent who does not reside with the children, the maintenance payable by the spouse who does not reside with the children, the division of property and joint estate, and the costs of the divorce proceedings.⁷³ In the joint

⁶⁵ Act 88 of 1984.

⁶⁶ Act 88 of 1984 s 11(1).

⁶⁷ N Arekapudi and N M S Martins 'Challenging entrenched marital power in South Africa' (2021) *Women, Business and the Law* 3.

⁶⁸ Arekapudi and Martins (n 67) 4.

⁶⁹ Act 88 of 1984 s 14, 15, 16 & 17.

⁷⁰ Act 88 of 1984 s 2,3,4,5,6,7,8,9 & 10.

⁷¹ Act 88 of 1984 s 6 (1).

⁷² *NS v MF* 2023 ZAGPJHC 1065 para 25.

⁷³ *NS* (n 72) para 11.

estate, the spouses had 3 immovable properties, movable property, life insurance, pension interest, and income.⁷⁴

In the divorce judgment, the Court awarded the applicant parental guardianship of the children. The other parent was granted the right to maintain personal relations with the children and was required to contribute to their maintenance.⁷⁵ Regarding the division of the joint estate, the applicant received 50% of the shares of the property located in Danville while the defendant received 100% of the property located in Loeries Park. The judge appointed a liquidator and asked the parties to determine the net value of the undivided property, including the 3rd property and the movable real property.

This case sets a precedent for equality before the law in divorce cases. The Court applied the law by dividing the estate and gave the wife a pension so that she wouldn't be left alone with the responsibility of looking after the children after the divorce.

M S v M J case

In *M S v M J*, the High Court of South Africa applied the Matrimonial Property Act to rule on the case. The appellant and the first respondent had been married since 2017 out of Community of Property, with the application of the Accrual system.⁷⁶ When this present case was brought before this Court, the applicant and the first respondent had already initiated divorce proceedings.⁷⁷

The appellant applied to this Court for an urgent interdictory relief prohibiting the respondents from selling or disposing of the former matrimonial home pending finalisation of the divorce proceedings between the appellant and the first defendant.⁷⁸ In addition, the appellant seeks anti-dissipation interdict, if the property has already been sold, whereby the proceeds of the sale of the property are to be paid into and held in trust until the divorce proceedings are finalised.⁷⁹

The appellant argued that the alienation of one of the first defendant's properties before the dissolution of their marriage by divorce prejudiced her claim. In other words, the alienation

⁷⁴ *NS* (n 72) para 34, 43, 44, 46, 47, 48 and 49.

⁷⁵ *NS* (n 72) para 74 (1), (2), (3), (4) and (5), 6 and 7.

⁷⁶ *S M v J M* 2023 ZAGPJHC 704 para 3.

⁷⁷ *S M* (n 76) para 5.

⁷⁸ *S M* (n 76) para 1.

⁷⁹ *S M* (n 76) para 2.

affects the reduction in the amount of the assets before the determining date of the accrual claim, thereby reducing the difference in accrual between the two estates.⁸⁰

After hearing the case, the appellant won. The Court heard the case as an urgent application. In addition, the defendants were enjoined from selling the property before the end of the divorce proceedings. If the property had already been sold, the Court ordered that the proceeds of the sale of the property should be paid into and held in a Trust account of an Attorney until the end of the divorce proceedings. Finally, the first and second defendants were ordered to pay the legal costs.⁸¹

The Matrimonial Property Act promotes women's rights. In the regime out of Community of Property with Accrual system, the assets of the spouses remain separate during the marriage. The marriage dissolution, by divorce or death, entitles the spouse who has accumulated the smaller accrual to a claim equivalent to half of the difference between the accrual of the respective estates of spouses.⁸² This contributes to valuing the wife's unpaid work in the home.⁸³

The Matrimonial Property Act can inspire Burundi on how to promote equality and non-discrimination in the events of divorce or widowhood in the sense that the Code of Persons Family of Burundi is deficient in the regulation of matrimonial property regimes and the abolition of marital power.⁸⁴

4.4. Codification of Customary Law

Customary law is defined as the customs and usages traditionally observed among the indigenous African peoples of South Africa, which form part of the culture of these peoples.⁸⁵ At the time of the British occupation of South Africa, Roman-Dutch law was the fundamental law of the land.⁸⁶ However, they had a non-interference policy in the usages and customs of the indigenous populations, on the one condition that these were not contrary to public order and the principles of natural justice.⁸⁷

⁸⁰ *S M* (n 76) para 7.

⁸¹ *S M* (n 76) para 47 1, 2,3, &4.

⁸² Act 88 of 1984 s 3,4.

⁸³ <https://theconversation.com/south-african-marriage-ruling-is-a-win-for-divorcees-and-surviving-spouses-it-guides-the-sharing-of-their-assets-217695>.

