



# EAST AFRICAN LAW JOURNAL

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*Esther Kathini Kyalo\* Wanjiku Mukabi Kabira\*\* Agnes Meroka-Mutua\*\*\**

# THE CONCEPT OF PERSONHOOD, WOMEN AND THE LAW IN KENYA

*Esther Kathini Kyalo\**

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## ABSTRACT

*Women are always becoming and belonging to by evolving from daughters, sisters, mothers, wives and widows. Personhood in Africa is tied to the family, the community and it is also spiritual. It is never defined in isolation; it is defined in relationships. This idea of communal living prevalent in Africa has intrinsic value; it is a product of African humanism which is concerned with the preservation of life, systems and order.<sup>1</sup> All these stages of life women go through are communal rather than individual. While African feminism embraces and celebrates women through their life cycle, it is evident that women are disproportionately affected by these relationships through customs, traditional values and beliefs, religion and the law. Therefore, the purpose of this article is to interrogate how the concept of personhood in Kenya is defined and interpreted through a woman's life cycle and how it reflects in law and its implication to the economic status of women. African and legal feminist frameworks will be used to discuss the concept of personhood, its interpretation from the different standpoints, challenges women face as a result and lastly, strategies that women use to overcome these challenges. This article aims to show the interrelationship and importance of taking into consideration the multifaceted nature of becoming from an African woman's standpoint, how we define and interpret women in law, their voices and experiences as individuals capable of being their own person and how legislations can be made to reflect these lived realities of African women to promote their economic status.*

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1 Adjei, Stephen Baffour. "Conceptualising personhood, agency, and morality for African psychology." *Theory & Psychology* 29, no. 4 (2019): 490

## I. INTRODUCTION

This article delves into the concept of personhood with emphasis on women's legal personhood in connection with the status of their property rights and ownership. It provides an in-depth assessment of women as human legal persons with the legal capacity to enter into contracts, such as marriage contracts, commercial contracts, proprietary contracts, and employment contracts. A Legal person is any human or thing, such as a corporate body with legal capacity to sue or be sued and enter into contracts.<sup>2</sup> In Kenya, women are still pursuing their personhood.<sup>3</sup> From the onset, I regard women as human legal persons who can sue and be sued in accordance with the prevailing laws that govern women's rights to property in Kenya. However, it is critical to investigate how this legal person as defined in law affects their right to fully enjoy their property rights. This is because most of our laws have been influenced by Common law that does not take into consideration the multifaceted nature of being a woman in Kenya and the intersectionalities that come into play such as culture and religion among others.

While it is presumed that Kenyan women enjoy the same rights as the menfolk (sons, brothers, husbands, and fathers), this is yet to be realised especially when it comes to property rights and ownership. Legislations in Kenya have allowed women to confer their justice assertions as provided by the law but their efforts are thwarted by deeply entrenched doctrines reinforced by religion, culture, and the law itself.<sup>4</sup> This work rests on the view that women are yet to overcome observable patriarchal constraints that prevent them from exercising their legal personhood especially with regard to enjoyment of property rights. The use of African and legal feminist methodology will aid in unpacking issues arising and how the law can be used to address, empower and uplift the status of women to ensure full enjoyment of rights as envisioned in the Constitution of Kenya, 2010. Since their personhood is predominantly 'covered' by the husband, does this render their citizenship incomplete?<sup>5</sup> Since this is the Constitutional position in Kenya, my analysis aims at ascertaining any past or prevailing detractions of women's legal personhood, the article will use case analysis to identify and highlight key issues that arise with regards to personhood and women's position within this concept and how they are situated within the law.

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2 Horsman, Yasco, and Frans-Willem Korsten. "Introduction: Legal Bodies: Corpus/Persona/Communitas." *Law & Literature* 28, no. 3 (2016): 279.

3 Burton, Antoinette. "Accounting for Colonial Legal Personhood: New Intersectional Histories from the British Empire." *Law and History Review* 38, no. 1 (2020): 147.

4 Hodgson, Dorothy L. "Women's rights as human rights: women in law and development in Africa (WiLDAF)." *Africa Today* (2002): 13.

5 Parpart, Jane L. "African Womanhood in Colonial Kenya 1900–50, by Tabitha Kanogo." (2010): 347.

Some key terms described include legal personhood, marital power, coverture, *feme sole*, *feme covert*, widowhood, and legal personhood on the subject of women's land and property rights. Marital power refers to the overarching authority of a marital partner (in most cases, a husband) over the other during the survival of a marriage.<sup>6</sup> The wife is largely considered to be the husband's subordinate. Under common British Law, *Feme sole*<sup>7</sup> literally means 'a woman alone' who has never been married, divorced or widowed and has the legal capacity to manage her own property. *Feme covert* refers to a married woman who is 'covered' by her husband's marital power, and does not have the legal capacity to exercise her own rights without involving the husband. Legal personhood is the self-identity of a human legal persona whose legal rights are recognised within specific legal systems.<sup>8</sup>

Persona, with reference to the Roman jurisprudence, refers to "a human being; a being or entity capable of enjoying legal rights or subject to legal duties; a natural person or a corporation; a person's political and social rights collectively; a person's legal capacity."<sup>9</sup> What describes a human being as a person? This question prompts one to reflect on humanity qualities and personhood qualities since they define the basis of our existence. Irrespective of who a person is or what a person does, personhood is the foundation of his or her unique standing in the world. Personhood allows one to exercise his or her legal-political capacity as a rational citizen.<sup>10</sup>

The term 'person' therefore seems to be used in two distinct fashions: traditionally referring to the purely biological – to individuals belonging to the species *Homo sapiens* – but lately also referring to individuals who share comparable characteristics – akin to the mental life that is characteristic of normal adult human beings. For Plato, persons are souls, able to exist apart from bodies. It is natural to read Plato, especially in the *Phaedo*, as holding a Prison Model of embodiment: an embodied person is different from a disembodied person roughly as a prisoner in a cell is different from a prisoner freed from his cell.<sup>11</sup>

Simone de Beauvoir in *The Second Sex*, argues that we are brought up in a world defined by men, where women are defined as 'other' or as 'not normal'.<sup>12</sup> She

6 Curran, William J. "An historical perspective on the law of personality and status with special regard to the human fetus and the rights of women." *The Milbank Memorial Fund Quarterly*. Health and Society (1983): 61-62.

7 Ibid

8 Sharpe, Robert J., and Patricia I. McMahon. *The Persons Case: the origins and legacy of the fight for legal personhood*. University of Toronto Press, 2007.

9 Odoor, Ada. "Sharing the Citizenship of Women: A Comparative Gendered Analysis of the Concept of "Legal Personhood" in Africa." (2002).

10 Moder, Ally. "Women, personhood, and the male God: A feminist critique of patriarchal concepts of God in view of domestic abuse." *Feminist Theology* 28, no. 1 (2019): 88.

11 Hall, Robert W. "Plato and Personhood." In *The Personalist Forum*, vol. 8, no. 2, pp. 82-83. 1992.

12 Moi, Toril. "While we wait: The English translation of *The second sex*." *Signs: Journal of Women in Culture and Society* 27, no. 4 (2002): 1011.



asserts that women are defined by a certain lack of qualities or viewed as afflicted with a natural defectiveness, as asserted by Aristotle, and seen as 'imperfect men'. She claims that no woman in society can act outside this constriction that defines man as the standard, or the 'normal'.

