Examining the Justice Paradigms for African Feminists in Traditional Dispute Resolution Mechanisms: A Case Study of Nyando Sub-County, Kenya

Student name: Anita Achieng Nyanjong

Supervisors: Prof. Magnus Killander and Prof. Nkatha Murungi

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Declaration

I declare that this thesis, 'Examining the Justice Paradigm of African Feminists in Traditional Dispute Resolution Mechanisms: A Case Study of Nyando Sub-county in Kenya', which I hereby submit for the degree of Doctor of Laws (LL.D), at the Faculty of Law of the University of Pretoria, is my work and has not been previously submitted by me for a degree at this or any other institution.

Anita Achieng Nyanjong

Student Number: u20813679

Dedication

To mama, you are the best there can be.

Erokamano!

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To God be all glory.

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Abstract

There appears to be a disjoint between the everyday experiences of justice by rural women justice seekers and what is primarily regarded as progressive jurisprudence by feminist liberal theorists. This disjoint has its genealogy in the global discourse on justice, which presupposes the universalism of justice. Feminist liberal theorists are central in this debate for advancing the idea of the universalism of justice without due regard to the everyday experiences and the power differentials of a diversity of women justice seekers. The idea of the universalism of justice emerges from liberal feminist scholars who criticize the inadequacy of the centrality of women's voices in John Rawls's justice as fairness in the exposition of the original position. This thesis departs from the predominance of male-led and western feminist discourses on justice. It relies on narrations of the lived realities of justice from ordinary women, more so, rural widows in the Nyando sub-county in Kenya who have resolved land and property rights disputes through cultural justice structures, considered by feminists as agents of reinforcing gendered hierarchies. This thesis reveals that traditional dispute resolution mechanisms can provide justice to rural women justice seekers in a manner that is protective of their rights.

Relying on the diversity of African feminisms, which are predicated on multiple indicators, this thesis reveals the intersectionality of widows' identities and their oppression within the context of the study. This thesis argues that the use of western universal ideas of justice as a paradigm for understanding women's oppression isolates the experiences of other women. This thesis argues for an approach which engages with the indigenous or local ideas of justice, focusing on the narratives of justice from the widows' who are the subjects of this study. This thesis adopts feminist narratology as a methodology and illuminates the dominant individual and group narratives of widows' pursuit of justice within the Nyando sub-county in Kenya. Paradigms of justice were identified based on recurring motifs during the interviews, including justice as recognition of a right, justice as truth and justice as peace. This thesis recognizes that while justice is not universal but contextual, the paradigms of justice identified may resonate in other similar settings. Finally, although this thesis finds that the traditional dispute resolution mechanisms can provide justice to rural widows, it makes recommendations from its analysis of the context of the justice mechanism in Nyando sub-county. Finally, this thesis argues that African feminist justice paradigms must be seen from the lens of the realities of African women who are at the margins, just like the widows in this study, whose ideas of justice are

practical – and where human rights standards materialize in the vernacular, allowing rural communities to find meanings that resonate with their everyday realities.

Keywords: Justice, feminisms, anti-essentialism theory, gender justice, paradigm, traditional dispute resolution mechanisms, widows'.

Chapter 1: Contesting oppression while affirming difference: Towards African feminist paradigms of justice

> '…African feminism is justice that seeks to create a discernible difference between women who were colonised, those deemed colonizers and a social movement that aims to raise a global consciousness which sympathizes with African women's histories, present realities and future expectations ..'[1]

1.1 Background

Justice mechanisms have existed in human societies since time immemorial. Across Africa, different communities have had justice mechanisms that predate colonialism, surviving as part of the different indigenous governance frameworks.[2] These justice mechanisms are referred to by various names such as traditional, indigenous, grassroots, informal, community and local justice mechanisms,[3] to mean the broad range of dispute resolution mechanisms distinct from the formal or 'western-style' justice systems.[4] Traditional dispute resolution mechanisms (TDRM) apply the wisdom and administrative skills of local elders and other leaders derived from the existing customary laws of their communities to dispense justice.[5]

In Africa, traditional dispute resolution methods are widely popular for accessing justice.[6] This popularity is due to the apparent disconnect between the formal or state-backed justice mechanisms with communities' perceptions of justice, as well as the failures by governments to provide adequate infrastructure to aid access to justice within the formal justice system.[7] Justice dispensed within traditional dispute resolution mechanisms is deemed flexible, reinforcing community notions of social harmony and restoration of peace; physically accessible, inexpensive; and appealing to community notions of justice.[8] Community members

[1] Ruvimbo Goredema, 'African Feminism : The African Woman's Struggle for Identity' (2010) 1 African Yearbook of Rhetoric 33.
[2] Adenike Aiyedun and Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 Law, Democracy & Development 154.
[3] Tim Allen and Anna Macdonald, 'A Post-Conflict Traditional Justice: A Critical Overview' (2013) JSRP Paper 3 Justice and Security Research Programme Working Paper Series 7.
[4] Penal Reform International, *Access to Justice in Sub - Saharan Africa the Role of Traditional and Informal Justice Systems* (Astron 2000).
[5] Aiyedun and Ordor (n 2) 157.
[6] Oyeniyi Abe and Smith Ouma, 'A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa' [2017] Ave Maria International Law Journal 1.
[7] Allen and Macdonald (n 3) 1.
[8] Allen and Macdonald (n 3) 22 – 37.

participate within these mechanisms, and the primary focus of the dispute resolution ensures that disputing parties reconcile, and in case of injury, the victim is indemnified.[9]

In pre-colonial Africa, communities relied mainly on their local leaders' wisdom and judicial skills to resolve disputes.[10] Within this framework, decision making was relatively slow amongst most communities, including amongst the Kikuyu of Kenya.[11] Indeed, communities in Kenya had long before the arrival of British colonialists organized their customs, politics, ideologies and economic transactions in significant autonomy.[12] Not only was indigenous law fully in existence, but communities in Kenya were also already practising that which cumulatively constituted their cultural and socio-political identity.[13] Within the Agikuyu community of Kenya, disputes were settled by the head of the family or *Muramati.* The resolution of a dispute depended on the seriousness of the offence committed or the number of families involved in a dispute.[14] If the dispute were amongst family members, elders at the house level would mediate, while those conflicts that impacted on the larger public would be mediated by the clan council if the first council was not able to resolve it.[15] The village council settled disputes that involved members of a different *Mbari* or clans, or if the dispute was severe, a bigger council was involved.[16] Disputing parties would attempt to resolve disputes privately, failure to which the dispute would be referred to the *Kiama* (council of elders).[17] The Kiama heard evidence from the disputing parties and their witnesses, after which the case would be opened for general discussion to the general public present at the hearing.[18] The audience had junior elders and warriors who observed legal procedures for their learning purposes. Such events provided those in attendance an opportunity to acquaint themselves with the community's customary laws.[19] After a dispute was heard, an inner council of senior elders without any direct interest in the case retired to consider judgement. However, before a case could be heard, litigants were required to produce a fee in the form of a goat which was

[9] Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-Colonial Criminal Justice Systems in Kenya' (2010) 10 Tribe Law Journal 3.
[10] Aiyedun and Ordor (n 2) 157.
[11] Aiyedun and Ordor (n 2) 156.
[12] Judiciary of Kenya, 'Alternative Justice Systems Framework Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)' (2020).
[13] Mungo Park, *Travels in the Interior of Africa* (Edinburgh: A and C Black 1858).
[14] Godfrey Muriuki, *A History of the Kikuyu, 1500-1900* (First Edition, Oxford University Press 1975).
[15] Elizabeth Muli, 'Kiamas: Rethinking Access to Justice in Domestic Violence Cases in Kenya', (University of Stanford 2004).
[16] Muriuki (n 14) 165.
[17] As above.
[18] As above.
[19] As above.

slaughtered and roasted as the decision was being considered. Having arrived at a decision, the council of elders would eat the meat and finally pronounce the judgment.[20]

Anthropologists have examined the social and political structures of the various tribes in Kenya, which point to a dynamic way of living.[21] Peter Ndege observes that many communities adjusted themselves to their ecological niches, with the Agikuyu and Mijikenda developing agricultural economies, while others such as the Samburu and Maasai practice pastoralist forms of production.[22] Ndege observes that in pre-colonial Kenyan society, kinship determined the ownership of factors of production such as land, livestock and labour.[23] Ndege further observes that relationships by blood was held in high regard and was the most significant political unit.[24] Trade, intermarriages and intermittent warfare, and interactions amongst different ethnic communities were sustained, while migrations and settlement resulted from the increase and decrease of various ethnic communities.[25] According to Agikuyu and Akamba, land ownership was communal, and user rights were dependent on an individual's lineage to a house (Mbari or Musyi) which was a grouping of families that shared a common head of the family, traced back to seven or eight generations along patrilineal lines.[26] This appears to be a similar situation concerning the Luo community, who regarded land as an inalienable property of the clan, inherited through lineage membership.[27]

Like other communities in Kenya, the Luo, whose traditional dispute resolution systems are the subject of this study, were also organized alongside kinship relations. The homestead or 'Dala' was a characteristic organized unit, where both the monogamous and polygamous family units resided.[28] Several homesteads made up a 'Gweng', a village or settlements based upon kinships and alliances arising out of strategic interests.[29] Elders settled disputes between individuals and clans amongst the Luo community, with the most severe cases referred to the chief.[30] Women and children were not required to attend these sessions unless they were

[20] Muriuki (n 14) 165.
[21] Peter Ndege, 'Colonialism and Its Legacies in Kenya' (African Philanthropy 2009).
[22] Ndege (n 21) 1.
[23] Ndege (n 21) 2.
[24] As above.
[25] As above.
[26] Muli (n 15) 14.
[27] Michael Odera, Mark Ntabo and Daniel Kendagor, 'Pre-Colonial Luo Land Tenure Systems and Agricultural Practices in Awendo Sub-county, Kenya' (2019) 6 International Journal of Contemporary Applied Researches 19.
[28] As above.
[29] As above.
[30] As above.

witnesses or requested.[31] Cases such as murder and adultery were considered severe, and persons guilty of these offences were despised, and in the case of murder, it was believed that the spirit of the murdered person would follow the murderer.[32] The murder of persons from other clans would invite wars amongst the clans, and the murdered persons would not be mourned until the revenge against the other clan was effected.[33] However, the killing of one clan member would not invite revenge. Instead, the offender would be ordered to pay a compensation of one or two cows.[34] However, in some communities, there were principles that advanced peaceful resolution for all disputes and promoted a common humanity, such as 'ubuntu' or 'utu' mean humanity.[35] There was also the principle of respect which extended to the elders, age groups and to the environment.[36] The principle of reciprocity emphasized a reciprocal attitude of sharing to sustain collective security amongst members of their communities, for example when food would be shared whenever there was famine.[37]

1.1.1 The influence of colonialism on traditional dispute resolution processes

Fundamental changes in Africa occurred between 1880 and 1935, during which the colonial powers fundamentally reshaped and introduced a new order of governance in Africa.[38] Adu Boahen observes that one of the aims of the colonial enterprise was the destruction of African communal autonomy and its replacement with a system of control of the African population.[39] Colonial powers had a dual agenda in advancing their conquest in Africa.[40] The first agenda concerned the establishment of a centralized system of control to support the conquest and administration of Africa, while the other was to facilitate the governance of colonies with meagre resources but little or no information about the indigenous African population.[41] Brett Shadle, quoting Fredrick Lugard, observed that the civilization mission in Africa by the British was devoted to changing the lives of the native Africans, including the constitution of the native courts.[42] Lugard argued that it was only through the native courts that 'it was possible to create

[31] Ojijo Ogilo, 'The Luo Nation: History, Origin and Culture of Luo People of Kenya' (2012).
[32] As above 68.
[33] Ogilo (n 31) 67.
[34] As above.
[35] Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' 16.
[36] As above.
[37] As above.
[38] Albert Adu Boahen (ed), *Africa under Colonial Domination: 1880 - 1935* (Heinemann 1985).
[39] As above (n 38) 2-18.
[40] Alternative Justice Systems Baseline Policy (n 12) 1.
[41] As above.
[42] Brett L. Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60' (1999) 40 The Journal of African History 411.

rudiments of law and order, inculcate a sense of responsibility and evolve amongst a primitive native African community some sense of discipline and respect for authority'.[43] The British government did not have the money or manpower to rule by arms and therefore, to make the colonial rule work, there was a need to incorporate African ideas of custom and law into the new state systems.[44] Shadle argues that customary law and African courts provided an ideological and financial underpinning for European colonial rule.[45] Pimentel contends that the colonial government had no choice but to recognize customary law to implement the principle of indirect rule.[46] The colonial authority also created a parallel court system, which was modern and Eurocentric and based on the English common law to serve their interests.[47]

The colonial administration viewed the African customary legal system as irrational and barbarous.[48] For these justice mechanisms to surpass the colonial legal assessment, they had to pass the repugnancy test.[49] Ahmednasir Abdullahi argues that the repugnancy test was applied by the colonial administration to reduce the influence of African customary norms, displace them and create room for the preferred European customary law.[50] The traditional justice systems were perceived as uncivilised, unable to conduct fair trial, as was the norm in the colonizing countries and in the modern legal systems of the colonies.[51] Colonial authorities, unwilling to submit to the jurisdiction of indigenous courts, separated the jurisdiction of the courts according to race, with indigenous African population accessing the indigenous courts, while Europeans used the 'formal' courts.[52] This led to the emergence of dual justice system, which featured indigenous dispute resolution mechanisms and western-style 'formal' court systems.[53]

At the outset, the British colonial system attempted to govern by introducing the western style justice system.[54] The British developed a systematic approach to dismantle and recreate the

[43] Shadle (n 42) 411.
[44] Shadle (n 42) 414 - 415.
[45] Shadle (n 42) 411.
[46] David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2014) 14 Yale Human Rights and Development Law Journal.
[47] As above (n 46) 82.
[48] Elijah Taiwo, 'Repugnancy Clause and Its Impact on Customary Law: Comparing the South African and Nigerian Positions — Some Lessons for Nigeria' (2010) 34 Journal for Juridical Science 89.
[49] Taiwo (n 48) 98.
[50] Ahmednasir M Abdullahi, *Burial Disputes in Modern Kenya: Customary Law in a Judicial Conundrum* (Faculty of Law, University of Nairobi 1999).
[51] Aiyedun and Ordor (n 2) 158.
[52] As above.
[53] Aiyedun and Ordor (n 2) 159.
[54] Aiyedun and Ordor (n 2) 157 – 158.

native structures employing European traditions, setting an effective colonial rule.[55] According to Mamdani, a direct rule meant the reintegration and domination of the natives in the institutional context of semi servile and semi-capitalist agrarian relations.[56] In contrast, indirect rule was a system of selective reconstitution, a hierarchy of the local state and in some instances, an imposition where none existed.[57] This 'civilization mission', which meant the advancement of the rule of law, was driven by the intention to have the western courts as shining beacons of civilization.[58] As such, traditional justice mechanisms were relegated to the periphery, with state-appointed chiefs and headmen presiding over cases in disputes involving "natives".[59] In some instances, where the colonial administration had inadequate mechanisms to decide cases, they established native courts, *de novo*, guided by prescribed legislation. [60]

In the 1920s and 1930s, the colonial administrative circles were dissatisfied with the supervision of customary courts, particularly in East Africa, which were under the direct control of the judiciary, but who in practice, were supervised by the district commissioners.[61] The 'native' courts applied customary law to adjudicate disputes. Only 'native' Africans accessed them, and administrative officers appointed by the colonial regime determined cases employing customary rules.[62] Despite the attempt to crystallize the native legal systems under one order, many traditional African justice mechanisms continued to operate alongside the Native Courts.[63] One of the most significant attempts to transform African culture was the introduction of the doctrine of repugnancy, which emphasized that African customary law was applicable, if it was in consonance with justice and morality of English common law.[64] According to English common law, the colonial administration understood justice and morality according to English common law, and effectively relegated African customary law.[65] This was a systematic relegation of the culture, norms, and practices of indigenous peoples and its

[55] Shadle (n 42) 411.
[56] Under this system, African population were subjected to European law in relation to all matters in the public sphere-and the economy. However, in personal matters they were bound by the customary laws as enforced by the designated authorities who were African.
[57] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996).
[58] As above (n 57) 109.
[59] Mamdani (n 57) 110.
[60] Henry Morris, 'Some Perspectives of East African Legal History' (1979) 1–4 Scandinavian Institue of African Studies 28.
[61] Paul Swanepoel, 'Colonial Judges, Administrative Officers and the Bushe Commission in Interwar Kenya and Tanganyika' (2017) 23 Fundamina 89.
[62] Swanepoel (n 61) 92.
[63] Alternative Justice Systems Baseline Policy (n 12) xiv.
[64] Article 52, 1897 Order in Council proclaimed the application of English law in Kenya.
[65] Justice Modibo Ocran, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' (2006) 39 Akron Law Review 18.

replacement with the culture and norms of western civilization.[66] The repugnancy clause was based on the European 'civilizing mission' assumption that African customary law was irrational, uncivilized and barbaric and required close supervision by the European legal system.[67] Therefore, the repugnancy clause was enforced to ensure that native customs passed the legal test.[68] An example of the relegation of African customary law, in regard to African customary marriages is evidenced in the decision of the Chief Justice of the then East Africa Protectorate, Sir Robert Hamilton in *Rex v Amkeyo.*[69] The issue was whether a woman could testify against her husband under African customary law which was contrary to the common law rule that a spouse could not testify against the other. The Judge ruled that a marriage under African customary law was not proper marriage in law and criticized the practice of paying of dowry which he termed as 'wife purchase'.[70] The judge averred that 'the elements of a so-called marriage by native customs differ so materially from the ordinarily accepted idea of what constituted civilized marriage by native customs'.[71]

In Kenya, the formal recognition of African customary law occurred vide the 1963 Constitution , which restricted its application to subordinate courts where personal laws involving marriage, divorce, land tenure and inheritance were applied.[72] The introduction of the Judicature Act in 1967 further clarified the application of customary law, retaining the repugnancy clause, [73] which was subsequently adopted by the Constitution of Kenya, 2010.[74] The basis of the repugnancy clause was that customary law was inferior to written law, and therefore the onus on the party citing a customary law to demonstrate that it is 'adequate' and therefore not repugnant to any written law.[75] The colonial powers intended to stifle African customary law and develop a hierarchy in which African customary law was inferior.[76] Subsequent legal

[66] Alternative Justice Systems Baseline Policy (n 12) 19 – 20.
[67] Alternative Justice Systems Baseline Policy (n 12) 19.
[68] Taiwo (n 48) 34.
[69] (1917) E.A.L.R 14.
[70] Bas de Gaay Fortman and Paschal Mihyo, 'A False Start: Law and Development in the Context of a Colonial Legacy' (1993) 26 Verfassung und Recht in Übersee 136.
[71] Buluma Bwire, 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example' (2019) 9 Societies 17.
[72] Sections 3, 166-169, 87.
[73] Section 3 (2) Judicature Act No. 16 of 1967 – This section recognizes that the all the courts shall be guided by African customary law so far as it is not inconsistent with any written law.
[74] Article 159 (3) recognizes that traditional dispute resolution mechanisms shall not be used upon certain conditions including: i) where they contravene the bill of rights; ii) where it is repugnant to justice or results in outcomes that are repugnant to justice and morality; iii) inconsistent with the constitution.
[75] Alternative Justice Systems Baseline Policy (n 12) 20.
[76] Alternative Justice Systems Baseline Policy (n 12) 20.

mechanisms, including the 1969 Constitution,[77] and the Judicature Act,[78] continued to reduce the influence of African customary law and place it at the bottom tier.[79] Despite these challenges, traditional dispute resolution mechanisms were popular amongst the native African communities.[80] Far beyond their infrastructure, government, and geography, indigenous justice structures were heavily impacted by colonialism.[81] Colonialism not only eroded the indigenous power structures, but it also meted out structural violence upon the native African population, and this led to a rejection of traditional practices, including traditional methods of dispute resolution.[82] The introduction of the western liberal approach to justice, characterized by retributive justice, weakened the indigenous justice systems whose strategy was based on restorative justice.[83] Wahome and Nganga affirm this and assert that the traditional systems were effectively rendered voluntary.[84] Indigenous justice systems were rebranded as informal, an alternative to subordination to the more 'established' European legal system.[85]

1.1.2 African women and the colonial state

The introduction of colonialism in the 19th century in Africa coincided with a time in Europe when women's roles were restricted.[86] However, in some parts of pre-colonial Africa, such as in Nigeria, women exercised political power and occupied influential positions such as chiefs.[87] There was a perception amongst colonial administrators that women had no place in politics, which they deemed 'a male domain'.[88] As a result, the isolation and exclusion of women from socio-economic and political activities were introduced.[89] These practices greatly reduced the status of women in the rural areas, depriving them of their roles in the agricultural farms due to the influence of modernization and commercialization of agriculture.[90]

[77] Section 115 (2). This section conferred ownership of trust land, however, it prohibited right or interest if the African customary law in was repugnant to any written law.
[78] Judicature Act No. 16 of 1967.
[79] Alternative Justice Systems Baseline Policy (n 12) 2.
[80] Alternative Justice Systems Baseline Policy (n 12) 4.
[81] Mary Wahome and Daniel Ng'ang'a, 'The Effects of Colonialism on Indegenous Conflict Resolution Systems Among Pokot and Turkana Communities' (2020) 11 Chemchemi International Journal of Humanities and Social Sciences 1.
[82] Wahome and Ng'ang'a (n 81) 70.
[83] As above. Also refer to background section of this chapter where this is discussed.
[84] Wahome and Ng'ang'a (n 81) 82.
[85] As above. Emphasis mine.
[86] Fredoline Anunobi, 'Women and Development in Africa: From Marginalization to Gender Inequality' (2002) 2 African Social Science Review 41.
[87] As above.
[88] As above.
[89] Emmanuel Olorunfemi Jaiyeola, 'Patriarchy and Colonization: The "Brooder House" for Gender Inequality in Nigeria' (2020) 10 Journal of Research on Women and Gender 3-22, 3.
[90] Anunobi (n 86) 6.

Indeed, European colonialization reversed and greatly diminished the status of African women.[91] With the introduction of cash crop farming and the systematic exclusion of women in the global marketplace, African women, lost economic autonomy and power.[92] Indeed, some scholars have suggested that colonialism is the root of the marginalization of women in Africa.[93] Selhausen and Weisdorf observe that men were considered in formal employment, while women were discouraged from engaging in any formal work.[94] Although European colonial rule ignited a transformation of colonies, it also led to an increase in gender inequality, particularly during the first half of the colonial era.[95] Selhausen and Weisdorf argue that while colonial occupation changed the educational and economic ecosystems in the colonies, it also amplified gender inequality, substantially delaying women's literacy rates.[96] For example, African men employed in the traditional informal economies had daughters who were less educated, less frequently employed in the formal sector, and likely subjected to gender inequality compared to daughters of men employed in the modernized and formal economy developed by the Europeans.[97] The effect of this legacy in contemporary African society as Selhausen and Weisdorf argue, was that African women working in the realm of informal economy readily preserved women's marginalization than those who worked within the formal economy.[98] In turn, this provided a key to understanding the persistence of contemporary challenges around women and girls education and poverty eradication in Africa.[99]

1.1.3 Feminism and the plurality of justice systems in post-colonial Kenya

The existence of the plurality of justice systems within the state legal system, whether recognized or not, is in legal anthropology referred to as legal pluralism.[100] Colonial empires distinguished 'modern' law from customs, traditions and primitive law to advance their administrative interests.[101] While indigenous laws enjoyed a monopoly in pre-colonial Africa, these laws metamorphosized due to colonialism, slave trade, urbanization, labour migration

[91] Anunobi (n 86) 5.
[92] Kathleen Sheldon, *Women and Colonialism* (Oxford University Press 2013).
[93] Felix Meier Zu Selhausen and Jacob Weisdorf, 'A Colonial Legacy of African Gender Inequality? Evidence from Christian Kampala, 1895–2011' (2016) 69 The Economic History Review 229.
[94] Selhausen and Weisdorf (n 93) 229.
[95] As above.
[96] Selhausen and Weisdorf (n 93) 229 – 230.
[97] Selhausen and Weisdorf (n 93) As above 229 – 230.
[98] Selhausen and Weisdorf (n 93) 255.
[99] As above.
[100] Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global†', *Legal Theory and the Social Sciences* (Routledge 2010).
[101] Keebet von Benda-Beckmann and Bertram Turner, 'Legal Pluralism, Social Theory, and the State' (2018) 50 The Journal of Legal Pluralism and Unofficial Law 255.

etc.[102] Today, what is referred to as customary law is a combination of indigenous laws and people's normative adaptations to socio-economic changes, which are greatly influenced by state laws.[103]

Post-colonial African states, including Kenya, continued and justified the unfair European policies and practices against women.[104] Newly independent states gave men more prominence, granting them more access to education, jobs, leadership, and property, which helped men gain more control.[105] Ambreena Manji argues that the colonial and post-colonial African states political economy impacted women and men differently.[106] Manji argues that women's experiences with the state-led to resistance to its intrusion into their lives.[107] Post-colonial African states constructed a ruling class that conflated male power, legitimizing patriarchy.[108] These assertions resonate with Catherine Mackinnon's observation concerning the relationship between the liberal state and women. Mackinnon argues that feminism has not confronted the relationship between the state and society within a theory of social determination specific to sex.[109] Mackinnon argues that the structure of the state is male in a feminist sense because the law treats women the way men see and treat women.[110] Mackinnon argues that the liberal state is constituted in men's interest through legitimating norms, forms relations and substantive policies that legitimate the male view.[111]

African states embraced legal pluralism with a view to preserving and respecting the cultural traditions of the indigenous African population.[112] A number of African states, including Kenya, reasserted themselves after independence, crediting the indigenous culture, which the colonialists had long devalued.[113] This resulted in the resuscitation of customary laws and the institutions related to them.[114] Accordingly, many post-independence constitutions adopted the recognition of customary law and traditional law and institutions while at the same time

[102] Anthony C Diala, 'A Butterfly That Thinks Itself a Bird: The Identity of Customary Courts in Nigeria' (2019) 51 The Journal of Legal Pluralism and Unofficial Law 381.
[103] Diala (n 102) 5.
[104] Anunobi (n 86) 6.
[105] As above.
[106] Ambreena S Manji, 'Imagining Women's "Legal World": Towards a Feminist Theory of Legal Pluralism in Africa,' (1999) Social & Legal Studies 84.
[107] Manji (n 106) 441.
[108] Manji (n 106) 443.
[109] Catharine Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1990).
[110] Mackinnon (n 109) 16 – 162.
[111] Mackinnon (n 109) 162.
[112] Pimentel (n 46) 67.
[113] David Pimentel, 'Legal Pluralism and the Rule of Law: Can Indigenous Justice Survive?' (2010) 32 Harvard International Review 32.
[114] Pimentel (n 113) 3.

maintaining the western-style courts.[115] Pimentel argues that the reassertion of culture and institutions related to it was a reaction to the rejection of the colonial influence. At the same time, the retention of the Western-style justice system was an 'embrace of the Western-dominated priorities associated with the global community, such as protecting human rights and maintaining the rule of law, largely observed as important to be admitted in the world economy'.[116] Thus, customary and western laws created diverse normative systems operating in a legally plural system.[117] Seong-Hak observes that post-colonial discourse has hailed indigenous cultures and legal identity and is dominated by efforts to rediscover 'authentic' customary law.[118] Post-colonial African states renewed interest in culture is read as shaking off the yoke of colonialism and the acclamation of African beliefs.[119]

However, human rights advocates, including feminists, have expressed concern regarding the ability of cultural norms to observe and respect women's rights.[120] Human rights advocates argue that legal pluralism compromises the human rights of women, minorities and those historically disenfranchised.[121] Human rights advocates say that the collective rights and interests of the community are often pitted against the rights of an individual whose rights are often curtailed to the benefit of the community.[122] Customary law is tainted by the colonial regime, which 'reinforced gender distinctions, consistent with European values' affecting women's ability to advocate for themselves within traditional structures.[123] Indeed, Winnie Kamau also observes an inextricable link between customary norms, practices, and women's rights within the context of Kenya.[124] Kamau observes that women occupy a disadvantaged position where women's interests are subsumed under patriarchal group interests.[125] Therefore, customary law contains aspects contrary to gender equality and international human rights law.[126] Within plural legal settings such as Kenya, there has been a conflict between the application of customary law concerning women's rights to inherit immovable property, which

[115] Pimentel (n 113) 3.
[116] As above.
[117] Kofi Abotsi, 'Customary Law and the Evolving Tensions and Re- Engineering' (2020) 37 Arizona Journal of International and Comparative Law 33.
[118] Marie Seong-Hak Kim, 'Legal Pluralism and Colonial Customary Law' *Perspectives (Institut des Études Avancées, France)* (Paris, 2012) 5.
[119] Lotte Hughes and Mark Lamont, 'Cultural Rights and Constitutional Change' (2018) 77 African Studies 159.
[120] Pimentel (n 46) 69.
[121] As above.
[122] As above.
[123] Pimentel (n 46) 70.
[124] Winifred Kamau, 'Customary Law and Women's Rights in Kenya' (2023) East African Law Journal 137.
[125] As above 1.
[126] Kamau (n 124) 2.

offends the provision of the Law of Succession Act.[127] However, human rights advocates argue that if justice is to be done in plural legal systems, there is a need to limit differences between indigenous cultures and norms.[128] They argue that to implement legal pluralism effectively, there is a need to balance and ensure that justice is guided from a human rights and the rule of law perspective while respecting traditional cultures and institutions.[129]

In Kenya, the ascendency of customary law culminated in recognition of culture and cultural rights within the Constitution of Kenya, 2010, which affirmed culture as the foundation and cumulative civilization of the nation.[130] The affirmation that traditional dispute resolution methods can also provide justice resonates with the global discourse.[131] This discourse emphasizes the rule of law as an enabler for economic development and the role of courts in creating an environment for sustainable economic growth.[132] After the promulgation of the Constitution of Kenya, the focus of the rule of law shifted from the role of the courts as purveyors of sustainable development to placing the needs of the individual justice seekers as the pivot of economic development.[133]

Perhaps one of the most significant aspects of traditional dispute resolution mechanisms that have enabled them to sustain popularity is their reliance on cultures and traditions, maintaining their relevance in communities.[134] These cultures and traditions denote established ways of living, drawing on spiritual and entrenched practices that have obtained some level of acceptance by the community.[135] Traditional rulers relied on some spiritual powers to interpret living customary laws and developed a system of execution of community policies.[136] This reliance on some vital force or some form of spirituality within traditional dispute resolution mechanisms is part of making a claim and rationalization of the culture of the different communities.

[127] Kamau (n 124) 2-3.
[128] Pimentel (n 46) 69.
[129] Pimentel (n 46) 73.
[130] Article 11(1) Constitution of Kenya, 2010.
[131] Alternative Justice Systems Baseline Policy (n 12) 5.
[132] As above.
[133] As above.
[134] Allen and Macdonald (n 3) 6.
[135] Cyprian Fonyuy Fisiy, 'Colonial and Religious Influences on Customary Law: The Cameroonian Experiences' (1988) 43 Africa: rivista trimestrale di studi e documentazione 262.
[136] Fonyuy Fisiy (n 135) 265.

However, despite the colonial experience, most African countries today have a plural legal system incorporating native African customs with western style legal courts.[137] Kathryn Wester notes that although the legal systems in these states are designed to be culturally inclusive, they neglect gender as a category of analysis. As a result, women's human rights are often trapped between traditional culture and formal law.[138] During decolonization, these legal systems were formed without women's input. Local customs were relayed through male tribal leaders and observed by male colonizers leading women to lose sight of what was accorded to them by native African customs.[139] African men, too, lost their rights during colonialism, continue to endure subordination imposed by western cultural and economic imperialism.[140] Wester further notes that African men imposed violence as a measure of control over local women as a result of this frustration.

Many attempts have been made to counterpoise women's human rights with traditional African values, solidifying the existing patriarchal structures.[141] Much resistance to western human rights is based on arguments around the imposition of western solutions to local problems and the viability of rights-based strategies to advance broader agendas of equality and social justice for women in Sub-Saharan Africa.[142] However, some feminists still believe the rights-based strategy is the best option because rights foster a sense of entitlement and constitute an important dimension of human rights realization.[143]

Indeed, increasingly many countries are institutionalizing traditional dispute resolution mechanisms to facilitate access to justice for those unable to access formal justice mechanisms. Traditional dispute resolution mechanisms are widely believed to advance situated ideas of justice of communities, therefore consistent with the fundamental principles of communities' justice.[144] Further, they are equally lauded for facilitating consensus amongst community members and being easily accessible financially and physically compared to the formal justice systems. This contrasts the legal realities that justice seekers face within the formal or State-backed justice systems, which have high litigation costs, severe backlogs and elaborate court

[137] Kathryn Birdwell Wester, 'Violated: Women's Human Rights in Sub-Saharan Africa' [2013] Tropical Review Digest: Human Rights in sub-saharan Africa 21.
[138] Wester (n 137) 3.
[139] Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16 Feminist Legal Studies 47.
[140] Wester (n 137) 3.
[141] Wester (n 137) 4.
[142] As above.
[143] As above.
[144] Oyeniyi and Ouma (n 6) 5-6.

procedures. Indeed, according to Ewa Wojkowska, 80 per cent of disputes are resolved through traditional dispute resolution mechanisms in some countries.[145]

Despite the popularity of traditional justice mechanisms, they are widely criticized for the perceived inability to provide justice for women.[146] A research study commissioned by three UN agencies, including UN Women, revealed that traditional dispute resolution mechanisms do not adhere to set human rights standards which can occasion injustice to women.[147] This research also noted that these cultural justice mechanisms are likely to reinforce the discrimination of women.[148] This is due to their over-reliance on religion, customs as well as practices of communities which are widely patriarchal.[149] This view is supported by the Human Rights Committee in its General Comment 28, which notes that violations of women's human rights are embedded in traditions, culture, and religion.[150]

Further, cultural norms still favour men, and in many instances, women are viewed as an adjunct rather than equals.[151] Feminist scholarship has expressed concern over the reliance on culture. Feminists also note that virtually all cultures in the world have a patriarchal basis. Therefore, women's rights can only be achieved if all discriminatory cultures are encouraged to promote women's rights.[152]

1.2 Traditional dispute resolution in the post-independence constitutional dispensation in Kenya

Kenya's 1963 Constitution recognized traditional dispute resolution mechanisms as part of its post-colonial legal and governance architecture.[153] However, traditional methods of dispute resolution were only applied in matters involving native law and custom[154] to the extent that they were not repugnant to justice or any written law.[155] Whilst the colonial administration

[145] Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (UNDP 2006).
[146] Elin Henrysson and Sandra Jareman, 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya' [2009] Law and Society Review 43.
[147] UNICEF, UN Women and UNDP, 'Informal Justice Systems Charting a Course for Human Rights-Based Engagement' <https://www.unwomen.org/en/digital-library/publications/2013/1/informal-justice-systems-charting-a-course-for-human-rights-based-engagement> accessed 5 September 2021.
[148] UNICEF et al (n 147) 99.
[149] As above.
[150] General Comment No. 20 Article 3 (The Equality of Rights between Men and Women) para 5.
[151] FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province* (2008).
[152] Leti Volpp, 'Feminism versus Multiculturalism' (2001) 101 Columbia Law Review 1181.
[153] Judiciary of Kenya, 'Alternative Justice Systems Framework Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)' (2020).
[154] Native Tribunals Ordinance of 1930.
[155] Judicature Act Chapter 8 of the Laws of Kenya.

placed these justice mechanisms at the periphery, there was much interaction with the formal systems of justice, leading to an inevitable influence in their processes and outcomes.[156]

Kenya's post-independence constitutional review process, culminating in the development of the draft Constitution of 2004 , also known as the Bomas draft Constitution, and the subsequent adoption of the 2010 Constitution reignited the debate on the place of African customary law and the traditional dispute resolution mechanisms through chapter 5 and Article 159(2)(c) respectively. Kenya's Constitution has been described as transformative.[157] This transformation is witnessed by how it confers rights and assigns responsibilities to the state. However, the journey towards the transformative Constitution of Kenya was rife with many pitfalls. The independence Constitution, brought about by the colonial administration, had little legitimacy with the people of Kenya. It was thus amended ten times during its first six years by the new independence administration.[158] This series of amendments demonstrated the failures in the Constitution resonating with the people of Kenya and instead with the few political elites.[159] Increased citizens' clamour for participation in the governance of Kenya culminated in the discussions leading to the development of the Bomas draft Constitution.[160]

Kenyans were categorical on the need for the recognition of customary law in the settlement of disputes, including its codification and the role of courts in the development of personal law.[161] Subsequently, the Constitution of Kenya, 2010 adopted the recommendations of the Bomas draft Constitution in so far as it recognized culture as the cumulative civilization of the people of Kenya and placed an obligation on the Judiciary to promote traditional dispute resolution. The Constitution of Kenya 2010 revives the role that traditional mechanisms play in the administration and delivery of justice.[162] However, it requires that these justice mechanisms adhere to constitutional thresholds, perhaps understanding the challenges that these mechanisms have in providing justice.[163] Further, the requirement in the Constitution that judicial authority is guided by certain principles, including traditional dispute resolution

[156] Alternative Justice System Framework Policy (n 153) 2.
[157] Willy Mutunga, Yash Pal Ghai and James Gathii, 'The 2010 Constitution of Kenya and Its Interpretation: Reflections from the Supreme Court Decisions' (2014).
[158] Frances McEvoy, 'An Evaluation of Constitutional Implementation in Kenya' [2016] Political Science.
[159] McEvoy (n 158) 2.
[160] The Elephant, 'Draft Constitution of Kenya [Bomas Draft] Accessed on 10th August, 2020'.
[161] 'The Final Report of the Constiution of Kenya Review Commission' (Constitution of Kenya Review Commission (CKRC) 2005).
[162] Article 159 (2) (c) Constitution of Kenya.
[163] See Article 159 (2) (3) contravenes the Bill of Rights and is repugnant to justice and morality or results in outcomes repugnant to justice and morality or is inconsistent with the constitution.

methods, demonstrates that these justice mechanisms are significant in providing justice to Kenyans.[164] This renewed interest in traditional dispute resolution mechanisms is part of a quest to diversify the modes of accessing justice while encouraging the development of Kenya's different cultures.[165]

As envisioned by the Constitution of Kenya, the traditional dispute resolution framework must operate in line with fundamental human rights principles such as dignity, fairness, inclusivity, equality and non-discrimination.[166] Therefore, these justice mechanisms must promote the fundamental rights of all Kenyans, including women, and ensure that their normative and institutional framework promotes justice and human rights. The Alternative Justice Systems Baseline Policy, adopted in August 2020 notes that principles articulated in Article 10 of the Constitution lie at the heart of a transformational alternative justice systems framework in Kenya.[167] The Policy notes that Alternative Justice Systems (AJS), including traditional dispute resolution mechanisms, are one of the mechanisms for upholding human dignity and promoting social justice.[168] AJS mechanisms affirm a people-centred justice and promote the dignity of Kenyans as envisioned in the Constitution of Kenya.[169] By affirming the human dignity and justice of local communities, AJS enriches the international discourse of this entitlement.[170]

The renewed interest in traditional dispute resolution mechanisms as an avenue for accessing justice resonates with the situation in Kenya today. According to a survey conducted in 2017 by the Hague Institute for Innovation and Law in partnership with the Judiciary of Kenya, approximately 90 per cent of disputes are resolved through informal or non-state-backed systems, outside of the confines of the formal state-backed courts.[171] In Kenya, the renewed interest in traditional dispute resolution mechanisms has its genealogy in the process for the

[164] See Article 159 (2) of the Constitution provides the principles that should govern the exercise of judicial authority. These are:
(a). Justice shall be done to all, irrespective of status;
(b). Justice shall not be delayed;
(c). Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.
[165] See Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.
[166] Article 10 of the Constitution of Kenya which outlines Kenya's national values and principles of governance.
[167] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)' (Judiciary of Kenya 2020).
[168] Alternative Justice Systems Baseline Policy (n 12) 25.
[169] Article 28 of Constitution of Kenya provides that every person has the right to inherent dignity and the right to have that dignity respected and promoted.
[170] Alternative Justice Systems Baseline Policy (n 12) 25 emphasis on Justice mine.
[171] Judiciary of Kenya, HiiL and World Bank, 'Justice Needs and Satisfaction in Kenya 2017: Legal Problems in Daily Life' (Judiciary of Kenya 2017).

agitation for a review of the Constitution of Kenya, 1969 also known as the independence Constitution. The report of the 2005 Constitution of Kenya Review Commission (CKRC), highlighted the renewed interest by Kenyans in redefining their nationhood, systems of governance and dispute resolution.[172] The report documents an elaborate provision on the recognition of culture including a resolve by Kenyans to promote culture and cultural heritage including norms, beliefs and rituals as long as they are not harmful, oppressive or forced on any person.[173] On cultural institutions, the report recommended the need for the recognition and facilitation of the reform and development of traditional institutions, and to utilise the strength of these traditional institutions in promoting peace, negotiations, dispute settlement, solidarity and conflict resolution.[174] Alternative dispute resolution mechanisms were identified as avenues for the advancement of equality and access to justice.[175] The Constitution of Kenya, 2010, premised upon the recommendations of the Bomas draft Constitution and the accompanying report, placed a constitutional obligation on the Judiciary to promote alternative forms of dispute resolution, including traditional dispute resolution methods.[176] The affirmation of culture as the foundation of a nation and cumulative civilization of the people of Kenya in Article 11(1) of the Constitution of Kenya reinforces the confidence in traditional dispute resolution mechanisms to provide justice. However, the Constitution has also limited the application of customary law to the extent that norms and cultures applied are not repugnant to justice and morality or inconsistent with any other written law in Kenya.[177] This ensured that harmful cultural practices that do not promote justice, equality and discrimination are eradicated.

Because there are diverse communities, each using its dispute resolution methods in Kenya, ideas of justice are as diverse. The Luo community of Nyando sub-county in Kenya, whose dispute resolution mechanism forms a case study to this research, also relied on their norms and cultures governing every part of their lifestyle, including conflict resolution. Historically, clans were led by a hereditary ruler who exercised political, judicial and spiritual powers. The decision-makers often invoked ancestral spirits in reinforcing communal order and made

[172] Constitution of Kenya Review Commission, 'The Final Report of the Constitution of Kenya Review Commission' (Kenya Law Reform Commission 2005).
[173] Constitution of Kenya Review Commission Report (n 172) 93 – 102.
[174] Constitution of Kenya Review Commission Report (n 172) 100.
[175] Constitution of Kenya Review Commission Report (n 172) 204.
[176] Article 159 (2) (c) of the Constitution of Kenya.
[177] Article 159 (3) (b) (c) of the Constitution of Kenya.

atonement to appease the spirits in cases of wrongdoing.[178] Women and children only attended dispute resolution sessions if they were invited as witnesses.[179] The Federation of Women Lawyers in Kenya (FIDA K), in a research report on access to justice for women within traditional dispute resolution mechanisms in Kenya's coastal region, has equally noted that women face challenges accessing justice due to the overreliance on cultural norms. The report notes that although traditional dispute resolution mechanisms encourage women's participation as arbiters, their roles are still relegated to resolving disputes involving women.[180]

Indeed, negative cultural norms have been used to reinforce patriarchal practices and legitimize the oppression of women worldwide.[181] An-Na'im argues that the relationship between culture and international human rights should be reciprocal, allowing customary and religious laws to conform to accepted international human rights standards.[182] He further argues that the idea is to transform these cultures and not curtail their existence.[183] It is trite that States have the responsibility under international law to ensure that domestic laws conform with international and regional obligations to promote, protect and respect human rights.[184] The Convention on the Elimination of Discrimination Against Women (CEDAW),[185] as well as the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, known as the Maputo Protocol,[186] provide frameworks for examining women's rights.

The obligation to protect, promote, and fulfil human rights is a constitutional duty that requires removing any practices or inconsistencies that do not conform with its legal obligation on protecting human rights under regional and international laws. Although CEDAW and the Maputo Protocol have divergent strategies regarding culture and whether culture can be used to advance women's rights, both recognize that the state is responsible for protecting women's human rights.[187] Celestine Nyamu-Musembi eloquently captures this discord between

[178] Nigro Blak, 'The Luo Nation-History, Origin and Culture of Luo People of Kenya', <https://www.academia.edu/11787831/The_Luo_Nation_History_Origin_and_Culture_of_Luo_People_of_Kenya> accessed 28 August 2023.
[179] As above 85.
[180] FIDA Kenya (n 151) 16.
[181] Abdullahi An-Naim, 'State Responsibility Under International Human Rights Law to Change Religious and Customary Laws' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 2011).
[182] An-Na'Im (n 181) 128 – 129.
[183] An-Na'I'm (n 181) 129 – 130.
[184] The obligation to respect, protect and fulfil is an international law obligation requiring state parties to ratified international treaties and conventions.
[185] Adopted by the UN General Assembly on 18 December 1979 in New York.
[186] Adopted by the African Union on 11 July, 2003 in Maputo.
[187] Celestine Nyamu-Musembi, *Pulling Apart? Treatment of Pluralism in CEDAW and Maputo Protocol' in Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013).

CEDAW and Maputo Protocol. Musembi notes that the Maputo Protocol's approach to culture gives it room to be a resource for enhancing rights, as opposed to CEDAW's approach, which views the very existence of pluralism as an impediment to gender equality.[188]

This study is grounded in the understanding of the politics of culture, particularly within the context of the study in Nyando, Kenya. Cultures are always contested and influence is obtained by powerful people within the communities. Laura Parisi notes that cultures can sometimes obscure harmful practices which can be masked as collective and acceptable.[189] This study is aware of the gendered power dynamics that can present a dilemma for women, especially when provided with a choice of enduring discrimination and inequality to remain vital members of their communities.[190] An-Na'im further notes that this dilemma can be more difficult for women who are aware than those who are not aware.[191] This is because women who are aware of their rights often have to make the difficult decision of opting out of their communities rather than enduring inequality and discrimination.[192]

1.3 Research problem, assumptions, limitations and significance of the study

1.3.1 Research problem

Within the global discourse on justice, there seems to be a disjoint between the everyday experiences of justice seekers and what is primarily seen as progressive jurisprudence by liberal legal theorists, some of whom are feminists. This disjoint is because actors within traditional dispute resolution mechanisms use customary norms, cultures and standards, which are an intrinsic part of the daily lives in resolving disputes.[193] On the other hand, some argue that justice, as dispensed within these mechanisms, undermines human rights standards such as justice and equality.[194] Liberal feminists critique the use of culture as a mechanism for reinforcing gender hierarchies and discrimination of women and call for universal norms of

[188] Nyamu-Musembi (n 187) 183-214.
[189] Laura Parisi, 'Feminist Perspectives on Human Rights' [2017] The International Studies Encyclopedia 2170.
[190] An-Na'im (n 181) 134 – 135.
[191] An-Na'i'm (n 181) 135 – 136.
[192] As above.
[193] Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 Indiana Journal of Global Legal Studies 87.
[194] Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 The American Political Science Review 303.

justice.[195] Yet, women on the ground using traditional dispute resolution methods defend local justice systems.[196]

The global debate on justice amongst feminists reveals that there is a conflict between those who favour a liberal feminist approach that advances a universalistic conception of justice and those who advocate for a situated paradigm of justice. This conflict is drawn from a debate amongst feminists regarding the centrality of women's voices in John Rawls's theory of justice and his exposition of the original position. Liberal and radical feminist legal theorists, while challenging modern contemporary theories of justice, such as that advanced by Rawls, note that Rawls's theory of justice as fairness is androcentric and structurally inadequate because it does not consider women's concerns. Yet, these dominant western feminists seem to assume a sense of heterogeneity of womanhood without a recognition of the diversity of voices.

Ann Ferguson captures this discord observing two problems facing feminism. On the one hand, there is the justice concern, which stems from dominant western feminist paradigms of universalistic justice. Secondly, a solidarity problem arising from the disconnect between feminism in the global sphere and indigenous women.[197] This fault line between western feminism and indigenous women, has long been driven by a feminist movement that appears disconnected with the everyday experiences of the indigenous or women in the rural areas. Indigenousness is an identity constructed, shaped and lived in the politicized context of colonialism.[198]

Communities, tribes clans or nations are called indigenous people's because they are indigenous to the lands they inhabit, in contrast to and in contention with the colonial societies from Europe.[199] Indigenous women prefer accessing justice through the traditional dispute resolution, which uses culture as the foundation of their justice.[200] The preference for traditional justice mechanisms is because they are more accessible, efficient, local based, and allow these justice mechanisms to influence laws more readily. Within these justice

[195] Cyra Akila Choudhury, 'Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice' [2015] FIU Law 44, 239–240.
[196] Manuela Lavinas Picq, 'Between the Dock and a Hard Place: Hazards and Opportunities of Legal Pluralism for Indigenous Women in Ecuador' (2012) 54 Latin American Politics and Society 1.
[197] Ann Ferguson, 'Feminist Paradigms of Solidarity and Justice': (2009) 37 Philosophical Topics 161.
[198] Alfred Taiaiake and Jeff Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40 Cambridge University Press 597.
[199] Taiaiake and Corntassel (n 198) 597.
[200] Picq (n 196) 4.

mechanisms, human rights discourse materializes in the vernacular,[201] allowing indigenous women to experience the community's ideas of justice that resonate with their context.

Indeed, western feminists have been criticized for advancing theories of gender devoid of account of the differences amongst other women, especially of different race, colour, class or ethnicity. Although women experience many injustices as women, other factors exacerbate women's oppression, depending on the contextual backgrounds. Manuela Picq continues opine that the feminist movement has long been individualistic in approach, emphasizing western political and normative hegemony over women experiencing multiple forms of oppression, particularly in the global south.[202]

1.3.2 Research questions

The main research question of this thesis is:

1. In what ways do the everyday experiences of women in traditional dispute resolution mechanisms in Nyando sub-county inform an African feminist paradigm of justice?

