

# The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights

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**ABSTRACT:** Over the last 15 years there have been concerted efforts to put in place frameworks on the protection of women's land and property rights both at the international and domestic levels. Despite the proliferation of these instruments and their supposed recognition across the African continent, the actual realisation and enjoyment of these rights by women is still scant. Systemic and systematic violations of women's rights persist. Such a state of affairs where the recognition of WLPR exists alongside violations of the protected rights points to the widely accepted fact that the realisation of WLPR cannot solely be achieved through the enactment of laws and policies that address the direct discrimination. From a legal perspective, there is need for jurisprudence that comprehensively outlines the content of rights and state obligations. In order to be fully conscious of the various limitations and challenges that exist towards the realisation of WLPR, bodies of the African human rights system have to use a substantive lens to interpret and apply equality and non-discrimination in such cases. That way the rights of women to land and property on the African continent may be guaranteed and protected.

## **TITRE ET RÉSUMÉ EN FRANÇAIS:**

**La pertinence de l'égalité réelle dans la jurisprudence du système régional africain des droits de l'homme pour les droits fonciers et de propriété des femmes**

**RÉSUMÉ:** Au cours des 15 dernières années, des efforts concertés ont été déployés pour mettre en place des cadres nationaux et internationaux relatifs à la protection des droits fonciers et de propriété des femmes. Malgré la prolifération de ces instruments et leur supposée reconnaissance à travers le continent africain, la réalisation et la jouissance réelles de ces droits par les femmes sont encore rares. Les violations systémiques et systématiques des droits des femmes persistent. Un tel état de choses, où la reconnaissance des droits fonciers et de propriété des femmes existe en même temps que les violations des droits protégés, indique que la réalisation de ces droits ne peut être atteinte par la seule promulgation de lois et politiques traitant de la discrimination directe. D'un point de vue juridique, il y a un besoin de jurisprudence qui définit globalement le contenu des droits et des obligations de l'Etat. Afin d'être pleinement conscients des différents limites et défis existant quant à la réalisation des droits fonciers et de propriété des femmes, les organes du système africain des droits de l'homme doivent adopter une approche basée sur la réalité pour interpréter et appliquer l'égalité et la non-discrimination dans de tels cas. Ainsi, les droits fonciers et de propriété des femmes sur le continent africain pourraient être garantis et protégés.

## **KEYWORDS:**

property, equality, women, rights, land, Africa, interdependence

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**1 INTRODUCTION**

Of all the rights that accrue to women, the right to land and property is one of the most significant, particularly on the African continent as a larger proportion of women live in rural areas and their livelihood is closely tied to land. While the importance of land and property rights for women is recognised, a substantial number of women have not realised their rights. In this regard, this article explores the right to equality particularly as guaranteed through the equality provisions and how it has been interpreted and applied within the African regional human rights system with the view to ascertain whether the interpretation of these rights is facilitative of the realisation of women's rights to land and property.

Over the last 15 years there has been wide recognition of women's human rights under international, regional and domestic laws. To date a plethora of instruments on these rights exist. Extensive research has shown the realisation of women's rights particularly rights to land and property has positive implications for the improvement of women's lives and for development.<sup>1</sup> Conversely, literature has also shown that while recognition of these rights is gaining acceptance through inclusion in a number of legal documents, there is a vast disparity in the actual enjoyment of these rights in many countries.<sup>2</sup> In Africa this is no different.

A number of instruments in the African human rights system contain provisions that guarantee or are relevant to the protection and realisation of women's rights. In spite of these guarantees systemic violations of these rights are rampant. Underlying these violations is inequality and discrimination. One of the critical rights accruing to women that is yet to be fully realised is the right to property. A significant number of women across the continent lack secure rights to property and at the heart of these violations and non-realisation of

<sup>1</sup> B Agarwal *A field of one's own: gender and land rights in South Asia* (1994); LN Fonjong *Issues in women's land rights in Cameroon* (2012); H Swaminathan *Women's property rights HIV and AIDS & domestic violence: research findings from two districts in South Africa and Uganda* (2008).

<sup>2</sup> Open Society Foundations 'Securing women's land and property rights, a critical step to address HIV, violence, and food security' <http://globalinitiative-escr.org/wp-content/uploads/2014/03/Securing-Womens-Land-Property-Rights-20140307.pdf> (accessed 18 June 2017).

women's property rights lies inequality. The bodies of the African human rights system can contribute to the realisation of women's rights through development of progressive norms on the right to property for women. The development of these norms at the regional level has the potential to enhance the protection of similar rights at the domestic level.