The terms masculine and feminine are used symmetrically only as a matter of form, as on legal papers. In actuality the relations between the two sexes is not quite like that of two electrical poles, for man represents both the positive and the neutral, as is indicated by the common use of man to designate human beings in general; whereas woman represents only the negative, defined by limiting criteria, without reciprocity.<sup>13</sup>

In "The Damnation of Women," a chapter from *Darkwater: Voices from Within the Veil*, Du Bois exemplifies his ability to use intersectional approaches to critique an oppression that is not his own. He establishes that "despite the noisier and more spectacular advance of [his] brothers, [he] instinctively feel[s] and know[s] that it is the five million women of [his] race who really count."<sup>14</sup> Du Bois readily discusses black women and the connections between racial and gendered oppressions. He provides a detailed analysis of the inequalities between black women, white women, and black men. He envisions a world where:

we will pay women what they earn and insist on their working and earning it; we will allow those persons to vote who know enough to vote, whether they be black or female, white or male; and we will ward race suicide, not by further burdening the over-burdened, but by honoring motherhood, even when the sneaking father shirks his duty.<sup>15</sup>

Du Bois' writings champion women's rights, denounce their exploitation, and extol women as heroic strugglers. While condemning the oppression of African American women, Du Bois became a vocal supporter of women's equality and a tireless critic of patriarchy. He consistently emphasized the equality of women with the least rights-African American girls and women. A pioneering feminist scholar and interpreter of Du Bois's pro-feminism, Bettina Aptheker notes that Du Bois began his scientific studies of Africans and African Americans "in an era when predominant scientific and theological opinion held the Negro to be an inferior, if not subhuman, form."<sup>16</sup>

As portrayed under common law, the wife is largely considered her husband's subordinate. Under common law, and more precisely in civil law jurisdictions, marital power was described "as a wife was legally an incapax under the

<sup>13</sup> Ibid

<sup>14</sup> W. E. B. Du Bois, "The Damnation of Women," in *Darkwater: Voices from Within the Veil* (New York: Dover, 1999), 85. First published 1920.

<sup>15</sup> Ibid

<sup>16</sup> James, Joy. "The profeminist politics of WEB Du Bois with respects to Anna Julia Cooper and Ida B. Wells Barnett." *WEB Du Bois on race and culture* (1996): 145.

usufructory tutorship of her husband.”<sup>17</sup> This means that one spouse (in many cases, a husband) has a greater influence on the behaviour of his/her significant other. Marital power is measured in terms of: (a) resources, such as income or level of education; (b) power processes, such as attaining goals; or (c) who generally has the final say when making key family decisions, which is commonly used<sup>18</sup>.

Luke<sup>19</sup> provides a multidimensional view of marital power by theoretically categorizing and describing them as three types: latent, invisible, and manifest. Latent power denotes the unseen interests of the spouse having marital power.<sup>20</sup> Invisible power dimension focuses on non-decisions, which help in eliminating any threat to the powerful spouse. This view of marital power through non-decisions focuses on potential issues, which are predominantly invisible.<sup>21</sup> Manifest power arise when making decisions about strategies, conflicts and change.

Past studies have consistently shown that marital power and marital satisfaction are symbiotic.<sup>22</sup> One of the studies reported that highest levels of marital satisfaction are common among couples that shared power. Furthermore, the study reported that compared to husband-dominant spouses, wife-dominant couples were the least satisfied.<sup>23</sup> A study conducted by Stuart<sup>24</sup> involving distressed couples revealed that marital distress can be identified by assessing a couple’s decision-making power. The majority of distressed couples who participated in the study could not agree on ways of allocating their decision-making power. One may deduce that couples with no ideal strategy for making a decision use negative power strategies.

Cromwell and Olson<sup>25</sup> categorises marital power into three domains: power bases, power processes, and power outcomes. The scholars define power bases as resources that a family member owns and uses them to control other members. Power processes are defined as the direct observation and measurement of various interactions within the family and among family members. Power outcomes take account of the decision makers in the family and those examining the connection between spouse’s mutual responses to their individual responses.

17 Leonhardt, Nathan D., Brian J. Willoughby, W. Justin Dyer, and Jason S. Carroll. “Longitudinal influence of shared marital power on marital quality and attachment security.” *Journal of Family Psychology* 34, no. 1 (2020): 1.

18 Hollerbach, Paula E. “Power in families, communication, and fertility decision-making.” *Population and Environment* 3, no. 2 (1980): 161.

19 Lukes, S. “Power: A Radical View (London: British Sociological Association).” (1974).

20 Bulanda, Jennifer Roebuck. “Gender, marital power, and marital quality in later life.” *Journal of women & aging* 23, no. 1 (2011): 13.

21 Fowers, Blaine J. “His and her marriage: A multivariate study of gender and marital satisfaction.” *Sex Roles* 24, no. 3 (1991): 215

22 Ibid

23 Jory, Brian, and Carrie L. Yodanis. “Power-Family relationships, marital relationships.” *Journal of Comparative Family Studies* 14 (2015): 40.

24 Stuart, Richard B. *Helping couples change: A social learning approach to marital therapy*. Guilford Press, 2003.

25 Miller, Richard B., W. Justin Dyer, and Randal D. Day. “Development and Initial Validation of the Perceived Power Imbalance Scale.” *Contemporary Family Therapy* (2021): 1-12.

A 1960 study by Blood and Wolfe<sup>26</sup> interviewed 900 wives with the purpose of assessing the distribution of power between spouses during the survival of marriage. To find out which spouse made decisions in the family, the study interviewed the wives about how they make decisions within their marriages. The researchers argued that the spouse who frequently sways decisions in his or her favour within the marriage was exercising marital power. The respondents answered eight questions about decisions typically made by couples in a family or marriage set-up. The decisions were as follows: they type of job a husband should have; weekly expenses on food; and the need to secure life insurance.<sup>27</sup> Blood and Wolfe found out that a spouse with better education (social resource), higher income (economic resource), and status (socio-political resource) usually has the upper hand in decision making within the marriage.<sup>28</sup>

On hypothetical and practical grounds, many researchers questioned the nature of power in marriage as concluded in this highly influential study. Blood and Wolfe's conclusions on marital power set off international debates for an in-depth understanding of the nature of marital power. One of researchers<sup>29</sup> raised a key question as to whether the weight of each decision presented in the interview questions indicated the exercise of marital power. This prompts further enquiry about how decisions in marriage should be weighted, and to what extent power relations affect the entire household.

## II. WOMEN AND PERSONHOOD IN KENYA

In Kenya, the law does not take into consideration the dynamics in marital power in Kenyan relationships, women are still seeking clarifications on the legal approach to take when asked to prove their contribution during the survival of marriage. The wife is largely considered her husband's subordinate, a position that blatantly underestimates the marital power of Kenyan women. *Feme coverts* already lag far behind men in exercising their property rights and ownership. In most property dispute cases, men have more resources to put behind claims that they are owed all or the majority of assets. Women often don't have the time or money to fight for their property rights in court, or simply don't know how.<sup>30</sup> Most women who are caught up in property disputes do not have the capacity even to file suit. Most of them just give up, relieved that their marriage is over, and want only to move on.

26 Szinovacz, Maximiliane E. "Husbands and wives. Dynamics of married living." *Journal of Marriage and Family* 62, no. 3 (2000): 855.

27 Ibid

28 Chien, Wen-Yin, and Chin-Chun Yi. "Marital power structure in two Chinese societies: Measurement and mechanisms." *Journal of comparative family studies* 45, no. 1 (2014): 93-111.

29 Centers, Richard, Bertram H. Raven, and Aroldo Rodrigues. "Conjugal power structure: A re-examination." *American Sociological Review* (1971): 268.

30 Kirui, D. (2018). *Still No Guarantee of an Equal Share in Divorce for Kenyan Women*. Women's Advancement. Retrieved 6 May 2022, from <https://deeply.thenewhumanitarian.org/womensadvancement/articles/2018/05/28/still-no-guarantee-of-an-equal-share-in-divorce-for-kenyan-women>.

In *FIDA v Attorney General & another*,<sup>31</sup> when making his ruling, Justice John Mativo noted that the Matrimonial Property Act makes allowances for nonmonetary contributions to the household, so legally the division of a couple's land and property will take into account the woman's unpaid work such as upkeep of the home, bearing and raising children, and farm labour. However, it's often difficult for women to quantify those contributions and most are never properly compensated for the unpaid work they do over the course of their marriages. In Kenyan culture, a woman is always involved in unpaid care work and labour at home when the man is working and buying property. And in the case of a divorce or dispute, the woman is taken to task to prove how much she worked and contributed so that the court can award them in financial terms or as otherwise determined.