The following sub-questions will assist in answering the main question:

1. What are the feminist paradigms of justice?
2. What are the justice concerns in traditional dispute resolution mechanisms?
3. What are the justice paradigms of widows' within traditional dispute resolution mechanisms in Nyando sub-county in Kenya?
4. How can traditional dispute resolution mechanisms ensure gender justice?

1.3.3 Research hypothesis

A situated experience of women justice seekers within traditional dispute resolution mechanisms is critical in developing a feminist paradigm of justice.

1.3.4 Assumptions

This study is predicated on some assumptions. Firstly, this study assumes that although a majority of criticism levelled against traditional dispute resolution mechanisms rests on their

[201] As above.
[202] Picq (n 196)18.

perceived inability to provide justice for women, an examination of the Nyando social justice project reveals that these mechanisms can indeed provide adequate justice for women. This assumption is premised on evidence obtained from The Kenya Legal and Ethical Issues Network[203] which has documented that approximately 625 cases involving widows[204] have been resolved in three sub-counties of Kenya, including Nyando sub-county, in a manner that is protective of the women's rights.

Secondly, this research intends to contribute to the global debate amongst feminists on justice by adopting a feminist method of consciousness-raising, through an examination of the experiences of women justice seekers using the traditional dispute resolution mechanisms in Nyando sub-county. This is predicated on the feminist legal theorists who insist on the importance of examining the situated ideas of justice in developing a feminist theory/paradigm of justice.

Thirdly, the study also assumes that criticisms levelled against traditional dispute resolution mechanisms can be mitigated if these justice mechanisms take into account a feminist paradigm of justice.

1.3.5 Limitations of the study

This study encountered a few limitations. First, in the context of Nyando sub-county where there are cultural stigmas related to widows' inheritance rights, re-marriages and family conflicts, some participants provided guarded responses to some of the questions posed. Second, some of the interview participants were hesitant to critique cultural norms that are retrogressive due to internalised negative traditional values about womanhood.

1.3.6 Significance of the study

The significance of this study is embedded in its contribution to the global debate by feminists on justice, through an examination of the lived experiences of indigenous African women accessing justice in traditional dispute resolution mechanisms. It is hoped that this study will

[203] KELIN is a registered non-governmental organization based in Kenya that conducts advocates towards the protection of HIV related human rights concerns in Kenya. Through its *Cultural Justice Project,* KELIN has supported widowed women living with HIV access justice in Nyando sub-county of Kisumu, working with the community structures to support women's access to justice.

[204] Kenya Legal and Ethical Network, 'KELIN Inter County Dialogue on Operationalisation of the Alternative Justice Systems' (*https://www.kelinkenya.org/wp-content/uploads/2019/12/intercounty-Dialogue-Report-.pdf*) 1.

contribute to a new paradigm of justice grounded in the lived experiences of women accessing justice using the traditional dispute resolution mechanisms in Nyando sub-county in Kenya. Further, the novel ideas generated through this study will provide an architectural review of traditional dispute resolution mechanisms in Kenya, towards a more gendered approach to justice.

1.4 Theoretical framework

This thesis is premised on the proposition that situated experiences of justice by women is critical in determining a feminist paradigm of justice. In particular, by studying the context of the lived experiences of justice of widows' in Nyando, Kenya, this study develops a grounded understanding of justice which may be applicable to other similarly situated communities in Africa. This resonates with the feminist method of inquiry which places women at the centre of its research. Critical to feminist method is consciousness-raising, which is a collective meaning of women's social experience as they live through it. Feminist epistemology postulates that the social process of being a woman allows a woman's consciousness to become aware of itself and its world. Therefore, women can claim knowledge about oppression within the society because they are part of the society. Consciousness-raising reflects women's comprehension of their experiences as products of their conditions, by being critical of their conditions together.[205]

The global debate amongst feminists reveals that there is a conflict between those who favour a liberal feminist approach that advances a universalistic conception of justice, and those feminists who advocate for a situated paradigm of justice. The divergence of opinion on the question of justice amongst feminists stems from their criticism of the lack of centrality of women's voices in major theories of justice. Specifically, feminists have criticized contemporary theories of justice for their lack of consideration of gender as a method of inquiry. Feminist scholars such as Susan Okin argues that Rawls' theory of justice lacks the voices of women and is not reflective of the injustice, particularly suffered by women in the society.[206]

[205] Mackinnon (n 109) 83-106.
[206] Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books 1989).

Although feminist legal theory is diverse, all commit to certain basic claims. First, central to the category of analysis of law is gender, and second is that mainstream legal doctrine and theory are developed with men's experiences in mind and incapable of addressing women's needs. Lastly, feminist legal theory opines that significant changes are needed in law to promote greater equality amongst sexes.[207] Feminist liberal legal theory is premised on the formal legal equality of sexes. This category of feminists argues that neutral legal practices and rules are male-biased. Therefore, legal officials need to be conscious of the hidden gender implications of neutral legal standards and concepts.[208] Radical feminist legal theory is critical of gender hierarchies which it argues defines sexual politics. These hierarchies are perpetuated by a male patriarchal system, which wields power through the domination and oppression of women. Radical feminists opine that the 'male perspective' is systematic and hegemonic and not biological, rather a social and political concept.[209]

Although there is no single feminist theory that encapsulates African women's experiences, this study will rely on the post-modern or anti-essentialist feminist legal theory whose premise finds appeal amongst feminists grappling with the dominant essentialist feminist theories. Post-modern feminist theories aim to be the voice of the excluded categories and intersect with post-colonial or other poststructuralists discourses.[210] Just like the liberal proponents of universalism of justice, essentialists compound the term woman to include all women and often ignore the differences amongst women. Anti-essentialism feminist legal theory emerged from criticisms of the proponents of essentialism, who assume that all women are inherently similar and possess homogenous characteristics.[211] Elizabeth Spellman argues against essentialism and exclusion of others, particularly the notion that the experiences of white women represents the condition of all women.[212]

Gender essentialism as Spellman refers to it, is the notion that there exists one monolithic women's experience independent of other factors such as race, class, or sexual orientation.[213] Charlotte Witt, also notes that feminist legal theorists have made gender as a central theme of

[207] Gregory Bassham, 'Feminist Legal Theory: A Liberal Response' (2012) 6 Notre Dame Journal of Law, Ethics & Public Policy 293.
[208] Bassham (n 207) 294.
[209] MacKinnon (n 109) 114.
[210] Philomina E Okeke, 'Postmodern Feminism and Knowledge Production: The African Context' (1996) 43 Africa Today 223.
[211] Jane Wong, 'The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond' (1999) 29 William and Mary Journal of Race Gender and Social Justice 25.
[212] Elizabeth V Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press 1988).
[213] Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581.

inquiry, ignoring other social categories such as race and class that equally marginalizes women.[214] Anti-essentialists such as Drucilla Cornell, critique leading 'second wave' feminist legal theorists such as Catherine Mackinnon and Robin West for advancing the concept of a 'unitary woman'.[215] Cornell notes that the term woman is not a biological entity as viewed by the West or as the object of male gratification as argued by feminist legal theorists such as Mackinnon.[216] Instead, the term woman is a category produced through discourse.[217] Wong postulates that when women are construed as similar, it occasionally causes problems with social change and law reform, which may be counter-productive.[218]

In examining the situated experiences of justice, this study considers it useful to reflect on the human rights principles of dignity, equality and non-discrimination, which are widely acceptable within international law. In addition, as feminists have sought to rearticulate international human rights law to reflect women's concerns, [219] this thesis in chapter 5 examines the extent of the protection of rights of widows' under two prominent international human rights frameworks namely the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol).

1.5 Literature review

Justice has been a subject of feminist philosophical thought and critique. Although there are different categorizations of feminists, all challenge the theoretical background of major contemporary theories of justice, such as that espoused by John Rawls in his *A Theory of Justice*, for failing to consider the lived realities of women in developing his theory. Rawls principle of justice as fairness argues for social justice, in which social institutions assign and determine rights, duties and responsibilities, which Rawls refers to as social cooperation.[220]

[214] Charlotte Witt, 'Anti-Essentialism in Feminist Theory' (1995) 23 Philosophical Topics 321.
[215] Ben Golder, 'Rethinking the Subject of Postmodern Feminist Legal Theory: Towards a Feminist Foucaultian Jurisprudence' (2004) 8 23.
[216] Golder (n 215) 78 – 79.
[217] Golder (n 215) 81.
[218] Wong (n 211) 281.
[219] Ivana Radacic, 'Feminism and Human Rights: The Inclusive Approach to Interpreting International Human Rights Law' (2008) 14 UCL Jurisprudence Review 238.
[220] John Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14 Philosophy and Public Affairs 223.

Rawls' idea of justice serves a twofold function, namely by providing a framework that can be agreed by members of a society and outlining a code of moral conduct that does not need to be governed by specifics.[221] Principles of justice are agreed upon in a hypothetical social contract termed the original position, in which members of a society determine the regulation of claims against one another and foundations of the charter, governing the community.[222] The original position espoused by Rawls, has a similarity to the state of nature in the traditional social contract theory. Because in the original position, no one knows details about themselves and that of others or their knowledge about their gender, class, strength or weakness, this allows for fairness in the determination of the principles of justice to govern a particular society.[223] Rawls argues that if the principles of justice are chosen behind the 'veil of ignorance', the initial status quo where no one is aware of their position, status or gender, then the society is likely to think of justice from the standpoint of equality and fairness.[224] According to Rawls, this ensures that no one is advantaged or disadvantaged by any social circumstances or by outcome of natural chance.[225]

Rawls subsequently formulates the principles of justice, which are likely to be chosen in this original position based on the following principles: [226]

1. Each person has equal indefeasible claim to same fundamental liberties, and this is compatible with the scheme of liberties for all; and
2. In the event of any socio-economic inequalities, they must be for the benefit of the least disadvantaged members of the society, what he calls the difference principle[227] and secondly, they must be attached to the offices and positions open to all under conditions of fair equality of opportunity.

Feminist scholars such as Susan Okin argue that there exists structural gender bias in Rawls theory of justice, in so far as the lived experiences of women who face injustice are not considered.[228] Iris Marion Young, also argues against universal theories of justice that are grounded independently of the experiences of a particular society.[229] Young observes that

[221] As above.
[222] Rawls (n 220) 211.
[223] Rawls (n 220) 208.
[224] Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books 1989).
[225] Rawls (n 220) 208.
[226] Rawls (n 220) 208.
[227] As above.
[228] Okin (n 224) 7-15 .
[229] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990).

universal and independent theories that do not take into consideration the social institutions and practices are too abstract to be useful in evaluating actual institutional practices.[230] Young rejects a universal normative system insulated from a particular society, and emphasizes on social, political description and explanations, in effect advocating for a situated idea of justice.[231] David Miller supports Young's position and notes that different principles of justice apply in different contexts, and there are no unifying principles that underpin them.[232] Miller further states that justice, just like science, is continuously evolving, and allows for the location of values and beliefs of justice within particular communities or groups. Young further argues that true justice can only be achieved by examining individual behaviour as well as structural and systemic phenomena.[233] Feminist communitarians, reject liberalism arguing that individuals are not distinct from their communities. According to feminist communitarians, people are defined by social roles, and therefore justice can only be secured communally and not individually.[234] This approach has been criticized by other feminist writers such as Marilyn Friedman, for valorising traditional gender roles which are the basis for women's subordination.[235]

Dominant debates on feminist ideas of justice, advanced by feminist scholars, seem to propose a universalistic concept of justice. This narrative is seen in the early works of renowned feminist writers of the 18th century such as Mary Wollstonecraft[236] who upheld western European women's social status as a standard for economic political and cultural progress, presenting a Eurocentric rhetoric of women's human rights. Presently, this approach has dominated feminist legal theorists who criticize Rawls ideas of justice, yet advance universalistic ideas of justice without taking into consideration the experiences of other women, particularly in the global south, who experience justice or injustice differently.[237]

However, other writers of political philosophy and feminism argue against the dangers of feminist theories of justice that substitute the experiences of other women, and proposes an

[230] As above 5.
[231] As above 5.
[232] Tom Campbell and Alejandra Mancilla (eds), *Theories of Justice* (Ashgate 2012).
[233] Young (n 229) 62.
[234] Elizabeth Edenberg and Emily McGill, 'Feminist Social and Political Philosophy' in Carol Hay (ed) *Philosophy: Feminism, 1st Edition* (Cengage 2017).
[235] McGill and Edenberg (n 234) 228 – 230.
[236] Eileen Botting Hunt, *Wollstonecraft, Mill, and Women's Human Rights* (Yale University Press).
[237] Chandra Talpade Mohanty, '"Under Western Eyes" Revisited: Feminist Solidarity through Anticapitalist Struggles' (2003) 28 Signs: Journal of Women in Culture and Society 499.

interactive universalism which acknowledges the plurality of modes of being human.[238] Ruth Anna Putnam, a feminist scholar, also agrees with Benhabib's approach and notes that feminists theories of justice have only offered a 'substitutional feminism' which attempts to transport other ideas of justice to fit all women.[239] Putnam argues for the replacement of substitutional by an 'interactive feminism' that understands the different and unique manifestations of gender inequality within the different contexts. Putnam notes that a feminist theory of justice should focus its attention on those issues of justice that affect women as women and are ignored by major contemporary theories of justice.

Kimberle Crenshaw also challenges the doctrinal treatment of intersectionality of the decisions[240] of the courts in the United States. Crenshaw criticizes the decisions of the US Courts for their inability to grasp the intersectionality of the discrimination of laws as experienced by black women. Crenshaw argues that the denial and disregard of the centrality of black women's experiences places Black women's agenda at the periphery of the feminist and black liberation agendas.[241] Deborah Rhode critiques radical feminists approaches such as that of Mackinnon for advancing the idea of a universal woman as a portrayal of all women and neglecting the unique dynamics amongst women.[242] Rhodes argues that although feminism gains power from its claims to speak on behalf of women and to identify perceptions growing out of women's experience, gender is often mediated by other forms of oppression such as sex, class, ethnicity and race and these are experienced by women differently and sometimes concurrently.[243]

This study is also guided by consciousness-raising as a feminist method of inquiry. Mackinnon notes that the key to feminist theory exists in its way of knowing. Consciousness-raising, as Mackinnon refers to it, affirms women's experiences and realities.[244] Mari Matsuda also confirms that the primary method of feminist theory is consciousness-raising and notes that by relying on abstractions, theories of justice such as that advanced by Rawls leaves out the voices

[238] Ruth Anna Putnam, 'Why Not a Feminist Theory of Justice?' in Martha C Nussbaum and Jonathan Glover (eds) *Women, Culture, and Development: A Study of Human Capabilities* (Oxford University Press 1995).
[239] Putnam (n 238) 17.
[240] See De Graffenreid versus General Motors; Moore versus Hughes Helicopter and Payne versus Travenol, where Crenshaw discusses the legislative and judicial decisions of the courts in these cases obscure the intersectionality's as against Black women.
[241] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (2015) 1989 University of Chicago Legal Forum.
[242] Deborah L Rhode, 'Feminist Critical Theories' (1990) 42 Stanford Law Review 617.
[243] Rhode (n 242) 65.
[244] MacKinnon (n 109) 84.

of women.[245] While feminist legal theorists all seem to agree that situated ideas of justice are vital in theorizing from a feminist perspective, perspectives of African women on justice seem invisible in the global debate on justice, with universalistic approaches by western legal feminists dominating the discourse on justice. Just like western feminisms, African feminisms are also diverse yet seek a difference from the western ideas of feminism. African feminist epistemology is premised on the validation of the experiences of the women of Africa and those who are of African origin, against a mainstream feminist discourse.[246] Rhoda Ige while quoting Filomena Steady, describes African feminism as combining racial, sexual, class, and cultural dimension of oppression to produce a more inclusive brand of feminism, where women are viewed first as human beings rather than as sexual beings.[247]

1.6 African feminisms

African feminism is a radical proposition, referring to the liberatory political philosophies, theories, writings, research, cultural production and organizing work of the transnational community of feminists in Africa.[248] Amina Mama further notes that African feminism is characterized by dynamism, and complex group with widely varied historical, political ideological, intellectual, socioeconomic and ethno-religious trajectory , not amenable to simple catalogue or generic definition.[249] The use of the term 'African' in African feminism has multiple philosophical and political ancestries which share historical identification with the continent of Africa, and serve to mark some feminists thought as African and therefore not same as those rooted outside of Africa's geographical space.[250]

Indeed, while major western feminisms' struggle is rooted in gender as a basis for equal rights, African feminisms aims to discuss gender roles in the context of existing and past oppressive mechanisms. African feminisms struggle with such issues as racism, colonialism, neo-colonialism, cultural imperialism, socio-economic exclusion and exploitation, gerontocracy,

[245] Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613.
[246] Ani Casimir, 'The Concept of Feminist Justice in African Philosophy: A Critical Exposition of Dukor's Propositions on African Cultural Values' (2013) 03 Open Journal of Philosophy 178.
[247] Rhoda Asikia Ige, 'Speaking for Ourselves: African Feminism and the Development of International Human Rights Law' Blue book 25.
[248] Amina Mama, 'African Feminist Thought', *Oxford Research Encyclopedia of African History* (2019).
[249] Amina Mama (n 248) 1- 2.
[250] As above 2-3.

religious fundamentalism, as well as dictatorial and corrupt systems.[251] Goredema argues that political eras primarily shape African feminism. The pre and post-colonial Africa, as well as the different histories of liberation, influenced African feminisms; hence they became dissimilar across various African countries.[252] Western feminism places sex difference as the sole site of women's subjugation and oppression.

African feminisms, on the other hand, while acknowledging that sex plays a role in women's oppression, note that freedom from oppression is based on political, economic, social, and cultural manifestations of racial, class, cultural and sexual biases.[253] This position appears to resonate with Hazel Carby, who while writing about the experiences of black women in Europe, equally criticizes western feminist theorists for their generalizations. Carby argues that dominant feminist interpretations often misunderstand contextual complexities, including power relations alongside the history and impact of colonialism on African women. Carby notes that although patriarchy is defined in relation to male dominance or androcentrism in the western world, it is redefined in complex terms for black women.[254]

The development of African feminist epistemology is rife with criticism of western feminisms attempts to impose their ideas of feminism. African feminist writers such Sylvia Tamale reject notions of equality that view individuals in the logic of colonialism and call for Africans to embrace values such as social equity, social justice and ubuntu which resonate with most African communities.[255] African literary writers such as Buchi Echemeta, rejected the notion of feminism espoused by western feminists for its advancement of separatism from the opposite sex.[256] According to Echemeta, African women's activism needed to be concerned with addressing the existing social inequalities and men played an essential part in the struggle.[257] Echemeta's views resonates with Omolara Ogundipe who cautions against the adoption of a western feminist stance without acknowledging the context of its application. While recognizing the flaws in African culture, Ogundipe warns against westernization at the expense

[251] Susan Arndt, 'Perspectives on African Feminism: Defining and Classifying African-Feminist Literatures' [2002] Agenda: Empowering Women for Gender Equity 31.
[252] Ruvimbo Goredema, 'African Feminism: The African Woman's Struggle for Identity' (2010) 1 African Yearbook of Rhetoric 33.
[253] Rhoda Asikia Ige', 'Speaking for Ourselves: African Feminism and the Development of International Human Rights Law' (2014) 6 KNUST 25.
[254] Hazel V Carby, 'White Woman Listen!: Black Feminism and the Boundaries of Sisterhood' in Kwesi Owusu (ed), *Black British Culture and Society* (Taylor & Francis 2000).
[255] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020).
[256] Pinkie Mekgwe, 'Post Africa(n) Feminism?' (2010) 24 Third Text 189.
[257] Buchi Emecheta, 'A Nigerian Writer Living London' (2014) 4 Kunapipi <https://ro.uow.edu.au/kunapipi/vol4/iss1/11>.

of African customs and proposes STIWANISM (Social Transformation, including Women in Africa) as an alternative to western feminism, which has the potential of addressing the economic challenges experienced by African women.[258]

Indeed, African feminisms, though diverse, acknowledged that women's struggle was not denoted by an antagonism towards men but viewed men as companions in the common battle for the removal of the yokes of foreign domination including Eurocentric and American exploitation.[259] Obioma Nnaemeka's nego-feminism, which stands for 'no ego' feminism captures the pervasive willingness of African women, to negotiate with and around men even in difficult circumstances.[260] Nnaemeka notes that African women are more inclined to collaboration, accommodation, compromise and reaching out and working with men.[261] This is a sharp contrast to western feminisms whose ideas are based on challenging, disrupting, deconstructing and blowing apart. [262]

It follows, therefore, that just as there are different conceptions of African feminisms, the ideas of justice are equally diverse. Ani Casimir notes that the basic African sense of justice flows from African values of respect for womanhood as the physical representation of mother earth.[263] Casimir further notes that the gender discourse in African philosophy is tainted by gaps in the culture created by the colonial experience, assault by modernity and un Africanness in being and essence.[264] Casimir quotes Dukor, who states that in African philosophy, the fulcrum of feminist doctrine is humanism, which abhors injustice and abuse on womanhood.[265] This humanism, in the context of African culture, also abhors class struggles of all kinds while seeking to sustain the concept of gender justice, gender balance and gender value for womanhood in the social context.[266]

From the above literature reviews, this thesis is premised on the proposition that the concept of justice is not universal and that there are diverse ideas of justice. Concerning feminist paradigms of justice, although dominant feminist categories propagate a universalistic idea of

[258] Ige (n 247) 18.
[259] Mekgwe (n 256) 17.
[260] Obioma Nnaemeka, 'Nego-Feminism: Theorizing, Practicing, and Pruning Africa's Way' (2004) 29 Signs 357.
[261] Obioma Nnaemeka (n 260) 4-5.
[262] As above.
[263] Ani Casimir, 'The Concept of Feminist Justice in African Philosophy: A Critical Exposition of Dukor's Propositions on African Cultural Values' (2013) 03 Open Journal of Philosophy 178.
[264] As above.
[265] As above.
[266] As above.

justice, situated experiences of women experiencing justice, particularly in the global south and in Africa is ignored. Feminist legal theorists challenge women's oppression and subordination by acknowledging the lived realities of men. In doing so, feminists emphasize consciousness-raising a method of understanding the experiences of women. Feminist epistemology postulates that the social process of being a woman allows a woman's consciousness to become aware of itself and its world.[267] Therefore women can claim knowledge about oppression within the society because they are part of the society.

1.6.1 Towards a situated paradigm of justice: The Nyando case study

> '..On African women's voices, we neither look for their voices where they utter them nor do we think it is worthwhile to listen to their voices. We sometimes substitute our voices for their own and we do not even know when we do this nor are we able to recognize the difference in the mixed substituted voices…'.[268]

Obioma Nnaemeka, a leading African feminist scholar opines that African feminist theory has to be built from the experiences of the indigenous African women.[269] Indigenous in this sense, is used to refer to authentic expressions of African lives. [270] Nnaemeka notes that building on the indigenous creates a feeling of ownership and opens door to a particular democratic process where stakeholders' values and worldviews are taken into consideration.[271] Nnaemeka further notes that lived experience gives form to theory and anticipates the mediation of theory.[272]

The rural women of Nyando sub-county suffer discrimination anchored in patriarchal community norms and cultures. This situation is further exacerbated by poverty, socio economic and structural disadvantages that women in this locality experience. Lisa Pruitt notes that rural women experience injustice differently and perhaps intensely as compared to urban women. Pruitt observes that legal scholars need to understand the lived realities of women, their encounters with the law as well as the geography.[273] Pruitt further notes that spatial aspects of women's lives have an implication on inequality and moral agency which are directly related

[267] Mackinnon (n 109) 90.
[268] Mary Ebun Modupe Kolawole, *Womanism and African Consciousness* (Africa World Press 1997).
[269] Obioma Nnaemeka (n 260) 376-378.
[270] Nnaemeka (n 260) 377.
[271] As above.
[272] As above.
[273] Lisa R Pruitt, 'Place Matters: Domestic Violence and Rural Difference' (2008) 23 Wisconsin Law Journal 347.

to an array of legal issues which have an implication on inequality and moral agency.[274] The widows' of Nyando sub-county face discrimination in their quest to inherit land after the death of their spouses. Many widows are socially and culturally marginalized through the manipulation of customs that disfavour their right to access property.[275] This situation is further exacerbated by the increasing exploitation of community resources due to the globalization of values.[276] This leads to the further marginalization of rural women's access to land rights.[277]

Since 2009, KELIN,[278] a Kenyan non-governmental organization, in efforts towards improving the plight of widows', has been building the capacity of the Luo council of elders on women's human rights. The aim of the KELIN *Cultural Structures* project is to ensure that the disinherited widows' access justice in a manner that is protective of their rights within the Traditional Dispute Resolution Mechanism in the different parts of Western Kenya including in Nyando sub-county. Although KELIN has provided capacity building on women's human rights, the traditional justice mechanism has interpreted human rights standards to ensure resonance with living customary law of the Luo community in a way that protects the rights of widows' and their children. KELIN has equally documented the resolution of approximately 625 cases in Nyando, Kisumu and Nyakach Counties.[279] KELIN notes that these cases were successfully resolved, in a manner that is protective of the rights of the widows'. Additionally, 150 families of the widows' and orphans have been resettled back in their own homes after displacement by their in-laws.[280] Today, the Luo Council of Elders typically resolve communal disputes,[281] including those involving women's access to land. A report by KELIN *Cultural Structures Project*[282] has lauded the Luo Council of Elders for successfully resolving disputes involving widows', access to, use and rights to inherit land in a manner that appears acceptable to the widows.

[274] Pruitt (n 273) 340.
[275] Kenya National Commission on Human Rights, 'From Despair to Hope_Womens Right to Own and Inherit Property' (KNCHR 2005).
[276] As above.
[277] As above.
[278] Kenya Legal Ethical Network, a non-governmental organization based in Kenya advocating for a rights based approach to health for all, including for the vulnerable and marginalized.
[279] Kenya Legal and Ethical Network, 'KELIN Inter County Dialogue on Operationalisation of the Alternative Justice Systems' (KELIN 2019).
[280] 'Impact-Evaluation-of-the-Cultural-Structures-Project' (KELIN 2018).
[281] Article 60 (1) (g) provides for the encouragement of communities to settle land disputes through recognized local community initiatives that are consistent with the Constitution.
[282] KELIN (2017) A commentary on the trends, actors and initiatives that impact women's inheritance rights, in Eastern, Nyanza and Coast Provinces. See also a compendium of cases decided by Luo council of elders involving widows' access to land rights.

This study, therefore, seeks to articulate a grounded understanding of widows' perceptions of justice. A novel contribution of this thesis is its development of grounded paradigms of justice representing African women's conceptions of justice within traditional dispute resolution mechanisms in Nyando sub-county, Kenya.

1.7 Research methodology

This study adopts a post-modern/anti-essentialist feminist legal theory. Specifically, feminist narratology as a method is used in examining the actual lived experiences of the 'experts' who are the women justice seekers within the traditional dispute resolution mechanisms in Nyando sub-county. As indicated in the literature review, this study emancipates feminist consciousness-raising and anti-essentialist/postmodern feminism as elaborated in the theoretical framework. This study is grounded in qualitative data obtained from the *in situ* research that excavates African women's understanding of the concept of justice.

As elaborated in the background of this thesis, traditional dispute resolution mechanisms in Kenya have operated since the pre-colonial times. There exist numerous examples of traditional dispute resolution mechanisms, often modelled along different communities' customs and cultures. For purposes of this thesis, the Luo traditional dispute resolution mechanism within the Nyando area of Kisumu district is analysed. Specifically, this thesis examines how disputes involving widows' have been resolved in a manner that is protective of their rights, in the context of a patriarchal society.

Within many African societies, widowhood is characterized by harassment, rejection, forced remarriages, poverty, loneliness, loss of status, fear of the future and depression.[283] Widowhood practices are usually tied to cultural beliefs and traditional practices about death, ghosts, feminine roles, family structures and family relationships.[284] Similarly, widowhood within the Luo community is often characterized by humiliating and harmful cultural practice, including widow inheritance.[285] Widows rarely resist disinheritance, due to lack of income, or fear excommunication from the marital home and loss of entitlement to the deceased husband's

[283] James Ntozi, 'Widowhood, Remarriage and Migration during the HIV/AIDS Epidemic in Uganda' (1997) 7 Supplement Health Transition Review 125.
[284] Marie-Antoinette Sossou, 'Widowhood Practices in West Africa: The Silent Victims' (2002) 11 International Journal of Social Welfare 201.
[285] Miruka Philip, Nathan Joshua and Jack Obongo, 'The Cultural View of the Luo People of Western (Kenya) on Widow Care and the Biblical Approach' (2015) 3 Sociology and Anthropology 240.

estates.[286] This phenomenon is further exacerbated by social structural arrangements within societies which continue to exclude women from participation,[287] and put them at a disadvantage to men.[288] The Nyando case study was selected because it presents a unique dichotomy. On the one hand, it appears that the mechanism provides justice to women in a manner that is protective of their rights, while on the other hand feminists, and other global liberal legal theorists, express concern over these justice systems' ability to provide justice for women. In developing a feminist paradigm of justice, this research is premised on the understanding that justice is not universal nor relative but contextual. Therefore, the Nyando case study presents an opportunity for a critical examination of widows' paradigms of justice from the lens of an institution that dominant categorizations of feminists and other social justice actors consider patriarchal.

This study adopts dual research approaches. The first approach involves doctrinal research that entails an in-depth analysis of primary sources such as reports UN agencies and treaty bodies reports, general comments and other relevant information from secondary sources such as books and journals. The second approach involves qualitative empirical research using feminist narratology as a method. Feminist narratology illuminates individual accounts and understandings of justice.[289] This research employs key informant interviews, case studies/stories, education materials, conversations, visual methods, semi-structured interviews, administered questionnaires to widows' accessing justice using the traditional dispute resolution mechanism and elders, who are both women and men directly involved in dispute resolution in Nyando sub-county. The information obtained will be analysed inductively to understand the perceptions and identify paradigms.

Kaur and Nagaich identify the emerging principles of feminist research.[290] First, feminist research aims to construct new knowledge and produce social change. Second, feminist research is grounded in feminist beliefs and values by focusing on meanings that women give to the world. Third, feminist research is characterized by its diversity, and it is interdisciplinary

[286] Samson Gunga, 'The Politics of Widowhood and Re-Marriage among the Luo of Kenya' (2009) 1 Thought and Practice: A Journal of the Philosophical Association of Kenya 165.
[287] Sherry B Ortner, 'Too Soon for Post-Feminism: The Ongoing Life of Patriarchy in Neoliberal America' (2014) 25 History and Anthropology 530.
[288] Emphasis on binary comparison is mine.
[289] Jo Woodiwiss, Kate Smith and Kelly Lockwood (eds) *Feminist Narrative Research: Opportunities and Challenges* (Palgrave Macmillan UK 2017).
[290] Ramandeep Kaur and Sangeeta Nagaich, 'Understanding Feminist Research Methodology in Social Sciences' [2019] Social Science Research Network.

as well as transdisciplinary.[291] While quoting Mitchel Olivier and Manon Tremblay, they also note that feminist research must be carried out within institutions that are deemed patriarchal.[292]

This study is therefore aligned to the research hypothesis and presents an integral feature of analysis. It allows for the examination justice mechanism, that although considered patriarchal, seems to address justice concerns of the widows'. Secondly, the case study also provides for interaction with the subjects of the research within their setting and allows for the understanding of the paradigm of justice and the complexity of their background. Finally, the case study allows for knowledge of the complexity of dispute resolution and justice within the case study context.

This research adopts a feminist narrative inquiry as a method of research designed to bring social change through the involvement of women as the subject of the study. However, in adopting feminist narrative inquiry as a research method, this thesis recognizes the importance of understanding the positionality of the researcher vis a vis the context of the research and the potential impact of this positionality to the outcome of the research study.[293] This thesis takes cognisance of the positionality and privileges of the researcher, as an educated African feminist, and the potential influence of this positionality on the research subjects. Therefore, the study employs interpersonal skills appreciating the diverse and gendered complexities of the research subjects and context. In many ways this calls for more 'active listening' and empathy in the course of the interviews, ensuring that the interviewees have autonomy and decision making, in telling their stories - visiting them in the confines of their homes, farms and in meeting spaces within their 'widows' self-help networks'. This also allows the widows', as experts of their own lives, to take the researcher through the process of 'knowing' reconstructing their past, present and the future.

Further, interviews were conducted with justice providers who are elders from this community, both men and women who have participated as arbiters in disputes involving widow's rights to property inheritance within the area of study. Interviews were also conducted with vital administrative persons within the community such as chiefs, headmen and village elders, both

[291] As above 3.
[292] As above.
[293] Michaela Rogers and Claire Brown, 'Critical Ethical Reflexivity (CER) in Feminist Narrative Inquiry: Reflections from Cis Researchers Doing Social Work Research with Trans and Non-Binary People' [2023] International Journal of Social Research Methodology 1.

men and women who do not serve within their dispute resolution mechanism as well as select community members.

Among those interviewed were widows' whose cases were successfully resolved and those whose cases were not successfully resolved. Success here is understood in the context of the justice seekers satisfaction with the decisions of these justice mechanisms. A total number of 30 widows, 8 village elders, 2 chiefs both men and women in Nyando sub-county are interviewed in focus group discussions and key informant interviews. 8 questionnaires were administered and all responses received. 12 key informant interviews and 3 focus group discussions are held separately with 2 separate groups of widows and 1 with chiefs and village elders who are part of the Nyando sub-county traditional dispute resolution mechanism. Interviews were conducted in English or Swahili, and to a lesser extent in *Dholuo*, the local language, where necessary. The location of study is rural and peri-urban areas most of the research subjects have access to basic education in English and Swahili and have a fairly good understanding of both languages.

1.7.1 Research method, data analysis and procedures

This thesis adopts a research approach that gives meaning to the voices of the ordinary women. This approach provides an anchor for developing a model of explaining or representing practices and understandings of justice. This study relies on data from KELIN as well as from FIDA Kenya Kisumu office, who have equally supported the widows within their locality access justice. The reliance on FIDA Kenya is premised on the fact that they have run legal clinics for widows within Nyando sub-county. A pragmatic number of 15 out of the 30 women was identified and I interacted with them, through focus group discussions, 8 of which through key informant interviews, for a period of 3 weeks, within their environment to gain a deeper understanding of their everyday realities.

This research is guided by the established theoretical perspectives already outlined in this proposal and the key words emerging from the interviews with the widows' will form a basis of analysis and given meaning based on the interviews with the widows'. Analysis of the data obtained across the interviews with the widows involves an examination of the strands of emerging dominant narratives of justice. A further step involves a detailed analysis of the interview transcripts, with a view to explore where and how the emphasis was given to different conceptions of justice and what motifs were recurring. The strands of the discourse that are

apparent, drawn upon or rejected as women narrate their experiences. A further analysis moves from the initial three, to compare data across the ten widows who will be part of the key informant interviews. This research collects descriptive accounts through audio records, photographs and transcriptions of the interviews and focus group discussions.

1.7.2 An overview of the ethical issues for consideration

This study obtained the approval of the Research Ethics Committee of the Faculty of Law of the University of Pretoria and the Kenya National Science, Technology and Innovation Center (NACOSTI). Consent was obtained from the interviewees in writing before the interviews which aided in understanding the use and purpose of this study, and in managing expectations. Anonymity and confidentiality of the interviewees was maintained, and where authorized in writing, the interviewees names were revealed. In order to obtain a grounded understanding of the context and issues, this study relied on the support of the KELIN project officer, who manages the *Cultural Structures Project* and the chairperson of the widows network in Nyando sub-county during the site visits.

1.8 Definition of terms

This thesis identifies vital terms that will be used throughout this research. It is necessary to provide clarity on these key terms within the context of this study to understand the scope of the research question and their meaning within the context of this study. The keywords that will be clarified in this section are: traditional dispute resolution mechanisms, justice, gender justice, feminism and paradigm.

1.8.1 Traditional dispute resolution mechanisms

Traditional is used in this thesis to refer to the imagination of that which was practised overtime but which is still practised today. Because tradition are people's creations of their past, it is not static rather continuous.[294] Although this thesis adopts the definition of traditional dispute resolution mechanisms as elaborated in section 1.1 paragraph 1 and 2, it recognizes that these justice mechanisms have undergone some forms of metamorphosis. These variations arise from the evolution of practices of customary norms and cultures and their interactions with the

[294] Henry Glassie, 'Tradition' (1995) 108 Journal of American Folklore 395.

various aspects of modernity including religion, education and urbanisation. For example, in the context of Nyando sub-county, although the justice mechanism fits within the definition of a traditional dispute resolution mechanism, there are notable variations in the application of customary law of the Luo community. Justice seekers (widows) and justice providers (elders) embrace the values of human rights in the ordinary and everyday meaning in a post 2010 constitutional context where the language of rights is fluidly used. Therefore, within the context of Nyando sub-county, as will be discussed in the subsequent chapters, there is a constant interface between the 'modern' and the 'traditional' rather than a detailed engagement with the fundamental notions of human rights.[295]

1.8.2 Indigenous

This term as used in this thesis has a similar meaning as 'autochthony', meaning nativity or originating from a particular place. To understand this term within the context of this thesis there is a need to revisit the implementation of the indirect rule in Kenya by the colonial regime. Mahmoud Mamdani argues that the colonial law in Kenya provided a distinction between indigenous (natives) and non-indigenous people (non-natives) with respect to the application of customary and civil laws.[296] This binary distinction provided a basis for assigning rights, considered a reserve of the non-indigenous people, with the indigenous population was governed by their customs.[297]

The UN Expert Group Meeting on Families and Inclusive Societies defines indigenous people as:[298]

> Those 'who descend from the populations which inhabited the country or region which the country belongs, at the time of colonisation, or the establishment of present state boundaries, and who, irrespective of their legal status retain some or all of their social, economic, cultural and political institutions.

In addition, the concept of 'indigenous' emerged strongly in certain countries in Latin America where there were contentions around the conceptualisation of nation states – evidenced in

[295] Steve Ouma Akoth, 'Human Rights Critique in Post-Colonial Africa: Practices among Luo in Western Kenya' (2014) 37 Anthropology Southern Africa 94.
[296] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996).
[297] Mamdani (n 296) 102-108.
[298] United Nations, 'Universal Declaration of Human Rights' (*United Nations*) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 7 September 2023.

identities, common cultures and language.[299] As states defined citizenship, there was little attention to issues such as gender, ethnicity and class governed relationships between people and the state.[300] Secondly, there was the question of how citizenship was going to ensure that the rights of the historically marginalised and discriminated indigenous populations were going to be promoted.[301]

1.8.3 Justice

Justice is a fundamental concept universally.[302] While justice has been a subject of much philosophical thought, the term has a subjective meaning to different people. While some believe in social justice and redistribution of wealth, others proclaim legal or biblical justice.[303] Justice grants rights and imposes obligations, while also limiting the claims that people make in the name of justice.[304] This research defines justice in the political sense and therefore within national boundaries. The conception of justice envisioned in this research is that which challenges institutionalized oppression and domination, while affirming difference.[305] Therefore, this study acknowledges the situated ideas of justice within the context of the research study area.

Gender justice, as defined within the western liberal discourse, is a concept that advocates for equality of sexes in the society. Kirp, Yudof and Franks note that gender justice proceeds from the conception of women, and its primacy is based on self-determination of individual's.[306] Goetz, on the other hand, defines gender justice more broadly as an ending of and provision of redress of the existing inequalities between men and women. Different writers define gender justice as both a process and an outcome which seeks to ensure access to and control over resources, agency and accountability of social institutions that are set up to dispense justice.[307] This study adopts the latter definition of gender justice, and further emphasizes to include the

[299] Amparo Maria Cruz-saco, 'Indigenous Communities and Social Inclusion in Latin America Report Prepared for the United Nations Expert Group Meeting on Families and Inclusive Societies' (2015) <https://www.un.org/development/desa/family/wp-content/uploads/sites/23/2018/05/2-1.pdf> accessed 10 August 2023.
[300] Cruz-saco (n 299) 1.
[301] As above.
[302] Stefan Liebig, Carsten Sauer and Sebastian Hülle, 'Why Is Justice Regarded as so Important? Theoretical Considerations and an Empirical Test of a Fundamental Question' [2015] SSRN Electronic Journal.
[303] Sovereignty Education and Defense Ministry (SEDM), *What Is 'Justice'?* (Sovereignty Education and Defense Ministry (SEDM) 2020).
[304] Ibid.
[305] Iris Marion Young, *Justice and the Politics of Difference*, vol 2 (Princeton University Press 1990) 4–14.
[306] Neal Devins and others, 'Gender Justice and Its Critics' (1988) 76 California Law Review 1377.
[307] Maitrayee Mukhopadhyay, 'Gender, Justice, Citizenship and Development: *An Introduction* in Mukhopadhyay M and Singh N (eds) *Gender Justice, Citizenship and Developmen*t (Zubaan Books 2007).

struggle against institutions that engender women's subjugation, denigrate gender roles and those that diminish their status in the society.[308] This study adopts a definition of justice that gives prominence to the diversities of women's voices rather than universalistic logic of justice. This study also emphasizes respect for personhood, dignity, and communitarianism as a strategy for the operationalization of gender justice. Feminist scholars have weighed in on the concept of justice, particularly the theory of justice advanced by John Rawls in his book *Justice as Fairness: Political Not Metaphysical.*[309] A detailed analysis of this critique by feminists is covered in the literature review.

1.8.4 Feminism

There are different kinds of feminisms, reflecting the varying social, class and race positions of women and those influenced by other movements. The early feminist movement is traced to around the 16th to the 18th century, during the industrial upheaval and slavery in Europe and America. Mary Wollstonecraft, one of the pioneer writers of feminism, in her book the *Vindication of the Rights of Women*[310] provided a basis for feminist ideas and subsequent feminist movements such as the first wave feminism in the 19th and 20th century. The first wave feminism is synonymous with the white suffragettes' movement, which demanded equality of the sexes and the right of women to vote.[311] The second wave feminism emerged in the 1960s – 80s broadened the debate on women's rights to include reproductive rights and drew attention to other legal inequalities existing in the society.

Third-world feminism emerged in the 1990s in opposition to white second-wave feminism for its linear analyses of gender that excluded the definition of the multiple and complex oppressions of women in their locations.[312] The third wave feminism emerged in opposition to the sex /gender binary advanced by the first and second wave feminisms. It advanced the idea that women's oppression should be historically situated and the voices and agency of third world women should be respected.[313] Third world feminist activism is often imbued with

[308] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020).
[309] John Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14 Philosophy and Public Affairs 223.
[310] Mary Wollstonecraft, *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects.* (Johnson 1792).
[311] Marcelline Block, 'First Wave Feminism (Ca. 1848–1960s)' [2010] The International Encyclopedia of Revolution and Protest 1.
[312] Ranjoo Seodu Herr, 'Reclaiming Third World Feminism' (2014) 12 Meridians 1.
[313] Herr (n 312) 1.

nationalistic and anti-colonial struggles for independence.[314] African feminisms, an off-shoot of third world feminisms, are diverse in ideology. African feminisms cast a critical eye on colonization and post-colonial state concerning activism, writing and theorizing about Africa.[315] Feminism in Africa is located within historical realities of the African people, including in marginalization, oppression and domination that was brought about by slavery, colonialism, racism, neo-colonialism and globalization.[316] Feminism in Africa also lays emphasis on the interconnectedness of gender, women's oppression, race, ethnicity, poverty and class at the center of discourse.[317] While resisting elements of western feminisms which do not speak to the context in Africa, African feminisms engages with custom and tradition and the goal of women's emancipation.[318]

1.8.5 Paradigm

Thomas Kuhn describes paradigm as a set of principles or consensus views from members of a community.[319] Paradigm therefore is uniquely specific to a particular community, just as he describes it in the context of science to mean the image derived from a subject matter in science.[320] The definition of paradigm as derived from Kuhn seems to be unique to a particular domain. This seems to resonate with the definition adopted by Nigel Stobbs who when referring to the Macquarie dictionary defines paradigm as a set of assumptions, concepts, values and practices that constitute a way of viewing reality for a community that shares them, especially in an intellectual discipline.[321] Therefore, for purposes of this study, a paradigm is considered to be a set of values, concepts and ideas derived from feminist perspectives and understanding of justice.

1.9 Chapter outline

This thesis is divided into six chapters that will be structured as follows:

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[314] Herr (n 312) 7.
[315] Sinmi Akin-Aina, 'Beyond an Epistemology of Bread, Butter, Culture and Power' [2011] Nkoko Institute of African Studies 66.
[316] Bisi Adeleye-Fayemi, 'Creating and Sustaining Feminist Space in Africa: Local-Global Challenges in the 21st Century' (Ontario Institute for Studies in Education of the University of Toronto, Centre for Women's Studies in Education 2000).
[317] Bisi Adeleye-Fayemi, 'Creating and Sustaining Feminist Space in Africa: Local-Global Challenges in the 21st Century' (Ontario Institute for Studies in Education of the University of Toronto, Centre for Women's Studies in Education 2000).
[318] Sinmi Akin-Aina, 'Beyond an Epistemology of Bread, Butter, Culture and Power' [2011] Nkoko Institute of African Studies 66.
[319] 'Paradigm Shifts' <https://www.lib.uidaho.edu/digital/turning/PDF/Kuhn's%20Paradigm%20Shifts.pdf> accessed 6 November 2023.
[320] As above 1.
[321] Nigel Stobbs, 'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship between Adversarialism and Therapeutic Jurisprudence' [2012] SSRN Electronic Journal 98.

Chapter two responds to the first sub-question and seeks to examine the different feminist paradigms of justice. This chapter is grounded on a study of the major contemporary theories of justice, such as that of John Rawls, which sets the philosophical groundwork for an examination of the concept of justice. This chapter delves into the leading feminist critiques of the major contemporary theories of justice while also examining other less dominant categorizations of feminist ideas of justice. This chapter equally examines African conceptions of justice such as ubuntu. The objective of this chapter is to develop a framework for analysis and understanding of the global dialogues on feminist paradigms of justice.

Chapter three responds to the second research sub-question regarding the justice concerns for feminists in traditional dispute resolution mechanisms in Kenya. This chapter involves an examination of the contextual historical background of traditional dispute resolution mechanisms, their normative framework and development in Kenya. This chapter also reviews social justice actors concerns from the perspectives of human rights within traditional dispute resolution mechanisms in Kenya. The question of gender justice is highlighted within the framework of Kenya's Constitution. In addition this chapter also delves into the discourse amongst feminists of the culture and gender which are the basis of the critiques of these justice mechanisms.

Having understood the context and normative framework of the traditional dispute resolution mechanisms, **Chapter four** responds to the third research sub-question, and seeks to delve into the realities of widows' justice within the traditional dispute resolution mechanism in Nyando sub-county's traditional dispute resolution mechanism. This chapter begins with an analysis of why a feminist narrative research is adopted as a methodology and why amplifying the lived experiences of widows' accessing justice through the traditional dispute resolution mechanisms in Nyando sub-county is important in developing a truly feminist paradigm of justice. This chapter reviews the socio-cultural and historical experiences of widows' in Africa, their intersecting identities to provide a groundwork for an understanding of the realities in Kenya. The question of widows' land and property rights in Kenya is also analysed and KELIN's role in changing the narratives of rights of widows' to property. Finally this chapter identifies three paradigms of justice according to the recurring motifs as justice as recognition of a right, justice a peace and justice as truth.

Chapter five responds to the fourth research question regarding how to ensure traditional dispute resolution mechanisms ensure gender justice. This chapter begins by examining the key international human rights principles, namely, equality, non-discrimination and dignity as a foundation for analysis. In addition, this chapter also examines key international women's human rights instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (Maputo Protocol) and the provisions regarding rights of widows' and justice within the framework of traditional dispute resolution mechanisms. Importantly, this thesis also examines the interface between these human rights frameworks and the paradigms of justice identified by the widows', who are the subject of this study. This chapter also examines the question of gender and culture and feminist discourse on both concepts as important considerations in the debate on justice. Finally, this chapter identifies three key questions for consideration in determining a truly African feminist paradigm of justice– including that African paradigms of justice must validate the experiences of African women, are grounded in the principles of human right and in the spirit of African communitarianism.

Chapter six is a conclusion of the study drawing onto the findings of the African feminist paradigms of justice in traditional dispute resolution mechanisms. This chapter also restates the research questions to find the extent of their findings in this thesis. Importantly, this chapter delves into the question of gender justice within the traditional dispute resolution mechanisms analyzing how this can be done in contemporary Kenya. It proposes recommendation towards gender justice within the traditional dispute resolution mechanisms drawing on the findings of existing research especially by the Kenyan taskforce on alternative justice mechanisms. First, it calls on a review of these justice mechanisms as important centers for justice and departs from the colonial view of the traditional as irrational and therefore backward. Importantly, this chapter also addresses the need for the restructuring of these justice mechanisms to ensure justice for women. Finally, this study proposes areas for future research noting that whilst the traditional dispute resolution mechanism in Nyando sub-county appears to be providing justice for women, there is still a need to assess the justice needs of a diversity of rural women.