Taking into account the indivisibility, interdependency and interrelatedness of all rights, the rights to equality and non-discrimination have a critical role to play towards the realisation and protection of women's land and property rights. As Bulto highlights, 'equality dictates the distribution of public resources for the protection and promotion of, several rights and 'other prized social goods and services to everyone at equal measure.'<sup>3</sup> Further, the African Commission on Human and Peoples' Rights (African Commission) has detailed the importance of equality as the basis of the enjoyment of all other rights.<sup>4</sup> For the interpretation of equality and its application to contribute to the realisation of women's right to property, the bodies tasked with the implementation of the various provisions must be accepting of the interdependence of rights.

The article begins with a brief overview of the development of property rights including on the African continent. The concept of indivisibility, interdependence and interrelatedness of rights and its recognition on the African system follows. Thereafter the right to equality, its development and content as applied in the international human rights system is discussed with the purpose of establishing a lens with which to view and compare the development of the right to equality in the African human rights system. The article concludes by unpacking the application of equality and non-discrimination by the African Commission.

## 2 THE DEVELOPMENT OF THE RIGHT TO PROPERTY

Over the years, human rights law has accumulated a number of instruments guaranteeing the right to property as a human right. The earliest formulations of this right in international human rights laws is captured under article 1(1) of the Universal Declaration of Human Rights (Universal Declaration) which provides that 'everyone has the right to own property alone as well as in association with others.'<sup>5</sup> The recognition of this right was without controversy and due to the controversies on the nature of the right that prevailed at the time regarding its role, functions and restrictions, the right to property was not included in the two key foundational human rights treaties of the

<sup>3</sup> TS Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) 29 *University of Tasmania Law Review* 142.

<sup>4</sup> *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006).

<sup>5</sup> Universal Declaration of Human Rights.

United Nations, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

After its expression in the Universal Declaration, the protection of property was mostly articulated in international instruments aimed at the protection of vulnerable people. Treaties that utilised this approach include the 1954 Convention relating to the Status of Stateless Persons<sup>6</sup> and the Convention on the Status of Refugees.<sup>7</sup> Of particular relevance to the property rights of women is the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). CEDAW does not have a specifically articulated right to property, however, several of the convention's provisions have relevance to the protection of property rights. Such provisions include articles guaranteeing rights to social security,<sup>8</sup> access to credit and loans,<sup>9</sup> and to administer property.<sup>10</sup>

Within the treaties of the regional African human rights system, there are several articles that have a bearing on the protection of the right to property.<sup>11</sup> Article 14 of the African Charter on Human and Peoples' Rights (African Charter) is the principal provision guaranteeing the right to property. The provision states that 'the right to property shall be guaranteed'. As Golay and Cismas point out, even though the provision does not specify to whom the right accrues, in light of the Charter's equality provisions in article 2 and jurisprudence of the African Commission, every individual has the right to property.<sup>12</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol) also includes a number of provisions that are of relevance to the protection of women's property rights. Such provisions include articles on the protection women's property right during marriage,<sup>13</sup> and at the dissolution of marriage,<sup>14</sup> access to land,<sup>15</sup> adequate housing,<sup>16</sup> and inheritance.<sup>17</sup>

In articulating the right to property and its importance, the African Commission has stated that the right to property encompasses the rights of an individual, group or people to the peaceful enjoyment of

<sup>6</sup> UN 1954 Convention relating to the Status of Stateless Persons 360 UNTS 117 articles 13 & 14.

<sup>7</sup> TRG van Banning *The human right to property* (2002) 49; articles 13 & 14 of the UN 1951 Convention Relating to the Status of Refugees 189 UNTS 137 (UN Refugee Convention).

<sup>8</sup> Article 11(e), 14(c) of the African Women's Rights Protocol.

<sup>9</sup> Article 13(b), 14(g) of the African Women's Rights Protocol.

<sup>10</sup> Article 15(2) and 16(h) of the African Women's Rights Protocol.

<sup>11</sup> See article 13(3) guaranteeing the rights to public property and article 21 on peoples' rights to wealth and natural resources.

<sup>12</sup> C Golay & I Cismas 'Legal opinion: the right to property from a human rights perspective' <https://ssrn.com/abstract=1635359> (accessed 15 June 2017).

<sup>13</sup> Article 6(j) of the African Women's Rights Protocol.

<sup>14</sup> Article 7(d) of the African Women's Rights Protocol.

<sup>15</sup> Article 15(a) of the African Women's Rights Protocol.

<sup>16</sup> Article 16 of the African Women's Rights Protocol.