⁸⁴ Burundi Personal and Family Code art 122.

⁸⁵ Act 120 of 1998 sec 1.

⁸⁶ C Rautenbach 'South Africa Common and Customary Law of Intestate Succession: A question of Harmonisation, Integration or Abolition' 2008 *Journal of Comparative Law* 120.

⁸⁷ As above.

In 1927, some customs and usages were brought together in the Black Administration Act 10 to deal with disputes between Africans.⁸⁸ Customary law was universally recognised, although it was applied by customary courts and special courts set up to deal with cases ‘between natives involving matters of custom followed by natives.’⁸⁹ Although this law has been modified, the customary law is recognised by the Constitution of the Republic of South Africa.⁹⁰ It must be applied by the Courts when customary law is applicable,⁹¹ and consistent with the Bill of Rights.⁹² It should be emphasised that customary marriages are recognised and regulated by the Recognition of Customary Marriages Act 120 of 1998. This act contributes to the promotion of gender equality as it safeguards equal status and capacity of spouses.⁹³

Customary Law is not static, it is a living law based on the actual practices of people or their day-to-day lives.⁹⁴ Codification of customary law is a step towards promoting women's inheritance rights, insofar as this law needs to change and adapt to the realities of modern society.

In Burundi, customs are not yet codified. By referring to customs in the litigation of land inheritance, Burundian judges are exposed to an undefined normative framework.⁹⁵ Therefore, judges refer to a set of local practices, inherited from the past or adapted, constantly evolving and variable, which are transmitted from one person to another.⁹⁶ Most Burundian judges favour equality between men and women, but in the absence of a specific law on inheritance, they are reticent about the direct application of constitutional principles, as they are convinced that judgments issued on this basis are often not well received by the community.⁹⁷

4.5. The Judicial systems available to deal with discrimination

South Africa has established specialised Courts known as Equality Courts to hear and determine allegations of unfair discrimination, hate speech, or harassment.⁹⁸

⁸⁸ I Moodley ‘The Customary law of intestate succession’ PhD Thesis, University of South Africa, 2012 49.

⁸⁹ Act 38 of 1927 sec 11(1).

⁹⁰ The Constitution of the Republic of South Africa sec 211.

⁹¹ The Constitution of the Republic of South Africa sec 211 (3).

⁹² The Constitution of the Republic of South Africa sec 39 (3).

⁹³ Act 120 of 1998 s 6.

⁹⁴ C M Fombad ‘Gender equality in African customary law: has the male ultimogeniture rule any future in Botswana?’ (2014) *The Journal of Modern African Studies* 485. See also R Ozoemena ‘Living Customary Law: A Truly Transformative Tool?’ (2014) *Constitutional Court Review* 148.

⁹⁵ RCN Justice et Démocratie ‘Droits et coutumes’ (2008) 19.

⁹⁶ As above.

⁹⁷ RCN Justice et Démocratie (n 371) 20

⁹⁸ Act 4 of 2000 sec 16, 21.

The victims of unfair discrimination and persons whose right to equality has been infringed have the right to legal remedies.⁹⁹ These courts have already delivered a variety of judgments, including the case *MEC for Education: Kwazulu-Natal v Pillayan* analysed above. Cases of discrimination are also brought before the country's other courts. Since non-discrimination is a constitutional principle, the South African Constitutional Court regularly rules on cases of discrimination.

The judicial system in South Africa has been a powerful force in promoting women's inheritance rights. For instance, the principles of customary law that discriminated against women on the grounds of sex, and the acts that protected these principles, were declared unconstitutional by the Constitutional Court. The judges did, however, promote the principles of equality and non-discrimination enshrined in section 9 of the Constitution, which is the supreme law.¹⁰⁰ Two cases in which the Constitutional Court dealt with women's inheritance rights are analysed below.

Bhe v Magistrate Khayelitsha

This case concerns the estate of the deceased, who died intestate in October 2002. He left behind a woman with whom he had lived for 12 years and two minor daughters from the union.¹⁰¹ Therefore, in the interest of the two children, Bhe (the appellant) applied to the Court. She argued that the principle of primogeniture in succession as provided for by customary law should be declared unconstitutional.¹⁰² The Court was thus called upon to answer the question of whether the two daughters born from an extra-marital union, had the right to inherit their father's estate.¹⁰³ The estate comprised the informal temporary shelter, the property on which it stood, and various items of moveable property that Mrs Bhe and the deceased had acquired in common over the years, including building materials for the house they intended to build.¹⁰⁴ Under the system of intestate succession under section 23 and the regulations, in particular, regulation 2(e), the two minor children did not qualify to be heirs to their deceased father's intestate estate.¹⁰⁵

⁹⁹ Act 4 of 2000 sec 2 (f).