Chapter 2: Developing the concept of justice

> '….justice is ultimately connected with the way people's lives go, and not merely with the nature of the institutions surrounding them..'[1]

2.1 Introduction

This thesis primarily seeks to examine the concept of justice through the lived experiences of women justice seekers within the traditional dispute resolution mechanisms in Nyando sub-county, Kenya. To begin with, this thesis explores the idea of the social contract as a basis for the development of contemporary theories of justice, including contemporary theories of justice such as John Rawls' *A Theory of Justice*.[2] This retrospection lays a foundation for the ensuing feminist critiques of the philosophy and foundations of the concept of justice. This chapter examines the exclusion of women in theories of justice including within the social contract as a foundation of theories of justice and in Rawls justice as fairness. The examination of John Rawls theory of justice as fairness provides a foundation for analysis of the liberalist approach to justice, which advances the universality of justice without regard to the diversity of realities. This chapter also delves into the debate between western and third-world feminists regarding the challenges of the universalism of justice and third world feminists advancement of situated experiences of justice. The values of Ubuntu as a concept of justice is central in this chapter, providing a grounding for an analysis of the link between African conceptions of justice and the western social contract theory.

[1] Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009).
[2] John Rawls, *A Theory of Justice: Original Edition* (Harvard University Press 1971).

2.2 Western conceptions of justice

2.2.1 Justice and the Bible

The word justice descends from the Latin word *jus*, meaning right or law.[1] Justice has two connotations in the Hebrew Bible. First is *mishpat,* which means a judge, and 'judgement' which is the decision of a judge; it is also an ethical term, *tzedek*, meaning righteous or upright person and related to the word *tzedakah*, meaning righteous.[2] The Bible, which is considered as one of the oldest books, is also replete with stories and teachings about justice in the old and new testaments.[3] In particular, the word justice has prominence in the social ethics of the old testament, which is not apparent in the new testament.[4] The old testament in Deuteronomy mentions justice and says, 'follow justice and justice alone, so that you may live and possess the land the Lord your God is giving you'.[5] There are many other instances within the Bible that the concept of justice is expressed.[6] In the book of Genesis, Abraham asks that the city of Sodom be spared if they have righteous men.[7]

In this context, justice requires that the innocent or righteous be spared from the punishment due to the guilty.[8] Justice here means that those who receive punishment are guilty, and there should be some discrimination between the guilty and the innocent.[9] Justice here is seen in the context of the law or legal processes.[10] There is also an implication that the judgement delivered by judges must be 'just if it is to be true or acceptable judgement'.[11] Moral and legal justice are fused early in the Bible, although the different words indicate that they began as independent notions.[12] The Bible also has prominent examples of social justice as moral demands, which

[1] 'Justice, Western Theories of | Internet Encyclopedia of Philosophy' <https://iep.utm.edu/justwest/> accessed 5 October 2022.
[2] David Daiches Raphael, *Concepts of Justice* (Oxford University Press 2001).
[3] See various references to biblical justice in Deuteronomy 32:3; Psalm 89:14; Psalm 82:3; Isaiah 1:17, Micah 6:8 etc.
[4] Raphael (n 2) 10.
[5] *Holy Bible* (Biblica Inc 2011).
[6] In Genesis 18:19-25, there is a dialogue between God and Abraham about the imminent destruction of Sodom and Gomorrah. The first mention of the justice occurs in verse 19, where God tells Abraham to '*'keep the way of the Lord and to do justice and judgement'*.
[7] Holy Bible (n 5) 18:26.
[8] Raphael (n 2) 2.
[9] Raphael (n 2) 12.
[10] As above.
[11] As above.
[12] Raphael (n 2) 13 – 18.

are a strict duty to help those who cannot easily look after themselves, but not under the rubric of justice.[13]

2.2.2 Plato and the Republic

Political philosophers in ancient Greece viewed the concept of justice as both a moral virtue of character and quality of political society and its application to ethical and social decision making. [14] Plato's work in the Republic exudes both a political and moral purpose.[15] He regards justice in society as a situation where each person sticks to one function that suits his natural abilities.[16] Plato's conception of justice is that benefits and burdens, including responsibilities, should be distributed according to the merits or worth, and one kind of merit is the talent or ability to do a particular kind of job very well.[17] Plato regarded justice in society as a situation where everyone sticks to a function that suits their natural abilities. He noted that life is more comfortable where there is division of labour and exchange of products amongst individuals.

2.2.3 Aristotle

The concept of justice can also be traced back to Greek mythology. Aristotle distinguishes universal and particular justice.[18] Aristotle's ideas of justice are documented in Book V of the Nichomachean Ethics. Unlike Plato, Aristotle approaches justice from a scientific standpoint by providing clarification of the different branches of justice and location on the map of ethical ideas.[19] Aristotle argues that justice may be several things and seen in different ways.[20] He draws a distinction between universal and particular justice. Aristotle identifies universal justice with moral righteousness led by his consideration of the law. Aristotle argues that universal justice is exhibited by human beings in their relations with others so far that their relations promote a good life and happiness to members of the community.[21] Aristotle also identifies the legal sense of justice and injustice with the idea of moral virtue and vice, arguing that the objective of the law is to promote virtue and prohibit vice.[22] Particular or partial justice

[13] Raphael (n 2) 13 – 18.
[14] Chase B Wrenn, 'Naturalistic Epistemology', *Internet Encyclopedia of Philosophy* (2003).
[15] Raphael (n 2) 36.
[16] As above.
[17] As above.
[18] David Johnston, 'Aristotle's Theory of Justice' (1st Edition, John Wiley and Sons Ltd 2011).
[19] Raphael (n 2) 45.
[20] Johnston (n 18) 64 -65.
[21] Raphael (n 2) 64.
[22] Raphael (n 2) 45.

on the other hand has to do with the sharing of benefits that individuals receive and their burdens.[23]

2.2.4 Early jurists and theologians' ideas of justice

Roman law including patristic and scholarly philosophies also make account of the history of justice. Roman Emperor Justinian consolidated a corpus of Roman law including a dictum of the jurist Ulpian in 3rd century AD which was a standard definition of justice.[24] Justice was considered as the constant and permanent will to render to a person what is right. Cicero also expresses the idea of justice as doing what is right. Giorgio del Vecchio also observes that several of church fathers (Lactantius, St. Ambrose , St. Augustine and St. John Chrysostom) considered justice as a comprehensive virtue, an idea that appeared in continuation of Plato and Aristotelian concept of the universal and general justice, but also in the Bibles broader definition of justice.

2.2.5 The social contract theory and justice

Modern theories of justice also have their foundations in the idea of the social contract, which goes back to Epicurus, an ancient Greek philosopher who lived between 341-270 BC.[25] Thomas Hobbes revived the idea of social contract which was later developed in different ways by John Locke, Jean Jacques Rousseau and Immanuel Kant. Hugo Grotius, Locke and Samuel Pufendorf conceived of the idea of the social contract based on two accounts. First, was based on the origins of the sovereign power and second, the moral origins of the sovereign power that provides its legitimacy.[26] Various political philosophers have advanced ideas of the social contract capturing various models of consensus including explicit consent, tacit consent and hypothetical consent.[27] Jean Jacques Rousseau for example provides his account of the consensus in the idea of the 'general will' where people privilege collective as opposed to individual interests and the 'will of all' where individual interests are aggregated for collective interest. John Rawls, building on Rousseau's arguments, argues for the 'veil of ignorance' –

[23] Johnston (n 18) 64-65.
[24] Raphael (n 2) 56.
[25] Fred D'Agostino, Gerald Gaus and John Thrasher, 'Contemporary Approaches to the Social Contract' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2019, Metaphysics Research Lab, Stanford University 2019).
[26] Jason Neidleman, 'The Social Contract Theory in a Global Context' <https://www.e-ir.info/2012/10/09/the-social-contract-theory-in-a-global-context/> accessed 9 October 2012.
[27] Neidleman (n 26) 1.

from which people develop principles of justice without any knowledge of the socio, political or economic status of the society they envision.[28]

The social contract presents two elements. The first is a pre-political situation known as the state of nature, advanced by thinkers such as Kant, Hobbes and Rousseau; and the original position advanced by John Rawls. In the initial position, all individuals are deemed equal, and any incentive to leave this position is only for their collective interest.[29] Additionally, the parties in the initial position only agree to contract if they (1) perceive that there are benefits arising from social interactions (2) if the advantages they expect to derive from the contract are also accorded to others, (3) the parties are also rational and reasonable in respect to their and others interests, and that the principles governing the pursuit of their interests are just and moral.[30]

The social contract theory provides empirical and normative dimensions.[31] The empirical account explains the origins of the state while the normative accounts for the principles of justice that provide legitimacy to the state.[32] Within the normative dimension, there is the question about the relationship between citizens' and the relationship between the sovereign (state) and the citizens. Whilst the social contract theory is conceived initially as an account of state legitimacy, by Hobbes and Locke, later philosophical thinkers such as Jacques Rousseau, and John Rawls, have applied it in the context of international justice, drawing from Grotius's account in his work, On the Laws of War and Peace.[33]

2.3 Feminist critiques of theories of justice

2.3.1 The exclusion of women in theories of justice

Western feminist scholars have been vocal in demonstrating how the arguments of past political theories, such as the social contract, exclude women.[34] Feminists such as Susan Moller Okin argue that past political theories have assumed the exclusion of women from politics and

[28] Neidleman (n 26) 1.
[29] As above 2.
[30] As above.
[31] As above.
[32] As above.
[33] Stephen C Neff (ed) *Hugo Grotius on the Law of War and Peace: Student Edition* (Cambridge University Press 2012).
[34] Susan Moller Okin, 'Feminism, the Individual, and Contract Theory' (1990) 100 Ethics 658.

reserved their confinement as 'natural' subordinates to the domestic sphere.[35] Carole Pateman, a feminist political theorist, in her famous book *The Sexual Contract*, also advances the exclusion argument and contends that the social contract theories pay little or no attention to the exclusion of women, from the original contract and in the new contractual order.[36] Pateman argues that social contract theories advance the idea of a paradigmatic free agreement. In reality, women are not born free, have no natural freedoms,[37] and their subordination is considered natural.[38] These arguments resonate with Biesecker and Winterfield, who have noted that the defining quality of the social contract is the *separating inclusion* of women, which they refer to as the sexual contract.[39] Biesecker and Winterfield argue that this *separating inclusion* comprises dualisms such as nature and society, private and the public sphere (women are separated from the latter), defining the individual identified as a male political actor and instrumentalizing and objectifying women's bodies and labour.[40] The social contract tells how a new civil society and a new form of political rights and order are created through an original constitutional agreement.[41] The initial contract is a fictional contract theory situated at a supposed threshold where humans move from a 'state of nature to 'civil society'.[42] Each social contract theory has a particular concept of nature, corresponding to civil society and a specific view of a human individual.[43]

Carole Pateman contends that the social contract theories advance a patriarchal social order.[44] Pateman further argues that while the patriarchal social order is divided into public and private spheres, the social contract story only creates the public sphere and civil freedom. The private sphere is considered politically irrelevant.[45] Pateman questions why women born free and equal in Hobbes' state of nature consent to form a civil society in which they are not equal.[46] Pateman also critiques John Locke's state of nature, observing that that women are not the subject of

[35] Okin (n 34) 658.
[36] Carole Pateman, *The Sexual Contract* (Polity Press 1988).
[37] Pateman (n 36) 1-18.
[38] Janice Richardson, 'Contemporary Feminist Perspectives on Social Contract Theory' (2007) 20 Ratio Juris 402.
[39] Adelheid Biesecker and Uta von Winterfeld, 'Notion of Multiple Crisis and Feminist Perspectives on Social Contract' (2018) 25 Gender, Work & Organization 279.
[40] Biesecker and Winterfield (n 39) 2.
[41] As above 2.
[42] Biesecker and Winterfield (n 39) 7.
[43] As above 7.
[44] Pateman (n 36) 10 - 11.
[45] Pateman (n 36) 11 - 12.
[46] As above 6. See also: Richardson (n 38) 406. According to some classic theorists women naturally lack the attributes and capacities of 'individuals'.

investigation as individual's, rather as those subordinate to men.[47] Pateman further observes that social contract theories generate a relationship of domination and subordination because they exclude women from participation.[48] Pateman singles out the marriage contract, and argues that it is a framework for the subordination of women.[49] Pateman questions why social contract theories encourage women to enter into marriage contracts, which, Pateman argues, are a form of civil slave contracts.[50] Pateman posits that the state of nature contains an order of subjection between men and women, and sexual difference is political, the difference between freedom and subjection.[51] Pateman observes that women are not a party to the original contract; instead, they are subject to it.[52] Pateman further notes that the social contract is a "sexual contract" hidden in fiction where women are subordinated to men.[53] Biesecker and Winterfield, however, observe that although women are excluded in the original contract, they are not left out in the state of nature.[54] The private sphere, assigned as women's domain, is viewed as natural, while the public sphere, viewed as male domain, is considered opposed but derive meaning from each other.[55]

2.4 The development of western feminist thought on justice

2.4.1 John Rawls' theory of justice as fairness

John Rawls is considered a highly acclaimed political philosopher of the 21st century. His book, *A Theory of Justice,*[56] is renowned for reviving the social contract theory. The foundation of the original position conveys the social contract, which is anchored on justice and designed through a deliberative process.[57] Rawls' original position is synonymous with other social contract theorists' ideas on the state of nature, and it is imaginary and hypothetical.[58] His account of the original position is a central feature of the social contract theory account of

[47] Pateman (n 36) 52 - 53. John Locke assumes that marriage and family exist in the natural state and that the attributes of individual's are sexually differentiated. Only men have characteristics of free and equal beings and women are naturally subordinate to men and the order of nature is reflected in the structure of conjugal relations.
[48] Pateman (n 36) 52 - 53.
[49] As above 52 - 53.
[50] Richardson (n 38) 406.
[51] Pateman (n 36) 6.
[52] As above 6.
[53] Lorenzo Rustighi, 'Rethinking the Sexual Contract: The Case of Thomas Hobbes' (2020) 46 Philosophy & Social Criticism 274.
[54] Biesecker and Winterfield (n 39) 7.
[55] As above.
[56] John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999).
[57] Alubabari Desmond Nbete, 'The Social Contract Theory: A Model for Reconstructing a True Nigerian Nation- State' (2012) 2 International Journal of Humanities and Social Science 12.
[58] Nbete (n 57) 273.

justice,[59] particularly "justice as fairness" John Rawls asserts that justice is the initial virtue of human institutions and likens justice to the virtue of truth in thought.[60] Rawls presents a paradigm of justice that amplifies the abstract theory of the social contract as found in Locke, Rousseau, and Kant.[61] According to Rawls, the object of the original agreement are espoused in the principles of justice for which holds the basic structure of society.[62] These principles of justice would therefore be accepted by free and rational persons in a state of equality in defining their relationships.[63] The identified principles of justice would define and regulate both their governance systems and social relationships.[64] Therefore, this manner of defining the principles of justice is what Rawls calls 'justice as fairness.[65]

In *Justice as Fairness; A Restatement*,[66] the state of nature as defined in the social contract theory is the original position.[67] The original position, notes Rawls, is a hypothetical narrative leading to a definition of a particular conception of justice.[68] In the original position, no one is aware of his class, position in the society, social status or his concept of good.[69] In the original position, there is equality amongst parties, they have similar rights, and are able to choose principles of justice freely.[70] This condition aims to create a sense of an equilibrium based on equality allowing persons to choose their sense of justice.[71] Like in the social contract, the original position creates a basis for reaching agreements that are fair and just.[72] Rawls' justice as fairness is appropriately called because it communicates that the ideas of justice proposed in the original position are fair and just.[73]

Rawls argues that the paradigm of interpretation of justice in the original position is the most favoured interpretation for a theory of justice.[74] The concept of the original position is premised on the need for a fair procedure in choosing the principles of justice.[75] The goal is to

[59] Samuel Freeman, 'Original Position' in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Summer 2019, Metaphysics Research Lab, Stanford University 2019).
[60] John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999).
[61] As above 10.
[62] As above.
[63] As above.
[64] As above.
[65] As above.
[66] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001).
[67] Rawls (n 66) 11.
[68] As above.
[69] As above.
[70] As above.
[71] Rawls (n 66) 19.
[72] Rawls (n 66) 120.
[73] Rawls (n 66) 33.
[74] Rawls (n 66) 18.
[75] As above.

demonstrate an impartial procedure as a basis of the theory of justice.[76] Rawls also proposes two principles of justice, which he argues are decided upon behind a veil of ignorance, as a solution to the problem of choice that is presented by the original position: [77]

a) First, is the requirement for equality, in assigning the basic rights and duties;
b) Socio-economic inequalities, including wealth, are only justified if they result in compensation to benefit everyone, particularly those who are disadvantaged in the society.

Rawls' first principle is used for designing the political constitution, while the second principle applies primarily to economic institutions.[78] The two principles determine how rights and duties are divided in the social order into two categories: a) aspects that involve securing equality and liberty; and b) those aspects that establish social and economic inequalities.[79] Rawls' first principle is formulated by rational analysis of moral principles, including freedom of conscience, thought, speech, assembly, association, toleration, liberty of the person, and political rights.[80] The other principles are equal participation in the political process, fair opportunity for their exercise, principles of priority that control conflicts among liberties, and the rule of law.[81]

According to Rawls' framework, the first principle of equal liberty has priority over the second principle of distributive justice.[82] This principle regulates the design of economic systems, as it applies to institutions other than those directly affecting income distribution and wealth distribution. The principle of equal liberty cannot be departed from or traded off to gain social or economic advantages.[83] Therefore, some sacrifices may have to be made to realize an organized society, such as exchanging the advantages of economic growth or efficiency that a more organized society might provide, nor may equal liberty be sacrificed to attain greater economic equality.[84] Rawls regards difference principle as beneficial, allowing persons to share in their natural talents which Rawls regards as common asset. [85] Gilbert Merritt seems to agree

[76] As above.
[77] These first principle is referred to as the equal liberty principle, while the second is referred to as the principle of distributive justice. See also: Gilbert Merritt, 'Justice as Fairness: A Commentary on Rawls's New Theory of Justice' 26 Vanderbilt Law Review 23 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=3263&context=vlr>.
[78] Sampurnaa Dutta, 'Rawls Theory of Justice: An Analysis' (2017) 22 IOSR Journal of Humanities and Social Science 40.
[79] AK Upadhyay, 'Rawlsian Concept of Two Principles of Justice' (1993) 54 The Indian Journal of Political Science 388.
[80] Upadhyay (n 79) 388.
[81] Gilbert Merritt, 'Justice as Fairness: A Commentary on Rawls's New Theory of Justice' 26 Vanderbilt Law Review 23.
[82] Merritt (n 81) 669.
[83] As above.
[84] Merritt (n 81) 669.
[85] Rawls (n 66) 62.

with this perspective advanced by Rawls, noting the power of nature in rewarding those who have lost out with good fortunes.[86] Rawls' second principle regulates the design of economic systems, as it applies to institutions other than those directly affecting income and wealth distribution.[87]

The social contract idea has traditionally performed two historical and logical functions.[88] First, it has been used to provide a foundation for the concept of government, state and society in an agreement between individuals or between some previously constituted people and their sovereign.[89] Secondly, it has been used as a theoretical tool to explain the nature and limits of political obligation and authority.[90] Feminists have pointed out that universal theories of justice, such as John Rawls', have failed to consider gender as an issue of justice.[91] The exclusion of women is traced to Aristotle, whose theory of justice, though influential, relegated women to a 'household justice' sphere.[92] As a result, women are considered not fundamentally equal to the free men who participated in political justice; instead, they were considered inferiors whose natural function is to serve those more fully human.[93]

2.4.2 Feminist critiques of justice as fairness

2.4.2.1 Principle of abstraction

Rawls' theory of justice as fairness is considered a brilliant exposition of contemporary liberalist social contract theory.[94] Rawls has made a significant improvement to the social contract theory, and his exposition has provided a foundation for discussions on justice.[95] However, feminists have found fault in the structure of Rawls' theory of justice as fairness and have questioned whether his principles of justice apply to women. To begin with, feminists have observed that Rawls theory fails because of its central use of abstraction to explain how

[86] Merritt (n 81) 670.
[87] Samuel Freeman, 'Rawls on Distributive Justice and the Difference Principle' in Serena Olsaretti (ed) *The Oxford Handbook of Distributive Justice* (Oxford University Press 2018).
[88] Kevin E Dodson, 'Kant's Theory of the Social Contract.' [1991] University of Massachusetts, Amherst 304.
[89] Dodson (n 88) 304.
[90] As above.
[91] Susan Moller Okin, 'Inequalities Between the Sexes in Different Cultural Contexts' in Martha C Nussbaum and Jonathan Glover (eds), *Women, Culture, and Development: A Study of Human Capabilities* (Oxford University Press 1995).
[92] Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books 1989).
[93] Okin (n 91) 14.
[94] Janet Moore, 'Covenant and Feminist Reconstructions of Subjectivity within Theories of Justice' (1992) 55 Law and Contemporary Problems 159.
[95] Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009).

parties in the original position choose the principles of justice.[96] Feminists reject the use of abstraction as a methodology of arriving at the principles of justice. They argue that the choice of abstraction is the first road to androcentric ignorance because it fails to acknowledge the actual lived realities of human beings affected by a particular abstract principle.[97] Mari Matsuda argues that women's experiences and knowledge are subordinated to someone else's false abstract assumptions.[98] Lori Watson agrees with Matsuda and observes that Rawls engages in an ideal theory because his principles of justice require that we abstract away from concrete facts or particulars and imagine counterfactuals for which antecedents are false.[99] Matsuda posits that Rawls' theory of justice as fairness is not designed to address systemic injustice because it is intended for a well-ordered society where there is strict compliance to principles of justice and where everyone accepts such principles.[100]

2.4.2.2 Principle of rationality

Rawls also asserts that in the original position, parties are rational, and while they are permitted to know that they have some rational plan of life, they do not see the plan's details.[101] Hannah Henshaw observes that the concept of rationality as the primary motivating factor for those in the original position needs to be revised because it overlooks important factors, like empathy that is not necessarily rational.[102] Henshaw argues that not all fundamental relationships are based on rationality.[103] Henshaw considers empathy an essential consideration in an arrangement of society and argues that empathy plays a vital role in people's decisions when they relate to one another. Henshaw, therefore, holds that a well-structured society should consider its members as rational and interdependent members of different communities.[104] Virginia Held agrees with Henshaw and finds Rawls' reliance on rationality troubling.[105] Held contends that structuring society around the concept of rational, mutually disinterested

[96] Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613.
[97] Matsuda (n 96) 619.
[98] As above.
[99] Lori Watson, 'Toward a Feminist Theory of Justice: Political Liberalism and Feminist Method' (2010) 46 Tulsa Law Review 11.
[100] Watson (n 99) 42. See also Virginia Held while quoting Schwartzman who argues that abstractions reinforce hierarchies (Lisa H. Schwartzman, *Challenging liberalism: feminism as political critique* (University Park, PA: Pennsylvania State University Press 2006) 80-81).
[101] Hannah Henshaw, 'Rawls and Feminism' [2018] CLA Journal 182.
[102] Henshaw (n 101) 183 – 184.
[103] As above.
[104] As above.
[105] Virginia Held, 'Non-Contractual Society: A Feminist View. In M.P. Hanen and K. Nielsen (eds) *Science, Morality, and Feminist Theory* (Calgary University Press 1987).

"economic man" is problematic because humans are interdependent.[106] This view challenges Rawls' assertion that human beings are independent, self-interested, and mutually disinterested individuals in the original position. Held argues that not all relationships are equal, and Rawls' rationality does not make sense, for example, in the context of human relations or relationships between dependents and their caretakers.[107] Held proposes a radical approach to redefine Rawls' model of 'economic man' in justice as fairness and argues that this should be replaced with the dynamic relationship between a child and mother.[108]

2.4.2.3 Difference principle

Hannah Henshaw also finds that Rawls' second principle of economic justice does not guarantee social or economic equality upon its implementation into the real world.[109] Henshaw argues that fair equality of opportunity is not practically possible in the real world.[110] Henshaw observes Rawls's difference principle, which asserts that whatever inequalities remain the most significant benefit to the least disadvantaged only works from a purely economic standpoint.[111] Henshaw observes that the trickle-down approach does not work for issues of social justice and systemic problems or norms that result in women's oppression, such as being paid less in the workplace.[112] Henshaw contends that women are paid less because of their gender, which the difference principle does not address.[113] Henshaw refers to Nancy Fraser's attempts to remedy the gender pay gap, noting that paying every person in the same job the same amount of money even though the difference in skills and abilities does not suffice.[114] Henshaw argues for an increase in payment for women while also highlighting the importance of recognizing sexism as the basis of unequal payment, which is fundamentally unjust.[115] Lisa Schwartzman also weighs into the debate and observes that Rawls' principles do not distinguish between the different injustices.[116] Schwartzman observes that Rawls' writings lump up the distribution of

[106] Held (n 105) 5.
[107] Held (n 105) 2 - 4.
[108] Held (n 105) 5. Held further observes the less value placed by political theorists of mothering as compared to the realms of trade and government. She contends that historically, mothers and children have somehow been placed 'outside' of the human society in the region labelled 'nature' wholly engaged in reproduction – despite mothering being at the heart of human society.
[109] Henshaw (n 101) 187.
[110] As above.
[111] As above.
[112] As above.
[113] Henshaw (n 101) 187 – 188.
[114] See also Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (Joel Golb, James Ingram and Christiane Wilke trs, New edition, Verso 2003).
[115] Henshaw (n 101) 190.
[116] Lisa H Schwartzman, *Challenging Liberalism: Feminism as Political Critique* (1st edition, Penn State University Press 2007).

natural talents and the contingencies of social circumstances without suggesting that there might be an important difference between them.[117]

Rawls' theory of justice as fairness is considered distributive justice,[118] which Conor Arsenault notes is often insufficient to explain certain injustices.[119] Arsenault observes that distributive justice overlooks group-based oppression.[120] Iris Marion Young agrees with this assertion and notes that injustices are usually done to people as a group they belong to and not because of who they are as individuals.[121] There is a need to eliminate institutionalized domination and oppression to achieve social justice.[122] Young further observes that it is a mistake to reduce social justice to distribution because distribution does not account for the oppression and domination of women in the private sphere or other group injustices.[123] Young argues that Rawls' distributive paradigm focuses only on the inequality of wealth and income as the primary question of social justice, ignoring non-distributive social justice issues.[124] Young critiques the distributive justice paradigm for considering justice solely from distribution, which tends to obscure the institutional context within which those distributions occur, often partly because of patterns of distribution of wealth or jobs.[125] Hannah Henshaw also affirms Nancy Fraser's critiques of the distributive paradigm of justice.[126] Henshaw rejects the distributive paradigm, which focuses on injustices it defines solely from an economic standpoint.[127] Fraser notes that the distributive paradigm is problematic because it does not remedy those culturally embedded injustices of the recognition paradigm.[128] Fraser posits that

[117] As above 70.
[118] Distributive justice also known as economic justice is justice that is concerned about the fair distribution of benefits and resources available. Principles of distributive justice are thought to provide moral guidance for the political processes and structures that affect the distribution of benefits and burdens in the society. However, there are different perceptions on what is fair, because some people view fairness as equity while others as equality. John Rawls difference principles is often considered an example of the distributive paradigm of justice. See: https://plato.stanford.edu/entries/justice-distributive/ Redistribution and recognition justice on the other hand are proposed remedies to the challenges of the distributive paradigm of justice. Redistribution comes from liberal tradition of the late twentieth century Anglo-American branch. Ronald Dworkin and John Rawls, seeking to synthesize the traditional liberal emphasized on individual liberty, with the egalitarianism of social democracy, developed new conceptions of justice that could justify socio-economic redistribution. Redistributive justice paradigm seeks to focus on injustices it defines as socio-economic and presumes to be rooted in the economic structure of the society. See Fraser and Honneth (n 114) 13; Henshaw (n 101) 189. Recognition in contrast comes from Hegelian philosophy and demands for the recognition on the basis for which it is denied such as to minorities and the underprivileged. It is about identity and the recognition of cultural and ethnic differences See: Redistribution, Recognition and Participation: Incorporating politics of difference to the capability framework Pinar Uyan-Semerci. Also Fraser and Honneth (n 114) 3 - 4.
[119] Conor Arsenault, 'A Feminist Critique on the Limits of Rawls' (2017) 7 Mapping Politics.
[120] Arsenault (n 119) 8
[121] Iris Marion Young, *Justice and the Politics of Difference*, vol 2 (Princeton University Press 1990).
[122] As above.
[123] As above.
[124] Henshaw (n 101) 192.
[125] Henshaw (n 101) 193.
[126] Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (New edition, Verso 2003).
[127] Henshaw (n 101)189.
[128] As above.

a just societal structure can be achieved if distribution is subsumed in the concerns and questions of recognition.[129] Susan Moller Okin also discusses the Rawls distributive paradigm, noting that it fails to address the justice of the gender system, which Okin argues has its roots in the sex roles of the family with its branches extending to every corner of people's lives.[130] Okin argues that Rawls' theory is disembodied and unembedded in any social or cultural reality, and therefore, cannot understand the reality of women's oppression.[131]

2.5 Justice in the western feminist sense

Catherine Mackinnon, a leading feminist legal theorist, weighs in on this debate on justice by proposing a feminist method of inquiry, noting that theories of justice should develop a grounded understanding of justice and equality from the lived experiences of women facing injustice.[132] Martha Nussbaum also contends that social contract theories have a history of leaving questions of familial justice unanswered.[133] Questions of "justice of the family, the equal justice for women" have not been adequately addressed by liberalism.[134] Nussbaum further argues that Rawls' theory of justice as fairness cannot recognize nor rectify the social hierarchies experienced in the society, particularly within the family, which often places unreasonable social expectations on women.[135] The exclusion of women's lived experiences in developing theories of justice is not a new phenomenon. Indeed, western feminists have questioned the false gender neutrality that has persisted in theories of justice.[136] To demonstrate that theories of justice are grounded in the subordination of women, this thesis must trace their development to examine these theories vis a vis feminists' concerns. Linda Hirshman observes that women's subordination is often due to the physical domination of men over women.[137] Hirshman introduced the reality of the physical disparity between men and women in the contractarian debate and noted that social contract theorists should face up to the gender-based physical reality that makes women more susceptible to physical violence.[138] Hirshman further observed that choosing principles of justice from the original position does nothing to address

[129] Henshaw (n 101) 193.
[130] Susan Okin, 'Gender, Justice and Gender: An Unfinished Debate' (2004) 72 Fordham Law Review 1537.
[131] Okin (n 130) 1544.
[132] Catharine Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1990).
[133] Martha C Nussbaum, 'Rawls and Feminism' in Samuel Freeman (ed) *The Cambridge Companion to Rawls* (Cambridge University Press 2002).
[134] Nussbaum (n 133) 488.
[135] As above.
[136] Okin (n 130) 10 – 14. Although Okin writes about the existence of two genders, male and female, there is no acknowledgement of the multiple gender identities in her remarks.
[137] Linda R Hirshman, 'Is the Original Position Inherently Male-Superior?' (1994) 94 Columbia Law Review 1860.
[138] Hirshman (n 137) 1889 – 1890.

the reality of private anarchy, where there is no law and where the naturally stronger, usually men, will rule.[139] Conor Arsenault agrees with Hirshman and exposes the reality of women's domination and observes that despite the original position disaggregation of sex and gender when individuals choose principles of justice, it does not help the reality of women being dominated and oppressed in the private sphere.[140]

Western feminist philosophy emerged in the 1970s as an expression of the second wave of the western liberation movement, which began in the 1960s.[141] Like critical race theorists who expressed concerns over the injustice of racialized people,[142] Western feminists drew on the resources available from western philosophy, especially the commitments to liberty and equality, while also questioning the assumptions about justice.[143] Western feminist philosophers began by conceptually distinguishing between sex, which they regarded as biologically given and gender, which was viewed as a complex set of social norms situating differently from the assigned masculine and feminine identities.[144] With the idea that people are situated differently according to their gender, western feminist theorists identified overt and covert forms of institutional gender injustice.[145] For example, they identified discriminatory laws and policies that overtly prohibited women from accessing certain occupations.[146] In other instances, they identified the non-gender neutral structures of institutions, such as the normal working day, premised on the assumption that workers' had no care responsibilities.[147] Therefore, western feminists exposed the injustice in institutions for disparate impacts on women.[148]

Just as the critical race theorists demanded the liberty and equality of people of colour on the same terms as white people, western feminist philosophers began demanding liberty and equality for women on the same terms as men.[149] These feminists also challenged the long-held assumptions about justice, drawing attention to the gendered power inequalities

[139] Hirshman (n 137) 1875.
[140] Conor Arsenault, 'A Feminist Critique on the Limits of Rawls' (2017) 7 Mapping Politics.
[141] Alison M Jaggar, 'The Philosophical Challenges of Global Gender Justice' (2009) 37 Philosophical Topics 1.
[142] Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press 2001).
[143] Jaggar (n 141) 6.
[144] As above.
[145] As above.
[146] As above.
[147] Jaggar (n 141) 6.
[148] As above.
[149] As above.

structuring many aspects of personal life.[150] A distinctive feature of the second wave of feminism was the slogan, 'the personal is political, which was a call that drew attention to the gendered power inequalities within women's personal lives.[151] Inequalities that had previously been regarded as idiosyncratic rather than systemic such as domestic violence, incest and the expectation for women to take primary responsibility for caregiving became more pronounced.[152] The home became a centre for analysis by feminist theorists, arguing that it should not be excluded from the justice domain and instead recognized as a site within which justice demands held sway.[153] As a result, feminists expanded philosophical conceptions of the object of justice to include customary responsibilities for unpaid work.[154]

2.5.1 Justice and gender

Susan Moller Okin observes that major contemporary theories of justice have displayed little or no interest or knowledge of the findings of feminism and have largely bypassed the fact that societies in which their theories pertain heavily are deeply affected by gender.[155] Okin argues that the structure of the society assumes gender and also perpetuates it, which leads to the inclusion and privileging of one category, men and exclusion of women from power, wealth and authority.[156] Okin further argues that issues of justice stem from society due to its gendered past and present assumptions.[157] However, despite the division of humanity into sexes, Okin observes that most contemporary theories of justice do not make sex a subject of inquiry and assume that the family is non-political, yet it is within the family that there is a gendered division of labour and the distribution of power, responsibility and privilege.[158] Okin further notes that theories of justice do not question the justice of the subordination of women.[159]

However, within the context of Africa, the discourse of gender assumes varied reactions, particularly from African feminists who find the description of gender as socially constructed, Eurocentric.[160] Ifi Amadiume challenges the biological determinism perspective of the

[150] This aspect was most notable during the second wave of feminism between the 1960s – 1980s, which is synonymous with the phrase "the personal is political" drawing a causal link between women's cultural and political inequalities.
[151] As above.
[152] As above.
[153] As above.
[154] As above.
[155] Okin (n 130) 8.
[156] Okin (n 130) 9.
[157] Okin (n 130) 8.
[158] Okin (n 130) 9.
[159] As above.
[160] Celestine Nyamu-Musembi, 'Addressing Formal and Substantive Citizenship' [2020] Southern Africa Regional Poverty Network 1.

western-centric definition of gender.[161] Observing the native Igbo tribe, Amadiume contends that gender construction meant that it was separate from sex, and therefore daughters could become husbands to wives and therefore male in relation to their wives.[162] Therefore biologism was not a determinant of women's oppression rather a source of their power.[163] Amadiume notes that while western feminists' regard the family as a source of women's subordination, African feminist discourse views the family as a source of women's power.[164] Susan Arndt also argues that the criticisms of concepts of gender on the basis of complementarity or cooperation with men, affirmations of motherhood and the family and criticisms of the African societies patriarchal tendencies do not represent obligatory criteria for Africa feminism.[165] Amadiume notes that African feminisms aims to discuss gender roles in the context of other intersecting oppressive mechanisms such as neo-colonialism, (cultural) imperialism, socio-economic exclusion and exploitation, gerontocracy, religious fundamentalism and dictatorial or corrupt systems.[166] Celestine Nyamu-Musembi notes that within the African context, the concept of the family is not based on the western nuclear model, which makes inevitable the use of gender as the organizing principle in any critique of hierarchy or differentiated roles within the family.[167] However, within the African context, power centres are diffused into kinship categories such as age, seniority or distinctions based on whether one is marrying into the family or born into it.[168] The concept of justice within the African feminist discourse is elaborately canvassed in the subsequent sections

2.5.2 Liberal feminist universality of justice versus particularity

Feminists such as Susan Okin also advance the universalism of justice when arguing that all women experience injustice as women regardless of their differences.[169] Ruth Putnam partially agrees with Okin, noting that women suffer injustices such as rape, battery, and abuse.[170] However, Putnam observes that women experience injustice differently and singles out reproductive research as a field that traditionally focuses on men, and where women's

[161] Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1987).
[162] Amadiume (n 161) 58.
[163] Amadiume (n 161) 58 – 59.
[164] Amadiume (n 161) 191.
[165] Susan Arndt, 'Perspectives on African Feminism: Defining and Classifying African-Feminist Literatures' [2002] Agenda: Empowering Women for Gender Equity 31.
[166] Arndt (n 165) 32.
[167] Nyamu-Musembi (n 160) 2.
[168] Nyamu Musembi (n 160) 2.
[169] Sara Rapport, 'Justice at Home: Okin's "Justice, Gender, and the Family"' (1991) 16 Law & Social Inquiry 835.
[170] Ruth Anna Putnam, 'Why Not a Feminist Theory of Justice?' in Martha C Nussbaum and Jonathan Glover (eds) *Women, Culture, and Development: A Study of Human Capabilities* (Oxford University Press 1995).

experiences were required, white women's experiences often substituted those of all women.[171] According to Putnam, a feminist theory of justice must focus on issues of justice that are of concern to women and those that are ignored by major contemporary theories of justice.[172] Benhabib and Cornell urge against feminist theories that advance conclusive generalizations based on gender.[173] They note that third world women challenge the assumption of generalizable, identifiable and collective shared experiences of womanhood.[174]

Rawls' liberal conceptions of justice, as observed in Chapter 2, is a foundation of contemporary thought on justice and is a subject of western liberal feminist critique. Putnam, for example, asserts that the liberal conception of justice as espoused by John Rawls presents itself as universal.[175] However, she argues that the idea of the universality of justice does not take into consideration the diversity of voices and claims of those less favoured since universality is based on a single voice of the dominant categories.[176] Therefore, Putnam argues that it follows that the conception of justice is likely to be biased, particularly concerning the claims of those less favoured.[177] Benhabib agrees with the arguments against universalism. She observes that universalistic moral theories from Hobbes to Rawls are substitutionalist because the universalism they defend is identified by a specific group of subjects as the representative case of humans.[178] She further notes that the subjects in theories of justice are primarily white, male adults who are likely propertied and professionals.[179] Benhabib calls for a replacement of substitutional universalism, a characteristic of modern universalistic political theories by interactive feminism.[180] Interactive feminism recognizes the plurality of modes of being human and aims at yielding political transformations as well as points of view that are acceptable to all.[181]

[171] As above 18.
[172] Putnam (n 170) 3.
[173] Seyla Benhabib and Drucilla Cornell, *Feminism As Critique: On the Politics of Gender* (University of Minnesota Press 1987).
[174] Benhabib and Cornell (n 173) 13.
[175] Putnam (n 170) 6.
[176] As above.
[177] As above.
[178] Seyla Benhabib, 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controvers and Feminist Theory' (1985) 5 PRAXIS International 402.
[179] Benhabib (n 173) 80.
[180] Putnam (n 170) 17.
[181] Benhabib (n 173) 81.

2.6 Communitarian theory and African conceptions of justice

Although the African conception of justice is a reflection of western values, it still approximates to the western conception of justice.[182] Unlike the social contract theory, as espoused by Hobbes and Locke, which advances individualistic aspects such as human reason and protection of individual lives and liberties, the African social and political context is informed by communal existence, common good and human welfare.[183] Within the African political thinking informed by communitarian setting, there is a respect for hierarchy, with elders assuming the responsibility for guiding the individualistic tendencies of the young.[184] In addition, African communitarianism places significance on communitarian human rights, than individual or 'fragmented approaches to human rights'.[185] The philosophy of ubuntu is an essential component of the African communitarian existence which is socially and politically binding to all human beings.

The philosophy of ubuntu within the African social contract is considered an expression espousing the community's common good.[186] Ghanaian philosopher Kwame Gyekye writes about the concept of the 'common good, noting that it is a notion that is affiliated to the notion of the human community and, by extension, to the notion of human society.[187] Although the African communitarian existence advances the idea of the common good, there is an understanding that individuals also have their identity, liberty and will. Kwame Gyekye captures this in an analogy likening the clan to a cluster of trees that appear huddled together when seen from far but stand individually when closely approached.[188] Therefore, although within the African social contract, the individual's give themselves to the community, they remain with their autonomy, free will and determinism.[189] In addition, consensus democracy is a key feature of African communitarian thinking which governs the social contract theory and is based on general agreement and compromise among community members within the social

[182] Ani Casimir, 'The Concept of Feminist Justice in African Philosophy: A Critical Exposition of Dukor's Propositions on African Cultural Values' (2013) 03 Open Journal of Philosophy 178.
[183] Munamato Chemhuru, 'Gleaning the Social Contract Theory from African Communitarian Philosophy' (2017) 36 South African Journal of Philosophy 505.
[184] Chemhuru (n 183) 512.
[185] As above.
[186] As above.
[187] Kwame Gyekye, *Philosophy, Culture and Vision: African Perspectives: Selected Essays* (Sub-Saharan Publishers 2013).
[188] Kwame Gyekye, *African Cultural Values: An Introduction* (Sankofa Pub Co 1996).
[189] Chemhuru (n 183) 513.

contract.[190] Consensus building within the social contract in Africa allows for the common good of everyone. Participation is a key component of the social contract, allowing for the participation of the community in matters that concern their social and political welfare.[191] Those who favour moderate communitarianism, such as Kwame Gyeke, recognize the importance of individual's and their rights within the community.

Gyekye observes that:[192]

> The communitarian conception of the person implies that community life is not optional for the individual. It also suggests that he cannot - perhaps should not – live in isolation from other persons, that he is naturally oriented toward other persons and must have relationships with them.

On the other hand, radical communitarians such as Ifeanyi Menkiti argue that individuals are recognized only if and when they belong to the community and adhere to the rules of that community.[193] They invoke the concept of kinship in traditional African societies, which they believe advanced this view noting that kinship controlled the relationships between members of a particular community.[194]

Menkiti observes that: [195]

> Without incorporation into this or that community, individuals are considered mere danglers to whom the description 'person' does not fully apply. Personhood has to be achieved and is not given simply because one is born of human seed.

2.6.1 Justice and ubuntu

The concept of ubuntu justice does not equate to justice in western legal terms. Justice is defined as a relationship between a human person and the universe, between a person and nature, and between a person and another.[196] It is believed that the values of ubuntu originated

[190] As above.
[191] As above.
[192] Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oup USA 1997).
[193] Walter P Maqoma, 'In Defence of Communitarianism Philosophy: The Contribution of Moderate Communitarianism to the Formation of an African Identity' (2020) 41 Verbum et Ecclesia 1.
[194] Maqoma (n 193) 3.
[195] Menkiti Ifeanyi, 'Person and Community in African Traditional Thought' in Wright RA (eds) *African Philosophy: An Introduction* (University Press of America, Lanham 1984).
[196] Temitope Fagunwa, 'Ubuntu: Revisiting an Endangered African Philosophy in Quest of a Pan-Africanist Revolutionary Ideology' (2019) 3 Genealogy 45.

in ancient Egypt, where the Egyptian goddess Maat or Ma'at personified harmony in the universe and represented order, truthfulness, justice, and all human beings sought to live according to her ethical rule.[197] Ma'at prescriptions of truth, justice and righteousness are said to form the basis of ubuntu.[198] Chukwunyere Kamalu notes that Ma'at embodied natural law and represented the principle on which society and cosmos were founded.[199] Ma'at represented a principle or philosophy rather than a static conception of the mind and is the same principle in traditional African societies, ensuring that cosmic and human justice is done.[200] The African cosmic universe regulates ubuntu while humans regulate western justice.[201] According to its yardstick of equality, ubuntu justice is awarded based on status and honours the values of equality and human dignity.[202] These values contrast with the western sense of justice, which is meted out according to a person's status, hierarchical position, or achievement.[203] Thus justice according to ubuntu is restorative, and compensation plays an integral role.[204] On the other hand, Western retributive justice metes punishment on the perpetrator with little consideration for the victims.[205] However, Ubuntu is not always sought when disputes involve those outside of the community.[206] Reconciliation and consensus-building are key facets of justice within African societies, and it is a fundamental law that justice must be obtained through peace.

2.6.2 African feminisms and ubuntu

African feminisms are a feminist epistemology and rhetoric that has provided arguments that validate the experiences of women of Africa and those of African origin against mainstream discourse.[207] African feminisms are diverse and include concepts such as Womanism,[208]

[197] Ilze Keevy, 'African Philosophical Values and Constitutionalism: A Feminist Perspective on Ubuntu as a Constitutional Value' (Thesis, University of the Free State 2008).
[198] As above.
[199] Chukwunyere Kamalu, *Person, Divinity & Nature: A Modern View of the Person and the Cosmos in African Thought* (Karnak House 1998).
[200] Keevy (n 197) 376.
[201] Keevy (n 197) 382.
[202] As above.
[203] Keevy (n 197) 384.
[204] Keevy (n 197) 382.
[205] As above.
[206] As above.
[207] Ruvimbo Goredema, 'African Feminism: The African Woman's Struggle for Identity' (2010) 1 African Yearbook of Rhetoric 33.
[208] Alice Walker, 'In Search of Our Mothers' Gardens: Womanist Prose' <https://bookshop.org/books/in-search-of-our-mothers-gardens-womanist-prose/9780156028646> accessed 7 May 2021. Alice Walker uses the term Womanism and defines it as feminist, Afrocentric, healing, embodied and spiritual. Womanism refers to African American feminism or feminism of women of color. Samir Kumar Sharma notes that Walker in naming black feminism as Womanism, seeks to demonstrate the reality of black women's struggle against white patriarchy, white women's racism and the sexism of black men.