<sup>17</sup> Article 21 of the African Women's Rights Protocol.

property.<sup>18</sup> Further, the Commission has highlighted that ensuring non discrimination in the right to property requires 'measures to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land.'<sup>19</sup>

As in most parts of the world however, the denial of women's land and property rights in Africa is pervasive. This is in spite of the widely accepted importance of women's control, and access to land and property to development goals. To date, systemic and systematic violations of women's land and property rights exist in many African countries in the form of statutory and customary laws, policies and practices and social norms that are widely discriminatory. These patriarchal beliefs and ideologies are deeply entrenched in the various ways through which women acquire rights to land and property.

A number of African countries have dual legal systems, with statutory law coexisting with customary or religious laws. Owing to the patriarchal beliefs as highlighted above and how a significant number of people's affairs end up being regulated through customary law the land and property rights of a large number of women have therefore been very precarious. In many instances, concerning women's land and property rights, discriminatory customary laws have tended to dominate land tenure systems, resulting in women's access to land or property being closely tied to their relationship to a man – as daughters, wives, widows and sisters. In some countries where laws have been enacted that prohibit discrimination, and constitutions guarantee equality, the application of these provisions to family and personal laws is exempted. Further, power imbalances and stereotypes within the family and home particularly around the role of women significantly pose threats to realisation of women's property rights.

As Banning points out, the right to property has linkages with a host of other rights.<sup>20</sup> The right to equality is one of these rights. That equality and property are closely linked cannot be doubted and there can be no question that in addition to the direct enforceability of property rights, equality jurisprudence has a critical role to play in securing women's rights to land and property. Putting this perspective forward, Bulto has propositioned that 'whenever a given socio-economic right is infringed, it usually leads to, results from or is accompanied by the violation of one or a combination of the right to equality, the right to judicial protection and the right to due process. A redress to the latter could also remedy violations of socio-economic rights.'<sup>21</sup> This article proceed on the same assumption that the effective

<sup>18</sup> African Commission on Human and Peoples' Rights 'Principles And Guidelines on the Implementation of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights' [http://www.achpr.org/files/instruments/economic-social-cultural/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf) 53 (accessed 17 September 2017).

<sup>19</sup> Principles and Guidelines on Implementation of ESCRR (n 18 above) 55.

<sup>20</sup> Van Banning (n 7 above).

<sup>21</sup> Bulto (n 3 above) 143.

implementation of women's equality guarantees is likely to contribute to the greater protection of women's property rights.

### **3 THE CONCEPT OF INDIVISIBILITY, INTERDEPENDENCE AND INTERRELATEDNESS OF RIGHTS**

The indirect approach of using the indivisibility, interdependency and interrelatedness of all rights has widely been accepted by scholars.<sup>22</sup> The principle of interdependence of rights which posits that rights are mutually reinforcing emerged as a refutation of the premise that certain categories of rights were more important than others. Traditionally, the principle was taken to mean that no right was greater in importance and in implementation. It suggests that through interpretation, the application of one right is capable of strengthening the application of another right.

Writing extensively on interdependence Scott highlights that the concept has been developed not for the sake of rights but for the sake of people entitled to the rights as the values 'related to the full development of personhood cannot be protected and nurtured in isolation.'<sup>23</sup> He concludes that interdependence mainly take two forms, namely, organic interdependence and related interdependence.<sup>24</sup> Organic interdependence makes reference to when one right forms part of another right and as a result the protection of the core right would entail protection of the other right.<sup>25</sup> He further distinguishes organic interdependence into logical and effectivist conception, with the former meaning that the derivative right is a more specific form of the core right while the latter meaning the effectiveness of the core right depends on the derivative right.<sup>26</sup> Under related interdependence two distinct rights are mutually reinforcing and therefore to protect one will indirectly result in the protection of the other.

Several authors have written on the benefits of using the indirect approach to the protection of rights, which include the experience that often rights have benefited more at all levels of human rights systems through enforcement using indirect protection.<sup>27</sup> Further, 'unlike the typical socio-economic rights, the cross-cutting rights to equality, judicial protection and due process guarantees have been concretely

<sup>22</sup> As above.

<sup>23</sup> C Scott 'Interdependence and permeability of human rights norms: towards a partial fusion of the International Covenants of Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769.

<sup>24</sup> As above.

<sup>25</sup> As above.

<sup>26</sup> Scott (n 23 above) 782.