*Feme sole* literally translates to 'a woman alone' who has never been married or who is divorced or widowed. Under common British law, a *feme sole's*<sup>32</sup> had the legal capacity to exercise her property rights and enter contracts in her own name either because a judicial decision, a prenuptial agreement or a trust had invalidated her legal subservience to the husband. The law provided that a *feme sole* was not 'covered' by, or rather, was independent of her husband.<sup>33</sup> Furthermore, she exercised her right to education without consulting the husband and made independent decisions regarding her wages.<sup>34</sup>

During feudal times in England, the *feme sole* concept rapidly grew. The wife's position to that of her husband during the survival of marriage was called *coverte de baron*<sup>35</sup> (covered by husband). This meant that the husband was considered to have greater marital power over his wife. In the 14<sup>th</sup> century, *feme sole* also included women who worked individualistically at a craft separate from her husband. As Carpenter quotes from the *Liver Albus*<sup>36</sup>, a book collection of laws and custom in mediaeval England,

And where a woman under the protection of a husband follows any craft within the said city by herself alone, with which the husband does not interfere, such a woman shall be charged as a single woman (*femme sole*) concerning everything which touches her said craft.<sup>37</sup>

31 *FIDA v Attorney General & another* [2018] eKLR

32 Travitsky, Betty S. "The Feme Covert in Elizabeth Cary's *Mariam*." *Ambiguous Realities: Women in the Middle Ages and Renaissance* (1987): 184-96.

33 Zaher, Claudia. "When a woman's marital status determined her legal status: a research guide on the common law doctrine of coverture." *Law Libr. J.* 94 (2002): 459.

34 Pearlston, Karen. "Married Women Bankrupts in the Age of Coverture." *Law & Social Inquiry* 34, no. 2 (2009): 286.

35 Beattie, Cordelia. "'Living as a Single Person': marital status, performance and the law in late medieval England." *Women's History Review* 17, no. 3 (2008): 333.

36 Carpenter, John. *Liber Albus: The White Book of the City of London*. R. Griffin, 1861.

37 *Ibid*: 1638

However, over the subsequent centuries, it was found out that the concept of *feme sole* was at odds with concepts surrounding debt of a family member becoming family debt. As a result, married women were prohibited from conducting business individualistically without consulting their husbands.<sup>38</sup>

It is also important to note that some modern-day legal systems allow married women to maintain their *feme sole* status<sup>39</sup>. In the U.S., the Revised Statutes of the state of Missouri state that:

A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party.<sup>40</sup>

The AU Framework and Guidelines for land policy in Africa calls for individual member States to cooperate at regional levels to address land issues and challenges through comprehensive people-driven land policies and reforms in which women's rights to land are ingrained.<sup>41</sup> Kenya is one of the member states that lags behind in implementing land policies to empower women and this has increased the marginalisation of women in land ownership rights. The absence of implementation of these policies has made it difficult for *feme soles* to acquire and own property as effortlessly as men. The 2010 Constitution gives women the right to own land but unfortunately, only 2 per cent own it. This is despite the fact that 50 per cent of women in the world are farmers. This means they farm on the land they do not own.<sup>42</sup>

Kenyan women mostly affected in denial of land ownership rights are widows, single mothers, married women with low incomes, and those who live in urban centres. The Sessional Paper No 3 of 2009 on National Land Policy provides an overall framework in addressing critical issues in land, including enacting, repealing, and enforcing legislation to ensure effective protection of women's right to land.<sup>43</sup> The policy is guided by the principle of gender equity, inclusivity,

38 Stretton, Tim, and Krista J. Kesselring. *Married Women and the Law: Coverture in England and the Common Law World*. McGill-Queen's Press-MQUP, 2013.

39 Gastle, Brian W. "as if she were single": working wives and the late medieval English femme sole." In *The Middle Ages at Work*, pp. 41-64. Palgrave Macmillan, New York, 2004.

40 Masters, M. "Revised statutes of the State of Missouri." (1978): 4707.

41 Union, African. "Framework and guidelines on land policy in Africa." In *Land policy in Africa: A framework to strengthen land rights, enhance productivity and secure livelihoods*. Addis Ababa, Ethiopia: Author. Edited and designed by the ECA Publications and Conference Management Section (PCMS), pp. 1-44. 2010.

42 Djurfeldt, Agnes Andersson. "Gendered land rights, legal reform and social norms in the context of land fragmentation-A review of the literature for Kenya, Rwanda and Uganda." *Land Use Policy* 90, no. 104305 (2020): 7.

43 National Land Policy (Sessional Paper No. 3 of 2009).

and transparency in decision-making, effective public participation, elimination of discrimination, and respect for human rights to land use. However, land policies and other legal frameworks are gender blind. There is dire need to mainstream gender equality issues in existing policies and programmes at every stage.

In Common Law doctrine, coverture refers to the legal status of a married woman, who is 'covered' by her husband, or in other words under his protection, care, and authority. Coverture begins "when a man and woman are joined together in marriage;...in the time of the continuance of this marriage between them is said to be done 'during the coverture' and the wife is called, a woman covert".<sup>44</sup> The doctrine of coverture allowed the husband to subsume the legal and commercial personhood of the wife. To put this into a marital relationship perspective, the wife was subordinated by the husband, who also 'covered' her legal capacity.<sup>45</sup> This means that coverture took away women's legal personhood as they were prohibited from taking legal actions independently.<sup>46</sup>

The doctrine of coverture was patriarchal because it restricted married women from having the legal capacity to enter into contracts, such as writing a valid will. At the same time married women had the disability to contract,<sup>47</sup> which clearly shows that *feme covert*s were under their husband's authority. Compared to that of an infant, the wife's disability to contract was worse off. When an infant reached legal age (18 years old), he/she could accept or reject a contract. However, a contract entered with a married woman without consulting her spouse was entirely void.<sup>48</sup>

Several modern-day legal systems do not explicitly embrace coverture laws but various principles and elements borrowed from various versions of coverture laws have been applied. For example, the U.S. Law protected American husbands from taking care of their wives financial obligations. In addition, the law allowed wives to incriminate their husbands as defence by telling the court that their husbands ordered them to commit the crime they are accused of.<sup>49</sup> Over the 19<sup>th</sup> and 20<sup>th</sup> century, many common law jurisdictions implemented alternative legal mechanisms to reduce the effect of the doctrine of coverture. In Kenya, the promulgation of the 2010 Kenyan Constitution and the enactment of

44 Tait, Allison Anna. "The Beginning of the End of Coverture: A reappraisal of the married woman's separate estate." *Yale JL & Feminism* 26 (2014): 165.

45 Zaher, Claudia. "When a woman's marital status determined her legal status: a research guide on the common law doctrine of coverture." *Law Libr. J.* 94 (2002): 459.

46 Dubler, Ariela R. "Wifely Behavior: A Legal History of Acting Married." *Colum. L. Rev.* 100 (2000): 957.

47 Tait, Allison Anna. "The Beginning of the End of Coverture: A reappraisal of the married woman's separate estate." *Yale JL & Feminism* 26 (2014): 165.

48 Ibid.

49 Pearlston, Karen. "Married Women Bankrupts in the Age of Coverture." *Law & Social Inquiry* 34, no. 2 (2009): 265-299.



the Matrimonial Property Act<sup>50</sup> have clearly given married women the right to own property and contract in their own capacity as legal persons who capable to make decisions.

Historically, as outlined in the MWPA, the doctrine of coverture applied where once married, a woman could not enter into a contract or sue and be sued in her own name. Upon marriage, a woman's legal existence as an individual was suspended; this is no longer the position. However, in Kenya, the Matrimonial Property Act of 2013 recognizes the equal status of spouses by providing that a married woman has the same rights as a married man to acquire, administer, hold control, use and dispose of property whether movable or immovable, to enter into a contract and to sue and be sued in her own name. Two other pieces of legislation being the Land Act and Land Registration Act were also enacted to safeguard the rights of a spouse to matrimonial property by requiring the consent of a spouse for the transfer or charge of the matrimonial home.