Motherism,[209] Stiwanism,[210] and Nego-feminism.[211] The justice of African feminism aims to demonstrate a discernible difference between women – that is grounded on the binary of colonized vis a vis those deemed colonizers on the one hand , and a social movement that seeks to raise a global consciousness, sympathizing with African women's realities and expectations.[212] Amina Mama observes the interventions of southern-based feminists and their insistence on the politics of location, diversity, class, race, sexuality amongst other factors is a significant development.[213] Rhoda Ige observes that the hallmark of western feminist jurisprudence is the belief that society and legal order are patriarchal and that sex is the only site of women's oppression and subjugation.[214] Ige contends that although sex is a site of African women's oppression, freedom from oppression is based on political, economic, social and cultural manifestations or racial, class, cultural and sexual biases.[215]

In part, African feminist discourse is signified by its theorization of alternative concepts to feminism.[216] African feminisms express ambivalence to its location within the global feminism network because it focuses on African societies' social and cultural realities.[217] It is a feminism that aims to get to the core of African gender relations and to upset the matrices of domination, transforming gender relationships in African societies and improving African women's situation.[218] African feminism grows out of a history of female integration within primarily corporate and agrarian-based societies with solid cultural heritages that have experienced traumatic colonization from the west.[219] Ige observes that western feminism has failed to

[209] Catherine Obianuju Acholonu, *Motherism : The Afrocentric Alternative to Feminism /* (Afa Publications, c1995). Acholonu provides Africa's alternative to feminism by advancing Motherism, which emphasizes motherhood, nature and nurture. Motherism celebrates African women's gender roles of service and nurture and some critiques have argues that her Motherism reinforces gender stereotypes. See also: Gwendolyn Mikell, African Feminisms 3.
[210] Molara Ogundipe-Leslie, *Re-Creating Ourselves: African Women & Critical Transformations* (Africa World Press 1994). Stiwanism was coined in response to arguments around the relevance of feminism in Africa which was seen as a western concept. Stiwanism, meaning, Social Transformation Including Women in Africa, called for the inclusion of African women in the social transformation of Africa. It also called for a partnership with men in this transformation ,a feature quite distinct from western feminisms and Womanism. See also: Taif et al.
[211] Nnaemeka (n 164). Obioma Nnaemeka defines here feminism as that of negotiation or 'no ego' feminism, signifying African women's willingness to negotiate with and around men even in difficult circumstances. Nnaemeka contends that African women are more inclined to reaching out and working with men in collaboration. This is quite in contrast with western feminisms which does not see men as allies, rather the perpetrators.
[212] Goredema (n 207) 34.
[213] Andrea Cornwall, Elizabeth Harrison and Ann Whitehead, 'Amina Mama, 'Critical Connections: Feminist Studies in African Contexts in Feminisms in Development: Contradictions, Contestations and Challenges' <https://www.amazon.com/Feminisms-Development-Contradictions-Contestations-Challenges/dp/1842778196> accessed 30 May 2021.
[214] Rhoda Asikia Ige, 'Speaking for Ourselves: African Feminism and the Development of International Human Rights Law' (2014) 6 KNUST 25.
[215] Ige (n 214) 111.
[216] Arndt (n 165) 35.
[217] Akachi Ezeigbo, *Gender Issues in Nigeria: A Feminine Perspective* (Vista Books 1996).
[218] Arndt (n 165) 32.
[219] Ige (n 214) 111.

consider the distinct differences between the location and diverse cultures.[220] Ige notes that using the Western feminist model as a paradigm for understanding women's gender oppression is an essentialist and universalist sense and must be discarded favouring an approach that engages local, contingent and historically specific analysis.[221]

Some African feminists oppose ubuntu revealing its oppressive reality for African women.[222] Ilze Keevy agrees with this perspective and observes the reality of two sides of ubuntu: first, being a male view that perpetuates patriarchal values, and another being female truth that aspires to bring ubuntu's patriarchal values in consonance with international paradigms of equality and human dignity.[223] Observing the patriarchy in ubuntu philosophy, Pamela Yaa argues that polygamy in Africa is grounded on ubuntu, an ancient divine principle of Maat.[224] In the polygamous patriarchal system, males enjoyed privilege while women were valued only in relation to men.[225] Indeed, Anne Wasike-Nasimiyu observes that polygamous systems exploit women for the benefit of men. The more a man's subordinates, the more proud he was, and his personality soared.[226] Thus, polygamous men enjoyed a prestigious and privileged social position instead of the women who were servers and maintainers of the system that relegated their inferior status in society.[227] Malera Tikambenji also observes that young girls were often married off in the name of ubuntu, and this encouraged polygamy and child marriages.[228] Other writers also observe that ubuntu regulates female-male relationships, often to the detriment of women, because ubuntu ignores the welfare of women and exploits their sexuality.[229]

Whilst some African feminists criticize the philosophy of ubuntu for its entrenched inequality and the oppression of women, Yvonne Mokgoro observes that ubuntu is in tune with

[220] Ige (n 214) 111 – 112.
[221] Ige (n 214) 112.
[222] Hendrick Viviers and Modisamkhondo Mzondi, 'The End of Essentialist Gods and Ubuntu: A Feminist Critical Investigation' (2016) 97 Pharos Journal of Theology 17.
[223] Keevy (n 197) 410.
[224] Pamela Yaa Asantewaa Reed, 'Africana Womanism and African Feminism: A Philosophical, Literary, and Cosmological Dialectic on Family' (2001) 25 The Western Journal of Black Studies 168.
[225] Anne Wasike-Nasimiyu, Polygamy: A Feminist Critique in Odudoye Mercy and Kanyoro Musimbi (eds) *The Will to Arise: Women, Tradition, and the Church in Africa* (Wipf and Stock Publishers 2005).
[226] Nasimiyu-Wasike (n 225) 104.
[227] As above.
[228] Grace Tikambenji Malera, 'Women, Reproductive Rights and HIV/AIDS: The Value of the African Charter Protocol' (2007) 21 Agenda 127. See also Keevy 417.
[229] Mercy Amba Oduyoye, *Introducing African Women's Theology* (1st edition, Sheffield Academic Press 2001). See also Keevy 419 who quoting Odudoye notes that Ubuntu hospitality is "incompatible with the dignity of women".

constitutional values and particularly the Bill of Rights.[230] Sylvia Tamale, for example, finds that the reconceptualization of justice as ubuntu accommodates African women's claims for gender justice.[231] Tamale argues that ubuntu provides the basis on which principles of justice give weight to the group's well-being than in the individual logic of colonialism.[232] Tamale contends that African traditions provide useful tools for achieving gender justice, and ubuntu is a tool that can be used for this purpose.[233] Tamale further notes that ubuntu's core values of communitarianism, humanness, and egalitarianism can be strategically deployed to operationalize gender justice in Africa.[234] Tamale further observes that the western rubric of equality promotes individualism where women are constantly compared to men.[235] Individual rights benefit privileged white heterosexual middle class women who are more likely to succeed in their claims for equality.[236] Finally, Tamale concludes that African women would have to assimilate rather than embrace their traditions and values to demand their rights in this model.[237]

2.6.3 The interplay between justice as fairness and ubuntu

Kofi Quashigah argues that for concepts of justice to have meaning, they must reflect the values inherent in customary practices and laws of a particular community.[238] Quashigah notes that the substantive content of the universal idea of justice must reflect the circumstances and aspirations of the specific people to whom the concept serves.[239] The concept represents a people's determinations to claim which they believe in consonance with the concept of their humanity.[240] Indigenous African people articulate an idea of justice that guarantees individual rights and responsibilities in the community to safeguard peace stability and ensure a sustainable society.[241] Justice as an ethical paradigm is captured in the social philosophy of

[230] Yvonne Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad.
[231] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020).
[232] Tamale contends that values such as equity, social justice and ubuntu resonate with traditional understandings of most African people and therefore, a need to 'move away' from narrow western concepts of equality to more 'participatory' and context driven notions of equality and justice. (Emphasis mine).
[233] As above 221.
[234] As above.
[235] Tamale (n 231) 222.
[236] As above.
[237] Tamale (n 231) 214.
[238] Kofi Quashigah, 'Justice in the Traditional African Society within the Modern Constitutional Set-Up' (2016) 7 Jurisprudence 93.
[239] Quashigah (n 238) 95.
[240] As above.
[241] Paul Nnodim, 'Justice as Fairness and "Ubuntu": Conceptualizing Justice through Human Dignity' (2020) 27 Ethical Perspectives 69.

ubuntu, found in the Eastern and Southern Africa cultures.[242] Ubuntu is derived from the Bantu word meaning 'a person' and merely translates into humanity.[243] The concept of ubuntu derives from a sense of community that celebrates human dignity, their value, worth and sees the development of self-identity as a give or take action between an individual and their community.[244] Ubuntu links one community member with the other, regardless of their socio-economic background and is the essence of humanness and a concretely lived philosophy within the human society.[245]

Moeketsi Letseka notes the link between Rawls' justice as fairness and ubuntu as a notion of communal justice.[246] Ubuntu embodies values, morals and ideas of justice, perceived as fairness, meaning doing that which is considered moral and right in the indigenous African society.[247] The concept of justice is anchored on the social contract theory, a pervasive feature of traditional African politics and governance where chiefs were bound by the law to rule with the people's consent.[248] Letseka observes that the family is the centre of the wider society, anchoring ubuntu morality in communities, families, and personhood. The family is the primary institution that plays a role in the formative moral development of a person.[249] While ubuntu is often seen as a communal concept, it is not anti-individualistic; rather, it respects particularity and respect for individuality.[250] Letseka argues that ubuntu defines an individual in terms of their relationship with others, and it never reduces the other to any specific characteristic, conduct or function.[251]

2.7 Conclusion

This chapter began by reflecting on the philosophical foundations of justice, tracing the history and foundations of the theories of justice. It reveals the concerns by western feminists of the lack of representation of women in the theories of justice, including within the social contract theory. Western feminists find a fundamental defect in the lack of representation of the realities of women in theorizing about justice. This chapter also reveals that both western feminists

[242] Nnondim (n 241) 70.
[243] As above.
[244] As above.
[245] As above.
[246] Moeketsi Letseka, 'Ubuntu and Justice as Fairness' (2014) 5 Mediterranean Journal of Social Sciences 544.
[247] Letseka (n 246) 545.
[248] As above.
[249] Letseka (n 246) 546 – 547.
[250] Letseka (n 246) 547.
[251] As above.

consider gender as a central issue in theorizing about justice. Western feminists argue that because societies are deeply affected by the question of gender, there is a need by theorists to make gender a subject of inquiry about justice, in societies where men are more privileged than women. To remedy this, they call for the development of a feminist theory of justice that appeals to women as women and addresses their concern as a category. However, western feminists' attempts at a theory of justice that appeal to women, in effect, fall into the universality trap, assuming the homogeneity of womanhood. However, the idea of a homogenous category of womanhood does not resonate with feminists from the Global South, who call for an appreciation of the of the realities of the diversities of women and the difference between western and African feminisms.

Finally, this chapter explores the meaning of justice in the African sense and finds favour in the communitarian nature of ubuntu justice, a concept that is engrained in African culture and ways of life. Ubuntu justice also resonates with leading feminist voices in Africa including Sylvia Tamale who calls for a return of human rights and justice grounded in ubuntu. Conversely, there are divergent opinions amongst some African feminists, who argue against ubuntu justice, revealing the patriarchal nature of ubuntu which they argue is detrimental to African women. Indeed, whilst this chapter reveals those challenges associated with aspects of ubuntu in some contexts, it finds that ubuntu is perhaps the only unifying concept of justice that resonates with African feminists.

Chapter 3: Assessing justice concerns in traditional dispute resolution mechanisms in Kenya

> '..As African feminists, our understanding of feminism places patriarchal social relations, systems and structures which are embedded in oppressive structures at the center of our analysis… to challenge patriarchy effectively, also requires challenging other systems of oppression and exploitation which frequently mutually support each other..'.[1]

3.1 Introduction

In the previous chapter, this thesis found that a viable feminist paradigm of justice is that which takes into consideration the issues that affect women as women, including discerning the multiplicity of women's experiences. Importantly, it finds that the lived experiences of women facing injustice is fundamental in arriving a viable feminist paradigm of justice. Whilst there is no consensus amongst feminists regarding a paradigm of justice that appeals to women as a category, there is agreement about the need to develop paradigms of justice that are grounded in the realities of women, particularly those facing injustice in institutions that are deemed patriarchal. It is for this reason that this chapter seeks to examine traditional dispute resolution mechanisms, as an institution that is considered patriarchal but which appears to provide justice to rural women in Nyando sub-county in Kenya. Traditional dispute resolution mechanisms have faced much criticism in the global discourse on justice, and this chapter interrogates the concerns raised by feminists and those in the global discourse on justice.

Like many other countries, Kenya is exploring mechanism for integrating traditional dispute resolution mechanisms as a fundamental component of the wider justice system. This chapter recognizes the fundamental role that traditional dispute resolution mechanisms play in the access to justice in Kenya today, noting that the formal courts are not the sole purveyors of justice. This chapter also interrogates the human rights concerns raised by various actors including human rights practitioners, scholars and feminists regarding the viability of these mechanisms to provide justice for women, particularly within the Kenya context. In the wake of renewed interest by justice actors at the global and national levels in indigenous justice, this chapter considers human rights as the yardstick or standard for interrogation of these justice

[1] African Feminists Forum, *Charter of Feminist Principles for African Feminists* (Akina Mama Wa Afrika 2006).

mechanisms. While affirming their role in providing justice in contemporary Kenya, this chapter also interrogates the question of gender as a central concern within the traditional dispute resolution mechanism. It examines the constitutional imperatives for gender justice within justice discourse in Kenya affirming fundamental human rights as an integral aspects of access to justice.

3.2 Conceptualizing justice in contemporary Kenya

The word 'justice' evokes different meanings to different people in Kenya. Often, a Kenyan seeking justice would refer to '*haki yangu'* meaning, my right in Swahili language. The '*haki yangu'* narrative is also used loosely to refer to any form of 'victory' or rights confirmed in cases of disputes. It is therefore common to hear *haki* being referred to whether in a civil or criminal dispute, in which either party is seeking a vindication of some right or rights. In common parlance, justice and rights are used interchangeably by the common *mwananchi*, meanin*g* citizen in Swahili seeking a vindication of rights. The claim for justice also extends beyond claims of personhood to community or groups and at the institutional level. It also not uncommon that justice is perceived of as a moral virtue requiring a person to commit to others at specific time, place in a specific circumstances.[2] As elaborated in chapter 2, conceptions of justice are today grounded in biblical meanings and teachings from stories evoking a sense of justice , requiring persons to render what is just to another.[3] There is no doubt the biblical teachings on justice have had an impact of justice mechanisms in contemporary Kenya – especially the criminal justice system.[4]

Contemporary ideas of justice in Kenya have their foundations in pre and post-colonial justice and governance architectures. As mentioned in chapter 1 of this thesis, different communities in Kenya had their ways of addressing injustice and mechanisms for seeking justice. There is no doubt that the political, legal and social economic developments in post-colonial Kenya shaped various institutions providing justice in Kenya including traditional dispute resolution mechanisms. See a detailed discussion on this is chapter 1. This influence led to the elevation of the formal justice mechanisms and the relegation of the pre-colonial dispute resolution

[2] Aggrey Ayub Walaba, 'Challenges of Achieving Justice, Equality and Peace in Kenya: A Literature Review' (2014) 4 Developing Country Studies 198.
[3] As above.
[4] The old testament refers to conceptions of justice based reciprocity or proportional vengeance for example in reference to an eye for an eye or a tooth for a tooth.

mechanisms – creating a two tier judicial system, with one receiving more benefits from the state, and the other left to operate independent of the state.

The Kenyan national anthem, which served as the state emblem after independence in 1963 is perhaps the most recognized reference to justice. The national anthem, unveiled at the dawn of independence was intended to 'express the deepest convictions and aspirations of the Kenyan people'.[5] The lyrics of the first stanza, which refers to justice as a shield, goes as follows:

O God of all creation
Bless this our land and nation
Justice be our shield and defender

The letter and spirit of the Kenya National Anthem, denotes the interest in justice as a concept and its recognition as a shield and defender. Inherently, national anthems of most African states were designed to reflect the spirit of post-colonial nations and the intention to advance, human rights, good governance, justice, rule of law, gender equality and promote democratic values.[6] Some Kenyan scholars Kameri Mbote and Migai Akech have attempted to define justice as 'what is fair, appropriate or deserved in social relations'[7] Mbote and Akech further opine that where there is scarcity of resources, there is the potential for competition for the scarce resources – and in the absence of mechanisms to determine what is just, it can be expected that natural human behaviour will override justice and trample on the weak.[8] Indeed, early political philosophers as noted in chapter 2 described this phenomenon in attempts at arriving at a social order devoid of injustice. The Kenyan Constitution does not define justice, however the preamble recognizes the heroism of those who struggled in the 'fight for freedom and justice to our land' – a important recognition of justice as seen within the political realm. The preamble also recognizes social justice[9] as one of the fundamental aspirations of the Kenyan people.[10] Therefore, letter and spirit of the Preamble to the Kenyan Constitution sets the tone for justice in the political sense. Inherently, Rawls theory of justice appears central in the enterprise of

[5] 'National Anthem of Kenya' (*Andrews University*, 1963) <https://www.andrews.edu/~orwenyo/anthem/anthem.html> accessed 30 July 2024.
[6] Francis Onditi, 'African National Anthems: Their Value System and Normative "Potential"' (The Research Committee for African Area Studies, Kyoto University 2018).
[7] Patricia Kameri-Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa* (The Open Society Initiative for Eastern Africa 2011).
[8] Mbote and Akech (n 7) 21.
[9] Social justice is sometimes referred to as distributive justice in the Rawlsian sense, as it is about the fairness in the distribution of resources, opportunities and privileges.
[10] See also Article 10 (b) recognizes social justice, amongst others as a national value and principle of governance, binding all state organs, state officer as well as public officers.

constitution development – defining relationships between the people and authorities, akin to the social contract.[11]

3.2.1 Traditional dispute resolution mechanisms in today's discourse on access to justice

> '..just as health is not found primarily in hospitals or knowledge in school, so is justice not found in official justice dispensing institutions. Instead, people experience justice (and injustice) not only (or usually) in forums sponsored by the state but at the primary institutional locations of their activity – home, neighbourhood, workplace business deal and so on ..' Marc Galanter.[12]

Access to justice is a fundamental provision within the Constitution of Kenya. It is a novelty in the sense that the Constitution places a mandatory obligation on the State to ensure access to justice, and where any fees is required to facilitate access, it must not impede access to justice.[13] The courts in Kenya have elaborated on the practical meanings of access to justice in the case of *Dry Associates Limited versus Capital Markets Authority and Another*[14] defining access to justice as:

> Access to Justice is a broad concept that defies easy definition. It includes enshrinement of rights in the law, awareness of and understanding of the law, easy availability of information pertinent to ones rights , equal right to the protection of those by the law enforcement agencies, easy access to the justice system particularly the formal adjudicatory process, availability of physical legal infrastructure, affordability of legal services, provision of a conducive environment within judicial system, expeditious disposal of cases and enforcement of judicial decisions without delay.[15]

From the foregoing, it is clear that the question of access is an integral part of justice in the Kenyan context – encompassing diverse aspects as the learned judge alludes in the case. However, the parameters of access to justice in this excerpt may not fit the realities of traditional dispute mechanism. For example, the availability of a physical infrastructure, affordability of services, denoting some fees involved, enforcement of judicial decisions

[11] Michael P Zuckert, 'The New Rawls and Constitutional Theory: Does It Really Taste That Much Better' (1994) 11 Constitutional Commentary 227.
[12] Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 Journal of Legal Pluralism 1.
[13] Article 48 of the Constitution of Kenya, 2010.
[14] Petition no 328 of 2011, [2012] eKLR.
[15] As above para 110.

without delay may not be reflective of the architecture of the traditional dispute resolution mechanisms.[16] Autonomous traditional justice mechanisms are those which are led by the community, and resolve disputes without any reference to the state or its regulatory mechanisms.[17] Here, the dispute resolution is left to some members of the community usually the elders, who make decisions based on their customary laws and practices.[18]

The global discourse on the rule of law and access to justice reflects that courts are not the sole purveyors of justice.[19] As observed in chapter 1 of this thesis, this centrifugal image of the courts as the sole purveyors of justice was in itself a colonial strategy meant to consolidate power and reduce the influence of indigenous or traditional justice mechanisms. Galanter, cautions against legal centralism – in which state agencies are centred in hierarchical relationships to other sections of the society.[20] Indigenous or traditional justice mechanisms have attracted attention in the international development discourse as 'alternative'[21] means of promoting access to justice.[22] Increasingly, there is a shifting interest from the state-centric bureaucratic approaches of formal justice and more recognition that justice can be provided in multiple places, including traditional dispute resolution mechanisms.[23] Governments and international development partners increasingly recognize the local legitimate notions and practices of justice and various contestations that accompany them.[24] There is also a recognition that these justice mechanisms are widely popular amongst the poor and disadvantaged yet widely neglected in infrastructural support.[25] Wojkowska notes that over eighty per cent of disputes are resolved through traditional dispute resolution mechanisms in most jurisdictions.[26]

[16] The findings of Kenyan Judicial Taskforce on Alternative Justice Mechanisms of several locations in Kenya including Isiolo, Kericho, Garissa, Othaya, Marsabit, and Nairobi revealed the existence of various models of traditional justice mechanisms, relying on customary laws and norms of their communities. The Taskforce classified these sample existing models under four key categories including: Autonomous models, court annexed models, third party institutions, and regulated models. See Alternative Justice Systems Baseline Policy for a further study into these models.
[17] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' (Judiciary of Kenya 2020).
[18] Alternative Justice Systems Baseline policy (n 17) 51.
[19] Alternative Justice Systems Baseline Policy (n 17) 9 – 10.
[20] Galanter (n 12) 2-3.
[21] The term 'alternative' is widely shunned by promoters of Alternative Justice Systems as it connotes inferiority of the traditional justice systems to the western justice systems.
[22] Alternative Justice Systems Baseline Policy (n 17) 1- 6.
[23] Erica Harper and others, *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (International Development Law Organization 2011).
[24] Harper et al (n 23) 4.
[25] Ewa Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (United Nations Development Programme 2006).
[26] Wojkowska observes that in Malawi, between 80 and 90 per cent of all disputes are processed through customary justice systems; in Sierra Leone, approximately 85 per cent of the population fall under the jurisdiction of customary law; in Bangladesh, and estimated 60 – 70 per cent of local disputes are resolved through the *Salish*.

Wojkowska also observes that the poor do not trust the formal justice system due to a number of reasons including; their mistrust of the law, fear and intimidation, lack of familiarity with the formal justice systems and low legal literacy, unequal power relations amongst the players, some formal justice systems are culturally inaccessible, uncomfortable and are complicit in conflict and colonial oppression, length of time it takes to process cases and the retributive nature of formal dispute resolution process which does not lead to party reconciliation.[27] Aiyedun argues that African customary law, which is the primary means of engagement within the traditional justice mechanisms, the principles of natural justice lie at the centre of the concept of fairness.[28] Aiyedun, quoting Bennett, observes that these justice mechanisms guarantee a fair hearing compared to the western formal justice systems because disputes are heard expeditiously, and debates extensively canvassed beyond the disputing parties and to the community and thereby, decisions are often well-considered.[29] Agnieszka Szpak also notes that indigenous people's[30] conception of justice aims to restore peace and harmony by seeking reconciliation.[31] This contrasts with the western conceptions of justice, which seeks to limit actions that violate legal rules considered harmful to society.[32] She notes that western justice is more concerned about the breached legal norm than the victims' welfare and the need to maintain social relations after resolving the dispute.[33] While in the formal justice systems, the victim is a witness in criminal cases, victims are at the center of the decision-making process in traditional justice mechanisms. Both the victim and offender agree to the proposed solution.[34]

A 2007 study commissioned by the Governance, Law and Justice Order Sector Reform Program highlighted low confidence amongst Kenyans in the formal justice system in Kenya.[35] Another survey released ten years later and commissioned by the Judiciary of Kenya and The

[27] Wojkowska attributes this lack of trust to several reasons, including; their mistrust of the law, fear and intimidation, lack of familiarity with the formal justice systems and low legal literacy, unequal power relations amongst the players, some formal justice systems are culturally inaccessible, uncomfortable and are complicit in conflict and colonial oppression, length of time it takes to process cases and the retributive nature of formal dispute resolution process which does not lead to party reconciliation.
[28] Aiyedun and Ordor (n 2) 163.
[29] Aiyedun and Ordor (n 2) 164.
[30] The term 'indigenous' has been used to focus on the native, historic continuity, self-identity or governance of a group. The Oxford Dictionary refers to indigenous as born or produced in a land or region or pertaining to a land or region.
[31] Agnieszka Szpak, 'Indigenous Mechanisms of Transitional Justice as Complementary Instruments to State Justice Systems: Cases of Mato Oput in Uganda, Bashingantahe Councils in Burundi and Navajos' Custom of Naat'aani' (2017) 46 Polish Political Science Yearbook 55.
[32] Szpak (n 31) 63 – 66.
[33] As above.
[34] Szpak (n 31) 65.
[35] Republic of Kenya, 'Governance, Justice, Law and Order Sector (GJLOS) Reform Programme' 120 <https://acjr.org.za/resource-centre/governance-justice-and-law-and-order-sector-reform-programme-administrative-data-collection-and-analysis-report>.

Hague Institute for Innovation and Law revealed that most Kenyans resolved disputes outside the formal court systems.[36] The essence of these studies was in response to the enormous challenges in accessing justice, such as the limited reach of the formal court infrastructure, limited judicial officers leading to a massive backlog of cases, lack of trust in the formal judicial system, limited legal aid in the context of prevailing illiteracy and high costs of legal services, among others.[37] Although the repugnancy clause was retained in the new constitutional dispensation in Kenya, the application of traditional dispute resolution mechanisms was limited as far as the bill of rights and fundamental freedoms are concerned.[38] The recognition of these justice mechanisms embodies Kenya's spirit for the revival and recognition of indigenous cultures, including the sustenance of its institutions.

Before the enactment of the Constitution of Kenya, 2010, previous constitutional drafts, such as the Bomas draft Constitution,[39] recognized the need to promote the different cultures in Kenya. In addition, the Bomas draft Constitution recognized the cultural interests in land, which was a significant milestone in Kenya, where community interests in the land have faced significant affront since colonialism.[40] The Kenyan judiciary task force with the mandate to develop a policy framework for the formal institutionalization of alternative justice models has identified reasons for the relevance of alternative forms of justice mechanisms.[41] The task force reflects on the relevance of alternative justice mechanisms and notes that these justice mechanisms reflect the lived realities of most Kenyans.[42]

3.2.2 Customary laws and traditional dispute resolution mechanisms

> **‘..**Traditions have been identified as one of the causes of gender injustice...’[43]

As established in chapter one, traditional dispute resolution mechanisms laws were based on their communities' local cultures and customs.[44] European colonization modified, regulated

[36] Judiciary of Kenya, HiiL and World Bank, ‘Justice Needs and Satisfaction in Kenya 2017: Legal Problems in Daily Life’ (Judiciary of Kenya 2017).
[37] Alternative Justice Systems Baseline Policy (n 17) 4.
[38] As above.
[39] Bomas Draft Constitution is a draft Constitution of Kenya that was prepared by the Constitution of Kenya Review Commission (CKRC) and adopted at the National Constitutional Conference held at Bomas in 2004.
[40] Section 80 (1) of the Bomas Draft Constitution 2004.
[41] Judiciary of Kenya, ‘Alternative Justice Systems Framework Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)’ (2020).
[42] Judiciary of Kenya (n 41) 4.
[43] Alternative Justice Systems Baseline Policy (n 17) 49.
[44] Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart 2005).

and reduced the application of indigenous laws in Africa, leading to the birth of what we know today as customary law.[45] The evidence of the clash between European and indigenous laws is seen in the application of family law in Africa in modern post-colonial states.[46] Martin Chanock argues that the inception of colonialism and the introduction of an economy reliant on money led to the evolution of a revised version of customary law favouring colonial administrators and African elders, who were mostly male.[47] Women were excluded from norm construction, and there was a desire to prevent women from 'becoming too independent'.[48] Therefore, in Malawi, for example, the colonial administration found it inconceivable that African women would enjoy rights that were denied to European women.[49] The district courts found in favour of African men in cases filed against women, arguing that women's independence undermined the community's morality.[50] The subordination of African women made sense to the colonial administrators because, during this time, white women were also subordinate to white men.[51] Banda argues that the revised customary law that assumed dominance in the context of colonialism assumed the subordination of African women.[52]

Newly independent African states began calling for the 'restoration' of 'African culture' to its former glory.[53] Indeed, the preamble to the Organization of African Unity Cultural Charter of 1976 provided that:[54]

> …Cultural domination led the depersonalization of part of the African people's, falsified their history, systematically disparaged and combated African values, and tried to replace progressively and officially, their languages by that of the colonizer...

Newly independent African states entrenched customary laws in their constitutions, acknowledging customary laws' influence within their societies and bodies. Chapter 12 of the

[45] Anthony C Diala and Bethsheba Kangwa, 'Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa' (2019) 52 De Jure Law Journal 189.
[46] Martin Chanock, 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 3 International Journal of Law, Policy and the Family 72.
[47] Chanock (n 46) 3.
[48] Banda (n 44) 18.
[49] As above.
[50] As above.
[51] As above.
[52] Chanock (n 46) 19.
[53] Chanock (n 46) 20.
[54] African Union, 'Cultural Charter for Africa' <https://au.int/en/treaties/cultural-charter-africa> accessed 18 August 2022.

Constitution of South Africa, for example, recognizes the role of traditional leadership. Article 211(2) states: [55]

> A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

Sub-article (3) provides that:

> The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Article 212 of the Constitution of South Africa recognizes the role of traditional leadership's role in resolving customary law disputes.[56] The Bomas draft Constitution of Kenya[57] recognized culture as '..the bedrock on which all spheres of individual and collective lives are based..'[58] Unlike the case of the South African Constitution, which entrenched traditional leadership in resolving disputes involving customary law, the draft Bomas Constitution did not have such a provision. Instead, the draft only considered aspirational values about culture.[59] However, it entrenched a national commission responsible for coordinating all the issues around culture, including advising on matters of culture-related policy.[60] The transition from the Bomas Draft to the new Constitution saw the adoption of the right to culture as the 'cumulative civilization of the Kenyan people'[61] placing an obligation on the Government of Kenya to promote all cultures.

Customary laws guide most dispute resolution processes in Africa.[62] Customary laws are unique to each ethnic group and apply to the dispute, as long as both parties are members of

[55] The Constitution of the Republic of South Africa, 1996: As Adopted on 8 May 1996 and Amended on 11 October 1996 by the Constituent Assembly (Department of Justice and Constitutional Development 2015).
[56] Section 212 (2) Constitution of the Republic of South Africa.
[57] After the independence Constitution, successive political regimes consolidated power, weakening governance institutions in Kenya. The Bomas draft Constitution was the first 'people driven' and representative attempt at revising successive repeals of the independence Constitution of Kenya. The Constitution of Kenya Review Commission, a body established to drive the amendment of the Constitution, developed a draft Constitution in September 2002 which was then debated in Bomas of Kenya and hence assumed the name "Bomas".
[58] See Article 5 of the Bomas Draft Constitution of 2004.
[59] Sections 25 (1) (2).
[60] Sections 26 (2) (a) – (o).
[61] Article 11 of the Constitution of Kenya 2010.
[62] Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 Indiana Journal of Global Legal Studies 87.

the ethnic group.[63] Today, customary law has many formations and is largely distorted. This distortion is because sources of customary law are today a product of social conditions and historical motivations, influenced by the interaction between colonialism and African customs and religion.[64] This position is also asserted by the Constitutional Court of South Africa in the case of *Alexkor Limited v Richtersveld Community and Others*[65] where the court noted that indigenous law had been greatly influenced by the political, administrative, and judicial context applied. The court observed:[66]

> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.…. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law..

The impact of customary law on people's personal lives in Africa cannot be understated. Matters involving marriage, inheritance, guardianship, appointment to traditional offices and exercise of authority, rites of passage apply indigenous customary law.[67] The *SM Otieno Case*[68] illustrates how customary law holds people despite embracing Western life. In this case, the court affirmed the application of customary law in a burial dispute, referring the deceased to be buried according to the customs of his ethnic, Luo community, despite the widow's assertions that the deceased had departed from his customs and embraced Christianity and western civilization.

Article 1(1) of the Constitution of Kenya, 2010 recognizes the sovereignty of the people of Kenya, which the Constitution should exercise. This sovereignty is exercised directly or through their elected representatives.[69] The AJS Baseline Policy argues that one way of exercising this sovereign power is by establishing and implementing the traditional justice

[63] Ndulo (n 62) 88.
[64] Ndulo (n 62) 88.
[65] *Alexkor v Richtersveld Community and Others* 2004 (5) SA 460 (CC) (Constitutional Court of South Africa).
[66] As above para 51.
[67] Ndulo (n 62) 88-89.
[68] *Virginia Wambui Otieno Versus Joash Ougo and Another Civil Appeal 31 of 1987(4)* (Court of Appeal).
[69] Article 1 (2).

systems.[70] Further, the Constitution of Kenya, 2010 recognizes culture as an integral part of the nation.[71] The Judicial Taskforce on Alternative Justice Systems in Kenya[72] argues that applying customary laws in traditional dispute resolution mechanisms in Kenya is a path to realizing the 'cumulative civilization' mission.[73]

Further, the baseline policy observes that state agencies are responsible for learning the right to culture.[74] Article 11 of the Constitution mirrors the provisions on the right to culture under the Bomas Draft Constitution.[75] The Constitution of Kenya, 2010, today requires that in exercising judicial authority, courts and tribunals must be guided by certain principles, among which are the need to recognize and promote traditional dispute resolution mechanisms.[76] The Constitution of Kenya, 2010, further notes that they must comply with specific standards to advance traditional dispute resolution mechanisms. Specifically, it notes:[77]

> Traditional dispute resolution mechanisms shall not be used in a way that:
>
> a) contravenes the Bill of Rights;
> b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
> c) is inconsistent with the Constitution or any written law.

The significance of recognition of traditional dispute resolution mechanisms within the Constitution of Kenya, 2010 is a crucial development and lends credence to these justice mechanisms. The popularity of these justice mechanisms is evident in the research conducted in Kenya that demonstrates the preference for these justice mechanisms.[78] Firstly, a research study[79] completed in 2007 observed low confidence in the government institutions, including

[70] Alternative Justice Systems Baseline Policy (n 17) 39.
[71] 'The Constitution of Kenya, 2010' <https://vision2030.go.ke/publication/the-constitution-of-kenya-2010/> accessed 31 August 2022.
[72] The Judicial Taskforce on Alternative Justice Systems was established on the 10th of March 2016 as a process for the realization of Article 159 (2) of the Constitution of Kenya. The Taskforce's mandate was to ensure the mainstreaming into the formal justice system, and traditional and other informal justice systems in Kenya.
[73] Alternative Justice Systems Baseline Policy (n 17) 38.
[74] Alternative Justice Systems Baseline Policy (n 17) 38.
[75] Bomas Draft Constitution of Kenya, Article 25 (1) (2).
[76] Constitution of Kenya, 2010 Article 159 (2) (c).
[77] Constitution of Kenya, 2010 Article 159 (3).
[78] Alternative Justice Systems Framework Policy (n 17) 9.
[79] 'Governance, Justice, Law and Order Sector (GJLOS) Reform Programme' (Judiciary of Kenya 2007) <https://acjr.org.za/resource-centre/governance-justice-and-law-and-order-sector-reform-programme-administrative-data-collection-and-analysis-report>.

the judiciary's ability to provide justice.[80] A subsequent study, Justice Needs Survey,[81] conducted a decade later, observed that most disputes in Kenya were resolved outside the confines of formal state justice mechanisms.[82]

Further, international and regional human rights law also recognizes the right to culture. For example, the African Charter in article 17(2), recognizes the right to culture: [83]

> Every individual may freely participate in the cultural life of his community.

United Nations human rights instruments, such as the International Covenant on Economic Social and Cultural Rights, also recognize the right of everyone to take part in cultural life at article 15.

Western liberal feminists have called to question the state's reluctance to intervene in institutions, such as traditional dispute resolution mechanisms, which they argue perpetuate women's subordination.[84] Yet, many women in rural areas value these justice mechanisms and work to end their discrimination by challenging the negative aspects of customary law.[85] International human rights systems have traditionally not seen women as active members of their cultural communities.[86] Joanna Bond, while applauding the potential of the Maputo Protocol to promote dialogue on cultural rights, also observes a disparity in power relations between the elders in the community and African women.[87] Bond notes that women must have a voice in shaping equality standards, cultural practices, and norms.[88] Bond argues for facilitating dialogue and litigation using the Maputo Protocol to promote the shaping of cultural norms and customary law that affect women's lives.[89] The Maputo Protocol, unlike CEDAW[90]

[80] Alternative Justice Systems Baseline Policy (n 17) 9.
[81] Hague Institute for innovation and Law, 'Justice Needs and Satisfaction in Kenya 2017: Legal Problems in Daily Life'.
[82] Alternative Justice Systems Framework Policy (n 17) 9.
[83] International Covenant on Economic, Social and Cultural Rights. Adopted on 16 December 1966 by the General Assembly resolution 2200A (XXI).
[84] Johanna Bond, 'Gender, Discourse, and Customary Law in Africa' (2010) 83 PSN: Other Political Behavior: Race, Ethnicity & Identity Politics (Topic).
[85] Bond (n 84) 511.
[86] As above 511.
[87] Bond (n 84) 512.
[88] Bond (n 84) 514.
[89] As above 514.
[90] CEDAW, having been drafted in the era of clamour for gender-based equality in the context of the global north, prioritizes gender as an analytical tool.

and the African Charter,[91] presents a modern and positive aspect of culture and equality rights for women.[92]

3.2.3 Traditional dispute resolution mechanisms and the human rights challenge in Kenya

> '..Indigenous legal institutions have largely failed to deal with gender violence, sexual abuse and rape and rights violations affecting women and girls. Typically, they either declare themselves unable to deal with the offence or favour perpetrators of some disputes.'[93]

Although traditional dispute resolution methods are widely touted as alternative methods of accessing justice, they are also criticized for their inability to challenge values and patterns of discrimination against women.[94] One of the most significant affronts to the ability of traditional justice mechanisms to provide justice to women is their overreliance on cultural norms, which are seen as discriminatory to women.[95] In addition, there are concerns that elders who have the final decision-making authority within traditional dispute resolution mechanisms prioritize community harmony rather than individual justice.[96] In many instances, women are forced to accept the decisions rendered for the sake of community harmony rather than for their justice.[97] Women's rights and their unique ideas of justice are often given less priority, while peace for the benefit of the community is given prominence.[98] Sometimes, decisions rendered within traditional justice mechanisms reflect the interests of those powers within the community who have a say in shaping values and laws.[99] In other instances, those powerful can resort to forum shopping to gain a legal advantage over those less powerful, including women.[100]

[91] The African Charter's text privileges culture as an analytical tool invariably due to the context of the clamour for self-rule by the African states.
[92] Bond (n 84) 519.
[93] Anna Barrera and Rachel Sieder, 'Women and Legal Pluralism: Lessons from Indigenous Governance Systems in the Andes' (2017) 49 CMI - Chr. Michelsen Institute 633.
[94] UNICEF, UN Women and UNDP, 'Informal Justice Systems Charting a Course for Human Rights-Based Engagement' <https://www.unwomen.org/en/digital-library/publications/2013/1/informal-justice-systems-charting-a-course-for-human-rights-based-engagement> accessed 5 September 2021.
[95] As above 10.
[96] UN Women, 'Informal Justice Systems Charting a Course for Human Rights-Based Engagement | UN Women – Headquarters' (Justice Base 2016) <https://www.unwomen.org/en/digital-library/publications/2013/1/informal-justice-systems-charting-a-course-for-human-rights-based-engagement>.
[97] As above 41.
[98] UN Women (n 96) 49.
[99] UN Women (n 96) 47.
[100] As above 47.

3.2.3.1 The challenge of representation of women

Representation, particularly of the most marginalised populations in any society is a critical concern of human rights. Globally, the representation of women is not only a human rights issue but also a political one. Since the Beijing conference affirmed women's rights as human rights. Indeed, one of the outcomes of the Beijing Conference in 1995, [101] was the need to ensure equal representation of women in key decision-making bodies. In Kenya, the spirit of the Beijing Platform for Action, particularly on the question of representation is seen in the Constitution, which sets the framework for women's and marginalised groups representation.[102]Indeed, for the first time in Kenya's history, women's representation has taken a centre stage as an obligation requiring political, legal and judicial implementation whether in elective or appointive responsibilities.[103]

Against the backdrop of progressive legal requirements to the representation of women, there are concerns about the representation of indigent women within the traditional dispute resolution mechanisms. Social justice and human rights scholars argue that these mechanisms neither provide justice or ensure access to justice by women justice seekers. Indeed, the majority of the claims against traditional dispute resolution mechanisms in Kenya is the question of gender justice – an argument sustained on the premise that these mechanisms are bad for women and girls.[104] This argument has its genealogy in the composition of traditional dispute resolution mechanisms which are male dominated. Therefore, in patriarchal setting in Kenya, it is argued that these justice mechanisms only affirm negative cultural practices which are detrimental to the human rights of women and girls. The Taskforce on Alternative justice Systems of Kenya (AJS Taskforce) also acknowledges there are challenges regarding the nature of human rights of women in some autonomous justice mechanisms. The taskforce while on a visit to Northern Kenya encountered Borana cultural dispute resolution system requiring women to be represented by male relatives, mostly men, as spokespersons.[105] FIDA avers that the composition of these justice mechanisms is majorly elderly male – with those allowing for women's representation only determine cases involving women.[106] The AJS Task force asserts

[101] The Beijing Conference birthed The Beijing Declaration and Platform for Action, which set the stage as a policy document for global advocacy on gender equality.
[102] See article 81 for example, which places a mandatory obligation on the electoral system to ensure that no more than two thirds of members of any elective body are of the same gender.
[103] See articles 27 (8), 177, 197 of the Constitution of Kenya, 2010.
[104] FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province* (2008).
[105] Alternative Justice Systems Baseline Policy (n 17) 42.
[106] FIDA Kenya (n 104) 16.

that it is unlikely that male dominated leadership is empathetic to the plight of women or neutral in the event of a disputes involving women.[107] Women are therefore often excluded from any decision making responsibilities, even where serious sexual violence cases such as rape or inheritance disputes, further marginalising them.[108] Mburugu and Macharia observe that the Njuri Ncheke[109] is a make only traditional justice mechanism, and women do have a role in policy or decision making.[110] The challenge of exclusion is not only seen in regard to women but also to other marginalised categories[111] including children, those living with disabilities.[112]

Other feminist writers have also weighed in on the question of representation arguing that the inadequate representation of women within decision-making cadres of traditional dispute resolution mechanisms also challenges justice.[113] Traditional governance systems, such as chieftaincy, vary across African countries, and most positions are reserved for men.[114] Joanna Bond argues that to improve women's rights within traditional dispute resolution mechanisms, they must be given leadership positions within those structures.[115] However, she cautions that this top-down approach should not be the primary goal of realizing women's rights and calls for the reconceptualization and promotion of women's roles in community problem-solving.[116] Bond further argues that within the context of rural communities in sub-Saharan Africa, there is a need to eliminate structural inequalities that make women feel pressured and disempowered to engage in dialogue with traditional authorities.[117]

3.2.3.2 The procedural fairness challenge

Procedural fairness in administering justice requires that there is bias and that parties to a dispute get a fair hearing.[118] Whilst the outcome of justice is important, procedural fairness

[107] Alternative Justice Systems Baseline Policy (n 17) 42 – 43.
[108] Alternative Justice Systems Baseline Policy (n 17) 42 – 43.
[109] Njuri Ncheke is a dispute resolution mechanism within the Ameru people of Eastern Kenya.
[110] Kirema Nkanata Mburugu, 'Resolving Conflict Using Indigenous Institutions: A Case Study of Njuri-Ncheke of Ameru, Kenya' 1 University of Embu 28.
[111] Article 21(3) lists all categories of vulnerable or marginalized groups as women, children, youth, older persons members of minorities or marginalized communities, members of particular ethnic, religious or cultural communities
[112] Alternative Justice Systems Baseline Policy 42.
[113] Johanna E Bond, 'The Challenges of Parity: Increasing Women's Participation in Informal Justice Systems within Sub-Saharan Africa, in Gender Parity and Mulitcultural Feminism: Towards a New Synthesis (Ruth Rubio Marin & Will Kymlicka, Eds.)' (Oxford University Press 2018).
[114] Bond (n 113) 5.
[115] As above.
[116] As above.
[117] Bond (n 113) 6.
[118] See the Supreme Court decision in *Githiga & 5 others v Kiru Tea Factory Company Ltd* (Petition) 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023).

requires that the procedure in arriving at justice is just as fair as the outcome.[119] Indeed, where procedures are seen as fair, parties are likely to accept the outcome of the process.[120] The AJS Taskforce observed from their field interviews that those justice mechanism that did not comply with the requirement for procedure fairness suffered a 'legitimacy crisis'[121] The legitimacy challenge is also evident in the modern selection of the decision makers in the traditional dispute resolution mechanisms. The AJS taskforce notes two categories, the first is those elected and recognized by the communities and the second is those elected by political actors, only serve to extend political narratives for their benefactors.[122]

Corruption remains a key challenge within traditional dispute resolution mechanisms and therefore, it there are valid concerns with regard to the extent of delivery of procedural fairness. Indeed, in one case, the applicant provided evidence indicating corruption within the Njuri Ncheke, following a demand of Kshs. 25, 000 to facilitate a hearing and oath taking.[123] There is the added concern around appeal with some noting that the power imbalance within these justice mechanism do not facilitate a process of appeal.[124]

3.2.3.3 The human rights challenge

One of the most significant affronts to the ability of traditional justice mechanisms to provide justice to women is their overreliance on cultural norms, which are seen as discriminatory to women.[125] There are concerns that elders who have the final decision-making authority within traditional dispute resolution mechanisms prioritize community harmony rather than individual justice.[126] In many instances, women are forced to accept the decisions rendered for the sake of community harmony rather than for their justice.[127] Women's rights and their unique ideas of justice are often given less priority, while peace for the benefit of the community is given prominence.[128] Sometimes, decisions rendered within traditional justice mechanisms reflect the

[119] https://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Procedural-fairness-guidelines.pdf
[120] Alternative Justice Systems Baseline Policy (n 17) 43.
[121] Alternative Justice Systems Baseline Policy (n 17) 43.
[122] Celia Nyamweru and Tsawe-Munga Chidongo, 'Elders in Modern Kenya: "Dying Institutions" or "Reinventing Themselves"?' (2018) 77 African Studies 240.
[123] *Erastus Gitonga Mutuma v Mutia Kanuno and 3 Others 2012 eKLR*.
[124] Mumbi Mwiruh, 'Analysing the Effectiveness of Informal Access to Justice in Kajiado North and Kajiado West Constituencies' (University of Nairobi, 2015).
[125] As above 10.
[126] UN Women, 'Informal Justice Systems Charting a Course for Human Rights-Based Engagement | UN Women – Headquarters' (Justice Base 2016) <https://www.unwomen.org/en/digital-library/publications/2013/1/informal-justice-systems-charting-a-course-for-human-rights-based-engagement>.
[127] As above 41.
[128] UN Women (n 126) 49.

interests of those powers within the community who have a say in shaping values and laws.[129] In other instances, those powerful resort to forum shopping to gain a legal advantage over those less powerful, including women.[130]

Feminist critiques of traditional dispute resolution mechanisms has focused on the perception that traditional dispute resolution mechanisms rely on retrogressive cultures and customs that impede women's access to justice.[131] Celestine Nyamu observes that 'culture is responsible for the gender imbalance and the exclusion of women from the control of resources'.[132] Susan Okin also weighs in on the debate on culture and women's human rights, arguing that discrimination based on sex occurring within the families are justified by reference to cultures, religion and traditions.[133] Accordingly, to realize women's rights, there is a need to recognize women's rights as human rights. Therefore, Okin urges that institutions such as the family, religion, and culture be viewed differently.[134]

Human rights activists argue that customary law undermines the dignity of women and those historically disenfranchised.[135] The concern for most human rights activists is that customary laws perpetuate patriarchal regimes that have historically and systematically undervalued women's human rights.[136] The CEDAW Committee has also pronounced itself on women's access to justice within traditional dispute resolution mechanisms.[137] The CEDAW Committee observes that although these justice mechanisms reduce costs and delays and are flexible, they may lead to rights violations, particularly against women, because they operate with patriarchal values that impede women's access to justice.[138]

3.2.3.4 The challenge of undermining the jurisdiction of criminal law

It has been argued that traditional dispute resolution mechanisms undermine the role of Director of Public Prosecutions (DPP) in Kenya because these mechanisms decide case, even

[129] UN Women (n 126) 47.
[130] As above.
[131] Johanna E Bond, 'Gender, Discourse, and Customary Law in Africa' 83 Southern California Law Review 67.
[132] Celestine Itumbi Nyamu, 'Achieving Gender Equality in a Plural Legal Context: Custom and Women's Access to and Control of Land in Kenya' 15 Third World Legal Studies 45.
[133] Susan Moller Okin, 'Feminism, Women's Human Rights, and Cultural Differences' (1998) 13 Hypatia 32.
[134] Okin (n 133) 39.
[135] David Pimentel, 'Legal Pluralism and the Rule of Law: Can Indigenous Justice Survive?' (2010) 32 David Pimentel 32.
[136] As above 11.
[137] Leilani Farha, 'Committee on the Elimination of Discrimination Against Women' in Malcolm Langford (ed), *Social Rights Jurisprudence* (Cambridge University Press 2009).
[138] CEDAW/G/GC/33, 'General Comment No. 33 on Women's Access to Justice'.

those of a criminal nature.[139] Francis Kariuki argues that in such cases, the courts have to make determinations that promotes the values and purposes and principles that promote human rights and fundamental rights and freedoms including good governance and the rule of law.[140] Whilst this is the case, courts must also ensure that the customs are not repugnant to justice and morality nor contravene the bill of rights. Indeed, the Constitution of Kenya mandates the DPP to commence and prosecute cases of a criminal nature, where they are reported to the law enforcement agencies. It is deemed that the criminal justice process is for public benefit and therefore offences are deemed to be against the public – requiring prosecution within the criminal justice frameworks. Whilst the AJS taskforce proposes that the Agency Theory should guide what matters or disputes are brought before traditional dispute resolution mechanisms, other writers have argued that the theory does not confer jurisdictional reach based on gravity of offence.[141] The theory should instead, ensure there is a voluntary consensus between parties to the mode of dispute resolution.[142] The AJS Taskforce in responding to criticism over the opening of 'pandora's box'[143] in criminal litigation addressed responded as follow:[144]

> …. The fear of opening a 'Pandora's box' for applying AJS in sensitive cases such as defilement is, thus, addressed sufficiently by the agency theory . This theory also challenges us to go beyond the narrow view in criminal law of taking these cases as disputes between the State and the individual and not between two individual's. Indeed, this theory address this concern as well…

The AJS Taskforce in proposing the agency theory also contends that the theory views criminal disputes not between the state and individual but also with parties. It sees the role of the DPP as the representative of the state in criminal disputes – and the DPP can freely consent with the victims and other stakeholders to a traditional dispute resolution mechanism.[145]

[139] In the case of *R v Mohamed Abdow Mohamed* (2013) eKLR, in which the accused person was charged with murder and in the course of trial, the victims' and accused families wrote a letter to the DPP informing the office of settlement of the matter out of court and the matter was subsequently withdrawn.
[140] Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR', *"Broadening Access to Justice through ADR-30 Years On* (2014).
[141] Naikuni, Ngah, Miencha and Co. Advocates, 'The Place of Alternative Dispute Resolution on Felony Matters' [2022] *The Platform* 1.
[142] As above.
[143] See Senior Counsel Pravin Bowry comments in https://www.standardmedia.co.ke/article/2000085732/high-court-opens-pandora-s-box-on-criminality.
[144] Alternative Justice Systems Baseline Policy (n 17) 23 – 24.
[145] Alternative Justice Systems Baseline Policy (n 17) 24.

3.2.3.5 The challenge of undermining Article 159 3 (c) of the Constitution of Kenya

There are concerns regarding the ability of traditional dispute resolution mechanisms to challenge harmful cultural practices and norms which perpetuate inequality in the community. Practices such as female genital mutilation have continued to persist unabated and some argue that elders shelter the continuance of these practices despite the statutory ban.[146] In contents where FGM is practised, perpetrators are more often brought before traditional dispute resolution mechanisms and not before the formal courts. Because the normative frameworks within these justice mechanisms call for social cohesion, perpetrators are often left free and victims' of family forced to make concessions and accept some form of compensation for the violation and sometimes just an apology. In other instances, such as the Borana community, the victims of sexual violence or rape are required to be married by the perpetrator further reinforcing the viability of these mechanisms to address the various human rights concerns.[147] The AJS taskforce argues against the resolution of such disputes through the traditional dispute resolution mechanisms, and calls for their resolution through the established criminal justice system with perpetrators facing a jail term.[148]

Whilst Article 159 2 (c)[149] recognizes the role of traditional dispute resolution mechanisms and calls for their promotion in Kenya.[150]

The Judicature Act also addresses the question of repugnancy as follows:[151]

> The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice an morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and undue delay.