<sup>27</sup> L Chenwi 'Permeability of rights in the jurisprudence of the African Commission' (2014) 39 *South African Yearbook of International Law*; S Liebenberg & B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335;

and repeatedly relied upon by the African Commission'.<sup>28</sup> Bulto highlights more of these advantages and states that the utility of cross cutting rights is that they are already established and undisputed rights within different systems and use of the permeability approach has the potential to reveal inherent hidden aspects of socio-economic rights.<sup>29</sup> As a result not only will the advantage be in the enhanced normative content of rights but the justiciability of these rights will also be enhanced.<sup>30</sup> The elaboration of the content of rights is quite significant as it is through this process that identification of right violations is made easier and state obligations regarding that right can be established. In *Legal Resources Foundation v Zambia*, the African Commission stressed these sentiments and stated that 'it is only to the extent that the Commission is prepared to interpret and apply the Charter that Governments would appreciate the extent of its obligations and citizens understand the scope of the rights they have under the Charter.'<sup>31</sup>

The African Charter in its preamble gives cognisance to the principle of indivisibility, interdependence and interrelatedness of rights provided for in the instrument. It acknowledges that the different categories of rights cannot be disassociated from each other and that the realisation of rights in one category is mutually beneficial to the realisation and enjoyment of other rights. The jurisprudence of the African Commission reflects the recognition of the interdependence of rights. It has used this approach in a number of communications filed before it. The *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC)* case, presents the Commission's classical case in the application of interdependence of rights. The Commission used the interdependence of rights to guarantee protection of the right to housing which is not specifically provided for in the Charter through an inference of its existence from the combined reading of the rights to property, health and family protection.<sup>32</sup> Further, the Commission derived the right to food from the right to life, the right to health and the right of all peoples to 'their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'<sup>33</sup> In the same communication, the Commission

H Quane 'A further dimension to the interdependence and indivisibility of human rights?: recent developments concerning the rights of indigenous peoples' (2012) 25 *Harvard Human Rights Journal* 49; Sisay Alemahu Yeshanew 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: progress and perspectives' (2011) 11 *African Human Rights Law Journal* 334.

<sup>28</sup> Bulto (n 3 above).

<sup>29</sup> Bulto (n 3 above) 145

<sup>30</sup> As above.

<sup>31</sup> *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 62.

<sup>32</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (AHRLR 2001) para 63.

<sup>33</sup> *SERAC* (n 32 above) para 64.

also found linkages between the rights to health in article 16 and the right to a general satisfactory environment in article 24.<sup>34</sup> In *Free Legal Assistance Group v Zaire*, the Commission also expanded on the right to health by finding that the failure to provide for basic services such as safe drinking water were a violation of this right.<sup>35</sup> Similarly, in the *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* communication, the Commission showed its acceptance of interrelatedness of rights by referencing the jurisprudence of international law that includes the right to dignity as a component of the right to life.<sup>36</sup>

#### 4 **EQUALITY AND NON-DISCRIMINATION AND THEIR RELEVANCE TO WOMEN'S LAND AND PROPERTY RIGHTS**

In order to appreciate the development of equality within the African human rights system it is imperative to carry out an exposition of the right to equality and non-discrimination in order to ascertain how the right is formulated, how it has developed and has been interpreted and applied at various levels. The section makes reference to equality under the United Nations human rights system and at domestic level.

A review of literature on the right to equality shows that the earliest conceptions of equality are generally traced back to Aristotle who posited the view that like should be treated as alike and unlike cases differently.<sup>37</sup> This view of equality known as formal equality is based on the view that fairness arises from equal treatment rendered on the basis of similarities in determined characteristics. What formal equality calls for is that laws and policies apply to everyone in the same way. In ensuring formal equality an individual's circumstances are of no relevance and as a result formal equality is said to disfavour arbitrary decision making.<sup>38</sup> It is worth mentioning at this point that formal equality is closely intertwined with the prohibition of direct discrimination which like formal equality also relies on comparators. It is akin to the prohibition of direct discrimination which sanctions less favourable treatment based on a prohibited ground. Formal equality and non-discrimination therefore emphasises that opportunities should not be availed on the basis of group identity but rather on merit.

<sup>34</sup> *Sudan Human Rights Organisation and Centre on Housing Rights & Evictions (COHRE) v Sudan* (2009) AHRLR 153 (ACHPR 2009).

<sup>35</sup> *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47.

<sup>36</sup> *Sudan Human Rights Organisation* (n 34 above) para 146.

<sup>37</sup> A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 609 611; P Westen 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537.

<sup>38</sup> 'The ideas of equality and non-discrimination: formal and substantive equality' <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf> (accessed 25 June 2017).

Early formulations of this form of equality are found in international law's early conventions.