The Court of Appeal recognized equality of the rights of spouses in a marriage in *Agnes Nanjala William v. Jacob Petrus Nicolas Vander Goes*.<sup>51</sup> The High Court in its decision stated where the Court of Appeal observed that Article 45 (3) of the Constitution gives parties to a marriage equal rights before, during and after a marriage ends. The Marriage Act and the Constitution provide for equal rights in marriage, and similarly, this Matrimonial Property Act seems to favour an approach that takes into account the contribution of either spouse towards its acquisition. This is however, according to the Act, subject to the provisions of Section 6 (3) of the Act that provides that parties to an intended marriage can agree on their property rights prior to entering the marriage. The Court of Appeal in effect rejected the existence of a general principle of sharing property in equal shares upon dissolution of marriage. Furthermore, it held that the courts can only consider non-financial contribution to acquisition of property upon the legislature passing a law to that effect.<sup>52</sup>

*Feme covert* refers to a married woman who is 'covered' by her husband's marital power, and who does not have the legal capacity to independently exercise rights, such as to sue or be sued and the writing of wills a. A *feme covert's* legal rights were not recognized if she decided to exercise them without her husband. To put this into perspective, when the National Woman's Suffrage Association was headed by Susan B. Anthony and Elizabeth Cady Stanton during the 19th century, unlike Anthony, Stanton could not sign the organisation's contracts for

<sup>50</sup> *Matrimonial Property Act*, (2013).

<sup>51</sup> *Agnes Nanjala William v. Jacob Petrus Nicolas Vander Goes*, Civil Appeal No. 127 of 2011

<sup>52</sup> Phiri, Patrick O'phade, and Bright Sefah. "Women's Right to Matrimonial Property Is Still in Murky Waters: a review of *federation of Women Lawyers v the Attorney-General*." *ESR Review: Economic and Social Rights in South Africa* 20, no. 3 (2019): 1.

because she was a *feme covert*. On the other hand, under law, Anthony was a *feme sole*. If Stanton's signature was inevitably required, her husband would sign on her behalf.<sup>53</sup> In Kenya, despite provisions for spousal consent when it comes to property matters, it is difficult to implement these provisions since sometimes the women are unaware of the transactions or they are not part of the decision making.

A major drawback of becoming a *feme covert* was their vulnerability to domestic violence from their husbands. At the time, marital rape could not be put on trial<sup>54</sup> and there were no statutes against sexual violence during the survival of marriage. The law instructed husbands to 'reasonably' beat their wives as a way of applying 'lawful and reasonable correction'.<sup>55</sup> In 1782, the 'rule of thumb' concept in common law was applied to allow English men to use tools equal to or smaller than the dimensions of a thumb to beat their wives.<sup>56</sup> Furthermore, the husbands were instructed to avoid beating their wives until they bleed. Women were also given the legal capacity to sue excessively cruel husbands and seek restraining orders against them.<sup>57</sup>

Lawoko<sup>58</sup> states that in Kenya, a good wife is the one who endures her husband's severe beatings. Husbands from the Maasai tribe still view women as their property and that of their fathers. Such patriarchal tendencies have made men in the community to use excessive force to assert their marital power over women who barely protest. Even though wife-beating is an illegal practice, it is reinforced by culture, as men who do not beat their wives are usually considered weak in the community. If a wife complains, they are usually subjected to intense pressure from the society to fit in. Furthermore, women victims who sue their husbands are also pressured to settle such matters out of court or to drop the charges entirely.

Widowhood is grief, pain and abandonment all wrapped around. It is a woman's body, heart and soul suffering after her husband dies, is killed, or permanently vanishes due to political, social and/or other types of unrest.<sup>59</sup> More often than not, it is a state of violation, constant and consistent stripping of one's humanity. In severe cases of widow abuse, it presents humans in their most debased form. Widowhood starts with marriage and is a consequence of a relationship which,

53 Stanton, Elizabeth Cady, Ann Dexter Gordon, and Susan Brownell Anthony. *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony: Against an Aristocracy of Sex, 1866 to 1873*. Vol. 2. Rutgers University Press, 1997.

54 Zaher, Claudia. "When a woman's marital status determined her legal status: a research guide on the common law doctrine of coverture." *Law Libr. J.* 94 (2002): 459.

55 Browne, Irving. "Wife-beating and imprisonment." *Am. L. Rev.* 25 (1891): 551.

56 Kelly, Henry Ansgar. "Rule of Thumb and the Folklaw of the Husband's Stick." *J. Legal Educ.* 44 (1994): 341.

57 Ibid

58 Lawoko, Stephen. "Predictors of attitudes toward intimate partner violence: A comparative study of men in Zambia and Kenya." *Journal of Interpersonal violence* 23, no. 8 (2008): 1067.

59 Agarwal, Bina. "Widows versus daughters or widows as daughters? Property, land, and economic security in rural India." *Modern Asian Studies* 32, no. 1 (1998): 11.



depending on your location, signifies elevated status, happiness, children and security. When that woman becomes a widow, she faces multi-layered discrimination. This situation is pervasive and known simply as discrimination and dehumanization of women.<sup>60</sup> The arduous fight for exercising her basic rights after the distressing loss of a husband gradually erodes a widow's dignity.

According to the UN, there are over 258 million widows in various parts of the world, and approximately 8 million in Kenya. Historically, widowhood has been unnoticed and neglected even today.<sup>61</sup> This means that after the death of a spouse, widows experience grief, loss, or trauma amidst economic insecurity, stigmatization, and harmful traditional practices.<sup>62</sup> Miguel<sup>63</sup> carried out a study to determine the impact of income shocks on murder incidents in rural areas. The study revealed that rural communities in Tanzania often blamed natural calamities on witches, who are predominantly elderly women. Their relatives usually hacked them to death using machetes citing that they are not only witches, but they also have the lowest future earning potential. Most victims are old widows killed by relatives following calamities.

After the death of her husband, the widow immediately loses her elevated status, her household income, and is mostly unable to inherit what is rightfully hers.<sup>64</sup> She becomes an outsider, ostracized and an object of ridicule - the devil who must be exorcised from the husband's family. In short, insecurities bombard her life along with fear and eventually poverty. Her situation is compounded by the presence of children who she now has to counsel, reassure and bring up on her own.

This situation prevails because society classifies women as inferior to men. Their status in marriage largely depends on the presence of the man. In his absence, she is no longer useful as the one she came along to serve is no longer alive and her services are therefore no longer needed. Indeed, a woman in marriage is subservient and subjected to the man in all ways. A woman usually gets herself immersed in her husband's family as expected - loving, serving and nurturing the extended family with care, all with generosity and without complaining.<sup>65</sup> Her worth in the home is measured by how successful she is adapting to the new status and in fulfilling the expectations the larger family and community. She is perceived as having no ability to stand in her own right as a human being with agency to contribute positively and productively in the family.<sup>66</sup>

<sup>60</sup> Ibid

<sup>61</sup> Shahnazarian, Nona, and Ulrike Ziemer. "Women Confronting death: War widows' experiences in the South Caucasus." *Journal of International Women's Studies* 19, no. 2 (2018): 29-43.

<sup>62</sup> Ibid

<sup>63</sup> Miguel, Edward. "Poverty and witch killing." *The Review of Economic Studies* 72, no. 4 (2005): 1160.

<sup>64</sup> Dankwa, E. V. O. "

Property rights of widows in their deceased husbands' estate." *U. Ghana LJ* 16 (1982): 1.

<sup>65</sup> Stretton, Tim, and Krista J. Kesselring. *Married Women and the Law: Coverture in England and the Common Law World*. McGill-Queen's Press-MQUP, 2013.

<sup>66</sup> Gates, Lori A. "Widows, property, and remarriage: lessons from Glastonbury's Deverill manors." *Albion* 28, no. 1 (1996): 27.