These concerns are not unfounded as elaborated in this chapter. Whilst the repugnancy clause has its basis in the relegation of traditional dispute resolution mechanisms by the colonial

[146] Daniel N Sifuna, Okwach Abagi and Nabiswa M Wasike, 'Female Genital Mutilation/Cutting among the Wardei of Kenya: Practice, Effects, and Prospects for Alternative Rites of Passage' (2016) 72 Journal of Anthropological Research 337.
[147] Alternative Justice Systems Baseline Policy (n 17) 45.
[148] Alternative Justice Systems Baseline Policy (n 17) 5.
[149] Constitution of Kenya 2010.
[150] Article 159 (3) of the Constitution of Kenya 2010.
[151] Section 3 (2) Cap 8 Laws of Kenya.

administrative powers. [152] However, there are those who argue against the continued relevance of the repugnancy clause in modern day Constitutions such as Kenya's.[153] The repugnancy clause should be a purveyor for justice rather than a stumbling block in the modern day constitutional set up. The AJS taskforce calls for courts to view the repugnancy clause from perspective of a building block to enhance justice and promote human rights within the framework of the Bill of Rights.[154] The taskforce further argues that because of the breath and extent of the Kenyans constitutional rights framework, the repugnancy clause is redundant.[155] This is because Article 153 (3) of the Constitution requires that traditional dispute resolution mechanisms align to the Constitution and other written laws.

The question of whose justice and whose morality has further been raised as a challenge to the implementation of the repugnancy clause, with the potential of raising challenges to decisions rendered by traditional dispute resolution mechanisms and thereby clogging the formal justice systems. Additionally, there is a need for the formal justice mechanism to appreciate the dynamic nature of customary laws and adopt decisions that promote the positive norms and cultures.[156]

3.2.3.6 The challenge of access for minority or mixed communities

One of the challenges raised against viability of traditional dispute resolution mechanisms is their suitability for adjudicating against disputes from people of mixed communities and cultures. This is particularly important in the context of modern societies such as Kenya where inter-tribal marriages and relationships are a reality. The AJS taskforce notes that in such circumstances the justice mechanisms would grapple with several questions including who becomes the adjudicators, what cultural norms apply and the language applicable.[157] Where there are mixed communities in border locations, a preference of one culture over another would result in the chosen culture being seen as superior to the other.[158] Thus could lead to discrimination of justice seekers – with minority groups feeling marginalised.[159]

[152] Elijah Taiwo, 'Repugnancy Clause and Its Impact on Customary Law: Comparing the South African and Nigerian Positions — Some Lessons for Nigeria' (2010) 34 Journal for Juridical Science 89.
[153] Pamela Muriuki, 'Against the Obnoxious Repugnancy Clause as a Limitation to Application of Traditional Dispute Resolution Mechanism' (2023) 10 Journal of Conflict Management and Sustainable Development 170.
[154] Alternative Justice Systems Baseline Policy (n 17) 21.
[155] As above (n 17) 21.
[156] Alternative Justice Systems Baseline Policy (n 17) 21 - 22.
[157] Alternative Justice Systems Baseline Policy (n 17) 45.
[158] Alternative Justice Systems Baseline Policy (n 17) 45 - 46.
[159] Alternative Justice Systems Baseline Policy (n 17) 45 - 46.

3.3 Gender justice within traditional dispute resolution mechanisms

> '..Understanding justice in the Alternative Justice Systems paradigm is broad and multi-faceted. Justice is both a process and an outcome: It is conceptualized not as a route and destination but as a single and a continuum. It encompasses principles of recognition and protection of the holistic personhood and the vindication, restoration and restitution of harmonious social ties….'[160]

Globally, there are gaps in women's access to justice, particularly in plural legal systems.[161] Because of the limitations within the formal justice systems, most poor women worldwide rely on traditional dispute resolution mechanisms to access justice.[162] To understand the relationship between gender and justice, examining the social context and documenting the extent of women's inequality is critical.[163] Mary Jane Mossman argues that it is also necessary to understand the impact of race and calls on women's lived experiences of inequality, the barriers experienced by women in different contexts and how these barriers shape assumptions about gender and justice.[164]

Indeed, traditional dispute resolution mechanisms play a central role in dispensing justice for women, particularly those in rural areas in Africa.[165] Although these justice mechanisms are deeply rooted in patriarchal norms and cultures, they are widely used and preferred by women in rural areas.[166] However, traditional dispute resolution mechanisms are widely thought of as lacking sensitivity and knowledge to rule on gender justice matters.[167] Michelo Hansungule and Rita Ozoemena agree with the assertion that global ideas on gender justice and human rights require that they are crystallized at the local level through the traditional dispute resolution mechanisms.[168] Traditional dispute resolution mechanisms can develop acceptable standards for their contexts and deliver gender justice.[169] The justice mechanisms can provide

[160] Alternative justice Systems Policy Framework (n 41) 10.
[161] UN Women, 'Womens Access to Justice' (UN Women 2015) <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/FPI-Brief-Access-to-Justice.pdf>.
[162] As above 1.
[163] Mary Jane Mossman, 'Shoulder to Shoulder: Gender and Access to Justice' (1991) 10 Windsor Yearbook of Access to Justice 351.
[164] Mossman (n 163) 356.
[165] Welekazi Stofile and Mahlatse Mpya, 'The Dissolution of a Customary Marriage: Women and the Traditional Court System in South Africa' (Springer 2022).
[166] Stofile and Mpya (n 165) 90.
[167] Stofile and Mpya (n 165) 90.
[168] Michelo Hansungule and Rita Ozoemena, 'Re-Envisioning Gender Justice in Access and Use of Land Through Traditional Institutions' (2009) 63 Center for Policy Studies 2.
[169] As above 3.

substantive justice to their clients, rooted in equality and timely dispensation of justice.[170] In Africa, women are still plagued by socio-economic inequality, exacerbated by legal challenges which require a return to the basics of the African human rights system to ensure justice and equality.[171] Traditional dispute resolution mechanisms resonate with many aspects of people's lives and provide the platform to crystallize global ideas into local meanings.[172]

3.3.1 Constitutional imperatives for gender justice within the justice discourse in Kenya

> '….. for human rights to be effective, they have to go beyond the normative, textual essence and become a part of the legal culture of a given society. Moreover, they must strike a responsive chord in the general public consciousness concerning political and civil issues. This resonance is, therefore, the clue to whether the 'myth of rights' works in a given society to ensure all persons' political and civil rights.'[173]

The quest for gender equality and the emancipation of Kenyan society has been described as synonymous.[174] Indeed, as Kenya moved toward a more democratic space, gender equality became integral to the new constitutional order.[175] The Constitution of Kenya, 2010 has sought to address the traditional exclusion of women from the political, social, economic and cultural spheres.[176] To begin with, a comprehensive bill of rights provision with the Constitution of Kenya, 2010 transcends the traditional ideas of human rights to include social, economic and cultural rights more relevant to women's lived realities.[177] The Constitution of Kenya provides for affirmative action and calls for the state to:[178]

> ….take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

[170] Hansungule (n 168) 5.
[171] Hansungule (n 168) 7.
[172] As above 7.
[173] Radhika Coomaraswamy, 'To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights' in Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 2012).
[174] Maurice Oduor and Ruth Aura, 'Gender in the New Constitutional Dispensation of Kenya' [2010] Social Science Research Network 38.
[175] Oduor and Aura (n 174) 2.
[176] As above 2.
[177] Oduor and Aura (n 174) 17 – 18.
[178] Article 27 (6).

The affirmative action provisions are also extended to marginalized and minority groups, requiring the state to ensure the implementation of affirmative action programmes for their inclusion into all spheres of life[179]

The Constitutional provisions on affirmative action are also extended to the political domain where it is intended to increase women's participation in decision-making.[180] These provisions oblige the state to take legislative measures to ensure that at least a third of a particular gender is represented in elective or appointive decision-making organs.[181] Further, the Constitution imposes an obligation to reserve political seats designated for women in politics to prevent the unequal participation of women.[182] Equality of all before the law is a fundamental principle to advance gender equality.[183] The Constitution of Kenya further provides for an institution, the National Gender and Equality Commission, which is vested with the responsibility of promoting gender equality and the principles of equality and non-discrimination, focusing on women and other special interest groups.[184]

The Kenyan task force on traditional and other methods of accessing justice observed certain imperatives and advantages of using non-formal justice mechanisms. First, that alternative justice mechanisms[185] reflect the lived reality of Kenyans and are the preferred method of accessing justice. This assertion was based on the two surveys commissioned by the judiciary within ten years, which demonstrated that most disputes, estimated at 95 per cent, are resolved through the informal or non-state-based systems, which are outside of the formal courts.[186] Further, the task force also noted that, in contrast, the perception is that alternative justice mechanisms are avenues for the abuse of human rights and gender justice; these justice mechanisms are an avenue for the expansion and the vindication of human rights and their autonomy.[187] Non-state justice systems provide an avenue for doing justice differently and effectively. Towards this, the policy paper argues that alternative justice systems, unlike adversarial legal system, is an avenue for restorative justice. Moreover, apart from ensuring

[179] Constitution of Kenya Article 56 (a) – (e).
[180] As above 7 (8) and article 81.
[181] Constitution of Kenya Article 27 (8). Article 81 speaks to affirmative action within public bodies.
[182] Constitution of Kenya Article 97 (1 (b).
[183] Constitution of Kenya Article 27 (1).
[184] The National Gender and Equality Commission Act section 8 establishes the commission. The Act of Parliament derives authority from the Constitution of Kenya in Article 59 (4) to restructure the Kenya National Commission on Human Rights into two or more separate commissions.
[185] Alternative justice systems is used in the context of the Kenyan policy to denote all other channels of accessing justice apart from the formal courts systems. These would also include traditional dispute resolution mechanism.
[186] Alternative Justice Systems Framework Policy (n 41) xv.
[187] As above.

social inclusion due to their participatory nature, these justice mechanisms are affordable, provide expeditious delivery of justice and have minimal formalities and technicalities.[188]

In making a case for these justice mechanisms, the baseline policy notes that they effectively reduce backlogs in the formal justice systems. In addition, the policy argues that in the context of Kenyan constitutional dispensation, which seeks to 're-legitimize the state' by enhancing closer engagement between the government and the people, alternative justice mechanisms provide this avenue, increasing public participation in the justice system.[189] The policy also observes that the alternative justice mechanisms are part of a process of the reconstitution of the Kenyan state, allowing the citizens' role as direct actors.[190] Therefore, accommodating Kenyans' lived realities, will enable them to contribute to their governance.[191] Finally, alternative justice mechanisms provide a site to resituate the 'traditional' as 'rational', doing away with the false logic that what is traditional is irritational or unfit for modern life.[192] Therefore, to guarantee women justice, there is a need to invest in the legal environment and justice institutions to ensure that women participate in their reforms and demand justice.[193]

3.5 Conclusion

The chapter examined the place of traditional dispute resolution mechanisms in contemporary Kenya, affirming their role in providing justice. It reveals the popularity of these justice mechanisms in Kenya despite the concerns emanating from their viability to adhere to human rights principles, and perception of inadequate protection of marginalised populations including women. Whilst acknowledging the importance of traditional dispute resolution mechanism in the wider discourse on justice, this chapter notes specific challenges identified by feminists, and other major actors in the global development discourse on justice. It identifies the opportunities for traditional dispute resolution mechanisms to promote the rights of the marginalised populations such as women. This chapter examines Kenya's constitutional architecture on gender equality and the safeguards that support the integration of traditional dispute resolution mechanisms to ensure justice for women. This chapter also notes Kenya's

[188] As above.
[189] As above.
[190] As above.
[191] As above.
[192] Alternative Justice Systems Framework Policy (n 41) xv.
[193] The United Nations Entity for Gender Equality and the Empowerment of Women and others, *A Practitioner's Toolkit on Women's Access to Justice Programming* (UN Women, UNDP, UNODC, OHCHR 2018).

radical shift in promoting these justice mechanisms and the opportunity it presents in enhancing the relationship between the government and the state and in promoting public participation in governance and justice. Finally, this chapter observes the great strides made by the Constitution of Kenya towards a rights-based approach to access to justice, recognizing the multiple models of justice, including traditional dispute resolution mechanisms.

Chapter 4: Rural widows and justice in traditional dispute resolution mechanisms

> '…in Nyando sub-county, the traditional dispute resolution mechanism is accessible, the elders understand our culture, our realities and their decisions promote reconciliation, enabling us to reintegrate back to our communities and continue with our lives..'[1]

4.1 Introduction

The previous chapters of this thesis have affirmed the role of consciousness-raising in feminist epistemology. Consciousness-raising produces an analysis of women's world as a perfect reflection of their reality and not in the abstract sense. Therefore, in seeking to understand the realities of women, this thesis adopted consciousness-raising as its primary method of inquiry – through an analysis of the everyday experiences of justice amongst rural women accessing justice in traditional dispute resolution mechanisms in Nyando sub-county in Kenya. Whilst the previous chapter assessed traditional dispute resolution mechanisms in Kenya, noting the challenges around access for marginalised communities especially women, this chapter seeks to amplify women's experiences using these mechanisms in Nyando sub-county. This is central to the debate on justice, affirming feminism's approach in its way of knowing by examining the lived experiences of women.

This chapter provides an overview of feminist narrative approaches in research and a brief on the methodology. This approach sets the groundwork for a more nuanced approach to how the widows' construct stories of their lives. This chapter also interrogates the social, cultural and historical context of widowhood in Africa, underscoring the unique yet similar challenges that widows' face across diverse settings in Africa and in their complex intersecting identities. It also examines the concept of rurality, which an integral aspect in seeking a deeper understanding of rural women's realities and the challenges widows situated in the rural areas in Kenya face concerning access to land and property rights.

This chapter also examines widows interactions with justice within traditional dispute resolution mechanisms. It situates the analysis within the context of rights of widows' to access land and property rights and the everyday socio-economic and cultural realities of widows in

[1] Interview conducted with Atieno on 2 January 2022 in Kadibo location, Nyando sub-county.

the Nyando sub-county. This chapter examines the African feminists' justice paradigms by discerning from the narratives of the widows interviewed their understanding of justice. The centrality of the lived realities of justice from the rural widows in the Nyando sub-county is critical because it remedies the lack of African women's voices in the global discourse regarding feminist paradigms of justice. It examines rural widows' stories and analyses the dominant and discernible conceptions of justice emerging from the widows' narratives and the relationship between those stories and emerging narratives of justice. Finally, it concludes by examining the human rights paradigms of equality, non-discrimination and dignity as key concepts within the global human rights framework.

4.2 Widows' paradigms of justice: A feminist narrative approach

This thesis challenges dominant narratives that have for a long time shaped global and national discourses on justice. Recalling consciousness raising as essential to feminist truth seeking, the thesis elevates the knowledge of justice and lived realties of widows', who are justice seekers in traditional dispute resolution in Nyando sub-county in Kenya. Whilst adopting the meaning of 'paradigm' as values, conception and ideas, this thesis elevates widows ordinary meanings of justice, defining them as paradigms. This is essentially a rebellion against established universal orthodoxies on justice, which have no regard for the particularity of context nor diversities of paradigms of justice. Indeed, while the global discourse amongst feminists has not yielded a specific paradigm on justice, there is consensus on that these paradigms should be developed from the lived experiences of women, especially those they deem as facing injustice.[2]

This narrative inquiry centres widows' lived realities told through stories – seeking justice in a mechanism considered patriarchal. By adopting an intersectional approach in this study, I explored the widows multiple social identities and how their perceptions of justice were defined within these contexts. This approach allowed for a more nuanced and holistic understanding of their identities rather than focusing on gender as the sole research category.[3] Although there were shared characteristics in the women's stories, there were equally considerable differences in their conceptions of justice. Despite this, my research identified four dominant themes of justice, which form part of the analysis of this thesis. Due to confidentiality, this research uses

[2] See chapter 2 discussions.
[3] Suzanne Solley, 'Rewriting Widowhood: Intersectionality, Well-Being and Agency Amongst Widowed Women in Nepal' (Thesis, Queen Mary University of London 2016).

pseudo names to conceal participants' identities. The widows individual stories will, however, be told in sections.

4.2.1 Why feminist narrative approaches?

The interest of narrative research is in how people construct stories about their lives to derive meaning from their experiences.[4] Feminist narrative research is research grounded in the reality of how women make sense of the world through telling of their lived experiences. Indeed, the prioritization of women's voices and lived experiences is at the heart of feminist research.[5] The emphasis on women's knowledge arises from the dominant androcentric constructions of knowledge of the world.[6] Feminist research challenges this approach by advocating for the inclusion of women's experiences and ways of seeing the world and challenging the dominant androcentric methods of gathering and making sense of knowledge.[7] Feminist research is resistant to abstractions as a method of inquiry and observes that well-grounded experiential knowledge is often subordinate to others' false abstractions.[8] Feminist research also encourages an understanding of the differences between and amongst women.[9] Differences are understood in how women interact and experience axes of power.[10] However, Scott contends that experience should be a way of understanding how difference is established and how it constitutes how research subjects see the world.[11] Feminist research also requires a measure of self-reflexivity, given that the research is political.[12] Reflexivity in feminist research is a core concept and refers to the tendency of feminists to reflect, examine and analyse feminist research.[13] Reflexivity also requires a thorough review of the research setting, research participants, and the researcher's reactions to doing the research.[14] Reflexivity, therefore, requires researchers to understand the complexities of power and the nuances accompanying those understandings.[15] Feminist research also calls upon an understanding of intersectionality,

[4] Shaylene Mills, 'Exploring Narratives of Women Who Survive Intimate Partner Violence and the Process of Their Moving on to Non-Abusive Relationships' (Dissertation, University of Pretoria 2013).
[5] Sumaya Laher, Angelo Fynn and Sherianne Kramer (eds) *Transforming Research Methods in the Social Sciences: Case Studies from South Africa* (Wits University Press 2019).
[6] Laher, Fynn and Kramer (n 5) 226.
[7] As above.
[8] Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613.
[9] Laher, Fynn and Kramer (n 5) 227.
[10] As above.
[11] Joan W Scott, 'The Evidence of Experience' (1991) 17 Critical Inquiry 773.
[12] Laher, Fynn and Kramer (n 5) 227.
[13] Mary Margaret Fonow and Judith A Cook, 'Feminist Methodology: New Applications in the Academy and Public Policy' (2005) 30 Signs: Journal of Women in Culture and Society 2211.
[14] Fonow and Cook (n 13) 2.
[15] Laher, Fynn and Kramer (n 5) 227.

a key guiding principle of feminist analysis, and how the complexities of power intersect with women's experiences.[16]

Therefore, in doing feminist research, one must be guided by the link between the personal and the political.[17] Careful analysis is required for a researcher to understand the connection between the subject matter with the socio-economic and political problems in ways that do not denigrate or pathologize the research subjects.[18] Thus, feminist narrative research embraces story-telling as a process of co-construction – in which stories are woven into story-telling, listening, and conversations.[19] Women's lived experiences are at the heart of the interpretative social scientific approach; therefore, care is taken to avoid external impositions by the researcher.[20] Feminist narrative research also emancipates the research subjects - women, often dominated, exploited and oppressed. Unlike traditional research methodologies, where researchers are often indifferent and disinterested in the research subjects, feminist researchers become part of the process.[21] Finally, feminist narrative research is not concerned with universal generalizable themes in its emphasis on the subjects' study experiences.[22] Instead, it is concerned with offering glimpses into others' ways of seeing the world.[23]

4.3 Socio-cultural and historical context of the realities of widows' in Africa

> '…. We walked the same path from adolescence to maturity, where the past begets the present: my friend, my friend, my friend. I called on you three times. Yesterday you were divorced. Today I am a widow'. Ramatoulaye.[24]

In her book S*o Long a Letter*, Mariama Ba aptly captures the socio-cultural context of Ramatoulaye, a Muslim widow who is the subject of the victimization in a male social order. In exploring Ramatoulaye's account of her grief after the death of her husband Modou, Ba, brings out the pain, anger and despair of the family and the agony of widows' in many contexts

[16] As above.
[17] Heather Fraser and Christiana MacDougall, 'Doing Narrative Feminist Research: Intersections and Challenges' (2017) 16 Qualitative Social Work 240.
[18] Fraser sand MacDougall (n 17) 5.
[19] Fraser and MacDougall (n 17) 5.
[20] As above.
[21] Lerato Theodora Makoba, 'The Experiences of Infertile Married African Women in South Africa: A Feminist Narrative Inquiry' (Thesis, University of Pretoria 2005).
[22] Fraser and MacDougall (n 17) 10.
[23] As above 10.
[24] Mariama Ba, *So Long a Letter* (1st edition, Waveland Press, Inc 2012).

in Africa. Ba observes that when a widow is disqualified from inheriting her husband's property; she is deemed a lesser being than her male children and is not expected to contest her situation but rather accept it.[25] Ba provides a glimpse of the challenges of a widow in a patriarchal Islamic culture, demonstrating how women negotiate their existence in complex cultural settings.[26] However, unlike most widows in Africa who accept their status quo, Ramatoulaye shuns the traditional practices to remove the mask of the 'passive and acquiescent woman' to find her true identity. In Ramatoulaye's rejection of polygamy, she signals a breakaway from polygamy, a conventional widowhood practice in Africa.[27]

Widowhood is one of the most stressful times in one's lifetime.[28] Widows' experience grief as humans, which may be compounded by the diminishing size of their social relations resulting in social isolation due to their newfound status.[29] This resulting status often affects widows' psychological and physical health.[30] In addition, the change in the cultural and societal definition often affects a widow's self-identity, including their mental and physical health.[31] Finally, although society tends to view widowhood as an event occurring upon the death of a spouse, widowhood can last varying lengths of time according to a person's recovery process.[32]

This thesis defines a widow as a married woman, having children or not, who has lost her husband due to death.[33] Widowhood is, therefore, the state of losing one's spouse to death and is also referred to as viduity.[34] Fasanmi and Ayivor have observed that widowhood in the African sense can begin at the time of sickness of a spouse and into death and mourning of a spouse.[35] Although widowhood has psychological implications on the victims, [36] women are particularly affected due to the socio-cultural contexts in which they operate. In many cultures in Africa, the position of women in society is considered inferior to the man, despite the

[25] Remi Akujobi, '"Yesterday You Were Divorced. Today I Am a Widow": An Appraisal of Widowhood Practices and the Effects on the Psyche of Widows' in Africa' (2009) 7 Gender and Behaviour 2457.
[26] Akujobi (n 25) 11.
[27] Akujobi (n 25) 13.
[28] Nancy Sue Volavka, '"Who Am I Now?": Widows' Learning Journeys in Self Identity' (University of Oklahoma 2017).
[29] Volavka (n 28) 2.
[30] As above.
[31] Volavka (n 28) 4.
[32] Volavka (n 28) 5.
[33] Amandla Daphney Ngoveni, 'Women's Experiences, Challenges and Coping Strategies of Widowhood in Mopani District, Limpopo Province' (Thesis, University of South Africa 2021).
[34] Catherine A Ogweno, 'Widows' and Widowers Experiences And Their Coping Mechanisms In A Deprived Community. A Case Study of Kibera Slum' (Thesis, University of Nairobi 2010).
[35] Abidemi Fasanmi and Sandra Ayivor, 'Widows', Widowhood, and Society in Africa' in Olajumoke Yacob-Haliso and Toyin Falola (eds), *The Palgrave Handbook of African Women's Studies* (Springer International Publishing 2019).
[36] Ogweno (n 34) 1.

women's hard work in support of their families.[37] Unlike widowers, widows are often required to maintain strict cultural rituals characterized by oppressive practices toward the widow.[38] Cultural practices and economic dispossession dehumanize widows and coerce them into silence.[39] These rites are designed to regulate widows with little or no contribution.[40] Often widows become voiceless and powerless after the loss of their spouses, and if not supported by family and friends, they may be alienated and live in poverty.[41] Therefore human rights advocates have asserted widows' empowerment by ensuring that their property rights are enforced.[42] Widows' access to property guarantees their economic survival and shields them against abusive relationships.[43] Unfortunately, widows' ordeals typically begin immediately after her husband's death, where in-laws demand and seize property belonging to her deceased husband.[44] The World Widows report documents that the seizure of property remains widespread in most countries in sub-Saharan Africa.[45] Disinheritance of widows' is also seen in the context of Zimbabwe, where Human Rights Watch documented the confiscation of widows' properties and belongings, including cattle, farmland and marital homes, leaving them in abject poverty.[46] In addition, in some cultures, widows' have no say or influence in the family's affairs after the death of their husbands, including participating in rituals and managing the wealth.[47]

Despite the variations in cultures across Africa, there are similarities in customs relating to widows' from across the regions.[48] Amongst the Luo of Kenya, traditional funeral rites required widows' to have sexual intercourse with a male in law, either a brother or cousin to the husband, to rid the homestead of the husband's ghost.[49] This practice is not unique to the Luo of Kenya,

[37] Marie-Antoinette Sossou, 'Widowhood Practices in West Africa: The Silent Victims' (2002) 11 International Journal of Social Welfare 201.
[38] As above.
[39] As above.
[40] Samuel Chukwu-Okoronkwo, 'The Culture of Widowhood Practices in Africa: De-Institutionalizing the Plights of Women through Theatre' (2012) 1 International Congress on Social & Cultural Studies: Book of proceedings 208.
[41] Fansami and Aviyor (n 35) 8.
[42] As above.
[43] As above.
[44] Sossou (n 37) 204.
[45] Loomba Foundation, 'World Widows Report' <https://www.theloombafoundation.org/our-work/research/world-widows'-report> accessed 20 March 2022.
[46] Human Rights Watch, '"You Will Get Nothing" -Violations of Property and Inheritance Rights of Widows' in Zimbabwe. Human Rights Watch.' (*ecoi.net*, 2017) <https://www.hrw.org/report/2017/01/24/you-will-get-nothing/violations-property-and-inheritance-rights-widows'-zimbabwe>.
[47] Sossou (n 37) 204.
[48] JP Ntozi, 'Widowhood, Remarriage and Migration during the HIV/AIDS Epidemic in Uganda' (1997) 7 Suppl Health Transition Review: The Cultural, Social, and Behavioural Determinants of Health 125.
[49] Ogweno (n 34) 3.

but it is also documented amongst communities in Zambia[50] and Rwanda.[51] Widow remarriages within the husband's extended family are common in various cultural settings in Africa, among the Fulani of Mali, Luo and Kisii of Kenya, and Kuranko of Sierra Leone, amongst others.[52] In many locations around the world, widows' are shunned, considered bad people who may have played a part, either directly or indirectly, in the demise of their husbands.[53] Widows' are forced to migrate to nearby towns to seek peace and alternative means to cater to their livelihood and children to escape societal brutality.[54] In some communities, such as the Luo and Nandi of Kenya, widows' have little choice other than to remain in their communities.[55] Widows from the Luo community are deemed to have left their birth homesteads and, therefore, cannot return unless cultural rights are performed. [56] Remarriages, preferably to the husband's kin are often encouraged in many African settings to ensure that property of the deceased stays within the family.[57] Those who resist remarriage are likely to be evicted from their homes and forced to leave their children.[58]

Widows' encounter economic challenges after the demise of their spouses, who are more often than not the breadwinners of their homes.[59] Many may be evicted from their homes and denied access to land and property.[60] As one widow observed: 'when your husband dies, you instantly become an enemy of the community'.[61] Indeed, the right of property owners of the deceased estate is often the cause of widows' strife, often resulting in their poverty. In the African cultural setting, women do not have a share of their husband's property upon death.[62] Instead, property ownership is descended to the deceased sons or brothers in patrilineal settings, such as in the Luo community. This practice is also observed in Rwanda, where widows' only hold usufructuary rights to land until their male children are of age and can manage their husbands'

[50] A Kunda, 'Pressure to Ban "Sexual Cleansing" in Zambia' (1995) 5 AIDS analysis Africa 4.
[51] M Bulterys and others, 'Traditional Mourning Customs and the Spread of HIV-1 in Rural Rwanda: A Target for AIDS Prevention?' (1994) 8 AIDS (London, England) 858.
[52] Ntozi (n 48) 126.
[53] As above.
[54] Ntozi (n 48) 126.
[55] *Widows in African Societies: Choices and Constraints* (Stanford University Press 1986).
[56] Interview conducted with elder Onyango in Nyando sub-county on 12 December, 2021.
[57] Ntozi (n 48) 126.
[58] As above.
[59] Francess Dufie Azumah and John Onzaberigu Nachinaab, 'Outmoded Cultural Practices and Its Effects on Victims: The Case of Widowhood Rituals amongst the People of Balungu Community, Ghana' (2018) 6 The International Journal of Science & Technoledge.
[60] Sossou (n 37) 206.
[61] Interview with Awino conducted on 28 December 2021 in Ahero, Nyando sub-county in Kenya.
[62] Bulterys and others (n 51) 17.

property.[63] In matrilineal settings, such as the Igbo community in Nigeria, the deceased property lineage follows the sister's son or other uterine kinship.[64] These customary rules of property ownership have caused untold poverty for widows'. Due to a lack of access to land, many rural widows cannot engage in economic activities, forcing them to seek gainful employment to ensure their children's survival.[65]

4.3.1 Widows' multiple and intersecting identities

The concept of intersectionality is widely embraced in feminist theory to acknowledge that women experience multiple and interlocking systems of oppression.[66] Intersectionality as a concept requires a rethinking of the concept of women, often used to express single and a uniform concept rather than a multi-dimensional and flexible concept.[67] The concept of women has to be applied in feminist theory and practice to understand the lived realities of women and challenge sexism.[68] Intersectionality acknowledges that women are heterogeneous and aims to consider other forms of identities beyond gender to cast light on the multiple identities and their relationship with power.[69]

This research examines the multiple intersecting ways widows' experience discrimination to provide a background to the study. Kimberlé Crenshaw's pioneering analysis of the paradigms of discrimination and inequality as experienced by black women highlighted the concept of intersectionality.[70] Crenshaw observes that although black women experience discrimination in ways similar to and different from white women and black men, black women experience double discrimination based on their sex and race.[71] She further observes that black women sometimes experience discrimination as black women and not based on the sum of race and sex discrimination.[72] Intersectionality is used to describe how an individual uniquely experiences forms of discrimination and inequality due to their multiple and intersecting

[63] JE Burnet and Rwanda Initiative for Sustainable Development, 'Culture, Practice and Law: Women's Access to Land in Rwanda' in Wanyeki Muthoni (ed) *Women and Land in Africa: Culture, Religion and Realizing Women's Rights* (Georgia State University 2003).
[64] Bulterys and others (n 51) 17.
[65] Sossou (n 37) 206.
[66] Anna Carastathis, 'The Concept of Intersectionality in Feminist Theory' (2014) 9 Philosophy Compass 304.
[67] Youjin Kong, 'Reconceptualizing Women for Intersectional Feminism' (Thesis, Michigan State University 2019).
[68] Kong (n 67) 1670.
[69] Solley (n 3) 33.
[70] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies' (1989) 1989 University of Chicago Legal Forum 139.
[71] Crenshaw (n 70) 149.
[72] Crenshaw (n 70) 149 -151.

identities.[73] Meghan Campbell observes that the text of international human rights instruments such as CEDAW, recognizes the concept of intersectionality although not explicitly.[74] Campbell observes that the CEDAW Committee has demonstrated an understanding through its Concluding Observations of the complex and intersecting factors as crucial in understanding women's discrimination.[75]

Bell hooks observed as follows: [76]

> The assumption that we can divorce the issue of race and sex or sex from the race has clouded the vision of American thinkers and writers on the 'woman' question that most discussions on sexism sexist oppression or woman's place in society are distorted, biased, and inaccurate. We cannot form an accurate picture of women's status by simply calling attention to the role assigned females under patriarchy. More specifically, we cannot form an accurate picture of the status of Black women by merely focusing on racial hierarchies.

The concept of intersectionality in this research is useful in understanding the complexities of widows' lives and experiences. This concept provides a groundwork for understanding their perceptions of justice which is at the core of this research study. Although, in the context of Norwegian society, the legal definition of a widow is clear, the characteristics of a widow are fluid and can be 'borrowed' by others.[77] A woman's experience of the loss of a loved one, regardless of the juridical situation of their relationship, may be considered a widow in some social settings.[78] Kartzow and Maseno contend that in the urban individualistic middle-class Norwegian culture that focuses on self-success, widows' often experience challenges fitting in due to a fall in their status or personal prestige.[79] They further observe that these challenges may differ according to the age groups of widows', with those older experiencing different and

[73] Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 Revista Direito GV 479.
[74] Campbell (n 73) 487.
[75] For example, Campbell notes that in 2012 Concluding Observations on Mexico made reference to the intersectional discrimination that indigenous rural women face and recommended efforts to alleviate poverty and pay particular attention to this group of women.
[76] Bell hooks, *Ain't I a Woman: Black Women and Feminism* (Ist Edition, Pluto Press 1982).
[77] Marianne Kartzow and Loreen Iminza Maseno, 'Widows', Intersectionality and the Parable in Luke 18' (2010) 2 International Journal of Sociology and Anthropology 140.
[78] Kartzow and Maseno (n 77) 143.
[79] As above.

sometimes similar challenges as young widows'.[80] Widows in Norwegian society, although not homogenous, are often vulnerable due to their gender and social position.[81]

Like in other contexts, in Kenya, widows are not homogenous and vary regarding their location, either in the urban or rural settings.[82] In addition, widows negotiate in patriarchal settings for their survival, just like in many other contexts.[83]

4.4 Rural widows access to land and property rights in Kenya

> 'There are negative cultural practices that protect men and disfavor women; However today, the Constitution of Kenya does not recognize these cultures that discriminate against women. Therefore, they are null and void'.[84]

The post-colonial independent government of Kenya initiated efforts to catalyse Kenya's economic growth.[85] Because Kenya was an agricultural economy, with a majority of peasant farmers, the newly independent government renewed calls for citizens to register and consolidate land to spur the development of Kenya.[86] This rallying call for land registration and consolidation was to encourage large scale farming of lucrative cash crops such as tea and coffee, which were the major agricultural exports.[87] Despite the renewed optimism by the citizenry regarding the state's responsibility to protect, the newly independent government failed to fulfil their promises as many, including widows', felt that their rights were not secure as they had imagined.[88] The government-mandated process involving the consolidation and registration of land was the genesis of the problem, as many thought their rights were not secured.[89] Widows in the newly independent Kenya felt that their rights to register land were not respected. They were only allowed to temporarily register the lands to safeguard the land for their sons.[90] As a result, widows' felt let down by the newly independent government, and

[80] As above.
[81] As above.
[82] Bell, Katrzowa and Maseno (n 77) 143 – 144.
[83] As above.
[84] Interview with elder Owino on 13 December 2021. Elder Owino presides over disputes involving women's access to land and property rights in the traditional dispute resolution mechanism in Nyando sub-county.
[85] Kenda Mutongi, *Worries of the Heart: Widows, Family, and Community in Kenya* (University of Chicago Press 2007).
[86] As above.
[87] As above.
[88] As above.
[89] As above.
[90] As above.

by the end of the 1980s, widows' did not have their land registered.[91] It followed, therefore, that those with unregistered land could not qualify for loans, and widows' continued to rely on subsistence farming much as they had done in the colonial era.[92] Kenda Mutongi's study conducted in the 1990s revealed that widows' were dissatisfied with the post-independent status quo preferring the colonial administration.[93]

Today, following the promulgation of the new Constitution of Kenya 2010, significant changes have been made in the landscape of women's rights, affirming their rights to land and property ownership.[94] The Constitution of Kenya guarantees the equal treatment of both men and women before the law [95] and the right to equal opportunities in the political, social, economic and cultural spheres.[96] The Constitution also prohibits direct and indirect discrimination by the state against any other person based on their difference in sex, race, health status, marital status, language, religion, belief, age, conscience, dress, birth, disability or pregnancy.[97] However, women are not homogenous; in contrast, there are laws to prevent non-discrimination, and laws and policies still do not capture the diversity of women, including precisely how rural women use land.[98] Due to harmful customs and discrimination against women in patriarchal settings, Rural women often have their roles defined within traditional gender roles, which shapes their access to and use of land.[99] In addition, rural women's access to land is limited further by discriminatory laws and local leaders who reinforce gender discrimination.[100]

In Kenya, customary land tenure is categorized as a community, clan-based and individual ownership.[101] A majority of land in Kenya, approximately 60 – 70 per cent, falls under community land, falling under a variety of customary land tenure rights and unique governance systems across all the 44 tribes in Kenya.[102] Often, customary land laws exclude women from rights to land and especially where the land is held under individual households where men are

[91] As above.
[92] As above.
[93] Mutongi (n 85) 193 – 194.
[94] Reem Gaafar, 'Women's Land and Property Rights in Kenya' <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf> accessed 10 January 2022.
[95] Article 27 (1).
[96] Article 27 (3).
[97] Article 27 (4).
[98] Elizabeth Daley and others, 'Women's Land Rights and Gender Justice in Land Governance: Pillars in the Promotion and Protection of Women's Human Rights in Rural Areas' (International Land Coalition 2013) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/RuralWomen/InternationalLandCoalition.pdf>.
[99] Daley (n 98) 9.
[100] As above.
[101] Gaafar (n 94) 11.
[102] As above.

traditionally considered heads of households.[103] In this context, a woman's right to land is often relationship-based and depends on her relationship with her male relatives, including her husband, father, or any other male relative.[104] Despite the constitutional guarantee of non-discrimination in Kenya, women's rights to land are still considered culturally illegitimate.[105] This is because of the patrilineal nature of communities in Kenya, which determines lineage according to the male bloodline.

Men have the primary interest in land, while women's right to land is determined by the strength of her relationship with her male relatives.[106] This discrimination is more evident in levirate unions,[107] where a widow was required to marry a male relative of the family to guarantee her right to access her matrimonial home or other resources.[108] In addition, when a man dies without having a male child, his daughters are not guaranteed any right to his property, and the land often reverts to his male relatives.[109]

Access to land is crucial to secure women's security and livelihood despite these barriers.[110] When women own land, they can access credit facilities and other economic benefits.[111] Access to land also influences the status of a person and rites of passage. Access to land and property rights is a major concern for women in Kenya.[112] It is also, particularly of concern to rural women, who, although they make up almost 85 per cent of women's population, are often excluded from ownership and control of the land.[113] Rural women usually have no role in the administration, sub-division, and inheritance of land left to men.[114] To date, rural women's unpaid work within the rural settings remains invisible, undervalued and unappreciated.[115] Whereas spouses are entitled to ownership of land under the law, women are often left

[103] As above.
[104] Gaafar (n 94) 12.
[105] As above.
[106] Gaafar (n 94) 12.
[107] Aloys Ojore, 'Levirate Unions Among the Luo' (2021) <https://www.academia.edu/29779374/LEVIRATE_UNIONS_AMONG_THE_LUO> accessed 8 May 2022.
[108] Gaafar (n 94) 12.
[109] As above.
[110] Celestine Itumbi Nyamu, 'Achieving Gender Equality in a Plural Legal Context: Custom and Women's Access to and Control of Land in Kenya' 15 Third World Legal Studies 45.
[111] Nyamu (n 110) 21.
[112] Ritu Verma Puri, 'Without Land You Are Nobody: Critical Dimensions of Women"s Access to Land and Relations in Tenure in East Africa IDRC Scoping Study for East Africa on Womens Access and Rights to Land & Gender Relations in Tenure' (IDRC 2007).
[113] Perpetua Wambui Karanja, 'Women's Land Ownership Rights in Kenya' (1991) 10 Third World Legal Studies 29.
[114] Nancy Janet Olum, 'Land Rights Challenges Among Widows' in Boro Division, Siaya County in Kenya' (Kenyatta University 2015).
[115] Network of Adolescents and Youth in Africa (NAYA et al.), 'Supplementary Information on the Kenya State Report for Consideration by the Committee on the Convention on the Elimination of All Forms of Discrimination against Women at the 68th Session.' (Committee on the Elimination of All Forms of Discrimination against Women 2017).

vulnerable in the event of a dissolution of marriage or widowhood where the property was registered in the name of the husband or where the property is not officially registered but its interest is dependent on customary laws that privilege male ownership of property.[116] Kameri-Mbote proposes that the roles that individuals play regarding land should determine their rights and environmental resources.[117] Kameri-Mbote argues that this focus should shift from the male control of households to the women, who are the labourers of the land.[118]

4.5 Rural widows access to justice in traditional dispute resolution mechanisms

Rural widows are often economically poor, with no means of accessing formal justice in the rural settings and shun any form of a contest with their in-laws.[119] There are cultural barriers to women's land ownership and property rights within the Luo community. Inheritance within this community is widely patrilineal, and fathers bequeath property to their sons while daughters are believed to be taken care of by their husbands.[120] In inheritance, women from this community are disadvantaged because they are not deemed to belong to their natal homes or their homes of marriage.[121] Women's rights are often limited to their land use, which is also limited to their relationship with a man, as a mother, sister, wife or daughter.[122] KELIN observes a form of internalized oppression in urban settings where women own land and register them in their husbands' names, who eventually bequeath the land to their sons, leaving out their daughters.[123] Internalized oppression, in this sense, is seen as acceptance of the oppression and prejudices by the dominant categories in this society, who are men.[124] Gail Pheterson observes that internalized oppression breeds subservience, feelings of powerlessness, isolation, fear of violence, and inferiority in the minds of oppressed groups.[125]

[116] Puri (n 112) 18112.
[117] Patricia Kameri-Mbote, 'Women, Land Rights and the Environment: The Kenyan Experience' (2006) 49 Development 43.
[118] Kameri-Mbote (n 117) 44.
[119] Catherine Muyeka Mumma, Allan Achesa Maleche and Jessica Achieng' Oluoch, 'Facilitating Legal Aid Through Traditional Dispute Resolution Mechanisms: Widows' Access Justice Through the Luo Council Of Elders' (2021) 1 Egerton Law Journal 115.
[120] KELIN, 'A Commentary on Trends, Actors and Initiatives That Impact Women s Inheritance Rights in Eastern, Nyanza and Coast Provinces'.
[121] KELIN (n 120) 16.
[122] As above.
[123] As above.
[124] Gail Pheterson, 'Alliances between Women: Overcoming Internalized Oppression and Internalized Domination' (1986) 12 Signs 146.
[125] Pheterson (n 124) 148.

Access to justice and effective remedies are crucial for rural women.[126] In the rural areas, access to justice is not only limited to access to legal representation and the courts but also an assurance the rights and existing legal protections are recognized through law.[127] Rural women often seek traditional dispute resolution mechanisms as they are more affordable and accessible than formal justice mechanisms.[128] Traditional dispute resolution systems are viewed as legitimate systems that often reflect community norms and practices instead of the formal justice systems, considered a mechanism of control and coercion.[129] These justice mechanisms are popular in rural areas due to their easier accessibility, cheaper in their cost and procedures, and that human rights discourse materializes in their vernacular contextual realities.[130]

Despite the challenges of harmful cultural practices, rural women rely on culture as their source of identity and defend traditional dispute resolution mechanisms.[131] On the other hand, western women feminists criticize these justice mechanisms and, by extension, traditional cultures, which they consider discriminatory towards rural women.[132] Women who interact with traditional dispute resolution mechanisms argue that the justice mechanism is accessible in terms of their cost and procedures are easily understood, efficient in providing justice, and the decisions rendered resonate with their communities' contextual realities and needs.[133] Faundez, writing about the status of indigenous communities access to justice in South America, observes that indigenous communities view the formal or state justice systems as inefficient and expensive.[134] Faundez observes that despite the efforts by state structures to diminish the existence of indigenous communities' justice structures, these justice systems have continued to flourish, addressing the everyday realities of indigenous communities.[135] Indigenous women face multiple intersecting forms of discrimination, and the challenges faced in accessing justice are context-specific.[136] Although Sieder and Sierra both acknowledge that gender discrimination is present informal and non-formal justice systems, they argue that indigenous

[126] FAO, 'Rural Women and Access to Justice: FAO's Contribution to a Committee on the Elimination of Discrimination against Women (CEDAW) Half-Day General Discussion on Access to Justice' (FAO 2013).
[127] FAO (n 126) 2.
[128] As above.
[129] Leila Chirayath, Caroline Sage and Michael Woolcock, 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' [2005] World Bank Development Report 2006: Equity and Development 31.
[130] Manuela Lavinas Picq, 'Between the Dock and a Hard Place: Hazards and Opportunities of Legal Pluralism for Indigenous Women in Ecuador' (2012) 54 Latin American Politics and Society 1.
[131] As above.
[132] As above.
[133] Picq (n 130) 20.
[134] Julio Faundez, 'Access to Justice and Indigenous Communities in Latin America in Yash Ghai, Jill Cottrell, (eds) *Marginalised Communities and Access to Justice* (Social Science Research Network 2009).
[135] Faundez (n 134) 5-11.
[136] Rachel Sieder and María Teresa Sierra, 'Indigenous Women's Access to Justice in Latin America' (2010).

women do not have to experience racism, discrimination and inefficiency, which is a characteristic of formal justice systems.[137]

Picq also contends that indigenous or cultural justice mechanisms allow women to influence the law more readily than formal justice mechanisms.[138] Picq further notes that choosing indigenous or traditional dispute resolution mechanisms makes more sense for rural women because they are easily accessible where access to physical and financial justice is challenging.[139] Although these justice mechanisms are not always fair for women, they provide an alternative to the 'obscure and bureaucratic court processes set in a foreign language'.[140] In addition, they provide rural women with immediate results and compensate for the state's failure to provide reach all geographical regions.[141]

Picq argues that rural women's concerns within traditional dispute resolution mechanisms in the Andes region include calls for more accountability, participation, and authority rather than explicit rules.[142] She further observes that rural women have greater control and voice within the traditional justice mechanism because it is local and more flexible than the formal justice system.[143] In addition, the main attraction of the traditional dispute resolution mechanisms is that they use the local languages and are practiced by those within the same who share similar socioeconomic reality and members of the community participate in resolving problems.[144] Picq observes that indigenous justice allows women to influence law more readily than the formal justice system cannot. She further contends that women's choice of traditional justice mechanisms demonstrates a deep mistrust for formal justice mechanisms and, by extension, a repudiation of state apparatus.[145] Community justice allows for the local interpretation of national and international politics to local realities[146] Picq argues that rural women frame gender equality debate within the confines of the local justice mechanisms.[147]

[137] Sieder and Sierra (n 136) 17.
[138] Picq (n 130) 20 – 22.
[139] As above.
[140] Picq (n 130) 21.
[141] As above.
[142] As above.
[143] As above.
[144] As above.
[145] As above.
[146] Picq (n 130) 23 – 24.
[147] Picq (n 130) 24.

In the Nyando sub-county, the widows' interviewed prefer accessing justice through the traditional dispute resolution mechanism to resolve land and property rights disputes. One interviewee remarked: [148]

> The Luo council of elders has been instrumental in resolving disputes involving widows' access to land and property rights in the Nyando sub-county. Having been trained by KELIN,[149] the elders apply the written laws of Kenya to affirm rights of widows' to access land and property rights according to the Constitution.

This preference for the local justice mechanism is a result of several factors. Firstly, they are considered readily available, have an understanding of the culture and customs of their community, and are overwhelmingly cheaper, flexible and easier to understand processes as compared to the formal justice structures.[150] However, some of the widows' interviewed also acknowledged the lack of awareness and inadequate knowledge of the formal justice mechanisms. Therefore there was less incentive to access justice due to a lack of understanding of the procedures within the formal courts' systems.

4.6 Everyday realities of widows' in Nyando sub-county in Kenya

'Widowhood in the Luo culture is characterized by harassment and intimidation. If your husband's death results from disease, the woman is always presumed to have infected him with HIV'. – Achieng, Widow in Nyando sub-county.

As observed in the previous section, widowhood in many African societies is marked by socio-cultural and economic difficulty for women. In the patriarchal context of the Luo community, the death of a husband marks the beginning of a period of strife for their wife or wives and children. This situation is exacerbated for rural women, who have limited education or awareness of their human rights and often inaccessible social support services. Lisa Pruitt highlights how the concept of rurality exacerbates women's susceptibility to domestic violence. Pruitt contends that rural contexts provide an environment for the sustenance of intimate-

[148] Interview with a female elder of the traditional dispute resolution mechanism in Nyando sub-county conducted on 31 December 2021.
[149] KELIN is a non-governmental organization that works to protect rights of widows' to access land and property rights using traditional dispute resolution mechanisms.
[150] Ewa Wojkowska, 'How Informal Justice Systems Can Contribute' 60.

partner violence due to its spatial isolation.[151] Patriarchal attitudes and discrimination against women are deeply entrenched in rural settings.[152] She further observes that poverty is higher than in urban areas in the context of rural United States, particularly for women-headed households.[153] This mirrors the context in Kenya and exemplifies the lived realities of widows' in the Nyando sub-county, where widows' vulnerabilities are exacerbated in the rural patriarchal contexts.[154] Fansami and Aviyor also observe that the identity of a 'widow' affects the social-economic standing in society, and this identity follows certain social norms and constructs that intersect with and heighten her vulnerabilities.[155] For example, Achieng, a widow with three children who is HIV positive and living in the rural Rabuor area, faces multiple and intersecting vulnerabilities, which are exacerbated by the fact that she is in rural isolation and therefore has less access to social services.[156]

Perhaps one of the most widely known customary rites concerning widowhood in the Luo community is the concept of *ter*. This cultural practice encourages a widow to marry within the deceased husband's family, a situation controversially referred to as wife or widow inheritance.[157] The 'new' husband, under widow inheritance, is expected to take guardianship of the deceased children, including his wife, so that the deceased's property remains within the family.[158] This practice was traditionally characterized by a widow cleansing ceremony where a widow was required to have sexual intercourse with a clan member to rid them of evil spirits.[159] Widow inheritance has been linked to the high rates of HIV prevalence in the Luo community; as such, a lot of advocacy has been conducted to rid this practice.[160] One widow narrated her refusal to undergo the culture of widow cleansing, noting the following: [161]

> After my husband died, my in-laws started talking about the cleansing ceremony, indicating that it was a necessary part of the community's customs. However, I declined to undergo this

[151] Lisa R Pruitt, 'Place Matters: Domestic Violence and Rural Difference' (2008) 23 Wisconsin Law Journal 347.
[152] Pruitt (n 151) 346.
[153] Pruitt (n 151) 349.
[154] Rayah Feldman, 'Women's Groups and Women's Subordination: An Analysis of Policies towards Rural Women in Kenya' (1983) 10 Review of African Political Economy 67.
[155] Abidemi Fasanmi and Sandra Ayivor, 'Widows', Widowhood, and Society in Africa' in Olajumoke Yacob-Haliso and Toyin Falola (eds) *The Palgrave Handbook of African Women's Studies* (Springer International Publishing 2019).
[156] Interview conducted with a widow in Nyando sub-county on 2 January 2022.
[157] Samson Gunga, 'The Politics of Widowhood and Re-Marriage among the Luo of Kenya' (2009) 1 Thought and Practice: A Journal of the Philosophical Association of Kenya 165.
[158] Gunga (n 157) 169.
[159] As above.
[160] Kawango E Agot and others, 'Widow Inheritance and HIV Prevalence in Bondo District, Kenya: Baseline Results from a Prospective Cohort Study' (2010) 5 PLOS ONE e14028.
[161] Interview conducted with Awino, a widow, on 2 January 2022 in Kadibo location, Nyando sub-county.