¹⁰⁰ The Constitution of the Republic of South Africa sec 2.

¹⁰¹ *Bhe* (n 63) paras 10 & 14.

¹⁰² *Bhe* (n 63) para 11.

¹⁰³ *Bhe* (n 63) para 3.

¹⁰⁴ *Bhe* (n 63) para 14.

¹⁰⁵ *Bhe* (n 63) para 16.

The Constitutional Court declared invalid and inconsistent with the Constitution section 23 of the Black Administration Act 38 of 1927, the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200), and Section 1(4) (b) of the Intestate Succession Act 81 of 1937. Furthermore, the rule of male primogeniture was declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. Lastly, in the application of sections 1(1) (c)(i) and (1) (4) (f) of the Intestate Succession Act 81 of 1987 to the estate of the deceased person who is survived by more than one spouse Nonkululeko Bhe and Anelisa Bhe were declared the sole heirs of the deceased estate of Vuyo Elius Mgolombane, registered at Khayelitsha Magistrates' Court under reference no 7/1/2-484/2002.¹⁰⁶

Shibi v Sithole

This case also concerns intestate succession. Daniel Salomon Sithole died intestate in Pretoria in 1995. The deceased was single, had no descendants, parents nor grandparents. He left behind a sister. His closest male relatives were his cousins Mantabeni Sithole and Jerry Sithole (first and second respondents).¹⁰⁷

Considering that the deceased was a black man, and that the estate was intestate, the provisions of section 23 of the Black Administration Act 38 of 1927 should be applied. In accordance with Regulation 3(2) of that Act, an enquiry was held to determine the persons entitled to the estate of the deceased.¹⁰⁸

Mrs Charlotte Shibi (the appellant in this case) therefore applied to the Court on the basis that she had been excluded from the estate despite being the sister of the deceased.¹⁰⁹ In other words, her application challenged the constitutional validity of the customary law principle of the right of descent and section 23 of the Black Administration Act 38 of 1927.¹¹⁰ The main question was whether the appellant was entitled to inherit her brother's intestate estate.¹¹¹

¹⁰⁶ *Bhe* (n 63) para (2), (3), (4), (5), (7), &136 (11) (a) (i).

¹⁰⁷ *Shibi v Sithole 2005 (1) SA 580 (CC)* para 21.

¹⁰⁸ *Shibi* (n 63) para 22.

¹⁰⁹ *Shibi* (n 63) para 21.

¹¹⁰ *Shibi* (n 63) para 31.

¹¹¹ As above.

In its decision, the Court declared Charlotte Shibi the sole heir of the deceased estate of Daniel Solomon Sithole registered at Pretoria North Magistrate District of Wonderboom under the reference no 7/1/2-410/95.¹¹²

These two cases were heard by the Constitutional Court together because they all concerned succession. These cases fundamentally changed women's inheritance rights to the extent that they challenged customary law, specifically the principle of primogeniture, which recognised the right of inheritance to male descendants only and discriminated unfairly on the grounds of gender, age, and birth.¹¹³ Not only were the principles and the statutory laws declared invalid, but South Africa's national legislation adopted gender-affirming and neutral legislation such as the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009.

The State of Burundi does not have specialised courts in Equality, therefore, the jurisdiction to hear discrimination claims falls to the ordinary courts. Like South Africa, Burundi has a Constitutional Court whose jurisdiction includes ruling on the constitutionality of laws and interpreting the Constitution.¹¹⁴ Compared with the Constitutional Court of South Africa, the Constitutional Court of Burundi is not actively involved in ruling on the unconstitutionality of laws and customs.

4.6. Chapter conclusion

This chapter has analysed the lessons that Burundi can learn from South Africa's legal reforms in the context of women's property and inheritance rights. This research has shown that the Republic of South Africa, having guaranteed the right to equality and non-discrimination in its Constitution,¹¹⁵ subsequently adopted a national legal framework in accordance with the Constitution. In fact, South Africa had already codified customary law; it then abolished certain principles of customary law that were incompatible with the Constitution and finally adopted other laws to better protect categories of people disadvantaged by unfair discrimination.¹¹⁶

Burundi has limited itself to guaranteeing the principle of equality and non-discrimination in its Constitution.¹¹⁷ Yet, contrary to South Africa, the country still has many legal gaps, especially in the domains of inheritance and matrimonial regimes. Additionally, laws that are incompatible with the Constitution are still in force, and customary law has yet to be codified.

¹¹² *Shibi* (n 63) para 136 (11) (b) (i).

¹¹³ *Shibi* (n 63) para 147.

¹¹⁴ Organisation et fonctionnement de la Cour Constitutionnelle Act 20 of 2019 art 24.

¹¹⁵ The Constitution of the Republic of South Africa s 9.

¹¹⁶ The Constitution of the Republic of South Africa s 9(2).