In Kenya, widows are still disinherited, including being evicted from family homes and land, with serious consequences for them and their children. In rural areas of Kenya where residents have limited access to justice, discriminatory traditional practices operate by default. Forcibly evicting a widow from her matrimonial home and land is illegal under Kenyan law, and a succession law bars her husband's relatives from arbitrarily appropriating her inheritance. But the laws aren't always enforced and justice is hard to come by, especially in rural areas. Furthermore, when women take these cases to court, they must pay expensive legal fees or proceed with no legal representation. If they are successful, they are stigmatized, ostracized and disowned by their communities. And in many cases poor and rural women struggle to enforce any favourable court decision.

The Law of Succession Act provides more protections for widowers than to widows since widows lose their "lifetime interest" in property if they remarry. The deceased's father is given priority over the mother where there is no surviving spouse or children. And pastoral and agricultural land, crops, and livestock in certain districts, are exempt, as are Muslims, with women only inheriting a fraction of what men can under Muslim inheritance norms. Widows in rural areas whose livelihood is closely tied to these pastoral and agricultural land may be evicted with no recourse because the law defers to customary law and traditional practices in these communities. Widows in areas where pastoral or agricultural land is exempted face being evicted from their homes with no recourse in law.

### III. LEGAL, RELIGIOUS AND CULTURAL CAPACITY

Legal personhood is selfhood, self-identity, and personal identity of a human legal persona whose legal rights are recognised within specific legal systems, such as to sue and be sued; to vote and to be voted; or to enter into contracts. In recent times, this concept has also triggered a global debate about the legal status of slaves, corporations, foetuses, animals, ordinary objects, and artificial intelligences. In addition, it has played a significant role in clarifying issues concerning the legal statuses of women globally.<sup>67</sup>

Women's legal personhood in the Kenyan matrimonial context is marred with the practical application of the principle of equality of sexes.<sup>68</sup> Article 27 of the Constitution provides for equality and freedom from discrimination:

67 Moder, A. (2019). Women, personhood, and the male God: A feminist critique of patriarchal concepts of God in view of domestic abuse. *Feminist Theology*, 28(1), 85-103.

68 Mucai-Kattambo, Vicky W., Janet Kabeberi-Macharia, and Patricia Kameri-Mbote. "Law and the Status of Women in Kenya." (1995).

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.<sup>69</sup>

However, questions still arise when considering the employed woman's position during the survival of marriage with respect to property purchased jointly but registered under her husband's name. Since local legislation does not clearly have provisions for the joint property of spouses, Kenyan usually make use of MWPA. This creates fiduciary spousal duties, where the husband holds all the matrimonial property in trust for the wife and the entire family. A rebuttable presupposition is that spouses who acquire matrimonial property during marriage and register it in their sole names hold the property in trust for their significant other.<sup>70</sup> However, where both spouses' names are registered under the matrimonial property, they will enjoy equal beneficial interests and vice versa.<sup>71</sup>

Establishing women's legal personhood calls for the practical application of the abovementioned principles, which largely depend on how courts and legal counsels address questions geared towards resolving conflicts concerning the equality of sexes.<sup>72</sup> However, women still face many challenges. Most importantly, they cannot easily access legal services or even get special legal aid to facilitate their efforts towards addressing various discriminatory practices. As a case in point, a general principle under customary law provides that the husband is the primary custodian of all his wife's property excluding movables.<sup>73</sup> This means that the husband may additionally acquire a beneficial interest in a property acquired by a wife separately before or during their marriage.<sup>74</sup> Such provisions demean a woman's position both during the survival of marriage and on dissolution of marriage with reference to her property rights.

<sup>69</sup> Constitution of Kenya 2010, Article 27

<sup>70</sup> Section 14 (a), *Matrimonial Property Act* (Act No.49 of 2013).

<sup>71</sup> *Ibid*, Section 14 (b).

<sup>72</sup> *Ibid*

<sup>73</sup> Dankwa, E. V. O. "Property rights of widows in their deceased husbands' estate." *U. Ghana LJ* 16 (1982): 1.

<sup>74</sup> Kimani, Elishiba N., and Lucy W. Maina. "Older women's rights to property and inheritance in Kenya: Culture, policy, and disenfranchisement." *Journal of ethnic & cultural diversity in social work* 19, no. 4 (2010): 256-271.

Kenyan women also face myriad social and cultural problems trying to enforce their rights to use, own, manage, and dispose of land and property. Discriminatory social and traditions practices perpetuate the notion that sons should inherit land, and that women and girls should negotiate use of land through male relatives such as fathers, uncles, brothers, husbands, and sons. The Kenyan government should provide accessible legal information and advice and make sure it reaches marginalized groups, especially rural women and girls. Women have made strides toward equality in Kenya. But Kenya has a long way to go to make the right to land and property a reality for all women.

The normative idea of personhood in Africa was first identified by Ifeanyi Menkiti, a Nigerian philosopher. It refers to agents who lead morally virtuous lives.<sup>75</sup> I identify three distinct notions of personhood in Menkiti's analysis. These are: (1) personhood as a claim about personal identity; (2) personhood as a claim about moral status; and (3) personhood as a claim about human beings who are morally upright or virtuous.

In Menkiti's analysis, I note the first notion of a person as one typical in Afro-communitarian articulations of how individuals come to form personal identities. In this light, he notes:

...the African view of man denies that persons can be defined by focusing on this or that physical or psychological characteristic of the lone individual. Rather, man is defined by reference to the envioning community. As John Mbiti notes, the African view of the person can be summed up in this statement: 'I am because we are, and since we are, therefore I am'.<sup>76</sup>

It is important to note that here Menkiti is talking about the African view of a 'man' in context where he distinguishes it from Western notions of a person. It is safe to assume that he uses the notion of a 'man' interchangeably to that of a 'person'. Menkiti notes that a Western view defines a person in terms of some feature(s) intrinsic in a human being like consciousness, memory or rationality. Concomitantly, an African view defines a person by relying on the envioning community. Here, Menkiti is not interested in giving an account of a human person that specifies properties that constitute a human being, be they physical or spiritual. This is because an 'envioning community' is not an ontological feature of a human being, rather it refers to external socio-cultural factors crucial in helping a human being develop the sense of personal identity.

Personal identity here is understood primarily in terms of 'being-with-others'. This position is further supported by Menkiti when he comments:

<sup>75</sup> Menkiti, Ifeanyi A. "Person and community in African traditional thought." *African philosophy: An introduction* 3 (1984): 171.

<sup>76</sup> Ibid

... as far as Africans are concerned, the reality of the communal world takes precedence over the reality of individual life histories ... it is by first knowing this community as a stubborn perduring fact of the psychophysical world that the individual also comes to know himself as a durable, more or less permanent, fact of this world ... What is more, the sense of self-identity which the individual comes to possess cannot be made sense of except by reference to these collective facts.<sup>77</sup>

The second notion of personhood is found when Menkiti invokes John Rawls in his discussion of personhood in African thought. He notes 'John Rawls comes closest to a recognition of this importance of ethical sense in the definition of personhood'. However, Rawls' notion of personhood is far removed from Menkiti's construction. Menkiti cites Rawls to clarify this notion:

Equal justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation. One should observe that moral personality is here defined as a potentiality that is ordinarily realized in due course. It is this potentiality which brings the claims of justice into play ... The sufficient condition for equal justice [is] the capacity for moral personality.<sup>78</sup>

It is crucial to note that the notion of personhood employed by Rawls is essentially associated with 'equal justice'. In other words, the notion he has in mind is dependent on facts possessed by human beings in virtue of which their equality is recognised. Rawls refers to this feature possessed by human beings as a capacity to be party to a contract or what he refers to as an initial situation. Those who possess the relevant capacity are owed duties of justice. The very language of capacity implies that personhood here is conceived as a function of some feature intrinsic to a human being, and that this feature is possessed by all human beings; hence a talk of 'equal justice'.

The last notion of personhood is also a moral notion except that it is an agent-centred one. To refer to some human being as a person, in this sense, it is to commend her moral conduct; it is to judge her as morally praiseworthy or morally standing out.<sup>79</sup> Those agents who successfully live according to norms of a society are considered persons and those who do not as non-persons.<sup>80</sup> What is granted here is a status that reflects one's moral achievement and what is

<sup>77</sup> Menkiti, I. "On the Normative Conception of a Person." In *Companion to African Philosophy*, edited by K. Wiredu, (2004): 325.