> custom since I am a Christian, and I do not believe in it. Therefore, my fate in the community was sealed, and I had to leave to rent a house within the town center'.

The endemic nature of HIV within the Luo community also creates stigma and discrimination against widows', which is associated with the myriad of cases of disinheritance.[162] In addition, there is the non-scientific perception grounded in gender discrimination which points to women as the carriers of HIV and therefore infects their men.[163] The practice of *ter* within the Luo community involved the guardianship of a widow by an in law.[164] The responsibility of guardianship included taking care of all the duties and responsibilities of the deceased family.[165] However, in the latter parts of the 20th century, this practice became synonymous with wife inheritance, attributed to the abuse of customs of the community.[166]

Property ownership or inheritance remains one of the salient concerns for widows', whether they be in the rural or urban contexts. As mentioned earlier, the Luo community is patrilineal and therefore, family life is centred around male descendants.[167] As a result, inheritance is centred around male lineage, and they are both the decision-makers and wielders of power.[168] Within this context, men are heads of households, and power lies in the hands of older men, who make all the decisions which women are expected to follow.[169] Marriage in this culture is considered actualized when a woman relocates to her husband's home upon dowry payment.[170]

Upon the husband's death, the elders assess whether the couple were adequately married, and no marriage is recognized unless the man has paid the bride price.[171] Where the man dies before payment of the bride price, the deceased brothers pay the bride price unless the lady decides to return to her parents.[172] Likewise, if the wife dies before the payment of the bride price, the

[162] Catherine Muyeka Mumma, Allan Achesa Maleche and Jessica Achieng' Oluoch, 'Facilitating Legal Aid Through Traditional Dispute Resolution Mechanisms: Widows' Access Justice Through the Luo Council Of Elders' (2021) 1 Egerton Law Journal 115.
[163] Mumma et al (n 162) 119.
[164] Abong'o Ngore Vitalis, 'The Socio-Cultural Changes in the Kenyan Luo Society Since the British Invasion and the Effects on the Levirate Custom: A Critical Survey' (2014) 4 Research on Humanities and Social Sciences 9.
[165] Vitalis Abong'o, 'The Socio-Cultural Changes in the Kenyan Luo Society Since the British Invasion and the Effects on the Levirate Custom: A Critical Survey' (2014) 4 Research on Humanities and Social Sciences 9.
[166] Abuya, 'Womens Voices on the Practice of Ter among the Luo of Kenya: A Philosophical Perspective' (2002) 43 94.
[167] So Gunga, 'The Politics of Widowhood and Re-Marriage among the Luo of Kenya' (2009) 1 Thought and Practice: A Journal of the Philosophical Association of Kenya 165.
[168] As above.
[169] As above.
[170] As above.
[171] Gunga (n 157) 172.
[172] As above 172.

man must pay the bride price before burying her.[173] Once it is established that the marriage was adequately consummated, the widow obtains acceptance in the home.[174] However, in most cases, approval of the widow depends on her level of cooperation with the cultural rights of widowhood.[175]

4.6.1 Securing widows' interests in land and property rights: The KELIN Project

There is a shift in the meanings and manifestations of human rights since post-independence Kenya.[176] Akoth argues that within the Kenyan context, the western style human rights discourse is 'moving target' – a challenge in pursuing human rights in the modernity, while maintaining colonial catalogue of morality and Eurocentric episteme.[177] Dominant modern and adversarial notions of human rights, categorising one as a perpetrator and victim have been challenged as universal in their approaches, ignoring the realities of justice seekers cultures and personhood. [178] FIDA Kenya, also grapples with this challenge, acknowledging the discord in legal approaches to human rights vis a vis cultural realities of justice seekers.[179]

This discord is even more evident in the realities of widows' in rural areas, who are often the subject of much distraught while attempting to execute their legal rights in land and property. In Nyando sub-county, securing widows' interests in land and property rights, is a challenge which is grounded in the interpretation of the Luo customary laws, to the detriment of widows'. The practice of widow disinheritance is not unique to Nyando sub-county, rather it is a practice in most ethnic communities in Kenya.[180] Customary laws, coupled with the lack of access to the formal judicial systems due to costs and technical procedures makes it virtually impossible for ordinary rural widows to access justice in property and land disputes.[181] As observed earlier, this is further exacerbated by HIV pandemic which has caused stigma and mis information and therefore mistrust and blame passing of women.[182]

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[173] Gunga (n 157) 173.
[174] As above 173.
[175] Gunga (n 157) 174.
[176] Stephen Ouma Akoth, 'Human Rights Modernities: Practices of Luo Councils of Elders in Contemporary Western Kenya' (Thesis, University of the Western Cape 2013).
[177] Akoth (n 176) 166.
[178] As above.
[179] As above 166. Interview conducted by FIDA Kenya Executive Director in 2009 narrating a story of a women seeking representation in a family court claiming desertion by her husband and lack of maintenance after the separation. When FIDA contacted the husband, he claimed that there was a quarrel resulting in the wife spanking her thighs, a serious violation amounting to divorce in Luo customary law. The wife acknowledged the act and they both agreed, through FIDA to seek the services of a Luo magician to reconnect the relationship.
[180] KNCHR From despair to hope i .
[181] As above.
[182] As above.

The Constitution of Kenya, 2010 set stage for catalytic interventions enhancing women's rights in Kenya. KELIN, a national NGO, based in Kenya, designed interventions targeting disinherited widows' who were denied access to property and land rights in Kisumu and Homa-bay counties.[183] The Cultural Structures Project (CSP) was designed to address the justice needs of disinherited widows' and orphans within the Luo community.[184] KELIN observes as follows:[185]

> ….The implementation of the Cultural Structures Project in Kisumu and Homabay counties seen the successful resolution of 272 cases out of 363 cases received by the project as at December 2016. Elders who are involved in the traditional dispute resolution process have undergone several trainings on land and property rights and human rights to ensure that they have the capacity to make decisions within their mandate as stipulated by the Constitution of Kenya. Currently around 800 beneficiaries (widows', children and elders) benefit directly from the project.

This called for the reframing of and 'multi-focal readings of human rights and Luo customary norms'.[186] Steve Akoth's ethnographic study of the meanings of human rights and cultures within the Luo community observed that unlike the modern legal definitions situating two binaries of duty bearers and rights holders, 'human rights realisation is associated with realignment, redefinition of social institutions and relationships'.[187] Akoth argues that the practise of human rights is often a construct of situations, histories and power relations.[188] Individual who seek justice within the traditional dispute resolution mechanisms first seek individual recognition and this observation resonates with the findings of this thesis, where widows' individual and personal identities were central in affirming their positions in the justice mechanism.

KELIN addresses widows' usufructuary rights to land and property by engaging in multiple meanings of culture and human rights that resonate with the justice seekers and promotes rights of widows'.[189] Whilst the language of human rights is predominantly used in the case studies,

[183] KELIN, 'Compendium of Cases by Luo Council of Elders' (KELIN 2017).
[184] As above.
[185] As above.
[186] KELIN (n 183) 6.
[187] Stephen Ouma Akoth, 'Human Rights Modernities: Practices of Luo Councils of Elders in Contemporary Western Kenya' (Thesis, University of the Western Cape 2013).
[188] As above 224.
[189] KELIN, 'Compendium of Cases by Luo Council of Elders' (KELIN 2017).

these find meaning in the local contexts to enhance widows' land and property rights. In the KELIN and Luo council of elders strategy, culture is seen as a driver for women's human rights. This resonates with African feminist scholars such as Tamale who has argued for the 'emancipatory' potential of culture to promote the human rights of women.[190] Tamale argues against beliefs that pit culture and human rights as binaries in opposition to each other arguing that this solidifies those who perpetuate patriarchy.[191] Akoth argues this requires a reimagining of human rights from its totalizing notion to more positional, sophisticated and contested meanings.[192] Akoth further argues that an approach to 'domesticated agency'[193] in human rights is more effective in locating citizenship that the universalising ideas as conceived in the western post enlightenment sense.[194] In the context of Nyando sub-county, human rights discourse is an ongoing conversation where widows constantly negotiate with both calcified and contemporary cultures in their attempts at seeking justice.

4.7 Justice through widows' eyes: Towards African feminist paradigms

Doing feminist research lays emphasis on enabling women to speak, listening and hearing what women have to say.[195] Conscious of the dangers of speaking for others or reliance on dominant narratives of justice, this thesis centres the experiences and narratives from widows' in Nyando sub-county in Kenya. This section therefore is an account of how widows', both individually and collectively make sense of their lives and justice. This is a first step in truth seeking for a truly feminist paradigm of justice.[196] As discussed in chapter 1 of this thesis , the word paradigm is conceived as a way of viewing reality for a community.[197] This thesis therefore relives and recasts ideas of justice from widows' daily lives and narratives.

[190] Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16 Feminist Legal Studies 47.
[191] Tamale (n 190) 150.
[192] Akoth (n 187) 224.
[193] The agency theory proposes a delimitation of the jurisdiction of traditional dispute resolution mechanisms. While not distinguishing between civil and criminal cases, it asks for an objective determination of whether parties appearing before a traditional dispute resolution mechanism have consent freely to its jurisdiction. If the response is in the affirmative, then jurisdiction cannot be ousted whether in civil or criminal cases.
[194] Akoth (n 187) 224.
[195] Jo Woodiwiss, 'Challenges for Feminist Research: Contested Stories, Dominant Narratives and Narrative Frameworks', *Feminist Narrative Research: Opportunities and Challenges* (2017).
[196] Mari J Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' in Ngaire Naffine (ed) Ngaire Naffine, *Gender and Justice* (1st edn, Routledge 2017).
[197] The word Paradigm as used in this thesis is seen as revolutionary in the sense that it is in many ways a rebellion against established orthodoxy on justice. It seeks to center the lived realties of those perceived to be experiencing injustice f justice and centers their realities as authentic and true versions of themselves.

4.7.1 Justice as recognition of a right

> 'Justice is my right to own land that my husband left me. I can plant crops on it, keep poultry and use it to take care of my children.' Atieno [198]

Eighty per cent of the widows interviewed observed that justice is the recognition of a right. This paradigm is evident in the narratives of widows' who had undergone a period of strife after the death of their husbands and the faced challenges in the recognition of their right to access to land and property. The right to access land and property within the context of the research study area is understood as a right to own, use and dispose of a share of land or matrimonial property.[199] Culturally, this right also includes access to land and property bequeathed to a son of the deceased family or that which is passed down to the deceased wives and children when they are dead. In the Luo custom, sons and their wives lived together in one homestead, with each son having a separate house situated according to the order of birth in the homestead.[200] However, this research established that despite both the written and customary laws acknowledgement of the rights of women to land and property, widows in the rural areas still had challenges in using and disposing of land upon the death of their spouses. Indeed, in all the interviews conducted, widows' observed that although the Luo customary laws allowed them access to and belonging to their spouses, their in-laws revised and interpreted the customary laws to rid them of the rights to access land their own matrimonial property. This is observed in the case of Maria below:[201]

Maria, not her real name, refers to herself as a widows' champion in the Nyando sub-county. Maria is a mother of three who lost her husband in 2002. At the time, Maria was three months pregnant and had twin boys. After Maria's husband died, Maria's brothers in law invoked the customary practice of widow inheritance, demanding that Maria be sexually cleansed of bad spirits. Maria is from the neighbouring Luhya community which does not practice wife inheritance and is married in the Luo community. Maria refused the advances of her in-laws,

[198] Interview conducted with Atieno, a widow, on 2 January 2022 in Kadibo location, Nyando sub-county.
[199] This is also in consonance with the different regimes of land, succession and marriage laws in Kenya which protect women's rights to own, use and dispose of land. The Marriage Act of 2014 , The Matrimonial Property Act No. 49 of 2013 and the Law of Succession Act Cap. 160 all protects women's right to land and property.
[200] Dorothy Achieng' Abonyo, 'Cultural Aspects of Housing: A Case of the Luo in Kisumu Town, Kenya', *South Africa* (University of Pretoria 2005).
[201] Interview conducted on 2 January 2022 in Ahero Location, Nyando sub-county.

which eventually led to the confiscation all her household property and her and her children's eviction from her matrimonial home.

The promulgation of the new Constitution 2010 spurred a pro-rights awareness amongst Kenyans and it is within this context that Maria reported the incident to the village elder, who referred her to the Luo Council of Elders. The case was adjudicated within three months, whereby the elders invited all the parties to the case and eventually rendering a decision. One of the determinations was the affirmation of the widow's right to own land and access her matrimonial property upon the demise of her husband. The elders asked Maria's in laws to allow her access the homestead and her matrimonial home. Further, the elders applied the Constitution of Kenya, 2010 and a rights based interpretation of the Luo customary law and acknowledging the widow's right to stay in the homestead upon the demise of her husband.

Like all the widows interviewed in this research study, Maria faced many challenges accessing her property and land rights. Widows told different stories regarding disinheritance and violence perpetrated against them upon the demise of their spouses. In nearly all the stories told by the widows, their in-laws alleged that the widows were responsible for their husbands' deaths, particularly where the spouses had died due to long periods of disease, which was often associated with HIV. In addition, widows indicated that their children were not allowed to access any land or property after the death of their fathers. Widows who had been living with their married sons in the same homestead, were equally evicted alongside their families.

> One morning, my children and I heard screams from the homestead. It turned out that my husband's brothers and a few family members were evicting us from our home. There was too much noise and verbal abuse from them, and they threatened to burn our house if we did not leave that morning. So my children and I quickly took some items we considered necessary and left the homestead. I rented a house at the nearby marketplace and sold groceries to support my children until my case was resolved.' - Atieno.[202]

Another also observed that the reason their in-laws evict the widows and their children is the belief that that children if they stay behind, would equally contest the property left behind by the deceased. This was also confirmed by the widows who noted that: [203]

[202] Focus group discussion with widows' conducted on 3 January 2022 in Ahero location, Nyando Sub-county.
[203] As above.

> It is a belief in virtually all of the cases that children, if left behind, will give trouble in so far as the division and inheritance of land and property and therefore should follow their mother.

Drawing on powerful narratives of justice as a recognition of a right. For example, the widows participating in the focus group discussion observed as follows: [204]

> Justice is my right to access my property that my husband left me' - Nyangi.[205]
> Justice is property ownership and therefore the right to speak about it because the property is mine. - Anyango.[206]

> 'Justice is right. I want to know where my land is..' - Adongo.[207]

> 'Justice is my right to own land that can help my children and me in life. Therefore, the land taken away should be mine' – Awino.[208]

The elders affirmed these accounts of justice as a recognition of a right to land and property. They resolved the disputes involving widows' land and property rights in traditional dispute resolution mechanisms of the Nyando sub-county. The elders interviewed[209] observed that in the Luo community, first, there was no separate definition of justice, and therefore the words justice and right, *ratiro*,[210] were often used interchangeably. Second, elders observed that according to the customary laws of the Luo community, widows' had a right to own, access, and use land and property before, during and after the death of their spouses. They, however, observed that the fact that the customary laws were unwritten allowed for its manipulation, often to the detriment of women. Apart from customary laws, the elders also observed that their decisions within the context of traditional dispute resolution are based on the laws of Kenya. These included the Constitution of Kenya,[211] the Matrimonial Property Act, 2013,[212] land

[204] As above.
[205] Focus group discussion conducted with widows' on the 3 January, 2022 in Ahero location, Nyando Sub-county.
[206] As above.
[207] Focus group discussion conducted with widows' on 3 January 2022 in Ahero location, Nyando Sub-county.
[208] As above.
[209] Focus group discussion with elders conducted on 4 January 2022 in Ahero location, Nyando Sub-county.
[210] *Ratiro* in Dholuo language means right.
[211] Article 2(4) of the Constitution of Kenya; Article 27 of the Constitution of Kenya.
[212] Act No. 49 of 2013.

Registration Act,[213] Land Act,[214] CEDAW, [215] Banjul Charter[216] and the Maputo Protocol,[217] which affirmed women's rights to own property.[218] One female elder observed: [219]

> Although having access to property ownership for widows' is still disputed, as a council of elders, we make decisions that restore the dignity of the widows' using cultural laws and national and international laws. We have had the opportunity of being trained on these aspects as these are pertinent issues of concern for women in this community'.

Justice as a recognition of a right was a consistent theme throughout the interviews with the widows'. Although most widows observed that this concept of justice is gleaned from their experiences in matrimonial property disputes, they also acknowledged that this principle applies to all other facets of their lives and should not be denied by anyone.

4.7.2 Justice as peace

'Justice is peace'- Apiyo.[220]

Justice as peace was another of the dominant paradigms from the interviews with the widows, with 75 percent of interviewees affirming this paradigm of justice. The widows' noted they faced many challenges including negative interpretation of cultural norms and practices, evictions from their homes, loss of property and belonging as well as challenges associated with being a family's sole breadwinners. Justice as peace was therefore a culmination of the end of all these challenges, irrespective of whether or not the widows' sought the intervention of the elders. The concept of justice as peace was also told in the context of the affirmation of rights and resolution of disputes by the traditional dispute resolution mechanisms. Justice as peace is told in the story of Apiyo below.

Apiyo is a 28 year old mother of 3 and a small scale trader in the rice farms of the Nyando sub-county. Apiyo lost her husband in her early twenties after which her in laws sold the land that belonged to her husband without her knowledge. When Apiyo learned about this, she was told

[213] Act No. 3 of 2012.
[214] Act No. 6 of 2012.
[215] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
[216] African Charter on Human and Peoples' Rights.
[217] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
[218] KELIN, 'Compedium of Cases by Luo Council of Elders' (KELIN 2017).
[219] Interview with elder Joyce conducted on 4 January 2022 in Ahero location, Nyando Sub-county.
[220] Focus group discussion with widows conducted on 5 January 2022 in Ahero location, Nyando Sub-county.

that she did not have access to land in her matrimonial home, but also to any other land belonging to her husband. She was subsequently evicted from the homestead alongside her children. A year later, she approached the traditional dispute resolution mechanism to help her gain access to the land so that she could till it and put up a house instead of living in the town center where she was paying rent. The elders summoned her in-laws, who initially refused to attend the meetings, but after some negotiations with Apiyo's mother in law, her in-laws finally agreed to participate in the sessions. Having heard all witnesses, the traditional dispute resolution mechanism overturned the transaction, and the land was returned to the widow.

The widows' also asserted that justice as peace was not synonymous with resolving disputes. In some instances, widows' contended that they would seek alternative opportunities for dispute away from their families where the elders were unable to resolve the disputes. It was interesting that nearly all of the widows' who conceived of justice as peace had their houses built by a local NGO, KELIN. The houses were constructed when the widows' were evicted from their matrimonial homes or did not have the resources to make their homes upon returning to their matrimonial homes.[221]

One interviewee remarked: [222]

> I was evicted from my home as soon as my husband was buried. There followed a difficult period because at the time, I did not know my rights. I sought help first from the village elders, and later to the Luo council of elders, after which we had a meeting with my husband's immediate family members. Although the Luo council of elders pronounced in my favour, my in-laws refused to implement the decision and continued harassing me at home and calling me names. Finally, my mother in law showed me some pieces of land to build a home, but I did not have money. KELIN then came in and built me home on that piece of land. Now I have my justice, I have my peace. I can grow my crops and live amongst my brothers in law without being near them. - Apiyo

Bassiouni observes that the mere absence of conflict is not an indication of peace; instead, justice needs to be restored, by legal means to mediate and resolve inter-social and

[221] KELIN, 'Women, Land and Property Rights' <https://kelin.kelinkenya.org/index.php/women-land-and-property-rights/> accessed 30 August 2023.
[222] Focus group discussion with elders conducted on 5 January 2022 in Ahero location, Nyando Sub-county

interpersonal disputes.[223] Indeed, this statement also reflected the reality of widows' understanding of justice as peace. Some widows' observed that justice as peace was not merely the absence of conflict but the proclamation of their rights as widows'. Although the houses were built for all widows' to whom judgement was found in their favour, not all decisions were complied with by their in-laws. Therefore, some widows' houses were built away from their in-laws in neighbouring town centres. One widow observed that: [224]

> The council of elders successfully mediated the dispute between myself and my brother's in-law. However, they have refused to let me go back into the family homestead and give me a portion of my land. However, my mother in law showed me a portion of land outside of the homestead, which KELIN had used to construct this house for me. I believe I have found my justice, as right now I am peaceful.' Aluoch.

The interviews conducted with the widows' revealed that the widows' faced so much violence, both physical and emotional, from their in-laws, and I wondered why they did not return to their natal homes. Betty Potash observes that in the Luo culture, once a woman was married, she did not have any rights in her natal home, and as such there, she would have no right to access property unless her parents or brothers undertook to support her and provide her with a piece of land.[225] Widows' observed that there was no option of going back to their natal homes once evicted because they would not access any land, and that would also be thought of as divorcees,[226] which was not the case, as their husbands had died. One widow remarked, *' going back to my natal home was not an option because there was nothing to return to.' – Auma.*[227] Therefore, when the husband's family refused to invite the widows' back to their matrimonial homes, the most viable option was to remain within the community but build a house outside her husband's family. This ensured that they had their place in the community and could live away from her husband's family. As one widow remarked: [228]

> KELIN bought land and built for me a house at the market centre next to my matrimonial home. This was a welcome gesture since I had difficulty with my in-laws at my matrimonial home.

[223] Cherif Bassiouni, 'Justice and Peace' (2003) 35 Case Western Reserve Journal of International Law 191 <https://scholarlycommons.law.case.edu/jil/vol35/iss2/17>.
[224] Interview conducted on 3 January 2022 in Ahero location, Nyando Sub-county.
[225] Betty Potash, 'Some Aspects of Marital Stability in a Rural Luo Community' (1978) 48 Africa: Journal of the International African Institute 380.
[226] The widows' observed that the shame of being referred to as a divorcees was a great burden which they were not able to adjust to especially for its impact to their parents and next of kin.
[227] Interview conducted on 5 January 2022 in Ahero location, Nyando Sub-county.
[228] Interview conducted on 5 January 2022 in Nambokana location, Nyando Sub-county.

> So today, I have peace, and I can generally go about my daily life without any interference' Apiyo.

In addition, widows' who left their homesteads preferred to sever the relationship with their in-laws. Finally, Nyambedha observes that widows' and, by extension, orphans seek financial support regarding education and job opportunities for their children from external parties such as donor-supported initiatives or faith-based institutions rather than their relatives.[229] This is because many want to avoid their family kin laying claim to their children's success and, therefore, obligations and support from their kin concerning sharing resources.[230]

4.7.3 Justice as truth

'Justice is knowing the truth about that which belongs to me.' – Nafula[231]

The idea of justice as truth was identified by 90 per cent of the interview participants. Justice as truth was conceptualized as the true knowledge that the widows' had regarding their rights to access land and property. In other instances, widows' references to justice as the truth emerged in the context of the successful resolution of the disputes involving land and property rights by the traditional dispute resolution mechanisms. Justice as truth is told in the story of Nafula below:

Nafula, who hails from the neighbouring Luhya community, lost her husband after a long period of illness. The death of Nafula's husband set the stage for a long period of strife and the breakdown of relationships her in-laws. Upon the death of her husband, Nafula was informed about the Luo traditional cultural right of inheritance, requiring that she undergoes this rite of passage to cleanse her of evil spirits. Since this practice involves sexual relations, Nafula informed her in-laws that she was HIV positive and therefore could not participate in this custom. However, her in-laws claimed that this was an excuse, and if she refused, she would have no access to land or property, even those pieces of land that belonged to her family. Nafula's in-laws also informed her that children borne out of the union with her husband, belonged to the family, and if she decided to divorce herself from the family, she should leave

[229] Erick Otieno Nyambedha, 'Change and Continuity in Kin-Based Support Systems for Widows' and Orphans among the Luo in Western Kenya' (2004) 8 African Sociological Review / Revue Africaine de Sociologie 139.
[230] Nyambedha (n 229) 4.
[231] Interview conducted on 6 January 2022 in Nambokana location, Nyando Sub-county.

her children at her matrimonial home as children belonged to the man according to Luo customary laws. Nafula did not heed to these threats and was eventually evicted from the home after which she went to rent a temporary shelter at a nearby shopping centre. Years later, Nafula formed a network of widows' in Nyando, realizing that she was not the only one suffering a similar fate. Later, she was introduced to KELIN, who introduced her to the council of elders in the Nyando sub-county. The council of elders thereafter took up the case and invited her in-laws to discuss Nafula's eviction. During the deliberations, the council of elders made a interpretation of the customary law on inheritance arguing that the widows' had a right to make a choice whether to undergo the rite of inheritance. The elders affirmed Nafula's right to choose, but also cautioned that the practice, in so far as it required sexual relations, was against the law and should be considered obsolete due to its misapplication in the contemporary Luo community. Finally, the elders' decision affirmed Nafula, as a wife, who was entitled to her land and property rights, even though she was not from the Luo community. Nafula therefore concluded that justice to her was the culmination of the elders affirmation of the truth, that which was already known, but which was denied of her.

The elders' decisions within the traditional dispute resolution mechanisms played a considerable part in affirming the widow's perspectives of justice as truth. The idea of justice as the truth emerged from a narrative involving the confirmation of that 'which was already known but which is avoided or not implemented.'[232] Those who recognized the justice paradigm as truth also acknowledged that their in-laws were aware of their right to acquire land and property but took advantage of their precarious situations. Therefore, the traditional dispute resolution mechanism has affirmed the truth, and the widows' felt vindicated and could go about their daily lives. Another widow also observed that 'Justice is my right to have what is rightfully mine ' - Nya Kajulu.[233]

The idea of justice as truth is also acknowledged by Jeffery Stevens, who observes a linkage between justice and truth.[234] Referring to the earlier writings of justice and truth, Stevens notes that justice appears to be the essence of truth.[235] Elster further affirms the correlation between

[232] Interview with a widow conducted on 7 January 2022 in Nambokana location, Nyando Sub-county.
[233] Focus group discussion conducted on 6 January 2022 in Nambokana location, Nyando Sub-county.
[234] Jeffrey Stevens, 'Nietzsche and Heidegger on Justice and Truth' in Mazzino Montinari and others (eds) (Berlin, De Gruyter 1980).
[235] Stevens (n 234) 225.

justice and truth.[236] Elster contends that justice may be observed as a goal of truth, produced as a by-product of the justice system's workings.[237] He notes that the nature of public trials of wrongdoers makes their actions public and serves as a goal of justice.[238] He further observes that in the context of truth commissions, the truth may also serve as a goal of justice.[239] While examining the different mandates of truth commissions in other parts of the world, Elster observes that by public identification of the perpetrators, even though there was an amnesty in some instances, like in El Salvador, the public identification of perpetrators serves the purpose of justice.[240] He, however, notes that where the pursuit of truth can be an obstacle to justice if the names of the perpetrators are published without due process.[241] In addition, while also observing the process of the Truth Commissions in South Africa and Chile, Elster notes that truth may be an object for providing justice to victims.[242] He states that the findings of the truth commissions can lay bare the factual basis for the reparations of victims of crimes.[243]

Elster's perceptions of the relationship between justice and truth resonate with some of the views expressed by the widows' who resolved their disputes within the traditional dispute resolution mechanism. For example, one widow observed that: [244]

> The traditional dispute resolution mechanisms have helped affirm widow's justice by ensuring that the truth is told. When the council of elders summons in-laws, we are given a chance to tell our story. As widows', we find the process fair because it is always a first chance to face in-laws where there is less violence, and we can talk about ourselves. We see our justice as the truth that we know is affirmed in this platform.

Widows' who observed the concept of justice as truth felt a measure of vindication when their rights were pronounced by the traditional dispute resolution mechanism in the Nyando sub-county. In some instances, the council of elders could not enforce their decisions. However,

[236] Jon Elster, 'Justice, Truth, Peace' in Melissa S Williams and Jon Elster (eds) *Transitional Justice* (New York University Press 2012).
[237] As above.
[238] As above.
[239] As above.
[240] As above.
[241] Elster (n 236) 94.
[242] Elster (n 236) 84. Elster insists that the pursuit of truth may be an obstacle to peace, where truth finding reveals perpetrators identities without any form of punishment.
[243] As above.
[244] Interview conducted in Alendu location on 6 January 2022 in Ahero location, Nyando Sub-county.

the widows' observed that the mere acknowledgement of the truth was justice to them. One widow observed: [245]

> I found my truth, my justice, after many months of waiting in the dark. Although I am not back on the land that belongs to me, I believe that I will someday because the council of elders have affirmed my justice and my truth.

4.8 Conclusion

This chapter provides an account of widows' lived realities of justice. As evident from the analysis, rural widows provide narrations of what amounts to justice within their context and lived realities. This chapter reveals that the concept of justice is contextual and not fixated on a particular meaning, instead, it is fluid and dependent on the widows' or others experiences and realities. This chapter, provides a framework for understanding of feminist narrative research, whose preoccupation is to offer a glimpse of how others, in this case, rural widows, see the world. This analysis provides a groundwork for the entire chapter, centred around understanding the widows' and their challenges concerning access to land and property rights in Africa.

This chapter also examines the unique realities of widows' in rural areas, the intersectionality of their lives and the dimensions of discrimination resulting from their widowhood. The widows' live in a rural setting where there are little or no social services available, and where the rate of literacy is much lower than the urban centres. These factors place rural widows in challenging positions, especially when faced with the death of their spouses, who are often the sole breadwinners of their families. This is coupled with patriarchal cultures, particularly widows' access to land and property rights, which persist today despite the legal developments acknowledging women's right to land and non-discrimination based on gender.

This chapter also reveals that traditional dispute resolution mechanisms have aided justice for rural women and are preferred by them. Drawing on the examples in other jurisdictions in South America, traditional dispute resolution methods appear to be the first choice for indigenous rural women. Indigenous rural women argue that the ideas of justice and human rights materialize in their vernacular platforms, allowing them to resolve their disputes

[245] Interview conducted with Nafula on 6 January 2022 in Ahero location, Nyando Sub-county.

efficiently. Indigenous women also laud these mechanisms for resolving their conflicts faster, allowing reconciliation rather than the traditional adversarial nature of the win-lose approach in the formal system. This approach is quite in contrast to the western feminists and 'urban' feminists. They do not think that traditional dispute resolution mechanisms can offer justice for women arguing that harmful cultural practices are upheld within these mechanisms.

However, the experiences of the Nyando sub-county have demonstrated that the ideas of human rights, non-discrimination and equality can resonate within the local contexts of these justice mechanisms. Further, this chapter identified the dominant paradigms of justice emerging from the interviews with the widows', including justice as the recognition of a right, justice as peace and justice as truth. As revealed in this chapter, the ideas of justice for rural widows relate to their everyday realities. The interviews reveal that widows' negotiate with patriarchal practices in their communities, particularly upon the death of their spouses. Finally, this chapter also examines human rights paradigm of equality, non-discrimination and dignity as key principles that underpin justice in the global discourse. Indeed, the human rights paradigm is widely embraced in Kenya since the push towards the revision of the post-independence Constitution. As demonstrated in this chapter, the idea of rights and justice are both a means and an end, continuously produced in the lives of the widows'.

Chapter 5: Human rights and African feminist paradigms of justice

5.1 Introduction

The previous chapters of this thesis have affirmed the integral role of human rights discourse within feminism. It is for this reason that this chapter seeks to analyse how various human rights principles in specific international and Africa regional laws interact with African feminism. This chapter appreciates that whilst rural women in Nyando sub-county laud traditional dispute resolution mechanisms, it finds that human rights principles have to guide these justice systems in a way that affirms individual and group rights.

This chapter seeks to respond to the fourth research question and analyses the extent to which the paradigms of justice identified by the widows' in chapter four align or detract from the international human rights standards and how the established paradigms ought to inform an African feminist paradigm of justice. This analysis will delve into the principles of international human rights including equality, dignity and non-discrimination. In addition, it also examines international legal instruments such as the International Convention on the Elimination of Discrimination Against Women (CEDAW), a key global legal instrument addressing the rights of women in a global context with the intention of achieving formal and substantive equality for women. This chapter also examine the extent of the protection of African women within the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Maputo Protocol, the legal instrument intended to address the unique realities of African women especially rights of widows'.

This chapter looks into the African feminisms and its relationship with human rights – especially the arguments against the universalising nature of human rights vis a vis cultural particularity. The issue of gender justice is also explored in this chapter, underscoring its importance as an aspect of feminist justice whether from an African or western feminist paradigms. The question of gender justice is often used in modern legal and development context to underscore the implication of programmes and policies on diverse categories of gender – more particularly women and those marginalised. This chapter explores gender justice as a justice issue within this framework examining its meaning within the pre and post-colonial social, cultural and legal framework. Lastly, this chapter also delves into what should inform

African feminist paradigms of justice. It identifies three key positions namely, that which is grounded in the lived realities of women in Africa, that which promotes human rights that is grounded in the everyday realities and that which is grounded in the spirit of African communitarianism.

5.2 Human rights principles

The idea of human rights has been a powerful mechanism to lay claim for the protection of individuals. Indeed, since the Second World War, the idea of human rights has informed the theory and practice of international law and governance in various states.[1] Human rights has become part of the 'modern consciousness'[2] and universal aspiration, holding universal credibility. The Universal Declaration for Human Rights (UDHR), a global blueprint articulating the values and aspirations of humanity, is described as a 'milestone document'[3] in the history of the international human rights setting out, for the first time, fundamental human rights binding all nations in the world. Since the adoption of the UDHR in 1948, human rights regime has been ingrained in legal, political and moral perspective of states and international bodies. This has provided a framework for individual and corporate entities to lay claim where there has been a violation of human rights. States have an obligation to remove any legal or policy inconsistencies between international law and any other law within the state under international law.

The human rights paradigm of justice is anchored on global principles of human rights accorded to all human beings by virtue of being human regardless of their race, sex, ethnicity, religion, tribe or any affiliation. Through the various efforts of women's rights groups, non-governmental organizations (NGOs) and States, the human rights paradigm of justice has evolved to ensure that the unique needs of women of all diversities are promoted and protected.[4] Therefore, the development of international women rights law has greatly contributed to the affirmation of women's rights as human rights, laying claims for justice amongst women.

[1] Philip Alston and Ryan Goodman, *International Human Rights* (New Edition, Oxford University Press 2012).
[2] Alston and Goodman (n 1) v.
[3] United Nations, 'Universal Declaration of Human Rights' (*United Nations*) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 7 September 2023.
[4] The international human rights reporting framework has shown a spotlight on various human rights violations including those of women. Through the efforts of various non-governmental organizations, states have been called upon to comply and promote women's human rights through treaty body recommendations.

5.2.1 Equality and non-discrimination

The international human rights system is founded on equality and non-discrimination.[5] The equality and non-discrimination principle signifies that all human beings are entitled to a set of rights regardless of their status.[6] The focus of equality pervades the UDHR, referring to this principle either implicitly or explicitly.[7] Furthermore, international human rights law has a legal obligation to eliminate all forms of discrimination against women.[8] Indeed, discrimination based on sex is prohibited because it is discriminatory.[9] The UN Charter states in article 1(2) that the UN aims to develop friendly relations amongst nations based on the respect for the principles of equality and non-discrimination.' The UN Charter in article 13(1) further calls upon states to promote human rights and fundamental freedoms of all persons without distinctions on any basis including on race, sex, language or religion. The UDHR elaborates on the equality and non-discrimination principle in the UN charter in nearly all of the articles either explicitly or implicitly.

> Article 1: '*All* human beings are born free and equal in dignity and rights..'
> Article 2: '*Everyone* is entitled to the rights and freedoms set forth in this declaration without distinction of any kind such as sex, race, color, language, language …'

Equality and non-discrimination have often been described as 'two sides of the same coin'[10] and even used interchangeably.[11] The principle around is equality has its basis in equal treatment, while non-discrimination 'precludes differential treatment on unreasonable grounds'[12] Matthew Craven provides a distinction between the two terms as follows:[13]

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[5] Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran David Harris (eds), 'Equality and Non-Discrimination' in *International Human Rights Law* (Fourth Edition, Oxford University Press 2022).
[6] Moeckli et al (n 5) 193.
[7] Stephanie Farrior, *Equality and Non-Discrimination Under International Human Rights Law* (Ashgate Publishing 2015).
[8] Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (1st edition, University of Pennsylvania Press 1994).
[9] The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights, European Convention on the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and People's Rights.
[10] Gillian MacNaughton, 'Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All' (2009) 11 Health and human rights 47.
[11] MacNaughton (n 10) 47- 48.
[12] Moeckli (n 5).
[13] Matthew Craven, 'Non-Discrimination and Equality' in Stephanie Farrior (ed) *Equality and Non-Discrimination under International Law* (Routledge 2015).

> In positive terms, the principle would require that everyone be treated in the same manner unless some justification is provided. In negative terms, the principle might be restate to allow differences in treatment unless they are based upon a number of expressly prohibited grounds.

The principles of equality and non-discrimination have been a foundation of feminist arguments for the protection of women's human rights under international law. The CEDAW, is the international legal instrument that provides guidance to countries on the elimination of discrimination against women and the promotion of gender equality. State parties to the CEDAW commit to end the discrimination[14] against women by undertaking a series of measures including:[15]

- To incorporate the principle of equality of men and women in their legal systems, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women.
- To establish tribunals and other public institutions to ensure the effective protection of women against discrimination, and
- To ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The Maputo Protocol, being the first comprehensive legal instrument on African women's human rights, also advances the principles of equality and non-discrimination in all its articles. Article 2 provides for the elimination of discrimination against women and requires that all state parties to the Protocol undertake to:[16]

- Take concrete measures to ensure that its constitution, the highest law of the land, and all other laws of the State Party, clearly stipulate that men and women have the same rights. This rule should be observed and applied by everyone;
- Undertake to enact and effectively implement appropriate laws or regulatory measures that prohibit and punish harmful practices which endanger the health and well-being of women;

[14] The Convention refers to discrimination against women as '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 or any other field'.
[15] Article 2 (a) – (g).
[16] See article 2 (a) – (e).

- Ensure that the opinions of women are taken in account in all endeavours at the village, city suburban or national levels.

The principles of equality and non-discrimination are also adopted in the Constitution of Kenya.[17] The comprehensive bill of rights has provided a foundation for various interest groups, including women's rights organizations compelling the state to promote equality and non-discrimination.[18]

5.2.3 Dignity

The preamble to the UDHR recognizes the 'inherent dignity and of the equal and inalienable rights of all members of the human family the foundation of freedom, justice and peace in the world.' The UDHR goes further in Article 1 to provide that: 'All human beings are born free and equal in dignity and rights..' Under international law, dignity is promoted as a right and as a value.[19] While there is no international consensus on its definition, dignity entails certain elements including:[20]

- An ontological element, which recognizes the inherent human dignity of all human beings which cannot be diminished;
- Due to the nature of dignity, it has to be recognized and respected;
- State obligation to progressively realise the right to dignity through the socio-economic and cultural rights.

The first and second elements are referred as human dignity as empowerment and as a constraint respectively.[21] The idea of human dignity as empowerment plays a 'background role' in international human rights instruments, while human rights as constraint is often invoked in relation to competing interests between individual's and the community.[22]

Article 28 of the Constitution of Kenya provides for the right to human dignity as 'Every person has inherent dignity and the right to have that dignity respected and protected'. Just like in

[17] Article 27 (1) – (8).
[18] *Centre for Rights Education and Awareness and others versus the Speaker of the National Assembly and others* Petition 371 of 2016 - Kenya Law (High Court of Kenya).
[19] Rinnie Steinmann, 'The Core Meaning of Human Dignity' [2016] Southern Africa Legal Information Institute 23.
[20] Steinmann (n 19) 1.
[21] David Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press 2002).
[22] Beyleveld and Brownsword (n 21) 11.

South Africa, the right to dignity in Kenya has often been invoked with regard to the state responsibility to promote social, economic and cultural rights. The inclusion of article 43 in the Constitution of Kenya provided a basis for litigation on the state responsibility to promote the human dignity in relation to housing,[23] and those challenging the effects of environmental degradation on health.[24]

5.3 The International Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

Before the establishment of the CEDAW[25] in 1979, there were other international legal instruments addressing the rights of Women. However, women's human rights continued to be violated unabated. CEDAW identified the inefficiencies within other international legal instruments, specifically, discrimination as the root cause of inequality and violations of women's human rights.[26] CEDAW became the international legal instrument that comprehensively addressed gender inequality within all spheres , including within family life, which was an important component of western feminist activism.[27] The instrument, which is binding on all state parties that have ratified it, has been lauded for establishing the rights of women , within areas not previously covered in international law. CEDAW provides for the establishment of a Committee,[28] which periodically reviews reports from state parties who have ratified and domesticated its provisions.[29]

To date, nearly 190 states have ratified this international convention, undertaking to promote women's rights. However, just like many international legal instruments, compliance to the provisions of the convention is solely state driven. Therefore, it is not uncommon for states to submit late reports or sometimes none, regarding the status of the implementation of the Convention at the national levels.[30] Although the convention does not have the power to compel state parties for compliance to its provisions, the monitoring committee plays a central role, articulating its principles in both formal and public spaces, and demonstrate application in

[23] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* Petition 3 of 2018.
[24] *Owino Uhuru Village Versus Metal Refinery EPZ Limited E004 of 2020* (Environment and Land Court).
[25] The Convention is also referred to us the International Bill of Rights for women.
[26] Leda Hasila Limann, 'Widowhood Rites and the Rights of Women in Africa: The Ugandan Experience' (Makerere University 2003).
[27] Refer chapter 2 on Susan Okin's assertions on the family, criticizing Rawls theory of justice for its lack of interest in the family as first a center of oppression for women.
[28] Committee on the Elimination of All forms of Discrimination Against Women,
[29] Sally Engle Merry, 'Gender Justice and CEDAW: The Convention on the Elimination of All Forms of Discrimination Against Women' (2011) 9 Hawwa 49.
[30] Merry (n 29) 52.

countries being reviewed.[31] This cycle of ratification, reporting, presenting and discussing implementation of the Committee's decisions fosters a cultural consensus on gender inequality and discrimination and promotion of women's human rights at the national level.[32]

5.3.1 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the protection of widows' fundamental rights

CEDAWs innovation is in its interest in addressing the structural violations against women.[33] Article 1 or CEDAW recognizes that women experience discrimination both directly and indirectly. It notes:

> "discrimination against women" shall mean any distinction , exclusion of 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.

CEDAW formally brought women's rights at the realm of international human rights , requiring state recognition of the diverse facets of women's discrimination and ensuring both legal and substantive equality.[34] It condemns stereotyping based on gender and urges states to eliminate social and cultural norms that perpetuate gender inequality.[35] The CEDAW Committee[36] has interpreted Convention and developed the law in relations to propriety interests in marriage and family relations , useful in advancing claims in property.[37]

CEDAW has provided a catalytic framework for the protection of women's human rights at the international levels. Indeed, as the first international human rights instrument dedicated to the

[31] As above.
[32] Merry (n 29) 52.
[33] Limann (n 26) 10.
[34] Frances Raday, 'CEDAW and the Jurisprudence of UN Human Rights Mechanisms: Women's Human Rights in the Context of Religion and Culture' (2018) 33 Canadian Woman Studies/les cahiers de la femme 60.
[35] Ebenezer Mensah, 'Women's Rights in Africa: Exploring the Integration of CEDAW and ACHPR in Addressing Violence against Women' (2024) 12 Journal of Social Science for Policy Implications 1.
[36] This a team of 23 independent experts, established in accordance with the provision of the Optional Protocol to the Convention that monitor countries compliance with the provisions of CEDAW. The committee has the mandate of receiving communications from individuals or groups, claiming a violation under the provisions of CEDAW and may also initiate inquiries into cases of grave violations of the rights of women from state parties.
[37] José E Alvarez and Judith Bauder, 'Introduction' in José E Alvarez and Judith Bauder (eds), *Women's Property Rights Under CEDAW* (Oxford University Press 2024).

protection of women, CEDAW has promoted the law in relation to women's rights, either through its General Recommendations or through its reports to state parties.

5.3.2 The interface between the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and widows' paradigms of justice

The Convention sets the global framework for women's human rights. As established in the previous section, the Convention sets stage for states to establish formal and substantive equality for the diversities of women in their contexts. To actualise rights, the capability approach[38] grounded in the concept of human dignity provides meaning to human rights and for testing validity of laws and policies.[39] Therefore, employing a capability approach would mean identifying components that demonstrate 'functional capabilities' for living a life of dignity.[40] Nussbaum argues that CEDAW's substantive equality provides a basis for affirmative action and the promotion of capabilities of those at the margins – who suffer from traditional marginalisation.[41] This reasoning is apt in the context of the realities of widows' in Nyando sub-county, who face marginalisation as rural women but also within the context of the family and access to propriety interests. The CEDAW affirms widows' lived realities in its normative framework, but also sets the framework for constitutional guarantees against women's discrimination and access to justice. Indeed, in CEDAW's General Recommendation number 33, the CEDAW acknowledges access to justice as a right and essential to the realisation of rights. This right denotes certain standards including accountability of justice systems, availability, accessibility , quality and the provision of remedies.

CEDAW acknowledges that the scope of access to justice also include traditional justice mechanisms – acknowledging that women may have an initial encounter within these justice systems. The General Recommendation therefore sets forth recommendations to promote women's access to justice, a catalogue of criteria to ensure the protection of women's rights in all contexts. [42] CEDAW, while acknowledging the existence of plurality of justice systems

[38] Conceived by Amartya Sen and Martha Nussbaum, this is a normative framework for the assessment of individual well-being and social arrangements. This approach is popular in the development sphere, where it is used to assess aspects inequality and poverty.
[39] Meena Shivdas and Sarah Coleman, *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context* (Commonwealth Secretariat 2010).
[40] Shivdas and Coleman (n 39) 10.
[41] Indira Jaising, 'The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Realisation of Rights: Reflections on Standard Settings and Culture', *Without Prejudice: CEDAW and the determination of womens rights in a legal and cultural context* (Commonwealth Secretariat 2010).
[42] CEDAW General Recommendation Number 33.

also cautions against these justice systems perpetuating discriminatory norms. This thesis has established that whilst discrimination is rife within traditional dispute resolution mechanisms, it can also be found within the formal justice systems.[43]

Widows' paradigms of justice are heavily influences by their everyday meanings of human rights. The ideas of justice as conceived by the widows' have a human rights connotation, not within the universalistic paradigm, but within their realities. Whereas CEDAW proposes standards for the promotion of universal access to justice, it does not take cognisance of the realities of the marginalised rural women, who interact with the plural justice mechanisms in the context of cultural norms. CEDAW's General Recommendation seems to be premised on western liberal feminism, a belief in the use of the law to address systemic inequalities against women. Whereas this intervention has merit, it is not the sole prescription to address rural or indigenous women's justice.

These fault line, between western liberal feminist arguments against culture and traditional dispute resolution mechanisms is elaborated in previous chapters dedicated to why rural and indigenous women prefer traditional dispute resolution mechanisms. Indeed, this 'great divide' is more visible in Manuela Picq's account of the *Remache* case[44] in Ecuador where indigenous women rejected ideas of the feminist movements for what they believe is an inadequate political identity.[45] As Picq observes in the *Remache* case, whilst indigenous justice aims at reconciliation and the influence of the law more readily that the formal justice systems, it also tends to silence case of domestic and sexual violence.[46] Picq, however, notes that there are limits to formal justice systems in advancing women's rights, especially where the focus is on the punishment rather than prevention of the violence against women.[47] Abstract universalisms around human rights and justice are framed in the vernacular, giving meaning that echo their experiences and realities.[48]

[43] Whilst this thesis is based on a study of the formal justice systems, it acknowledges that discrimination of women is not a preserve of one justice mechanism.
[44] A case of domestic violence of indigenous community in the Andes, demonstrating challenges of women seeking justice in patriarchal setting. Picq observes the challenges of political power embedded in indigenous justice mechanisms that undermine accountability in the face of violence against women.
[45] Manuela Lavinas Picq, 'Between the Dock and a Hard Place: Hazards and Opportunities of Legal Pluralism for Indigenous Women in Ecuador' (2012) 54 Latin American Politics and Society 1.
[46] Picq (n 45) 8.
[47] Picq (n 45) 23.
[48] Picq (n 45) 27.