¹¹⁷ The Constitution of Burundi arts 13 and 22.

Faced with this situation, Burundian courts and tribunals continue to apply customs and laws that discriminate against women.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

In Burundi, the issue of inheritance rights for women remains problematic. This research has shown that traditional inheritance practices limit access to land for women. This discrimination based on sex affects their right to food, access to credit, and other resources such as agricultural inputs; it also undermines women's decision-making power.

The Constitution of Burundi guarantees the right to property to every person and the right to equality and non-discrimination. This implies a guarantee not to be excluded from social and economic life on the grounds of gender, and a guarantee of protection by law. However, there are gaps in the legislative and institutional framework. The national legal framework that protects women's rights is incomplete. Specific laws governing inheritance and matrimonial regimes are not yet in place. This situation is due to a lack of political will. Regarding the institutional framework, the Ministry of National Solidarity, Human Rights and Gender, whose main responsibility is to promote gender equality, is faced with various challenges such as the complexity of its mandate and the lack of material and human resources, which limits the effectiveness of its interventions.

Women's economic empowerment implies the right to access resources and is a precondition for achieving gender equality. International, regional, and sub-regional standards are the guarantees that the State must uphold and enforce. Burundi is a monist country that has incorporated all the treaties it has ratified into its constitution. Nevertheless, Burundian judges prioritise national law; and given the gaps in the national legal framework protecting women's rights, they apply traditional practices whenever they are called upon to rule on land inheritance issues. They rarely apply international law when they can do so.

Moreover, this research took into consideration the experience of South Africa, where customary practices treated women as permanent minors who could not own or inherit property. In addition to the guarantee of equality and non-discrimination based on gender, the South African Constitution of 1996 introduced legislative measures to further protect and promote categories of people disadvantaged by unfair discrimination. The lessons drawn from the South African experience include the enactment of comprehensive, gender-affirming, and neutral legislation, but also, and more importantly the foresight of the judges, who in the presence of

customary law discriminating against women, gave the supremacy to the Constitution and international law. They went so far as to recommend amendments for certain acts before the legislative power. The promotion of property and inheritance rights for women in South Africa is attributed to these legal reforms.

5.2 Recommendations

Based on the experience of Burundi and the lessons learned from the South African experience, this research proposes the following recommendations to the State of Burundi, Parliament, judges, NGO, and community leaders to promote women's inheritance rights.

Short-term recommendations

Parliamentary

- a. The Parliament must, in all urgency, enact a law on succession. This law should include provisions reaffirming the principle of the equality of men and women; it should also establish non-discriminatory order of heirs and the nature of the assets to be inherited.
- b. Parliament should also enact a matrimonial property law, which would govern the partition of spouses' property in case of divorce and death.
- c. Parliament should align national laws, particularly Article 122 of the Personal and Family Code, with the current Constitution.
- d. Parliament should finally codify custom. The Burundian legislator should learn from the South African legislator by compiling customs and practices relating to inheritance in a single document that they would call Customary Law. The legislator should then ensure that the Customary Law is in harmony with the Constitution.

Judges

- a. While awaiting the adoption of the Succession Act and Matrimonial Regulations Act, Burundian judges should take steps to apply international human rights treaties directly.

State of Burundi

- a. The State of Burundi should significantly increase the budget of the Ministry of National Solidarity, the Human Person and Gender. It should also continue to support women's economic initiatives at the community level.
- b. The State of Burundi, through its Ministry of National Solidarity, the Human Person and Gender, should intensify community awareness-raising on the laws and policies

already in place, focusing particularly on gender equality and the inclusion of women in the control of household assets.

- c. The State of Burundi, through the Ministry of Justice, should intensify the training of judges to ensure their sensitivity to gender equality.

NGOs

- a. The NGOs should pursue advocacy activities in support of the enactment of the Succession Act and the Matrimonial Regimes Act.
- b. Pursuant to Article 24 of the law on the Constitutional Court, NGOs and other women's rights activists should take action before the Constitutional Court on the unconstitutionality of the customary rules governing inheritance in Burundi.
- c. The NGOs are also called upon to continue supporting the initiatives of the Government of Burundi, in particular community awareness-raising on gender equality, and women's economic empowerment.

Mid-term recommendations

The State of Burundi

- a. In the era of digitalisation, it is unfortunate that the most recent publications of Supreme Court decisions date back to 2012. The State of Burundi should therefore make a budget available to ensure the continuity of this activity of the Supreme Court of Burundi. Although not bound by the rule of precedent, Burundian judges are allowed to refer to case law which is one of the sources of the law. Digitalisation would offer judges, particularly those in lower courts, the opportunity to keep informed about good practices. It would also help NGOs and activists in their work of raising awareness among judges and the community.

Word count: 20 003.

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