<sup>78</sup> Menkiti, Ifeanyi A. "Person and community in African traditional thought." *African philosophy: An introduction* 3 (1984): 177.

<sup>79</sup> Wiredu, Kwasi, and Kwame Gyekye. *Person and community: Ghanaian philosophical studies I*. Vol. 1. CRVP, 1992.

<sup>80</sup> Molefe, Motsamai. "Personhood and rights in an African tradition." *Politikon* 45, no. 2 (2018): 218-219.

denied is this kind of status, without making claims about one's biological status as a human being. The evaluation at play is at a moral level.

It is for this reason that Menkiti informs us that 'personhood is the sort of thing which has to be attained' and one who has it is 'marked by a widened maturity of ethical sense – an ethical maturity without which personhood is conceived as eluding one'. Menkiti also marries this idea to what he refers to as 'moral arrival' or 'triumph' and those who have triumphed he characterises them as having 'inbuilt excellencies'.

Menkiti restated his contribution on personhood in 2004. He is unequivocal about the notion of personhood he is after. The first cue is found in the title of the article which is *On the Normative Conception of a Person*. The article reads more or less the same as the 1984 contribution, except that here Menkiti clarifies that he is after an agent-centred notion. To this effect I cite one passage to demonstrate:

- (1) For married to the notion of person is the notion of moral arrival, a notion involving yardsticks and gradations, or, more simply, involving an expectation that certain ways of being or behaving in the world may be so off the mark as to raise important questions regarding the person status of their doers.<sup>81</sup>

Here it is clear that this is a moral notion. Clearly, this notion is agent-centred since it has to do with certain ways of being or conducting oneself in the world and it is concerned about the status of the doer. Based on African communalism, I argue that an understanding of personhood, agency, and morality is a culturally contextualised and socially intentioned phenomena. Women are always becoming, striving and performing in order to be, and to be able to fit in and be accepted within each stage their in and in every community they find themselves in.

Religion stands out as one of the roots of many gendered rules in the world. This could be a result of the punishment that God gave to Eve after she lured Adam into eating the forbidden fruit in Genesis chapter 3. In line with verse 16, God told the woman that 'Your desire shall be for your husband, and he shall rule over you.'<sup>82</sup> Since the legal status of a married woman is under the authority of her husband, this biblical verse is the fundamental foundation of the doctrine of coverture. Married women lose their legal personhood to their husbands not only during the survival of marriage, but also on dissolution of marriage. Many Abrahamic religions respect this presumed control over *feme covert*s.

81 Menkiti, I. "On the Normative Conception of a Person." In *Companion to African Philosophy*, edited by K. Wiredu, (2004), 326-327.

82 The Holy Bible, NIV, Genesis 3:16.



In Kenya, Christianity is the leading Abrahamic religion commanding a following of more than 85 per cent of the population, and 11 per cent being Muslims.<sup>83</sup> By and large, this makes Christianity the state religion because it attracts the largest proportion of citizens. This means that many laws and statutes in the land give special consideration to Christianity as the official religion. However, it is important to note that this special status does not warrant any discrimination against followers of other religions or the denial of human rights for non-believers.<sup>84</sup>

With reference to the creation story in the bible, the equality of sexes in the eyes of God has been clearly outlined. Specifically, Genesis<sup>85</sup> describes the creation of Adam and Eve in God's image, which makes it clear that a man and woman are companions of equal standing. Furthermore, I Corinthians<sup>86</sup> states that a husband has authority over his wife's body but only after providing for her.

Let the husband render to his wife what is her due, and likewise the wife to her husband. A wife has no authority over her body, but her husband; likewise the husband has no authority over his body, but his wife.

When it comes to property ownership and succession, women's rights are documented under the *Torah* (or the Pentateuch: the first five books of the Bible), which provide evidence on some of the earliest forms of women protection from patriarchal discrimination. For example, Numbers 27 gives an account of how Zelophehad's five daughters inherited their ancestral land according to Jewish norms. At the time, the male heads of Jewish households were given authority over their ancestral land, which they could distribute through patrilineal arrangements. Therefore, as commanded by God, Zelophehad's five daughters took ownership of their ancestral land after pleading with the Jewish patriarchy for justice.<sup>87</sup>

The *Torah* does not have any scripture that mentions women as men's property.<sup>88</sup> However, there is a biblical mention of the rights of widows to property ownership and inheritance. In the book of Ruth, the bible indicates that after the Moabite woman was widowed, she had an option to sell her late husband's land.<sup>89</sup> With no husband, no son, no brother-in-law and no father-in-law, Ruth

83 Maina, Newton Kahumbi. "Freedom of religion." *Freedom of Religion at Stake: Competing Claims among Faith Traditions, States, and Persons* (2019): 65.

84 Ibid

85 The Holy Bible, The New International Version, NIV, 1978. Genesis 1:27, 2:7 and 21-22

86 Ibid: I Corinthians 7:3-6

87 The Holy Bible, NIV, Numbers 27:8-11.

88 Murray, Mary. "Primogeniture, Patrilineage, and the Displacement of Women." *Women, Property, and the Letters of the Law in Early Modern England* (2004): 121-36.

89 Ostriker, Alicia. "The Book of Ruth and the Love of the Land." *Biblical Interpretation* 10, no. 4 (2002): 350.

had rights over her husband's land only to the extent to which a male relative would not claim it as was the law.<sup>90</sup> Boaz, a wealthy relative of Ruth, bought the land and also took Ruth as his wife as was the custom, and sired a son, Obed. This account not only shows that women were subjected to the customs of the land which included wife inheritance to continue with the lineage of the deceased and property inheritance.

In Islamic laws (also *Shari'a*), the principles emphasise on the need to improve the status of women, establish peace and order, and address property inheritance equitably. Furthermore, it promotes equality of each and every individual while encouraging people to avoid any forms of discrimination. This is because ever individual, whether male or female is created from the same soul.<sup>91</sup> Historically, as stated by Bishin,<sup>92</sup> under *Shari'a*, Muslim women are allowed to own property as a way of exercising her legal personhood and economic identity vis-à-vis her access to land rights.

The Holy Qur'an, through its Islamic substantive laws recognizes women's rights to purchase or inherit land and property from their husbands.<sup>93</sup> It states that:

...and for women is a share of what the parents and close relatives leave, be it little or much – an obligatory share (4 verse 7). ...For men is a share of what they have earned, and for women is a share of what they have earned (verse 32).

From this excerpt, it is evident that Muslim women have the legal authority over the property of their husbands and parents before marriage under Islamic laws. In addition, Muslim women can be allowed to hold property that they received from their husbands as gifts (*mahr*), which endows her with some degree of financial freedom. However, such freedoms are limited by the Islamic legal system, which generally provides that women can only inherit half the inheritance as her male counterparts, but she can exercise her authority over the inherited property.<sup>94</sup>

A dominant reason for the need to ensure that women's rights do not clash with the freedom of religion is that many human rights issues regarding women are acknowledged in the name of religious decrees and special attention to 'state

90 The Holy Bible, NIV, Ruth 4:3.

91 Qur'an 4:1, 6:98

92 Bishin, Benjamin G., and Feryal M. Cherif. "Women, Property Rights, and Islam." *Comparative Politics* 49, no. 4 (2017): 501-520.

93 Sait, Siraj, and Hilary Lim. "Muslim Women and Property." *Land, Law and Islam: Property and Human Rights in the Muslim World* (2006): 134.