The widows' paradigms of justice resonate with dominant global discourses on human rights - adapting these standards to their local realities. These vernacular constructions of human rights echo the widows' struggles for gender equality within traditional dispute resolution mechanisms.[49]

5.4 Maputo Protocol and the protection of the rights of widows'

It is evident from this thesis that patriarchal cultural and socio-economic challenges have a significant impact on the enjoyment of fundamental rights and freedoms of widows' in Africa. The Maputo Protocol, just like CEDAW, has deferred the responsibility of protection of rights of widows' to state parties. The Protocol calls on state parties to ensure that widows' are not subjected to humiliating and degrading treatment,[50] and where it is in the best interest of her children, that the widow shall continue to be guardian of her children unless her children wish otherwise.[51] As observed this chapter, the horrifying widowhood practices qualify the interpretation as humiliating and degrading treatment and therefore contribute to the violation of widows' right to dignity.

The Maputo Protocol equally recognizes the rights of widows' to an equal share of inheritance in the event of the death of her spouse. Importantly, the Protocol, in recognition of the often difficult circumstances widows' face upon the death of their spouses, provides that the widows' 'shall have the right to continue living in the matrimonial house'.[52] This is a significant contribution of the Protocol, noting that widows in diverse contexts in Africa are plagued by a myriad of patriarchal and discriminatory laws and customs that impede their justice. The Protocol further recognizes equality of sexes during the inheritance of deceased parents properties, and provides that ' women and men shall have the right to inherit, in equitable shares, their parents properties'.[53] This attempt to resolve past injustices is faced by women and female children as a result of cultural norms that deny them access to property is

[49] Picq (n 45) 24.
[50] Article 20 (a) Maputo Protocol.
[51] Article 20 (b) Maputo Protocol.
[52] Article 21 (1) Maputo Protocol.
[53] Article 21 (2) Maputo Protocol. It must be noted that scholars such as Prof. Fareda Banda have questioned the use of the word equitable rather that equal share. Prof. Banda argues that despite the Protocol strong equality stance, there use of the word 'equitable share' does not necessarily guarantee an 'equal share'. Indeed, the Committee of CEDAW, on 15th February 2005 in its concluding observations to Paraguay, has also observed that equitable share and equal share are different and should not be used interchangeably and calls on states to use the word 'equality' rather than equity.

significant.[54] Indeed, as observed in this chapter, the death of a spouse is often the beginning of challenges for a widow and her children. Whilst the Protocols recognition of the plight of widows is significant, there is still the added imperative of implementation of these provisions to ensure that the rights of widows' and children, particularly girls in Africa are protected.

The Maputo Protocol is lauded for promoting substantive equality. The Protocol goes beyond the traditional formal equality provisions to seek a restructuring and re-ordering of the society including in the distribution of resources.[55] Additionally, Danwood Chirwa observes that the protocol 'adopts a holistic approach to women's rights, whereby civil, political, social, economic, cultural as well as third generation rights are part of a single whole' in the promotion of women's rights.[56] The Maputo Protocol affirms the justice paradigms of right, peace and truth identified in this chapter. The Protocol, by explicitly and substantively acknowledging African women's rights to dignity, equality and non-discrimination, ensures that women's rights are protected regardless of their diversity and intersectional challenges they may face.

5.4.1 The interface between Maputo Protocol and widows' paradigms of justice

The normative construction of human rights has gained credence worldwide and in Africa.[57] African states have adopted continental human rights frameworks that appeal to the African socio, political, economic and cultural contexts.[58] The Maputo Protocol provides a more detailed approach to its provisions, specifically as it relates to the unique context of Africa.[59] It is also the first international instrument to provide for medical abortion[60] and the right for a woman to know the HIV status of her sexual partner.[61] The Protocol importantly acknowledges that rights can be realized in the private sphere, a departure from western feminist criticisms of the private sphere as a space riddled with the discrimination of women.[62] The Protocol was adopted as a result of the mobilising capacity of women's rights organizations based in Africa, with the support of the Inter-African Committee on Harmful Traditional Practices Affecting

[54] Danwood Chirwa, 'Reclaiming (WO)Manity: The Merits and Demerits of the African Protocol on Women's Rights' (2006) 53 Netherlands International Law Review 63.
[55] Chirwa (n 54) 88 – 89.
[56] Chirwa (n 54) 88.
[57] Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005).
[58] Banda (n 57) 47.
[59] Frans Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 Washington and Lee Journal of Civil Rights and Social Justice 11.
[60] 14 (2) (c).
[61] 14 (1) (d).
[62] Tracy E Higgins, 'Reviving the Public/Private Distinction in Feminist Theorizing Symposium on Unfinished Feminist Business' (1999) 75 Fordham Law Review 850.

Women's and Children's Health.[63] The Maputo Protocol was adopted as the first comprehensive human rights instrument that uniquely addressed the lived realities of women in the African continent.[64] The Protocol derives its legal authority from the African Union Constitutive Act.[65]

The onus of responsibility on the Maputo Protocol's adoption and sanctions rests upon the highest AU organ, the Heads of States and Governments.[66] The Maputo Protocol goes beyond the scope of rights in the Banjul Charter, and provides for such rights, including the right to food security[67] and adequate housing[68] and a positive cultural context.[69] The Maputo Protocol equally extends the right to a health and sustainable environment by requiring states to take "appropriate measures" to make health services available, particularly for rural women.[70] The innovation of the Maputo Protocol is seen in its location of everyday abuses against women in the realm of rights violation requiring states to be held accountable.[71] In addition, the Maputo Protocol, departs from references to women as a collective as conceived within the African Charter, and interprets 'people's' rights in the Charter as it applies to women.[72]

5.4.2 Rights of widows'

The Maputo Protocol recognizes the socio-cultural challenges surrounding widows' in most African societies.[73] It is for this reason that the Maputo Protocol requires state parties to ensure that:[74]

a) a widow is not subjected to inhuman, humiliating or degrading treatment;

[63] Rachel H Murray, 'Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' in Buss D and Manji A (eds) *International Law: Modern Feminist Approaches* (Hart Publishing 2005).
[64] Article 14 for example provides for the protection of women from HIV/AIDS as a component of sexual and reproductive health and rights. Other unique provisions to African women include Article 19 on the protection of widows'; Article 20 on right to inheritance and 21 on the protection of elderly women. Article 13 on sexual and reproductive health and rights The Maputo Protocol also affords legal protection against gender based violence, in private and public spheres including domestic abuse and marital rape Article 14 (2) (a) Rural women.
[65] Viljoen (n 59) 12.
[66] As above 13.
[67] Article 15 of the Africa Charter on Human and People's Rights.
[68] Article 16 of the Africa Charter on Human and People's Rights.
[69] Article 17 of the Africa Charter on Human and People's Rights.
[70] Article 18 of the Africa Charter on Human and People's Rights.
[71] Brenda Kombo, Sow Rainatou and Jama Faiza Mohamed, 'Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa' (*IRCKHF Haqqi*) <http://haqqi.info/haqqi/research/journey-equality-10-years-protocol-rights-women-africa> accessed 27 June 2021.
[72] Viljoen (n 59) 20.
[73] Rabiatu Ibrahim Danpullo, 'The Maputo Protocol and the Eradication of the Cultural Woes of African Women: A Critical Analysis' (2017) 20 Recht in Afrika 93.
[74] Article 20.

b) in the event of the death of her husband, that a widow automatically becomes the guardian of her children (unless it is contrary to the wishes of the children);
a widow has the right to remarry a person of her choice;
c) has the right to inherit an equitable share of property of her husband and continue living in the matrimonial home; and
d) ensure that women and men have the equitable right to inherit parents property as much as the men.

These provisions resonate with the realities of widows' in most African contexts, including in Nyando sub-county as previously elaborated in chapter 4 of this thesis. These provisions also affirm the widows' paradigms of justice. Justice as recognition of a rights which is the first paradigm identified, in relation to the recognition of widows' right to inherit an equitable share of her husband's property and to continue living in her matrimonial home narrated by one of the widows' interviewed *'justice is my right to own land that my husband left me…'*[75]

Similarly, the recognition of equality of sexes with regard to the inheritance of equitable shares in parents property is a catalytic provision of the Protocol. The Maputo Protocol recognizes that negative cultural practices are harmful to women, and notes that women have a right to live in a positive cultural context, where practices of a community are not harmful to all, including women. The challenges narrated by widows' directly relate to the reliance on harmful cultural norms that perpetuate their discrimination. In recognizing justice as truth, widows' challenge the perpetuation of negative norms that deny them their right. As one widow observed, *"justice as truth is an affirmation of that which is known, but avoided'*.[76] Additionally, the Maputo Protocol places an obligation on states to ensure that women have a role in defining culture in their communities.[77] The Maputo Protocol, unlike CEDAW contextualizes universalistic claims, proposing locally led solutions.[78] Again, this is an important recognition of the, facilitating communal harmony in development of culture, by involving those often at the margins, mainly women. Maputo Protocol therefore aligns with

[75] Interview conducted with Achieng on 2 January 2022 in Nyando sub-county.
[76] Interview conducted on 7 January 2022 in Nambokana location, Nyando sub-county.
[77] Article 17.
[78] Sylvia Bawa, 'Women's Rights and Culture in Africa: A Dialogue with Global Patriarchal Traditions' (2012) 33 Canadian Journal of Development Studies/Revue canadienne d'études du développement 90.

the widows' paradigm of justice as truth, affirming widows' realities and acknowledging their truth.

The paradigm of justice as peace was identified from two levels, first from the perspective of whether a dispute was resolved or not, and in this instance, the decision of the traditional dispute resolution mechanism was ignored and widows' chose to re-marry or restart life in a separate setting. The second scenario was where the traditional dispute resolution mechanism affirmed rights of widows' and allowed the widow to return to her matrimonial home as affirmed by Apiyo's story in chapter 4. The Maputo Protocol recognizes the right to access justice and equal protection of the law. Article 8 enumerates equality of men and women before the law and benefit of the law. It places an obligation on states to among other provisions, reforms discriminatory practices and promote women's rights. Whilst the protocol appears to refer to the formal justice system, in reference to the judiciary, legal services, legal aid and services, it calls for the reforms of practices that discriminate against women, which can be found in either formal or informal systems. As is evidence from KELIN project, Traditional dispute resolution mechanisms can provide justice to women, ensuring that global human rights standards make meanings to their realities of rural women. I argue that justice as peace is a culmination of access to justice and protection of women before the law.

5.5 African feminisms and human rights paradigms

Universal human rights has provided a foundation for the promotion of human rights globally, yet in reality, women's dignity, equality and fundamental freedoms are eroded in practice and in law.[79] Proponents of the universalism of human rights, including liberal feminists, argue that there must be a core set of standards that apply to all women regardless of their cultural traditions.[80] On the other hand, cultural relativists advance the argument for the preservation of culture that favours universal norms.[81] Claims of western cultural dominance have inundated the human rights discourse.[82] Those who argue against western cultural dominance claim that the individualism of human rights in communal settings is 'inappropriate' and 'irrelevant'.[83] The

[79] Joy Ngozi Ezeilo, 'Feminism and Human Rights at a Crossroads in Africa: Reconciling Universalism and Cultural Relativism' in Marguerite Waller and Sylvia Marcos (eds) *Dialogue and Difference: Feminisms Challenge Globalization* (Palgrave Macmillan US 2005).
[80] Vedna Jivan and Christine Forster, 'What Would Gandhi Say? Reconciling Universalim, Cultural Relativism and Feminism Through Women's Use of CEDAW' [2005] Singapore YearBook of International Law Contributors 103.
[81] Jivan and Forster (n 80) 104.
[82] 'Western Human Rights in a Diverse World: Cultural Suppression or Relativism?' <https://www.e-ir.info/2014/04/25/western-human-rights-in-a-diverse-world-cultural-suppression-or-relativism/> accessed 29 August 2023.
[83] Anon (n 82) 2.

argument against the 'irrelevance' or 'inappropriateness' of human rights is premised on the differences between societies that do not uphold some human rights tenets.[84] Despite the claims of domination of western human rights, cultural rights are an essential construct of the international bill of rights.[85] However, in some settings, the claim for cultural difference has been used to justify the violation of human rights.[86] Indeed, harmful practices such as female genital mutilation and other gender-based violations have been justified in many contexts premised on collective or traditional rights .[87] Thus, traditionalists argue that human rights concepts that challenge collective or traditional rights are impositions of western values which are promoted as universal.[88]

Human rights scholars who advance the human rights paradigm of justice challenge culture for the harmful effects on women.[89] Indeed, inequality perpetuated by cultures continue to hinder the full realisation of women's human rights in Africa and the opportunity to achieve their fullest potential.[90] Additionally, the debate on human rights in Africa has centered around those who propagate the universalism of human rights on the one hand those who argue for cultural relativism on the other.[91] Proponents of cultural relativism argue that universal norms of human rights are nothing short of cultural imperialism. According to cultural relativists, human rights norms are western centric and based on individualism, a concept which is alien to Africa.[92] Cultural relativists further opine that African philosophy is characterized by communalism and holistic harmony rather than individualist isolationism which is a characteristic of western thought.[93] The women's rights movement have also been caught up in this debate, with western feminisms predominantly supporting the universality of human rights, where human rights has the same meaning in all cultures, while African feminists have reservations to the universality of human rights based on their lived experiences, including colonialism, neo-colonialism and displacement in the world economic order.[94] Critics of cultural relativism argue that human

[84] As above. For example, although the Universal Declaration of human Rights guarantees the equality amongst human beings, some cultures, including the hundi culture, do not share a similar belief . In addition, equality between genders is also challenged by some societies.
[85] International Bill of Rights which is composed of key international human rights instruments reinforce the right to culture. Article 27 UDHR recognizes the right to participate freely in the cultural life of one's community; Article 15 (1) (a) of the ICESCR recognizes the right of everyone to participate in their cultural life; while Article 18 of the ICCPR recognizes the freedom of thought, conscience and the right to manifest religion, practices and teachings of one's choice.
[86] Anon (n 82) 7.
[87] Anon (n 82) 4.
[88] Anon (n 82) 6.
[89] Jivan and Forster (n 80) 104.
[90] Jivan and Forster (n 80) 231.
[91] Jivan and Forster (n 80) 234.
[92] As above.
[93] Jivan and Forster (n 80) 234 - 235.
[94] As above.

rights is not an attempt at neo-colonialism and that the argument for communalism propagated by cultural relativist more often means men first since they are the most influential in these communities.[95]

Indeed there are divergent perspectives regarding the universality of rights, with some African feminists propagating cultural relativism.[96] Joy Ezeilo captures the debate between the school of thought favouring the universality of human rights and those opposed to human rights as an alien concept in Africa. Ezeilo argues that the human rights debate in Africa appears to have taken the universal and particularity angle with western feminists supporting the universality of human rights, noting that human rights have the same meaning in all cultures.[97] African feminists, on the other hand, express reservations to universality based on the lived experiences of colonialism, neo-colonialism and displacement in the world economic disorder.[98]

Critics of cultural relativism argue that violations against African women, including female genital mutilation, have been justified based on cultural, religious, and traditional grounds that deny women's human rights.[99] Citing case law from Africa,[100] Ezeilo observes that cultural laws deny women's equal status in law and practice.[101] Sylvia Tamale, however, sees the potential of culture in emancipating women of Africa and argues that culture is a double-edged sword that can enhance women's access to justice.[102] Tamale further notes that the sustainable solutions to their oppression, exploitation, and subordination for many African women do not lie in vague alien legal rights but instead in the creative deployment of the more familiar cultural norms and values.[103] Although Tamale observes that the human rights discourse has had little effect on the lives and realities of African women, Tamale advocates for approaches that are anchored on the lived realities of African women and the local cultures and traditions.[104] Tamale argues for a method to culture that is dynamic and unritualized fashion that establishes linkages between positive aspects and the emancipation of women.[105]

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[95] Jivan and Forster (n 80) 237.
[96] Obioma Nnaemeka, *Sisterhood, Feminisms, and Power : From Africa to the Diaspora* (Africa World Press Trenton, NJ 1998).
[97] Ezeilo (n 79) 235.
[98] As above.
[99] Ezeilo (n 79) 236.
[100] *Nzekwe v Nzekwe* (1991) 2 NWLR.
[101] Ezeilo (n 79) 237.
[102] Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16 Feminist Legal Studies 47.
[103] Tamale (n 102) 164.
[104] As above 164.
[105] As above.

Addressing African women's human rights concerns must be done within socio-economic, political and cultural contexts, keeping in mind the legacy of colonialism, neo-colonialism that have continued unabated at the expense of African women.[106] Within traditional human rights or feminist paradigms, issues of race, class and difference are often subsumed under the category of gender.[107] In western thought, women as a social category are often understood as powerless, disadvantaged, controlled and defined by men.[108] However, this appears in contrast to the situation in pre-colonial Africa where gender relations varied.

African women have been particularly viewed as victims' of their own cultures, and African women's potential to reformulate policies within their contexts have been undervalued.[109] International human rights discourse has portrayed culture from a colonial standpoint rather than integrate it to local understandings.[110] This is seen for example by the equation to culture as ancient practices and therefore a barrier to progress to women's human rights.[111] Merry argues that this view of culture fosters an imperial perspective, which views it as a domain of the primitive and backward.[112] The perception of culture as an impediment to women's human rights is more seen in human rights documents such as CEDAW.[113] CEDAW in cautioning against gender stereotyping, noting that States Parties shall take all appropriate measures: [114]

> (a) To modify the social and cultural patterns of conduct of men and women, to eliminate prejudices and customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women.

Further, CEDAW also places an obligation on states to change culture when it observes: States Parties condemn discrimination against women in all its forms, agree to pursue by all

[106] Ezeilo (n 79) 231 – 252.
[107] Obioma Nnaemeka and Joy Ngozi Ezeilo, *Engendering Human Rights: Cultural and Socio-Economic Realities in Africa* (Palgrave Macmillan US 2005) <https://www.palgrave.com/gp/book/9781403967077> accessed 22 March 2021.
[108] Nnaemeka and Ezeilo (n 107) 76.
[109] Johanna E Bond, 'The Challenges of Parity: Increasing Women's Participation in Informal Justice Systems within Sub-Saharan Africa' in Ruth Rubio Marin & Will Kymlicka (eds) *Gender Parity and Multicultural Feminism: Towards a New Synthesis* (Oxford University Press 2018).
[110] Sally Engle Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way' (2003) 26 Political and Legal Anthropology Review 55.
[111] Merry (n 110) 60.
[112] As above.
[113] As above.
[114] CEDAW Article 5 (a).

appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake: [115]

> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

The African Charter acknowledges the right to culture and places an obligation on the state to promote and protect morals and traditional values recognized by the community.[116] Joanna Bond argues that the promotion of the women's agency in the formulation of cultural policies, in the Maputo Protocol reflects theoretical advances in the conception of women's identity and the potential of dialogical processes to promote women's rights.[117] Bond further argues that African feminists can engage women in the public discourse that shapes African customary law by dint of this provision.[118] Deliberations at the local level can also identify viable methods of implementing women's human rights from a context-specific approach.[119] Bond argues that the dialogue on implementing human rights in the local context should engage with traditional leaders to ensure that human rights norms are internalized at the local levels.[120]

5.6 African feminisms and gender as an issue of justice

> 'The cultural logic of western social categories is based on the ideology of biological determinism: the concept that biology determines the organization of the social world. Thus this cultural logic is, therefore, "bio-logic".'[121]

Oyeronke Oyewumi challenges western theories on gender. Oyewumi observes that western feminist theories prioritize explanations of gender based on biology, ignoring other wars of explaining differences such as race and class.[122] Oyewumi notes that western feminism's account of gender places male and female, man and woman in a binary and both in a

[115] CEDAW Article 2 (f).
[116] Article 17 (3) African Charter.
[117] Bond (n 109).
[118] As above 512.
[119] Bond (n 109) 513.
[120] As above.
[121] Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (First edition, University of Minnesota Press 1997).
[122] Oyeronke Oyewumi, '(Re)Constituting the Cosmology and Sociocultural Institutions of Oyo-Yoruba: Articulating the Yoruba World Sense' 99.

relationship and against each other.[123] Oyewumi observes that these categories in western societies are not free of hierarchical associations, with males signifying privilege and female subordination.[124] Oyewumi argues that while the concept of gender has been seen as timeless and used as a basis for analysis of societies, it was not an organizing principle in the native Yoruba tribe in Nigeria.[125] Instead, the primary social organizing principle was seniority, defined by relative age.[126] Oyewumi argues that in the traditional Yoruba society, social positions were not determined by one's anatomy, therefore the social categories of 'men' and 'women' are derived from western assumptions that characterize physical bodies as social bodies.[127] Oyewumi argues that despite gender being a social construction, the impulse to universally apply bio-logic reasoning transculturally is rooted in the assumption that gender is universal, manifested in male privilege.[128] Oyewumi argues that in the pre-colonial Yoruba culture, social categories 'men' and 'women did not exist, nor were they binarily opposed or hierarchical. Oyewumi asserts that in the Yoruba culture, gender was culturally derived, and the maintenance of gender was dependent on the cultural system.[129] Therefore, the social category 'woman' as anatomically defined and assumed to be subordinate in the western sense did not exist.[130]

Ifi Amadiume also asserts that in the pre-colonial Igbo society of Nigeria, biological sex did not determine the roles a person could play in society.[131] Amadiume notes that in the traditional Igbo culture, gender was flexible and separate from biological sex; hence, daughters and women could become husbands to wives and, therefore, males about their wives.[132] The gender system was, therefore, flexible in Igbo society, resulting in status and role ambiguity.[133] There was flexibility in the gender classification in the political power, allowing the incorporation of certain aspects of women into the male structure, giving them positions of authority in the power structure.[134] Amadiume argues that colonialism suppressed indigenous institutions, ultimately affecting women's social positions in Igbo society.[135] Indigenous flexible gender

[123] Oyewumi (n 122) 99.
[124] As above.
[125] Oyewumi (n 122) 99.
[126] As above.
[127] Judith Lorber, *Paradoxes of Gender* (Yale University Press 1994).
[128] Oyewumi (n 121) 101.
[129] Oyewumi (n 121) 102 – 104.
[130] Oyewumi (n 121) 102 – 103.
[131] Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1987).
[132] Amadiume (n 131) 58.
[133] As above.
[134] As above.
[135] Amadiume (n 131) 201.

constructions were replaced by rigid gender ideology characterized by strong sex and class inequality.[136] A biological woman was always a female, regardless of her social status or achievements.[137] Amadiume challenges the western advancements of the ideas of a nuclear family and women as subordinate as a universal idea, arguing that African women had a long history with power before Africa's colonialism.[138] Amadiume also notes that in traditional African communities, kinship was a classification in a collective sense and could be traced through mothers.[139] Amadiume rejects the western conception of a woman as an object of social exchange through marriage, which contrasts with a woman's autonomous status as a mother as seen in traditional African society.[140]

Wairimu Ngaruiya and others also argue against the historical fixation on the nuclear family as universal, arguing that in the traditional Kikuyu society, woman to woman marriages existed.[141] They argue that the female husbands in the traditional Kikuyu society did not identify their role with maleness, as observed in the western sense.[142] Indeed, unlike the west, the family in many African societies was not based on the nuclear or monogamous relationships.[143] Just as in the Kikuyu community, the practice of woman-to-woman marriage was also observed in other communities in Kenya, including within the Luo, Nandi, Kuria and Kamba.[144]

Oyewumi observes that gender as an analytic tool cannot be similar in all situations; instead, it is a social and historical construct.[145] Oyewumi argues that gender must be located within a specific cultural system and examined alongside the social institutions of that system.[146] Gender roles vary within specific cultural and socio-economic contexts in which they are placed.[147] Therefore, a social constructivist approach to gender opines that femininity and masculinity are not individual personality traits but reflect a personal interaction with their

[136] As above.
[137] As above.
[138] Ifi Amadiume, *Re-Inventing Africa: Matriarchy, Religion and Culture* (2nd edn, Zed Books 1997).
[139] Ifi Amadiume, 'Theorizing Matriarchy in Africa: Kinship Ideologies and Systems in Africa and Europe' in Oyèrónké Oyěwùmí (ed) *African Gender Studies A Reader* (Palgrave Macmillan US 2005).
[140] Amadiume (n 139) 93.
[141] W Njambi and Wairimu Ngaruiya William E O'Brien, 'Revisiting "Woman-Woman Marriage": Notes on Gikuyu Women' (2000) 12 NWSA Journal 1.
[142] Njambi and others (n 141) 149.
[143] Monicah Wanjiru Kareithi, 'A Historical-Legal Analysis of Woman-to-Woman Marriage in Kenya' (Thesis, University of Pretoria 2018).
[144] Kareithi (n 143) 2.
[145] Oyewumi (n 122) 116.
[146] As above.
[147] Rita Ozoemena, 'Challenges and Prospects to the Realisation of Gender Justice in Africa' (University of Pretoria 2013).

context.[148] This means that gendered attitudes and behaviours such as femininity and masculinity change over time and are not static but dynamic.[149]

Today, gender as a concept has been thought of as a human rights concern.[150] Rita Ozoemena observes that contemporary approaches to gender tend to treat women as an isolated group, ignoring the needs of men.[151] Ozoemena argues that as a result, this leads to programmes that are not integrative and comprehensive to achieve equality and empowerment.[152] Ozoemena observes that this isolation is grounded in the assumption that women are subordinated in society and, therefore, deserving of more attention and protection – an understanding grounded in western conceptions of gender.[153] The concept of gender mainstreaming has emerged as an idea to effectively address the discrimination of women in the socio-economic and political situation in society.[154] Gender mainstreaming has thus been adopted at the United Nations as a global strategy to promote gender equality.[155] The Economic and Social Council conclusions 1997/2 define gender mainstreaming as:[156]

> The process of assessing the implications for women and men of any planned action including legislation, policies or programmes in all areas and levels. It is a strategy for making women's and men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

Gender mainstreaming is a mechanism for achieving human rights and social justice for women and men and contributes to realizing social and economic goals.[157]

[148] Clare Mehta and Yulia Dementieva, 'The Contextual Specificity of Gender: Femininity and Masculinity in College Students' Same- and Other-Gender Peer Contexts' (2017) 76 Sex Roles 604.
[149] Mehta and Dementieva (n 148) 6.
[150] Ozoemena (n 147) 66.
[151] As above.
[152] As above.
[153] As above.
[154] As above.
[155] United Nations, 'Gender Mainstreaming: An Overview' (United Nations Office of the Special Adviser on Gender Issues and Advancement of Women 2002).
[156] United Nations (n 155) v.
[157] United Nations (n 155) vi.

5.6.1 The concept of gender justice

> 'We may want justice for women, but can we accept that there might be different ideas about justice and that different women might want or choose different futures from what we envision best?.' - Lila Abu-Lughod'[158]

The de-politicization of gender mainstreaming in the international arena led to the emergence of the concept of gender justice.[159] After a period of implementing gender mainstreaming measures, there was a concern by feminists regarding the social and political transformational agenda of women.[160] Gender mainstreaming was thought to have obscured the vision for the transformation of unequal power relations between genders.[161] Gender mainstreaming, though a strategy in development for pursuing gender equality, lost credibility as a chance mechanism. For this reason, the language of justice, rights and citizenship gained traction.[162]

Contemporary definitions of gender justice have different starting points, including discussions on the philosophy of human agency, autonomy, rights and capabilities, democratization and citizenship, and discussions on judicial reforms and access to justice.[163] Gender justice is a term often used to promote women's legal empowerment or the promotion of women's interests through social and economic policy.[164] Anne Marie Goetz observes that some key elements require understanding for gender justice to be examined. First, Goetz notes that women, alongside other disadvantaged groups, are not homogenous, so gender cuts across all these groups producing diverse interests and conceptions of justice.[165] Second, gender-specific injustice is often observed in the family and the community,[166] and therefore, to examine gender-specific injustice, one must also look at the domestic or private sphere.[167] Third,

[158] Lila Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104 American Anthropologist 783.
[159] Maitrayee Mukhopadhyay, 'Gender, Justice, Citizenship and Development: An Introduction in Mukhopadhyay M and Singh N (eds) *Gender Justice, Citizenship and Development)* (Zubaan Books 2007).
[160] Mukhopadhyay (n 159) 2.
[161] As above.
[162] As above.
[163] Maria De Mar Castro Varela, 'Envisioning Gender Justice' <http://www.mcrg.ac.in/spheres/maria.pdf>.
[164] Ann Marie Goetz, 'Gender Justice, Citizenship and Entitlements Core Concepts, Central Debates and New Directions for Research', *Gender Justice, Citizenship and Development* (Zubaan, an imprint of Kali for Women and International Development Research Centre 2007).
[165] Goetz (n 164) 18.
[166] Black's Law Dictionary defines community as a society of people, living in the same place and guided by the same laws and policies, and who have the same rights and privileges.
[167] Goetz (n 164) 18.

political, social and economic institutions are not free of patriarchal mindsets which extend from the private sphere.[168] Goetz argues that gender justice often reminds us of institutionalized bias in the conception of justice derived from a patriarchal standard acquired from the domestic arena.[169] Goetz also classifies three typologies that define gender justice in feminist activism, including gender justice as entitlements and choice – the enabling paradigm,[170] gender justice as the absence of discrimination[171] and gender justice as positive rights.[172] Gender justice is also defined broadly as the array of modes of representing and seeking justice between men and women and the gendered assumptions or implications of the different justice regimes, including human rights, customary and religious methods of dispute resolution, and international and national laws.[173] Susan Moller Okin observes that any society concerned with justice must pursue equality within gender and the family.[174] Okin observed a disconnect between constitutional values of liberty, justice and equality and the reality of inequalities between the sexes.[175] Today, despite laws and policies guaranteeing gender equality, there is still a social dynamic perpetuating inequality from within and across institutions including in direction.[176] However, gender justice can be both a process and an outcome involving access to and control over resources, agency and accountability of social institutions to dispense justice.[177]

5.6.2 Gender justice and culture

> ‘ ….customary law development has been manipulated to ensure that it promotes gender discrimination in its application and justification. Because it is unwritten and is often nothing more than oral tradition, it is easily misconceived and manipulated to reflect the politics of the time or even a specific set of circumstances.’[178]

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[168] As above.
[169] As above.
[170] This approach is rooted in liberal feminist politics which opines that because women have been socialized to accept their subordination, they cannot propose an account of gender justice that challenges male privilege. Therefore, liberal feminists have proposed minimum economic, social and psychological conditions for which women might negotiate social arrangements.
[171] CEDAW provides a formalized attempt to establish the principles of gender justice, which is the absence of gender -based discrimination.
[172] Concept is based on a rights-based approach to development, which acknowledges the role of power relations in the outcomes of policies and states' accountability to promote human development.
[173] Dorothy L Hodgson, *Gender, Justice, and the Problem of Culture: From Customary Law to Human Rights in Tanzania* (Indiana University Press 2017).
[174] Okin (n 130) 17-23.
[175] Okin (n 130) 62.
[176] Elizabeth Beaumont, ‘Gender Justice V. The Invisible Hand of Gender Bias in Law and Society’ (2016) 31 Hypatia 668.
[177] Goetz (n 164) 4.
[178] Muchela Munalula, ‘Changing the Customary Law Standard of Gender Justice: The. Additional Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa' in Hintz Manfred (ed) *The Shade of New Leaves* Center of Applied Social Sciences, Faculty of Law, University of Namibia (Transaction Publishers 2006).

Today, culture is widely thought of as contentious, with some writers noting that it is the root of gender inequality and the subjugation, particularly of African women.[179] Rwafa, for example, argues that while culture projects the illusion of shared values amongst a community, it obscures the contentious divisions existing such as class, race, gender and ethnicity.[180] However, some scholars such as Dorothy Hodgson observe that contemporary negative portrayals of culture, particularly against women, have a history grounded in racism and the legacies of colonial conquest and rule.[181] Hodgson follows that the negative image of culture is about power and the assumption that colonial officers, donors, activists and today, African elites speak for, rather than listen to, the rural poor women of educated African women, who are deemed culturally 'other'.[182] Hodgson observes that blaming culture as the cause of the current gender inequalities obscures the historical effects of dispossession, marginalization and oppression in Africa.[183] While conducting an anthropological examination of the culture of the Maasai of Tanzania, Hodgson observes the interaction of Maasai culture with colonial ways of 'progress and productivity'.[184] These indirect interactions with socialist and capitalist economies revised Maasai gender relations, which produced new set-ups and understandings of family, marriage, labour, wealth and politics.[185] These effects led to the elders' distortion of customary law rules, who began to interpret them in rigid ways as compared to before.[186]

Hodgson notes that the western impositions on African culture are essentialist, disparaging and ahistorical.[187] These impositions also justify the assumption of 'saving' the Maasai and others from oppressive cultures.[188] Hodgson observes that the colonial interventions on law and justice and the racialized ideas on gender and culture shaped the development and eventually the domination of ceremonial law as a justice mechanism.[189] The concept of justice premised on natural justice and eventually 'universal rights' transformed traditional justice systems, giving more authority to traditional elders and diminishing people's ability to challenge the

[179] Kimani Njogu and Elizabeth Orchardson-Mazrui, 'Gender Inequality and Women's Rights in the Great Lakes: Can Culture Contribute to Women's Empowerment?' (2009) 2 Twaweza Communications Publications 1.
[180] Urther Rwafa, 'Culture and Religion as Sources of Gender Inequality: Rethinking Challenges Women Face in Contemporary Africa' (2016) 32 Journal of Literary Studies 43.
[181] Hodgson (n 173) 160.
[182] As above.
[183] As above.
[184] As above.
[185] As above.
[186] Maitrayee Mukhopadhyay, 'Gender and Access to Justice: Report on the KIT-CALS Conference 29-30 October 2008 Johannesburg, South Africa' Center for Applied Legal Studies 45.
[187] Hodgson (n 173) 160.
[188] As above.
[189] Hodgson (n 173) 29-51.

state.[190] Finally, Hodgson observes that whilst the recognition of women's rights as human rights has led to the challenging oppression of women, rights-based approaches obscure the structural contexts of gender inequality produced by neo-liberal policies, making it challenging to address them.[191] Hodgson concludes by noting that there is a need to examine the gendered consequences of androcentric forms of law introduced by colonialism.[192] These forms of law emphasized individualism, secularity and rationality, and the alternative conception of justice grounded on the ideas of morality, respect and social independence.[193]

Gender justice is not alien to customary law because African communities already practice it.[194] Indeed, equity and justice are intricate components of African people and existed well before the colonial relegation of customary law to obscurity.[195] Customary laws in Africa granted women leadership opportunities as decision-makers and chiefs.[196] For example, among the *Iyede* people of Nigeria, women enjoyed 'equal status' to the men in the society and politics was not exclusively left to the men.[197] Similarly, in the *Baganda* Kingdom of Uganda, Queen mothers also called *Namasole* , were revered by Kings and were considered a significant political authority.[198] The queen mother alongside the queen sister were the only female who could bear the title of *Kabaka* or King.[199] The office of the queen mother was a highly regarded office with tangible 'power and prerogative ' and where the queen mother was dead, the office had to be filled with a classificatory mother.[200]

In the international development sphere, debates around gender justice have often assumed a human rights tangent, regarding the universality of human rights vis a vis culture [201] and the viability of culture to sustain women's human rights. While there is some correlation, human

[190] Hodgson (n 173) 49-51.
[191] Hodgson (n 173) 161.
[192] Mukopadhyay (n 186) 161.
[193] As above.
[194] Michelo Hansungule and Rita Ozoemena, 'Re-Envisioning Gender Justice in Access and Use of Land Through Traditional Institutions' (2009) 63 Center for Policy Studies.
[195] Hansungule and Ozoemena (n 194) 2.
[196] As above.
[197] Onaiwu W Ogbomo and QO Ogbomo, 'Women and Society in Pre-Colonial Iydele in Anthropos.', *Anthropos* (Smithsonian Libraries 1993).
[198] Laurence D Schiller, 'The Royal Women of Buganda' (1990) 23 The International Journal of African Historical Studies 455.
[199] As above.
[200] As above.
[201] Rhiannon Stephens (ed), 'Mothering the Kingdoms: Buganda, Busoga, and East Kyoga, Sixteenth through Eighteenth Centuries' (Cambridge University Press 2013).

rights and justice do not mean the same thing.[202] Human rights are about the legitimacy of an individual to make claims upon their society for certain freedoms and benefits.[203]

5.6.3 Feminisms and gender justice

Feminist scholars have called for the reconceptualization of justice due to what they refer to as the gender blindness and gender bias of substantive laws and legal procedures to address gender inequality.[204] Different categorizations of feminists adopted varied approaches to address the gender blindness and prejudice of the statutes. Liberal feminists called for adding more women into the institutional structures, making women more visible. However, this approach to formal equality attracted criticism from African feminists, who were operating in dual legal contexts and argued that the ceremonial laws were alien to African women's lives and therefore were not enough to address gender injustice.[205]

Radical feminists also challenged the liberal assumption of formal equality, arguing that the law was based on a male standard and that any attempts at incorporating women into the existing structures only emphasized similarities to or differences from men.[206] Radical feminists argued that the measures were inevitably male-centric, and therefore the only solution was to eliminate the hierarchy in male and female relations.[207] Radical feminists further argued that eliminating discrimination required a demonstrated impact in public and private domains of women's lives.[208]

Mulla Munalula argues that human rights theory provides a framework for resolving the problem of gender injustice.[209] Munalula argues that when human rights are used as a threshold for any system of justice, it becomes easier to demonstrate the inability of the law to respond to gender inequalities.[210] African feminist scholars' critiques of the law were based on the view that state and customary law had fundamental flaws in promoting gender equality.[211] The

[202] Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 10.
[203] Henkin (n 202) 11.
[204] Muchela Munalula, 'Changing the Customary Law Standard of Gender Justice: The Additional Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa in Hintz Manfred (ed) *The Shade of New Leaves* (Transaction Publishers 2006).
[205] As above 171.
[206] As above.
[207] As above.
[208] Munalula (n 204) 171 – 172.
[209] As above.
[210] As above.
[211] As above.

sustained criticism around gender inequality within the African human rights systems, revolved around the lack of established legal protection of women within the African region.[212] Therefore, the entry of the Maputo Protocol is lauded as an attempt to provide a middle ground between the universal ideas of justice and the African conceptions of justice.[213]

Rita Ozoemena argues that the equality of sexes should be considered an end product of justice.[214] It is not justice if unequal power relations dispossess any part of the community.[215] Ozoemena also observes that although different categorizations of feminists call for eliminating all forms of discrimination against women from other approaches, their overriding goal is to promote and protect women's rights and ensure gender justice.[216]

5.7 What then are African feminist paradigms of justice?

> '.. the fluid character of African feminism seeks difference from the west, yet promotes female agency, autonomy, is pro-male and anti-gender separatist..'[217]

This thesis acknowledges that African feminist paradigms of justice are not homogenous and thus – the identified paradigms of justice only relate to the context of the study and may resonate with other similarly situated settings. Whilst this is the case, this thesis also asserts that African feminists paradigms of justice must resonate with established standards that are truly feminist – and which uphold the spirit of African feminism.

5.7.1 Validating the lived realities of justice of African women

This thesis departs from the use of western feminist epistemology as a paradigm for understanding women's experiences and proposes an approach that is local, specific and addresses the lived realties of women's in the context of the study. Indeed, this approach is not only feminist, but is also based on an African feminist epistemology, which validates the experiences of African women – including those who trace their origins from Africa, against

[212] Karen Stefiszyn, 'The African Union: Challenges and Opportunities for Women' (2005) 5 African Human Rights Law Journal 358.
[213] Munalula (n 204) 172 – 173.
[214] Rita Ozoemena, 'Challenges and Prospects to the Realisation of Gender Justice in Africa' (University of Pretoria 2013).
[215] As above.
[216] As above.
[217] Pinkie Mekgwe, 'Post Africa(n) Feminism?' (2010) 24 Third Text 189.

mainstream feminist discourse.[218] African feminist justice is that which seeks a difference between women who were colonized and those deemed colonisers – and aims to raise global consciousness of the histories, present realities and futures of African women.[219]

Ruvimbo Goredema's reflections on African feminisms resonate with the approach adopted in this thesis – which seeks to raise feminist consciousness of the reality of women at the margins and assert their reality of justice as that which is authentic and worthy of recognition. This approach is truly feminist in nature – as feminists' recognize the importance of validating the experiences of women.[220] A truly African feminist paradigm of justice is that which validates the experiences and knowledge of women in Africa and those of African origin. This thesis identifies dominant narratives of justice from widows' in Nyando sub-county in Kenya and validates these identifies paradigms of justice – in a context in which global discourse on justice is saturated with dominant western androcentric paradigms. African feminist paradigm of justice is that which therefore validates the present realities and experiences of African women as true knowledge, whilst also acknowledging their past and futures. It is a departure from the theorizing that stereotypes African women as the 'other' in need of 'saving' – as is the present neo-colonial discourse.[221]

This thesis also observes that there are dangers of essentialism and assumptions of heterogeneity of womanhood. The global discourse on justice amongst western feminists had fallen trap to essentialism – an assumption rooted in the heterogeneity of womanhood without the exploration of a diversity of voices of women.[222] These dominant generalizations and misunderstandings of the lived realities of African women are problematic and do not take into account the 'ideas of justice' based on the situations contexts.[223] This violence and coercion of modern paradigms of justice especially if considered as the absolute universal truth - negates the experiences of African women's paradigms of justice. Feminism therefore needs to be interactive with diversity instead of the substitutionalist approach.[224] This thesis explores the

[218] Ruvimbo Goredema, 'African Feminism: The African Woman's Struggle for Identity' (2010) 1 African Yearbook of Rhetoric 33.
[219] As above.
[220] Catharine Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1990).
[221] Sinmi Akin-Aina, 'Beyond an Epistemology of Bread, Butter, Culture and Power' [2011] Nkoko Institute of African Studies 66.
[222] Ruth Anna Putnam, 'Why Not a Feminist Theory of Justice?' in Martha C Nussbaum and Jonathan Glover (eds) *Women, Culture, and Development: A Study of Human Capabilities* (Oxford University Press 1995).
[223] Dina M Siddiqi, 'Transnational Feminism and "Local" Realities: The Imperiled Muslim Woman and the Production of (in)Justice' (2011) 9 Hawwa 76.
[224] Seyla Benhabib, 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controvers and Feminist Theory' (1985) 5 PRAXIS International 402.

exclusion argument[225] within feminist theorizing tacitly highlighting the threat to justice discourse grounded in western paradigms as the center of inquiry.

Unlike western feminisms built largely from the experiences of white upper class educated women,[226] Africa feminisms seeks inclusivity – where women are viewed first as human beings rather than as sexual beings.[227] As Amina Mama argues, African feminisms lays emphasis on the totality of human experiences – and that freedom from oppression is based on the political social cultural and economic manifestations of racial, class, cultural, sexual and cultural manifestations. [228]

5.7.2 Grounded on principles of human rights

As established in this thesis, human rights is critical in feminist epistemology. African feminisms also consider human rights an integral part of making the case for women's justice. African feminisms have found solace in the state responsibilities under international law, including respect, protect fulfil and transform human rights. It is for this reason that feminists in Africa have used legal protection mechanisms whether at the internal, regional or national levels to promote the rights of women.[229] The clamour for and final adoption of the Maputo Protocol is a clear indication of the importance of human rights for African feminisms in the modern constitutional architecture. The Maputo Protocol – as elaborated in this thesis is an instrument by and for women of Africa, addressing the unique challenges that they face, including rights of widows' and the right to culture. Indeed, the idea of human rights is seen as a dominant global discourse.[230] However, there have been challenges to the universality of human rights especially from the global south scholarship with arguments to its opposition centering around ethnocentrism and its lack of the diversity of cultures.[231]

This thesis finds that whilst the legal reasoning has often dominated post-colonial discourse on human rights in Kenya, the culture and practice of human rights resonate with the daily realities of the widows'. As observed from the identified paradigms of justice, whilst the legal concept

[225] Elizabeth V Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press 1988).
[226] Rhoda Asikia Ige, 'Speaking for Ourselves: African Feminism and the Development of International Human Rights Law' Blue book 25.
[227] Rosalyn Terborg-Penn and Andrea Benton, 'Filomena Chioma Steady,'African Feminism: A Worldwide Perspective' in Women in Africa and the Africa Diaspora: A Reader' (Second Edition, Howard University Press 1996).
[228] Amina Mama, 'African Feminist Thought', *Oxford Research Encyclopedia of African History* (2019).
[229] Botswana High Court, 'Unity Dow v. Attorney-General (Botswana) [June 1991]' (1992) 36 Journal of African Law 91.
[230] Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005).
[231] Banda (n 230) 41.

of human rights is certainly discernible, the everyday meaning of human rights is that which resonates with their lives.[232] This, for example is seen in the paradigm of justice as a recognition of a right – within the context of customary law but also in the legal sense of human rights, which is largely a contribution of the human rights programming conducted by KELIN for the traditional dispute resolution mechanism emphasizing human rights in the legal sense. Adeotun Llumoka argues that for human rights standards to resonate with African women, there is a need for the recognition of the different experiences of rights rather than suppress them, while encouraging women's collaboration in localised struggles against their oppression.[233] The idea of universality of rights reinforces inequalities rather than serving to dismantle them.[234] This rift is also exacerbated by the quest for formal equality that is embodies in the rights discourse leading to tensions between those who advocate for formal equality and those who argue for difference in the feminist discourse.[235]

5.7.3 Grounded in the spirit of African communitarianism

As observed in chapter 2 of this thesis, African communitarianism is espoused in the philosophy of ubuntu – emphasizing the philosophy of ubuntu. Indeed, Sylvia Tamale calls for a reconceptualization of justice as ubuntu.[236] Tamale argues that ubuntu justice premised on the notion, " I am because you are" captures the spirit of interconnectedness and reciprocity that is alive in most African cultures.[237] Community is an important concept to African people, which is a direct opposite of the individualism that is rife in western societies.[238] Tamale urges Africa feminisms to re engagement with and take heed of the indigenous forms of living, knowing and being.[239] These ethos have their genealogy in African communitarianism which calls for African solidarity. Ubuntu therefore is not trapped between individualism and communitarianism.[240]

Many Africa communities share the spirit of interdependence and compassion. Whilst there is a common misconception that ubuntu is exclusive to Bantu speaking people, many African

[232] Steve Ouma Akoth, 'We Have Moved on: Human Rights and Intersubjectivity in Post- 2007/2008 Violence in Kenya' (2014) 47 Acta Academica 228.
[233] Adetoun O Ilumoka, 'African Women's Economic, Social and Cultural Rights: Toward a Relevant Theory and Practice' 307.
[234] As above.
[235] As above.
[236] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020).
[237] As above.
[238] As above.
[239] As above.
[240] Tamale (n 236) 221- 222.

cultures do have similarities to ubuntu. Ubuntu can also be traced to ancient Egyptian holy belief of *Netcher Maat*.[241] Ubuntu philosophy can also be traced to other regions in Africa including in Yoruba speaking people of Nigeria[242] to the Baganda[243], Shona[244] and Baluba[245] in the Central Africa region.[246] Ubuntu provides a basis for engaging with the principles of justice that gives validity to the community and the individual. Ubuntu provides an opportunity to address African women's subjugation and oppression through its insistence on the core values of communitarianism, humanness and egalitarianism.

5.8 Conclusion

This chapter has demonstrated the central role of human rights discourse in justice for women. In the wake of the global discourse on access to justice and the promotion of indigenous conceptions of justice, this chapter reveals that the rights discourse is still central in this debate. Whilst appreciating the human rights principles this chapter also affirms that the rights discourse is also contextual, allowing local communities to affirm the meaning of human rights that resonates with their everyday realities. This chapter also finds that there is some merit in the argument that some customary laws perpetuate negative cultures that impede justice within traditional dispute resolution mechanisms. It also finds that culture is constantly evolving and just like in the context of Nyando subcounty, there is progressive ideas of rights and justice, particularly for marginalised populations are taking root within traditional dispute resolution mechanisms.

African feminists promote a human rights discourse while also asserting the realities of rights within their local contexts. This chapter notes that while universalism has promoted the rights discourse, the reality on the ground is that women's dignity is eroded in practice in many contexts. It explores the tension between the proponents of universalism who argue for a set of standards for human rights and those who argue for the preservation of culture that favours universal norms. It reveals the reservation that African feminists have with universality of

[241] Hendrick Viviers and Modisamkhondo Mzondi, 'The End of Essentialist Gods and Ubuntu: A Feminist Critical Investigation' (2016) 97 Pharos Journal of Theology 17.
[242] Ubuntu referred to as *Ipawele.*
[243] Ubuntu referred to as *Obuntu Bulama*.
[244] Ubuntu referred to as *Hunhu.*
[245] Ubuntu referred to as *Bumuntu.*
[246] Viviers and Mzondi (n 241) 4-10.

human rights, based on their experiences with colonialism, neo-colonialism and the impact of the world economic order on African women's lives.

Additionally, this chapter also delved into the question of gender as an issue of justice noting the centrality of this discourse in global feminism and justice and finds that human rights discourse provides a framework for arguments against gender inequalities. It also finds that the human rights instruments such as the Maputo Protocol espouse universal and African conceptions of justice. Gender justice as espoused in this chapter seeks to uphold a holistic approach, that addresses women's lived realities within the social, economic and political sphere. It also recognizes the need to amplify women's agency, autonomy and the decision making power to allow them choose whatever justice forum they desire. This chapter reveals the need for justice mechanisms to address the unique concerns of the diverse categories of women and their intersectional realities.

Lastly, this chapter identifies three key pointers to what amounts to a truly African feminist paradigm of justice. It finds that African feminism is fluid, yet promotes women's agency, autonomy and is pro-male as opposed to the western feminisms that view men as the aggressor. Whilst acknowledging the homogeneity of feminisms in Africa, this chapter finds that a truly African feminist paradigm of justice must validate the realities of African women, recognizing the saturation of dominant androcentric discourse on justice. Whilst appreciating the need to validate the lived realities of women in Africa, this chapter also cautions against essentialism and the belief that African women possess similar realities. Additionally, this chapter also finds that an African feminist paradigm of justice must be grounded in the principles of human rights – while promoting African women's interpretation of rights that resonate with their everyday realities. Lastly, this chapter also finds that a truly African feminist paradigm of justice must be grounded in the spirit of African communitarism grounded in ubuntu justice which is premised on interconnectedness and reciprocity.

Chapter 6: Conclusion

6.1 Introduction

Traditional dispute resolution mechanisms can provide justice for women. The paradigms of justice emerging from this thesis are grounded in the lived realities of widows' in the Nyando sub-county in Kenya who access justice using traditional dispute resolution mechanisms. Within the global development discourse on justice, there is a disconnect between feminist liberal legal theorists and the everyday experiences of justice by rural widows'. Feminist liberal legal theorists have argued that traditional justice mechanisms cannot provide justice for women due to their over-reliance on customary norms that impede access to justice for women.

Central to the discussion in this thesis is the concept of justice, which is defined as that which affirms difference and challenges all forms of institutionalized oppression and domination. Contemporary ideas of justice, espoused by the philosopher John Rawls in his *A Theory of Justice,* and the exposition of the original position in justice as fairness provide the groundwork for a feminist critique against Rawls. Western feminists, in their quest to find a feminist paradigm of justice, advance universalistic ideas of justice without regard to the diversity of voices and experiences of women, particularly those in the global south. This thesis exposes a feminist fault line, showing a disconnect between western feminisms and African feminists' conceptions of justice. To understand an African feminist paradigm of justice in traditional dispute resolution, this thesis relies on the lived experiences of widowed women using traditional dispute resolution mechanisms in the Nyando sub-county in Kenya to access justice concerning their land and property rights. Importantly, this study contributes to the new paradigms of justice, which are grounded in the lived realities of widows' in the Nyando sub-county using the traditional dispute resolution mechanisms to access justice.

This chapter will discuss the key findings of the feminist narrative research, suggest proposals to ensure gender justice within traditional dispute resolution mechanisms and provide suggestions for future research.

6.2 Key findings

This main research question of this thesis examines they ways in which the everyday experiences of women accessing justice in traditional dispute resolution mechanisms in Nyando sub-county can inform an African feminists' paradigm of justice. By adopting consciousness-raising[1] this thesis finds that the widows' ideas of justice resonate with their realities. Consciousness-raising affirms women's way of knowing and it is premised on the fact that women know their societies better because they are part of it. This thesis has demonstrated that the situated experiences of women justice seekers are critical in developing an African feminist paradigm of justice in traditional dispute resolution mechanisms. This discussion, therefore, contributes to the ongoing global debate on feminists' paradigms of justice.

This study also observes that whereas there are challenges within the traditional dispute resolution mechanisms, there is an opportunity to integrate human rights paradigms to reduce the barriers to accessing justice. The findings of this study are further canvassed in the subsequent sections.

6.2.1 Methodology and approaches

As highlighted in chapter 1, this thesis relies on feminist narrative analysis to understand how the widows' in the Nyando sub-county make sense of justice by telling their lived experiences. Narrative research concerns how people construct stories and derive meanings from their lived experiences.[2] This thesis prioritizes women's way of knowing instead of the dominant androcentric constructions of knowledge. This thesis also rejects false knowledge that conflates the experiences of western women as representative of all women's experiences. Indeed, this thesis takes cognizance of the debate in the global development discourse on justice and between different categorizations of feminists on the question of justice. Finally, this thesis encourages understanding differences between and amongst women, mainly how women interact and experience the various axes of power.

Given that the research is political, the thesis reviewed the research setting, understanding the sociocultural, economic and political background of the research context. This entailed a

[1] Catharine Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1990).
[2] Jacobus Maree, 'Narrative Research in Career Counselling: The Career Construction Interview' in Angelo Fynn, Sherianne Kramer and Sumaya Laher (eds) *Transforming Research Methods in the Social Sciences: Case Studies from South Africa* (Wits University Press 2019).

review of the social and cultural-historical context of widows in Africa and the Nyando sub-county. The widows in the Nyando sub-county have multiple and intersecting identities and realities. The widows interviewed were generally economically poor, lack educational opportunities, had many children, low-income jobs and struggled with the pressing challenges around patriarchy and access to and right to property, particularly land. The widows' challenges were further exacerbated by rurality, where access to socio-economic amenities is scarcely available. All the widows interviewed, except one, were from the Luo community. The non-Luo interviewee ended up challenging the practice of *ter*, an age-old customary practice of the Luo community requiring the deceased husband's widow to be inherited by the deceased living brother.

As a researcher, I understand that the complexities of power intersect with women's experiences and the nuances accompanying those understandings. I was also aware of my positionality as a researcher, having an understanding of the context of the study since it is my natal home. This thesis embraced storytelling, listening and conversations in which the widows' told their lived experiences through individual interviews and focus group settings. This culminated in a glimpse of how the widows in the Nyando sub-county see the world and understand justice. The traditional dispute resolution mechanisms, described in this thesis as non-state justice systems which predate colonialism, dispense justice according to the culture and customs of their local communities. In the case of the Nyando sub-county, there are the Luo council of elders, existing in every geographical location occupied by the Luo community of Kenya. The choice of this justice mechanism is deliberate, as it is an institution viewed as patriarchal but has profoundly championed the rights of indigent rural widows', ensuring their dignity and rights are upheld. As elaborated in chapters 3 and 4 of this thesis, the Nyando sub-county experiences confirm that traditional dispute resolution mechanisms can provide justice for women.

6.2.2 What are the feminist paradigms of justice?

Although there are different categorizations of feminists, all agree that contemporary theories of justice, particularly those espoused by Rawls in his *A Theory of Justice*, are not

representative of women.[3] Rawls's justice as fairness aims to present a conception of justice founded on the social contract theory advanced by Rousseau, Locke and Kant.[4] Rawls argues that principles of justice for the order of a society are the basis of the original agreement. These principles of justice are developed in a state of nature, dubbed the original position, a hypothetical situation where no one knows their class or place in society. The original position is meant to be a state of equality; therefore, agreements reached within this state are intended to be fair.

Radical feminists such as Mackinnon, argue that Rawls propagates a theory of justice, in justice as fairness and the exposition of the original position, that is devoid of the unique experiences of women. Western feminists argue that Rawls's justice as fairness, just like the Social Contract theory, relies on abstraction as a method of inquiry, which western feminists argue is a 'road to androcentric ignorance' due to the failure to acknowledge the realities of those affected by the abstract principles. As Matsuda argues, women's experiences and knowledge are subordinated to false abstract assumptions. Liberal feminists, such as Moller Okin, argue that contemporary theories of justice, including Rawls's justice as fairness, have no regard for gender despite societies being deeply affected by it. Okin singles out the family as a political unit which theories of justice ignore. Yet, Okin argues, most women experience injustice in the family context due to the gendered division of labour and the distribution of power, responsibility and privilege favouring men.

The assumption of the male and female binary as a category of analysis of the shortcomings of justice does not hold sway, according to some African feminists. Unlike Western feminism comparison of female sex to weakness, Ifi Amadiume argues that in her native Igbo tribe in Nigeria, biologism was a source of women's power. Amadiume notes that in her culture, daughters could become husbands to wives and males. The family, which is not necessarily based on the western nuclear conception, is a source of strength. Gender in the context of African feminism is discussed in the context of other intersections of neo-colonialism, cultural imperialism, socio-economic exclusion and exploitation.[5]

[3] The category 'women', as used in this context, refers to the western feminisms understandings, which primarily assume the universality of womanhood. This thesis calls for anti-essentialism in its arguments against the essentialist understandings of womanhood. Importantly, its calls attention to the diversity of womanhood.
[4] See chapter 2 of this thesis.
[5] Sinmi Akin-Aina, 'Beyond an Epistemology of Bread, Butter, Culture and Power' [2011] Nkoko Institute of African Studies 66.

Unlike the social contract theory, which promoted the protection of individual lives and liberties, the African social and political contexts are informed by communal existence. The philosophy of ubuntu is considered to advance the coming good of all. However, there is also an understanding of the need to protect individual identity, liberty and will. While the concept of ubuntu justice appears to gain favour amongst African feminists, others have also observed its limitations, arguing that ubuntu perpetuates ancient hierarchical values that are oppressive towards women. Polygamy, for example, is mentioned as grounded in the concept of ubuntu, while others observe that ubuntu is not always applicable to disputes outside of the community. Still, leading feminist figures such as Sylvia Tamale agree with the concept of ubuntu, arguing that the reconceptualization of justice as ubuntu has the potential to accommodate African women's claims for gender justice.[6] Tamale argues that because ubuntu's core values are grounded in communitarianism, humanness and egalitarianism, it can be an adequate tool for achieving gender justice in Africa. This contrasts with the western model of justice that espouses individualism, which Tamale argues, is person-centred and does not provide adequate protection for African women. Therefore, ubuntu embodies the values, morals and ideals that can be anchored in African communities. Ubuntu is also seen as respecting individuality yet upholding community.

Human rights concepts appear to gain favour amongst the different categorizations of feminists in the raging debate on justice. Indeed, normative conceptions of human rights have gained acceptance in Africa and have been adopted into legal instruments at the regional and national levels. The Banjul Charter crystallizes international human rights ideals to reflect the realities of Africa. However, whilst the African Charter provides a framework for the realization of human rights, African feminists found it inadequate to address African women's unique realities. This led to the creation of the Maputo Protocol as the first comprehensive instrument to address the unique challenges of rural African women, and it places the responsibility on states to realize women's rights.

[6] Sylvia Tamale, Decolonization and Afro-Feminism (Daraja Press 2020).

6.2.3 What are the justice concerns for African feminists within traditional dispute resolution mechanisms?

Indigenous African[7] communities have always resolved conflicts before the advent of colonialism. The diversity of governance systems in pre-colonial Africa provided leadership in dispute resolution in many African contexts. While some communities relied on kings, others relied on spiritual leaders or chiefs, depending on the norms of their communities. Fundamentally, in pre-colonial Kenya, the system of governance differed across communities, with the Agikuyu having a hierarchical approach to dispute resolution, rendering judgement after junior elders heard disputes. Despite this hierarchical approach, other disputes were resolved within the family levels, either by family members or elders at the house level. Amongst the Luo community, chiefs played a significant role in dispute resolution. Whilst other mechanisms existed to address disputes, such as through the village elders, chiefs resolved the most severe cases, such as murder.

The European civilization mission in Africa brought some fundamental changes in the governance of traditional dispute resolution mechanisms. In its quest to consolidate power, the colonial administration weakened native dispute resolution mechanisms by introducing native courts for Africans to advance their colonization agenda. The promotion of the native courts and the subsequent relegation of the African customary legal system, viewed as irrational and barbarous, reduced the influence of customary law courts. This led to the creation of a dual system of justice, with the native courts, on the hand, serving the African population while the formal courts served the Europeans. In the end, the colonial interest led to the relegation of the native courts through the introduction of the repugnancy test doctrine, effectively reducing its influence.

The repugnancy test doctrine was premised on the colonial administration's mission of ‘civilization’, essentially the imposition of western norms and cultures as the ideal standards of civilization. Although, after independence, customary law was retained, significant damage had already been done, one of which was the retention of the repugnancy clause in the laws and the retention of western-styled courts as the beacons of civilization or mainstream justice systems. This is seen in the subsequent adoption of the 1969 Constitution and the Judicature

[7] This thesis also recognizes the diversity of ‘Africanness’. Whilst it uses African in this sense to mean African feminists living in Africa, it does not conflate all African women's experiences. For example, the lived realities of women in the Nyando Sub-county are unique but may also reflect the realities of other widows’ in similarly situated settings.

Act No. 16 of 1967, which continued to reduce the influence of African customary law. The colonial administration also meted out structural violence against the indigenous population, weakening their justice structures and imposing the western courts as the ideal and the indigenous structures as subordinate.

Colonialism also had an impact on gender inequality in Africa. The introduction of European norms, which emphasized women's subservient position in society, significantly contributed to the marginalization of African women. Men were preferred in formal employment and were often more educated.[8] Since entering formal employment required some educational background, African women's chances were substantially reduced due to their literacy levels. There was equally the perception by the colonial administration that women had no place in politics, entrenched women's subordination, especially in the political and socio-economic domains. This new paradigm was a far cry from the initial status where African women played roles as leaders such as chiefs. African women's roles within the agricultural sectors were also limited due to the influence of the modernization and commercialization of the agricultural sector.

The marginalization of African women continued to play out even after independence in most African countries, as the post-colonial governments adopted similar governance strategies from the colonial administration. For example, the commercialization of land, which began under the independent government administration, led to the transfer of land titles to men, a domain which women primarily controlled.[9] Commercial rather than subsistence farming was highly prioritized, paving the way for dependency by farmers on credit facilities and technical training from the state. Women were left out of these initiatives.[10] Rural women's labour functions were diminished in the post-colonial era, and this led to a reduction in their political influence.[11]

Independent African administrations continued justifying European policies that marginalized women while conflating male power and legitimizing patriarchal attitudes. Indeed, at independence, men were given more prominence, which granted them more access to employment, property and education. This new pollical economy impacted African women

[8] Felix Meier Zu Selhausen and Jacob Weisdorf, 'A Colonial Legacy of African Gender Inequality? Evidence from Christian Kampala, 1895–2011' (2016) 69 The Economic History Review 229.
[9] Fredoline Anunobi, 'Women and Development in Africa: From Marginalization to Gender Inequality' (2002) 2 African Social Science Review 41.
[10] Anunobi (n 9) 45.
[11] Anunobi (n 9) 46.

negatively, legitimizing patriarchal systems. Mackinnon asserts in her book *Towards a Feminist Theory of the State* that the state is fundamentally male, which is seen in how the law treats women and is akin to how men treat women.[12] Mackinnon also argues that the social subordination of women is not based on biological dependence but rather on the relegation of their reproductive capacity by society.[13] Post-independence African states also embraced the traditional culture, despite retaining the law's repugnancy clause. Post-independence constitutions in Africa began a process for the recognition of culture and traditional methods of dispute resolution mechanisms. As Pimentel observed, this new interest signified 'a rejection of colonial influence'.[14] Yet, at the same time, western styled courts continued to exist parallel to the traditional dispute resolution mechanisms. The western systems of courts were regarded as the beacons of human rights and the rule of law, and their existence meant African states gained acceptance in the world economy. [15] The result was the creation of a plural legal system, with traditional dispute resolution mechanisms relying on culture as the foundation of dispute resolution. In contrast, the formal justice mechanisms rely on international human rights standards.

Traditional dispute-resolution mechanisms have been criticized for their overreliance on culture. This argument has been advanced by human rights advocates and feminists, particularly regarding using a culture that promotes women's rights. The arguments against traditional dispute resolution mechanisms and, by extension, culture can be traced to the colonial era in Africa, where they were relegated to the periphery. Although recognized within the revised Constitutions in post-colonial Africa, these justice mechanisms were only allowed to function as long as they were not repugnant to justice and morality.[16] However, it must be noted that there was an overwhelming influence of European norms and values on indigenous customary laws, particularly gender. Indeed, European values emphasized gender distinctions consistent with the European way of living in which the position of women in society was diminished in relation to men. The introduction of European norms reinforced gender hierarchies in the traditional dispute resolution mechanisms. Colonialism's introduction of the formal economy, with changes in the educational and occupational structures, amplified gender

[12] See chapter 2 for an in-depth narrative of this and other literature review.
[13] Catharine Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1990).
[14] David Pimentel, 'Legal Pluralism and the Rule of Law: Can Indigenous Justice Survive?' (2010) 32 David Pimentel 32.
[15] E Kofi Abotsi, 'Customary Law and the Evolving Tensions and Re- Engineering' (2020) 37 Arizona Journal of International and Comparative Law 33.
[16] Pimentel (n 14) 2.

hierarchies in the colonies and delayed women's literacy levels.[17] Where there were African men employed in the informal economy, their daughters were likely less educated and less employed in the formal sector than those whose daughters were employed in the formal sector.[18]

On the other hand, feminists have faulted traditional dispute resolution mechanisms for their lack of protection of women's human rights and the elevation of harmful cultural norms that discriminate against women. Feminist scholars such as Tamale have questioned the structural arrangements that perpetuate patriarchy, particularly the cultural, institutional and legal frameworks that subordinate women.[19] There is evidence of challenges of traditional dispute resolution mechanisms regarding women's justice including the elevation of culture; there is also evidence that rural and indigenous women prefer them. Whilst these concerns about the traditional dispute resolution mechanisms are valid there is an opportunity to integrate human rights paradigms. This thesis finds that the African Charter provides a radical shift in the framing of human rights language, a departure from the western individual sense. The Charter recognizes the right to culture and notes women's role in its development, a significant departure from the western feminist arguments that shun cultural norms and practices as detrimental towards women.

This study also finds an opportunity for reliance on international human rights standards, which call for eliminating discrimination against women. Many African states, including Kenya, rely on international human rights standards, including the general rules of international law. Kenya's Constitution 2010 recognizes that traditional dispute resolution mechanisms have a role in ensuring access to justice and acknowledges the critical role of culture in facilitating justice. As elaborated in Chapter 3 of this thesis, the Bomas draft Constitution provided a significant milestone by recognizing the vital role of culture in community land interests. Subsequently, the revised Constitution in Article 11 formally recognized the right to culture, noting its role as the foundation and the cumulative civilization of the Kenyan people. Accordingly, the right to culture is a transformative idea that resonates across legislations in Kenya, especially around land ownership, which has traditionally been a challenge to many women and indigenous communities. International legal instruments such as the Convention

[17] Meier Zu Selhausen and Weisdorf (n 8) 229.
[18] Meir, Selhausen and Weirsdorf (n 8) 229 -230.
[19] Sylvia Tamale, 'Gender Trauma in Africa: Enhancing Women's Links to Resources' (2004) 48 Journal of African Law 50.

on the Elimination of All Forms of Discrimination Against Women (CEDAW) call for caution regarding negative culture, particularly regarding the discrimination of women. CEDAW calls on states to change and eliminate cultures that advance the inferiority of women. However, the Maputo Protocol, adopts a differential approach in the arguments for culture. The Maputo Protocol does not shun culture but acknowledges that women have a right to contribute to the reformulation of culture to advance their rights.

African feminists also call for contextualizing African women's lived experiences and shun western arguments of a unitary idea of womanhood and assumptions of gender. This study finds that because the architecture of feminism and gender is distilled from European and American experiences, it has provided a foundation for advancing the universality of womanhood and the elevation of western theories, which uphold white women's experiences as progressive and advanced. This tyranny of a single voice does not represent the manyness of women; it is essentialist and hegemonic. This thesis also finds that whilst western feminists view the family, patriarchy and reproduction as agents of women's oppression, feminists of African descent argue that the family is not always a source of oppression but rather a source of resistance to oppression.[20]

6.2 How can the everyday experiences of women justice seekers in the Nyando sub-county inform an African feminist paradigm of justice in traditional dispute resolution mechanisms?

6.2.1 Feminist narrative research and consciousness raising

Feminism is a theory emerging from affirming the interests of women. Central to feminist theory is its way of knowing and understanding power. Consciousness-raising, which is a feminist method of knowing, is based on the notion that oppressed people have to discover their own identity and shatter that which their oppressors bestow upon them.[21] Consciousness-raising emerged in the wake of the second wave of feminism in the 1960s and 70s, from which a diversity of women shared the realities of their oppression. Consciousness-raising groups, as they were called, provide a space for women to share their realities of the mistreatment they faced allowing other women to identify with those realities. This thesis adopts consciousness-raising as its method of inquiry, affirming the lived experiences of widows' accessing justice

[20] Hazel V Carby, 'WHITE WOMAN LISTEN!: Black Feminism and the Boundaries of Sisterhood' in Kwesi Owusu (ed), *Black British Culture and Society* (Taylor & Francis 2000).
[21] Mackinnon (n 13) 84.

using traditional dispute resolution mechanisms in the Nyando sub-county. This thesis also relies on feminist narratology, whose interest is understanding how women construct stories about their lives and meanings from their experiences.

This thesis prioritizes women's lived realities and ways of knowing instead of the androcentric constructions of knowledge characterized by abstractions. Indeed, as elaborated in chapter 2 of this thesis, major contemporary theories of justice rely on abstractions in propagating the idea of the social contract and, specifically, the original position. Feminism calls for affirming women's lived realities and shuns abstractions as a method of inquiry. The feminist narrative research methodology adopted by this thesis embraces storytelling as a method of co-construction, where widows' tell stories about their lives. The narratives captured in this thesis revolve around widowhood, wife inheritance, and access to land and property. Through this method, this thesis has gained insight into the lived realities of widows' in the Nyando sub-county, their conceptions of justice and how the widows' negotiate their sense of justice in a patriarchal setting. The ideas of justice gleaned from this thesis are not conclusive and only apply to the context of the study. However, they may be used in other similar settings in Africa.

This thesis highlights widows' everyday struggles in similar settings in Africa. Despite the differences in culture across Africa, this thesis finds similarities in laws relating to widows' across regions. It finds that widowhood in Africa is a period of strife – punctuated by legal, social, cultural and economic challenges. Widows' who are not well educated, are poor and do not have access to social and economic amenities to support their needs are often most affected. Widows' challenges are further complicated by rurality – which often translates to socio-economic disadvantages. Although widows' suffer similar challenges, they all experience multiple and interlocking systems of oppression. In the case of the widows' interviewed within the context of the Nyando sub-county, for example, although they are disinherited, they also suffer different levels of oppression. Whereas all were widows' married in the Luo community, they experienced various levels of oppression regarding their literacy level, HIV status, tribe, employment, sex and the number of their children, age and duration of the marriage and relationship with their in-laws. These intersecting factors exacerbated each of the widow's plight and impacted each of them differently. Access to land and property rights, particularly for rural widows, is also identified as a key concern whose genesis is traced to the Government of Kenya's post-colonial land systems adjudication, which failed to secure their property interests. However, the promulgation of the Constitution of Kenya 2010 set the stage for a new

order, affirming women's interests in land – while placing equality, human dignity and non-discrimination as key tenets of the bill of rights.

In chapter 3, this thesis found divergent positions about the use of culture within traditional dispute resolution mechanisms. While studies[22] have shown that these justice mechanisms resolve nearly 90 per cent of all disputes, policy makers within the global development discourse of justice, including feminists, find fault in the use of culture. However, as established in chapter 4, rural women rely on these justice mechanisms as their source of identity.[23] Similar studies also reveal that rural women using these mechanisms negotiate for accountability, participation and authority and have greater control and voice than in the formal justice systems.[24] Similarly, the rural widows of the Nyando sub-county prefer using these justice mechanisms to resolve their disputes. First, they consider them readily accessible; they understand the culture and customs of the local community and are cheaper, more flexible to their daily realities and have processes that are simple and easy to understand. Although the widows acknowledged the existence of the formal justice system, they remained sceptical of the viability of the formal justice system to understand their realities or the widow's ability to shape the outcome of justice.

6.3 Towards African feminist paradigms of justice: Examining the lived realities of widows' in the Nyando sub-county in Kenya

This thesis proves its hypothesis, noting that the identified paradigms of justice reflect the narratives emerging from the lived realities of widows' interviewed in the Nyando sub-county. Justice was identified in three categories, including justice as right, justice as peace and justice as truth.

Justice as the recognition of a right

Although the widows' thought that the idea of justice as the recognition of a right should apply to all facets of an individual's life, it was more pronounced concerning their challenges around

[22] Judiciary of Kenya, HiiL and World Bank, 'Justice Needs and Satisfaction in Kenya 2017: Legal Problems in Daily Life' (Judiciary of Kenya 2017).
[23] Julio Faundez, 'Access to Justice and Indigenous Communities in Latin America in Yash Ghai, Jill Cottrell (eds) *Marginalised Communities and Access to Justice* (Social Science Research Network 2009).
[24] Manuela Lavinas Picq, 'Between the Dock and a Hard Place: Hazards and Opportunities of Legal Pluralism for Indigenous Women in Ecuador' (2012) 54 Latin American Politics and Society 1.

ownership and use of land and other matrimonial property once their husbands had died. The widows' interviewed appeared to have a good sense of the Luo community's customary laws and written law within the Constitution regarding women's property rights. However, all the widows' interviewed had undergone significant challenges inflicted by their in-laws and extended family members once their husbands had died. From being accused of their husbands' death to eviction from their homes and denying access to the farming land, the widows' understood that their rights were significantly curtailed. As a result, some widows' approached the council of elders within their localities to address their challenges. However, it must be taken into account that nearly all of the widows' interviewed felt that the council of elders provided a better option to address their challenges, despite knowledge of the existence of the formal justice structures.

The widows' observed that the council of elders identified with the customs of their communities, was more respected, understood the plight of widows', was flexible in allowing them to go about their business, and, in some instances, provided temporary remedies. Others also observed that they opted for this mechanism because it is not adversarial, which allowed for restoring the relationship with their in-laws. The elders also observed that while there are challenges in the Luo community regarding widows' ownership of property, they always resort to decisions that restore the widows' dignity, using customary, national and international laws. Through the training on women's rights to access property by KELIN, the council of elders could apply progressive rights-based decisions to the cases involving women. The council of elders observed that the national and international laws such as the Matrimonial Properties Act,[25] Law of Succession Act,[26] Land Act,[27] African Charter, Maputo Protocol and CEDAW were not applied in isolation, instead complemented customary laws of the Luo community. However, they noted some resistance to implementing some of the decisions, but eventually, all their decisions were complied with.

The widows' narrated the challenges they faced upon the death of their husbands within the context of the patriarchal Luo community. As observed in chapter 4, marriage between a man and woman within the Luo community signified a relationship of *'wat'*[28] between the two families. Once a woman leaves her father's home and is married into another family, she cannot

[25] Act No. 49 of 2013 Laws of Kenya.
[26] Chapter 160 of the Laws of Kenya.
[27] Act No. 6 of 2012 Laws of Kenya.
[28] The term *wat* means relation/kin in Luo Community.

return to her matrimonial home except upon divorce, which is also highly discouraged. The widows' who were evicted from their matrimonial homes or chose to leave their homes found themselves homeless, while some rented small rooms in their local town centers. These challenges are often exacerbated by poverty, lack of employment, and HIV status, amongst others.

Justice as peace

The widows' who advanced the idea of justice as peace had been evicted from their matrimonial homes, their properties confiscated and left to fend for their children and the challenges associated with being the sole breadwinners for their households. In all the instances where the widows' were evicted from their homes, the local NGO, KELIN, came to their rescue and built temporary shelters for those whose cases were still being resolved or homes for those who decided to settle away from their in-laws permanently. Justice as peace was also seen in the context of the final proclamation of the rights of widows' by the council of elders. In this instance, acknowledging their rights was justice, as this affirmed their rights and allowed them to move on peacefully whether the decision was implemented.

Justice as truth

Justice as truth also emerged within the context of resolving disputes by the council of elders – particularly regarding the final proclamation by the council of elders of the rights of widows'. As highlighted in Nafula's case in chapter 4, she is from the Luhya community and refused to be inherited according to the Luo customary laws from which her husband hailed. The council of elders, in making its decision on Nafula's case, acknowledged the existence of the Luo custom of inheritance. However, they pronounced it obsolete and noted its misapplication in the context of Nafula's case, which they argued, did not promote the rights of widows'. The council of elders observed that Nafula was still entitled to the share of her husband's property as a wife, even without the practice of wife inheritance. According to Nafula, justice was affirming what was already known as the truth but avoided by her community. The decisions of the council of elders played a significant role in the widows' conclusion that justice is truth. In virtually all the instances, the widows' acknowledged that the council of elders decisions affirmed their truth, and protected their rights, despite some of their kin's refusal to adhere to the decision of the council of elders.

6.4 How can traditional dispute resolution mechanisms ensure gender justice?

This thesis has extensively delved into the viability of traditional dispute resolution mechanisms to provide justice for women. It has been found through literature analysis that traditional dispute resolution mechanisms provide justice to rural and indigenous women and are preferred by them despite the notable challenges highlighted by feminists and those within the global development discourse on justice. This thesis has also, in chapter 3, examined the lived realities of widows' in the Nyando sub-county who access justice through the traditional dispute resolution mechanism and who have had to define their ideas of justice while navigating the complexities of their intersecting identities, customs of the Luo community and the justice mechanisms.

This thesis adopts the definition of gender justice as both a process and an outcome that seeks to ensure access to and control resources, agency and accountability of social institutions that are set up to dispense justice. This calls for the rejection of institutions that promote women's subjugation, which promote elements of western feminisms that do not speak to the realities of African women. As observed in Chapter 5, gender is a significant consideration in western feminisms arguments around women's subjugation. There are divergent opinions regarding gender in western feminisms, with some adopting the binary gender system premised on the relationship between gender and sex. In contrast, others assume the construction of gender is fluid.[29] Western theories of gender, especially those based on biology that places male and female, man and woman in binary opposition to each other, do not resonate with African feminisms because they ignore different ways of explaining differences, such as race and class.

As highlighted in chapter 3 of this thesis, within the context of the Yoruba and Igbo society, sex was not a determinant of a person's role in an African society. The idea of gender was flexible and separated from biology. Colonialism had a significant influence on Africans' way of life. The European norms, viewed as progressive and productive, revised gender relations in many African contexts, producing new set-ups and understandings of family, marriage, labour, wealth and politics. The consequences of the androcentric forms of western norms are seen in the introduction of individualism, secularism, rationality and the androcentric conceptions of

[29] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999).

law grounded in morality, respect and social independence. Indeed, introducing these western norms led to more rigid and binary explanations of gender and the relegation of African customs to the periphery. Gender justice was an intricate component of the African justice systems before the onset of colonialism – with women assuming leadership and decision-making positions, unlike in the western sense, where women were subjugated.

Today, African states have human rights-based Constitutions, which also acknowledge customary laws and their influence in their societies. The South African Constitution, for example, acknowledges the existence of traditional courts and their application of customary law, which is subject to legislation and the customs of each community. However, there is a difference between official customary law and customary living law. Official customary law is often described as a by-product of colonialism due to attempts by the colonial governance system to standardize it and restrict its development. On the other hand, customary living law is fluid and changes according to society's socioeconomic situation. Today there is an interaction between the courts and customary laws that ensure they promote constitutional values. The South African Constitutional Court has been called upon in various cases to pronounce itself on the viability of customary laws. As highlighted in Chapter 5 in the case of *Shilubana v Nwamitwa and Another*[30] and *Bhe v Khayelitsha*,[31] courts have been called upon to clarify whether aspects of customary law advance human rights standards and promote constitutional values. This thesis also acknowledges that various distortions are masquerading as official living customary laws today, which do not promote human rights or justice, especially for the most marginalized.

Customary laws which do not promote human rights and other Constitutional values have been subject to revision by the courts. The revisions by the court may be seen as interference with customary laws, likely to stunt the growth of customary law. On the contrary, others may see these revisions as necessary interventions that allow customary laws to align with the Constitutional frameworks within their contexts. Like South Africa, the Kenyan courts have also been called upon to adjudicate in contentious cases involving customary laws. For example, since the *SM Otieno* case[32] in which the High Court of Kenya set a precedent by

[30] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (Constitutional Court of South Africa).
[31] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).
[32] 'Civil Case 4873 of 1986 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/51097/> accessed 12 February 2023.

upholding customary law of the deceased husband, the post 2010 constitutional era has seen the Kenyan courts affirm the place of customary law in respect to a myriad of disputes involving customary marriages, burials and customary interests in land.

Culture has traditionally played a part in the clamour for a new constitutional framework. The draft Bomas Constitution of Kenya included elaborate provisions on culture, providing for the principles of culture, setting aside a national day commemorating the diversity of cultures in Kenya and establishing a National Commission of Culture dedicated to policy-making and advocacy.[33] However, some of these provisions were revised in the new Constitution promulgated in 2010, which only acknowledged the culture, describing it as the cumulative civilization of a people. The Constitution also recognized the role of traditional dispute resolution mechanisms in facilitating justice as long as they are not in contravention of the bill of rights or decisions inconsistent with any written law. Recognizing traditional dispute resolution mechanisms within the Constitution of Kenya elevates their legality and credibility since their status has historically been relegated to the periphery. However, as elaborated in this thesis, these justice mechanisms resolve most of the disputes in Kenya. For this reason, in the wake of the promulgation of the Constitution of Kenya, a task force, composed of representatives of various sectors in Kenya, was established to provide policy recommendations on integrating traditional and other forms of dispute-resolution mechanisms to ensure they continue providing access to justice within the framework of the Constitution. [34]

The AJS task force, which was composed of representatives from various facets of Kenyan society, including cultural and religious leaders, judicial officers, civil society representatives, lawyers, police and academia, identified seven key advantages of these alternative methods of dispute resolution.[35] First, the task force observed that the alternative dispute resolution methods reflect Kenyans' lived realities and provide a framework for realizing human rights and autonomy. Second, the task force also observed that these mechanisms provide a method of doing justice differently yet effectively. Third, the task force also noted that these justice mechanisms benefit the formal justice system by providing a tool for reducing the court backlog, especially where judicial officers transferred cases for their adjudication.

[33] Bomas Draft Constitution Chapter 5.
[34] Alternative Justice Systems Taskforce was established on the 10th of March 2016, with the mandate to develop a policy to mainstream the 'alternative, customary or informal or traditional dispute resolution mechanisms into the formal justice system.
[35] The task force describes Alternative Justice Systems (AJS) as a philosophical concept consistent with human rights and seeks to ensure access to justice. They are initiatives that advance equality in particular contexts to promote their cultural, political and social identity. AJS is sometimes referred to as traditional, customary or alternative dispute resolution methods.

Additionally, the task force noted the importance of alternative justice mechanisms for promoting culture contrary to the logic that sees the 'traditional' and 'African' as irrational and unfit in modern life. Finally, it must also be noted that the Constitution of Kenya also provides for a transformative bill of rights and recognition of international law as part of Kenyan law.

To begin with, the Bill of Rights is considered integral and anchors the protection of all individuals' human rights and freedoms. The Bill of Rights binds all of the state organs in Kenya and is only limited by the provisions of the Constitution. There is Constitutional guidance on the extent of the application of the Bill of Rights requiring courts and other judicial organs to adopt the interpretation of the law that most favours the advancement of rights and fundamental freedoms. These provisions apply to all institutions in Kenya, including traditional dispute-resolution mechanisms.

6.4.1 Recommendations towards gender justice within traditional dispute resolution mechanisms

6.4.1.1 Human rights framework as a catalyst to gender justice

Whilst this thesis identifies the human rights paradigm as a catalyst for gender justice, it also argues against the privileging of universal ideas of human rights without due consideration to the practices of others. Although touted as a western concept, the human rights paradigm exists everywhere.[36] An examination of the African customary laws reveals that most are pro-human rights.[37] Therefore, there is a need to engage with the retrogressive aspects of customary laws to ensure they comply with the Constitution. Therefore, in response to the question as to how traditional dispute resolution mechanisms can ensure gender justice, this thesis concludes that the ideas of human rights, justice, and equality, resonate with the ideas of gender justice and have to crystallize in the local context to find meanings which resonate with the realities of a particular society. The experts, who are users of these justice mechanisms, and widows in the context of this thesis, can find meanings of justice, human rights and equality that resonate with their everyday realities. This crystallization ensures that the global ideas of justice find legitimacy and appeal within the local contexts.

[36] Surya Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism' (1999) 30 California Western International Law Journal.
[37] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)' (Judiciary of Kenya 2020).

The Constitution of Kenya, in Article 159(2), places an obligation on the courts and tribunals to exercise their judicial authority to be guided by certain imperatives. These include the use of traditional dispute resolution mechanisms to promote justice. This obligates the judiciary to encourage these justice mechanisms as long as they promote the Bill of Rights and are consistent with the Constitution. The Bill of Rights is at the core of Kenya's democracy and is a foundation of the social, economic and cultural policies.[38] The Constitution of Kenya, Article 19(2), also recognises and protects human rights and fundamental freedoms. Primarily, the Constitution identifies this objective as preserving the dignity of communities and individuals and promoting social justice to realize the potential of all human beings. The AJS Taskforce of Kenya has identified three pillars as imperatives for the Judiciary[39] and other state organs in the promotion of traditional dispute resolution mechanisms:

6.4.1.2 Duty to respect

The duty to respect places an obligation on the judiciary of Kenya, including other state organs, to promote traditional dispute-resolution mechanisms without interference. However, this duty does not mean these justice mechanisms should not be scrutinized. On the contrary, where human rights violations are alleged, there must be an intervention from the state organs, which should be in accordance with the Constitution and other written laws.[40] The duty to respect also requires that the state mechanisms and processes of these justice mechanisms are monitored, that the state conducts the impact assessment and audits to remove any barriers to justice and share knowledge of these justice mechanisms with stakeholders. Finally, the Judiciary of Kenya is also obligated[41] to provide personnel and resources to enable traditional dispute resolution mechanisms to thrive.

6.4.1.3 Duty to protect

The duty to protect is grounded in Article 3 of the Constitution of Kenya, which is an obligation on every person to respect, uphold and defend the Constitution. Traditional dispute resolution mechanisms are called upon to comply with this imperative. This also requires that the leadership of these justice mechanisms secure the legal and administrative measures that

[38] Alternative Justice Systems Baseline Policy (n 17) 60.
[39] Article 159 2 (c) of the Constitution of Kenya places an obligation on the judiciary of Kenya to promote alternative forms of dispute resolution including traditional dispute resolution mechanisms.
[40] Alternative Justice Systems Baseline Policy (n 17) 60.
[41] Mandate derived from Article 159 2 (c) of the Constitution of Kenya.

promote justice. The state must also provide resources to facilitate the duty to protect and refrain from actions that may erode the enjoyment of this right.[42] The duty to protect in Article 21 of the Constitution of Kenya places an obligation on the state to guard against any interference with the traditional dispute resolution mechanisms. The duty to protect also requires addressing allegations against traditional dispute resolution mechanisms, where perpetrators of human rights violations are identified and prosecuted.[43] The duty to protect also requires that laws and policies are developed to guard against any human rights violations and appropriate remedies provided in case of violations.[44]

6.4.1.4 Duty to transform

The Kenyan Constitution has been described as transformative[45] because of the far-reaching quest to create a new order.[46] The Supreme Court of Kenya set the tone for the duty to transform by observing that the transformative concept reconfigures the relationships between state and non-state institutions to ensure governance consistent with the dominant perceptions of legitimacy.[47] The Supreme Court also observed that the Constitution aims to institute social change through the values enshrined, including; human rights, social justice, equality, the rule of law, devolution, freedom and democracy. Those obligated to promote these values must ensure they apply their minds to the process.[48] This may mean that justice providers are trained on their roles and responsibilities to ensure the promotion of the transformative nature of the Constitution. Decisions of these justice mechanisms must ensure that they promote substantive equality, including socio-economic transformation.[49] The duty to transform also requires that the state institute minimum standards to state actors ensure adherence to the Constitution.[50] Concerning right holders, the duty to transform requires the state to facilitate access and use of these justice mechanisms.[51]

[42] Article 21 of the Constitution of Kenya provides an obligation to the state and all state organs to observe, respect, protect, promote and fulfil all the rights the freedoms in the Bill of Rights.
[43] Alternative Justice Systems Baseline Policy (n 12) 60.
[44] As above 60.
[45] Supreme Court of Kenya Advisory Opinion Reference No. 2 of 2013.
[46] Alternative Justice Systems Baseline Policy (n 12) 61.
[47] Supreme Court of Kenya (n 45) 52.
[48] Alternative Justice Systems Baseline Policy (n 17) 63.
[49] As above.
[50] As above.
[51] Alternative Justice Systems Baseline Policy (n 12) 62.

6.4.2 Resituating the traditional as rational

African customary laws are not static. Therefore, norms and traditions that are considered unfavourable should be allowed to conform to the new constitutional order. Traditional dispute resolution mechanisms are sites for developing these norms and traditions. Indeed, whilst traditional dispute resolution mechanisms operate independently of the state, regulation is essential to guarantee constitutional safeguards. The idea is not to transform their structures or procedures but to ensure the protection of those most vulnerable, mainly rural women. In addition, whilst it has been established that the traditional dispute resolution mechanisms need to operate within the confines of the written law – including promoting human rights, the idea is not to extinguish these justice mechanisms but instead transform and advance their jurisprudential structures. Where cultural norms exist that harm women, they should be discontinued or replaced with more progressive ones.[52] Promoting traditional dispute resolution mechanisms is a project towards women's emancipation. As noted in this thesis, these justice mechanisms are most preferred by women, especially those who live in marginalized rural contexts. Improving their standards and systems promotes rural women's socio-economic and political status in the communities, especially in patriarchal settings. When these justice mechanisms entrench Constitutional safeguards, the rights of everyone, including the most indigent, usually rural widows, are guaranteed.

6.4.3 Empowering women justice seekers

One of the leading arguments against traditional dispute resolution mechanisms is the need to observe women's human rights. Significant attention needs to be paid to ensure that women justice seekers are empowered to be aware of their rights in seeking justice and can participate in the development of norms that promote women's rights or challenge the norms and standards that curtail their human rights. This idea requires concerted efforts to develop structures that allow traditional dispute-resolution mechanisms to thrive. In the case of the Nyando sub-county, KELIN, in partnership with the Federation of Women Lawyers of Kenya (FIDA), has conducted capacity-building sessions on women's human rights targeting rural women in Nyando as well as the traditional dispute resolution mechanisms. These capacity-building sessions, modelled around conversations on justice and human rights, have effectively ensured

[52] Abdullahi An-Naim, State Responsibility Under International Human Rights Law to Change Religious and Customary Laws in Cook J Rebecca (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 2011).

that rural women have information on human rights, justice and equality. The elders within the traditional dispute resolution mechanisms have equally undergone the training, and cases are adjudicated on human dignity, human rights, equality and justice. KELIN developed the first compendium of cases adjudicated by the Luo council of elders. It is evident from the decisions of these justice mechanisms, if supported to understand the written law, can apply them to their contexts to promote women's human rights.

6.4.4 Recalibrating structures within traditional dispute resolution mechanisms

There is a need to re-engage with traditional dispute mechanisms to ensure that their systems, structures and procedures adhere to constitutional principles. This would mean that the human rights paradigm is entrenched in the systems and structures of these justice mechanisms. The council of elders, who primarily play the role of adjudicators, are central. The AJS task force report observes that the human rights-based approach involved certain principles, including the need to ensure the participation of all people, that practitioners of these justice mechanisms must adhere to specific standards, that there should be no discrimination of any user of traditional dispute resolution mechanisms, that there should be transparency in their procedures and adjudication of disputes, that the human dignity of all individuals using these justice mechanisms must be respected and promoted and lastly the need to empower all users of these justice mechanisms, especially those most vulnerable.[53]

6.5 Proposed areas for future research

Although Rawls's Theory of Justice has provided a platform for feminist critiques and thought on justice, there is an opportunity to construct knowledge of justice from diverse women's lived experiences. This thesis has identified African feminist justice paradigms through the eyes of widows in the Nyando sub-county who use traditional dispute resolution mechanisms to resolve their cases. While the justice paradigms identified in this thesis may apply to other similarly situated contexts in Africa, there is a need to understand the lived realities and meanings of justice from the diverse categories of women. There is an opportunity to explore a myriad of justice paradigms through the realities of the diversities of African women.

[53] Alternative Justice Systems Baseline Policy (n 12) 59.

In addition, there is an increasing interest in diversifying and meeting the justice needs of citizens today. Most justice seekers turn to their family members or friends instead of courts or lawyers to resolve their disputes.[54] Justice problems tremendously impact people's lives, with many experiencing adverse physical and mental stress due to legal problems.[55] As a result, countries, including Kenya, are increasingly promoting alternative justice centers to meet the justice needs of their citizens. For this reason, traditional, indigenous or cultural justice systems have gained a renewed interest among policymakers and planners. Indeed, while this thesis has highlighted their potential in promoting gender justice, there are still other areas for research within these justice mechanisms, including:

a) The extent of rural women's involvement in shaping culture and norms within their societies. As reflected in this thesis, traditional dispute resolution mechanisms apply the norms of their local communities. Whilst interpretation is sometimes relative, women are only sometimes involved in shaping culture despite the provision in the Maputo Protocol.[56]
b) Whilst this thesis established that traditional dispute resolution mechanisms are popular, particularly for rural women, there is also a need to assess the justice needs of the diversity of women. This thesis acknowledges that many justice mechanisms at the community level need to accord women their dignity and rights. Rural indigent women often negotiate their rights in patriarchal settings, which may not accord them justice. In the context of the Nyando sub-county, many NGOs, through KELIN and FIDA, built the capacity of justice providers through traditional dispute resolution mechanisms. As a result, there was a gradual shift in the need for applying progressive national and international laws in tandem with the customary laws of the Luo Community. The assessment of the justice needs of women should not assume homogeneity of women; instead, as observed in this thesis, it should examine their lived realities.
c) As more and more countries embrace traditional dispute resolution mechanisms, there is a need for an analysis of the case law emerging regarding the protection of women's rights, particularly for cases involving women's land rights. The jurisprudential value

[54] World Justice Project, 'Global Insights on Access to Justice. Findings from the World Justice Project General Population Poll in 101 Countries' (2019).
[55] World Justice Project (n 54) 7.
[56] Article 17 (1) of the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) provides for women's right to live in positive cultural contexts and to participate in the determination of positive cultural policies. The Protocol in Article 17 (2) further calls on states to enhance women's participation in developing these cultural policies.

from this analysis will help us understand the progress made in the evolution of the official customary law and the protection of women's human rights.

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African regional human rights instruments

African Charter on Human and People's Rights
African Charter on Human and People's Rights on the Rights of Women

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Convention on the Elimination of All Forms of Discrimination Against Women
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ANNEX

The study site

The study focused on the traditional dispute resolution of Nyando sub-county, particularly in Kadibo division within the following locations: Nyang'ande, Rabuor, Korowe, Ahero, and Okana which are the leading centers or locations with the Nyando sub-county. KELIN Cultural Structures Project officer supported in the identification of interview subjects from the study areas over the duration of the field research.

Target population

This study targeted approximately 30 widows' who had resolved disputes within the traditional dispute mechanism of Nyando sub-county. The study obtained a mix of interview subjects who were satisfied and dissatisfied with the decisions of the Nyando cultural justice system. For this reason, the study focused on all the widows' ideas of what would have been an ideal situation of justice and injustice based on their experience with the justice mechanism. This study also interview female and male members of the council of elders.

Interview questionnaire

Key informant interviews with widows' who have resolved disputes involving access to land rights within the traditional dispute resolution mechanisms in the Nyando sub-county

Interview main questions

1. What is your understanding of the concept of just /justice? (Process and outcome)
2. Do women have any influence in shaping and articulating officially recognized customary law / communities ideas of justice?
3. What can be done to improve justice for widows' accessing justice using traditional dispute resolution mechanisms?

Specific questions

4. What was the nature of the dispute brought before the traditional dispute resolution mechanism?
5. Describe the nature of the case, when it took place and the process of the adoption of the dispute by the traditional dispute resolution mechanism? When and where did the dispute occur? How long did it take? Who was involved? What was required?
6. What was the outcome of the case and what was the impact of the case and its decision on you?
7. If dissatisfied with the decision, what was your recourse? If satisfied, how was the decision implemented?
8. What factors affected your preference for the traditional dispute resolution mechanism?
9. What challenges did you face after the case was brought before the traditional dispute mechanism?
10. Were you satisfied /dissatisfied with the justice provided in regard to this case?
11. What can be done to improve justice for widows' accessing justice using traditional dispute resolution mechanisms?
12. Is there anything else you would like to add?

Focus group discussion with widows' who have resolved disputes involving access to land rights within the traditional dispute resolution mechanisms in Nyando sub-county

Main questions

1. Do women have any influence in shaping and articulating officially recognized customary law / community's ideas of justice?
2. What is your understanding of justice? Do you think this is a community conception of an individual conception? If so, please explain further.
3. What do you understand by justice or what is just (Process and outcome)

General questions

4. Do widows' prefer using traditional dispute mechanisms to access justice? If so, please explain further.
5. What are women's experiences of justice in using traditional dispute resolution mechanisms? What was the outcome of the case you were involved in?
6. What were the outcomes of the cases and what impact do they have on widows'?
7. What are the cultural norms that reinforce, encourage or discourage justice for women within the traditional dispute resolution mechanisms?
8. What can be done to improve justice for widows' accessing justice in respect to land inheritance using traditional dispute resolution mechanisms?
9. Is there anything else you would like to add?

Focus group discussion with council of elders, chiefs and village head men involved in dispute resolution regarding widows' 'access to land rights in Nyando sub-county

Main questions

1. In your opinion what constitutes justice for the widows'?
2. Is the widow's perception of justice different from the community's perception?
3. What factors hinder the effective resolution of disputes involving widows' access to land?
4. What should be done to enhance justice for widows' within traditional dispute resolution mechanisms?

General questions

5. What kind of disputes are resolved by the traditional dispute resolution mechanisms in Nyando sub-county?
6. What are the guiding frameworks for resolution of disputes within the traditional dispute resolution mechanisms in Nyando sub-county?
7. Do these guiding frameworks apply to cases involving widows' right to access land? Please describe how

8. Describe at least two success case stories involving the resolution of disputes on access to land in which the widow was satisfied with the decision.
9. What contributed to this 'success'?
10. How are the resolutions / decisions of the traditional dispute resolution mechanisms enforced?
11. Is there anything more that you would like to add?