94 Udoh, Oluwakemi D., Sheriff F. Folarin, and Victor A. Isumonah. "The influence of religion and culture on women's rights to property in Nigeria." *Cogent Arts & Humanities* 7, no. 1 (2020): 175.



religions'. As such, religious norms frequently infringe on women's rights when opposing gender equality arguments.<sup>95</sup> Furthermore, a number of human rights violations against women are conducted on the backdrop of traditions endorsed by the state religion.<sup>96</sup>

Law and culture are closely intertwined, and this means that the provisional concept of women's legal personhood with regard to culture plays a significant role in the relativistic application of human rights. Ordinarily, laws are often enacted based on prevailing cultural practices, and cultural practices are subjective of the law.<sup>97</sup> As such, it is prudent to affirm that both law and culture have a substantial impact on women with regard to political structures and social organisations. Hitherto, even though women in the modern-day world can be found in the judiciary, the legislature, and related lines of work, men assume the decision-making role when it comes to enacting, interpreting and applying laws pertaining to traditions and cultural norms. In Kenya, women hardly determine the scope and terms of their cultural practices and prevailing customs.<sup>98</sup>

Throughout the constitution-making process, Kenyans were vocal about the need for their culture to be documented, respected, celebrated, and prioritized.<sup>99</sup> They cited culture as providing for international instruments and argued for their right to practice their cultures and to speak their languages. As a result of this, the final constitutional document states that everyone has a right to culture,<sup>100</sup> a right to speak their language, a right to use traditional dispute resolution mechanisms,<sup>101</sup> a right to hold land based on tradition and cultural practices,<sup>102</sup> and a right to marry and form families based on customary law.<sup>103</sup> In response to what Kenyans wanted to be enshrined in the constitutional dispensation, the Constitution also upholds customary law as a source of law<sup>104</sup> but incorporates the exclusion cause embodied in the Maputo Protocol and the Kenyan Judicature Act. Therefore, this means that although customary law is recognized as law in Kenya and the foundation of the nation, women are not expected to be subjected to customs and traditions that contradict their constitutional rights. Customary

95 Frances Raday, 'Culture, Religion, and Gender,' 1:4 *International Journal of Constitutional Law* (2003), p. 665.

96 See Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener, *Freedom of Religion or Belief, An International Law Commentary* (Oxford: Oxford University Press, 2016).

97 Meliakova, Yuliia Vasyilivna, Inna Igorivna Kovalenko, Svitlana Borysivna Zhdanenko, and Eduard Anatolievich Kalnytskyi. "Performance in the Postmodern Culture and Law." *Amazonia Investiga* 9, no. 27 (2020): 344

98 Hardee, Catherine A. "Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law." *NYUL Rev.* 79 (2004): 712.

99 CKRC, Final Report of the Constitution of Kenya Review Commission (Approved for Issue at 95<sup>th</sup> Plenary Meeting of the Constitution of Kenya Review Commission Held on 10<sup>th</sup> February 2005) 394 (2005).

100 Constitution art. 44(1) (2010) (Kenya)

101 Constitution art. 159(2)(c) (2010) (Kenya)

102 Constitution art. 63(1) (2010) (Kenya)

103 Constitution art. 45(1) & 45(4)(a) (2010) (Kenya); The Marriage Act, No. 4 (2014)

104 Judicature Act (2012) Cap. 8

laws are only applicable if they are “not repugnant to justice and morality or inconsistent with any [other] written law.”<sup>105</sup> Therefore, issues of interpretation come into play and it is evident that it is through interpretation of law, arises issues of conflict of laws. Will the courts uphold customary laws or statutory laws in case of a dispute?

In Susan Okin’s essay *Is Multiculturalism Bad for Women?*<sup>106</sup>, the liberal feminist political philosopher points out that religious or cultural groups that are fighting for the right to protect their culture often are concerned most with personal law. This has a disproportionate effect on women because home is where culture is disseminated to the young and “the distribution of responsibilities and power at home has a major impact on who can participate in and influence the more public parts of the cultural life.” Oppressive cultural practices in the home have deep ramifications for women’s ability to participate in all other aspects of society. Okin argues that women in such patriarchal cultures “might be much better off if the culture into which they were born were either to become extinct . . . or, preferably, to be encouraged to alter itself so as to reinforce the equality of women.” Essentially, whenever women’s equality is compromised by a cultural practice, that practice should not be tolerated.

Despite the fact that Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is consented to by majority of countries, women’s rights continue to be violated based on longstanding traditions and customs. One of these rights that CEDAW vouches for is the right to property. Since Kenya is also a member state of CEDAW, the 2010 Constitution in the Bill of Rights guarantees equality of the sexes. It allows ownership and protection of property by both sexes without discrimination. Indeed it has in place legislation to implement these Constitutional provisions. However, it has been difficult to put in practice the Constitutional provisions due to persistent patriarchal environment which has ensured that the country’s governance continues to be male-dominated.

In 2012, the UN Special Rapporteur<sup>107</sup> published a comprehensive report that accentuated “the right of women to have access to, participate in and contribute to all aspects of cultural life.” The report delved into the need for women to exercise their rights by actively taking part in the identification and interpretation of various traditions and customs that affect their livelihoods. Women were also encouraged to endorse their most preferred cultural norms and practices,

<sup>105</sup> Ibid

<sup>106</sup> Okin, Susan Moller. “Is multiculturalism bad for women?” In *Is multiculturalism bad for women?*. Princeton University Press, 1999.

<sup>107</sup> Ertürk, Yakın, and Bandana Purkayastha. “Linking research, policy and action: A look at the work of the special rapporteur on violence against women.” *Current Sociology* 60, no. 2 (2012): 150.

while modifying or discarding unfavourable ones. It is important for women to understand all cultural rights associated with their interests by actively engaging those in power to define women's collective identity in the community. This reports emphasises that both men and women should enjoy their cultural rights equally to ensure that women's rights are fully realised democratically.<sup>108</sup>

John Stuart Mill's argument in *The Subjection of Women* is one of the most essential ideologies for building a democratic and liberal society. Mill states that:

[T]he principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to the other – is wrong in itself and now one of the chief hindrances to human improvement; and [...] ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other (Mill, 1984: 261).<sup>109</sup>

Mill delves into the social injustices regarding the social status of women who were completely excluded from public and civil life, such as politics and decision-making. His overarching argument emphasises that such forms of social injustices thwarts human progress because they not only affect the lives of women, but also of men. The whole society usually suffers in situations where the subjection of women prevails as this takes away their principle of liberty.

Leading African authors have depicted African societies as patriarchal, for example in their fictional accounts of Flora Nwapa and Grace Ogot.<sup>110</sup> In masculine cultures, both men and women go for occupations that are socially suitable for their sex and avoid the ones suitable for the opposite sex.<sup>111</sup> Consequently, apart from gender, this creates a gap in various culture-related demographic factors, such as income, level of education and recognition.<sup>112</sup> Women tend to avoid 'masculine occupations' since they are seen as less competent compared to men in terms of aggressiveness and independence.<sup>113</sup> They are also viewed as competitors by fellow men and less feminine which affects their status in the society.

In Kenya, child marriage, FGM and son preference are some of the leading harmful cultural practices that negatively affect women. Since 2001, both child

<sup>108</sup> Ibid

<sup>109</sup> Mill, J. S. "The Subjection of Women, Essays on Equality, Law, and Education, Collected Works of John Stuart Mill vol. XXI, ed. J. Robson." (1984): 277.

<sup>110</sup> Stratton, Florence. *Contemporary African literature and the politics of gender*. Routledge, 2020.

<sup>111</sup> Hofstede, Geert, Gert Jan Hofstede, and Michael Minkov. *Cultures and organizations: Software of the mind*. Vol. 2. New York: McGraw-hill, 2005.

<sup>112</sup> Lefkowitz, Eva S., Cindy L. Shearer, Meghan M. Gillen, and Graciela Espinosa-Hernandez. "How gendered attitudes relate to women's and men's sexual behaviors and beliefs." *Sexuality & culture* 18, no. 4 (2014): 840.

<sup>113</sup> Wegemer, Christopher M., and Jacquelynne S. Eccles. "Gendered STEM career choices: Altruistic values, beliefs, and identity." *Journal of Vocational Behavior* 110 (2019): 28-42.

marriage and FGM became illegal when the Children Act<sup>114</sup> was enacted into law. In addition to child marriage, FGM is also prohibited by the Sexual Offences Act<sup>115</sup>, the Marriage Act<sup>116</sup>, and the Prohibition of Female Genital Mutilation Act.<sup>117</sup> These Acts protect women and girls from the cultural practices predominantly by setting the marriage age at 18 years. FGM and child marriage is a harmful practice that is rampant in northern Kenya. During the Nairobi Summit on ICPD25 in November 2019, Kenya committed itself to eliminating a number of cultural standards that proliferate such harmful practices as a way of supporting affected women and girls.<sup>118</sup> While the negative outcomes of child marriage affects both boys and girls, the latter sex is more vulnerable. This is because girls are often forced to drop out of school due to pregnancy even when they are not physically and mentally ready to enter motherhood.

Gender-biased legal systems are known to reinforce son preference because boys and men are often accorded higher social status over women and girls. In 2014, a study by KDHS 2014 provided evidence that men who don't profess to any religion mainly preferred daughters. However, son preference was clearly pronounced among Muslims because their doctrines are deeply entrenched in their culture. Son preference is a harmful gender-biased practice because it plays a significant role in the deliberate prevention of female births. Therefore, harmful cultural practices such as child marriage, FGM and son preference prevent the realisation of gender equality and women's legal personhood.

The 1963 Constitution of Kenya was a west-minister model Constitution that was based on the traditional legal assumptions of neutrality, equality, universality and the "autonomous, reasonable man" – literally man to mean also woman.<sup>119</sup> It was totally gender blind, overtly and covertly submerging women and gender in the traditional assumptions of the law. For instance, the Bill of Rights made the blanket assumptions of equality before the law and in property ownership. It protected the right to property (land), thus entrenching and perpetuating women's marginalization in access and ownership of land, since it was only men, through customary law practices and colonial land ownership processes and the law, ensured that only men owned and had access to land.

Since the promulgation of the 2010 Constitution of Kenya, majority of women, however only have access to land controlled by men. This ensures they

114 *Children Act* No. 8 of 2011.

115 *Sexual Offences Act* No. 3 of 2006.

116 *Marriage Act* No. 4 of 2014.

117 *Prohibition of Female Genital Mutilation Act*. No. 32 of 2011.

118 Yankah, Ekua. "Putting the African Girl at the Centre of Demographic Change Programmes." *The Demographic Dividend and the Power of Youth: Voices from the Global Diplomacy Lab* (2021): 53.

119 Kimeri-Mbote, Patricia. "Women, land rights and the environment: the Kenyan experience." *Development* 49, no. 3 (2006): 45.

have a weak economic status as land is seen as the basis of wealth - security, belonging and better livelihood through food security. This being the case, land is predominantly owned by men through inheritance or acquisition. Very few women traditionally inherit land or own it compared to men. To add insult to injury, women neither belong to their parents' homes nor their marital homes when it comes to land inheritance. They get into marriage younger and poorer than men and therefore the property they will have will either be jointly owned with the husband or wholly owned by the husband, making her dependent on the man. Exercising their land rights is associated with the extent to which they relate to men as wives, mothers, sisters or daughters.<sup>120</sup>

Under customary law in Kenya, men are readily allowed to inherit land because they do not get married off like women and girls. Such entrenched cultural beliefs prioritize male relatives (sons, fathers, brothers, and husbands) when it comes to owning and inheriting land and property. This form of male 'protection' not only robs women and girls of their property ownership rights, but also gives men more power to have authority over women. When a husband dies, the wife is usually dispossessed of the land and property of her husband. In addition, the widow may be forced to remarry the brother to her late husband before she is allowed to claim ownership of the land. Challenging such cultural norms is often detrimental to her security and wellbeing in the society.

Women's personhood is directly associated with human rights. Generally, there is sufficient evidence to show that religion and culture have an overbearing impact on human rights. All leading global religions share the tradition of respecting the dignity and integrity of every individual along with those who are discriminated, such as widows and orphans.<sup>121</sup> It is important to note that the foundation of international law on human rights was established using religious beliefs that aimed at protecting the dignity of all persons. In early religious writings, Rieffer<sup>122</sup> argued that:

...these early religious beliefs promoted the initial discussions about rights...and ideas about human duties led quite naturally to ideas about human rights. It is in this initial formulation of the inherent dignity of every human being and duties to others in which we see the origins of the idea of human rights which was eventually ratified and incorporated into international law in the 20<sup>th</sup> century.

120 Djurfeldt, Agnes Andersson. "Gendered land rights, legal reform and social norms in the context of land fragmentation-A review of the literature for Kenya, Rwanda and Uganda." *Land Use Policy* 90, no. 104305 (2020): 7.

121 Wang, Qiliang. "Role of Religion in the Occurrence of and Resolution to Civil Disputes." In *Sociology of Law*, pp. 29. Springer, Singapore, 2022.

122 Rieffer, Barbara Ann. "Religion, politics and human rights: understanding the role of Christianity in the promotion of human rights." *Human Rights and Human Welfare* 6 (2006): 34.

When it comes to culture, human rights are observed through philosophies that look at a person's 'feelings, empathy, intuitions and concerns toward specific groups of others'.<sup>123</sup> Nevertheless, the protection of women's rights is affected by the existence of many ethnic groups, tribes and races that follow wide-ranging traditions and customs. As stated by the UN Office of the High Commissioner on Human Rights (UNOHCHR):

Culture is often invoked as a justification for violations of women's human rights, reflecting deep-seated patriarchal structures and harmful gender stereotypes. In several countries, culture is invoked to negatively impact the rights of women, in particular in the areas of marriage and property. However, culture is not a static or unchanging concept, although some states tend to present it as such in order to justify discrimination and violent practices against women and girls.<sup>124</sup>

Therefore, in the face of wide-ranging national and international statutes that forbid inequality and discrimination, religion and culture play a significant role in the marginalisation of women as regards their property rights and ownership. Different religious doctrines deny women their rights and various cultures have in-built patriarchal standards that encourage men to control women.

#### IV. CONCLUSION

The status of a woman as a human person must be rightly attached to her legal capacity to sue or be sued, and enter into contracts. By retaining various individual senses of human personhood, and gaining an in-depth understanding of their coherent relations, women can gain greater clarity in the ways in which they exercise their property rights and ownership. Property falls into a legal-religious-cultural sphere that adhere to intrinsic constructs of law, which should be open to analysis. Women's legal personhood has evolved over the centuries, and this calls for amendments to specific legal systems as well as a conceptual assessment of property laws. Bhandar and Goldberg-Hiller claim that, "the law is enfolded within the social norms and economic relations that structure recognition in manifold ways: laws governing desire, repressive laws, and within the colonial context, a law of subjection that is based on a racial [and patriarchal] system of property appropriation".<sup>125</sup>

Even though increased advocacy efforts pertaining to women's rights have improved property rights and ownership, there is dire need for specific legislative

123 Kirchschräger, Peter G. "The Concept of a Universal Culture of Human Rights." In *Proceedings of the XXIII World Congress of Philosophy*, vol. 15, pp. 57. 2018.

124 Nkealah, Naomi N. "Conceptualizing feminism (s) in Africa: The challenges facing African women writers and critics." *The English Academy Review* 23, no. 1 (2006): 138.

125 Bhandar, B., & Goldberg-Hiller, J. (2015). *Plastic Materialities*. Durham: Duke University Press. 231



measures and policy interventions geared towards empowering women to exercise their property rights, especially matrimonial property. To ensure that women's legal personhood is actively being sought, the government should embark on training and providing employment opportunities for women. Further to, there is need for sensitization of communities against harmful cultural and religious practices, accessible legal information, civic education throughout the country, especially marginalized groups, and rural women and girls. Sensitising and educating women and girls before they enter into marriage, employment, proprietary and commercial contracts and financial literacy should be a priority because they affect the status of their property rights and ownership as well as their personhood. Girls and young women need to build their capacity to make decisions affecting their future from an early age. The Government should also set in motion systematic legislative reviews to ensure gender mainstreaming and gender responsive legislations, policies and programs that will ensure that women and girls fully enjoy their rights fully as they should.

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