It is now widely accepted that while formal equality guarantees the same treatment for everyone, there are various intersecting factors such as sex, age, race and disability that make it difficult to attain equality even when people are treated the same way. For women, it was only recently that formal equality resulted in any gains and even then it was successful in 'eliminating explicit barriers to equal treatment'.<sup>39</sup> While this conceptualisation of equality in the past resulted in significant gains for women,<sup>40</sup> over the years the adequacy of formal equality in achieving meaningful equality has been called into question. This inadequacy of formal equality is attributed mainly with how similarity and difference are defined as well as its concern only with the form or framing of rules or laws. Formal equality it has been said:<sup>41</sup>

Fails to understand the structural imbalance of power between men and women and the systemic nature of discrimination. Rightly so, it has come to be accepted that such a narrow formulation of equality creates an illusion of equality while potentially contributing to the entrenchment of inequalities for particular individuals or groups.

The problems encountered by women on the continent highlighted in the previous section attest to this. The existence of formal guarantees to equality have not done much to improve the lived experiences of a significant number of women.

The deficiencies of formal equality have spawned vast literature and scholarship acknowledging the complexities of inequality as a result of its systematic nature, and its entrenchment in social values and behaviours, the institutions, the economic systems of society.<sup>42</sup> In particular feminist scholarship and critique contributed vastly to how a conception of equality that is wider than formal equality can derive any meaningfulness for women. The formulation of equality as substantive equality is one of these. While there are many variations or models to substantive equality such as equality of results, equality of opportunities and the four dimensional formulation,<sup>43</sup> at its most basic level substantive equality recognises that equal treatment in itself does not and indeed did not guarantee equal outcomes or equality of opportunities; as a result the law should take into account relevant differences that pose disadvantage to an individual or a particular group. As opposed to the form of laws, its concern is with the actual enjoyment of a right and unmasking the factors that hinder attainment of equality in fact.

<sup>39</sup> N Levit & RRM Verchick *Feminist legal theory* (2004) 15.

<sup>40</sup> As above.

<sup>41</sup> OM Fiss 'Groups and the equal protection clause' (1976) 5 *Philosophy and Public Affairs* 107.

<sup>42</sup> C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253.

<sup>43</sup> S Fredman & B Goldblatt 'Gender equality and human rights' <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/goldblatt-fin.pdf?vs=1627> (accessed 18 June 2017).

While it is beyond the scope of this article to go into the different formulations of substantive equality, a substantive approach to equality delves into the individual's context in order to eliminate barriers that impinge on full realisation of equality. The concern of substantive equality is not only that laws or policies should guarantee equal treatment but it goes further into analysing that the application of laws and policies ensures equal outcomes. Fredman and Goldblatt point out that substantive equality has as its dimensions 'redressing disadvantage; countering stigma, prejudice, humiliation and violence; transforming social and institutional structures; and facilitating political participation and social inclusion.'<sup>44</sup> To a large degree this four dimensional approach captures the formulations of the various strands of substantive equality. Put differently, substantive equality should encompass

equality of opportunity under the concept of 'formal equality,' meaning requiring the equal value of all; equal access to the opportunities through pro-active policy and programmatic measures and redistribution; equality of outcomes; sustaining equality of outcomes by institutional reform and creating enabling environment.<sup>45</sup>

By focusing on redressing disadvantage, substantive equality is achieved through recognising how power imbalances within families result in inequalities that impact access generally.<sup>46</sup> In this instance, the concept of direct discrimination which refers to when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon a particular group or individual is of importance. As is the case with the relationship between formal equality and direct discrimination, substantive equality is interlinked with the concept of indirect discrimination albeit that under the four dimensional approach it is an incomplete version. Indirect discrimination sanctions the use of seemingly neutral laws and policies which have disparate outcomes. Indirect discrimination does not however 'redress disadvantage nor require institutional change.'<sup>47</sup>

## 5 THE APPLICATION OF SUBSTANTIVE EQUALITY IN INTERNATIONAL HUMAN RIGHTS SYSTEMS

There have been a number of ways in which the adoption of substantive equality has been assessed. The formulations of substantive equality mentioned above provide a lens through which to understand how substantive equality has been incorporated. This section explores how equality and non-discrimination have been adopted, interpreted and applied in the international human rights system, particularly, the ICCPR, ICESCR and CEDAW. This includes the interpretation of the

<sup>44</sup> As above.

<sup>45</sup> UNWomen 'Women's rights to equality: the promise of CEDAW' (2014) 24 <http://asiapacific.unwomen.org/~media/field%20office%20eseasia/docs/publications/2014/7/the%20promise%20of%20cedaw%20final%20pdf.ashx> (accessed 18 June 2017).

<sup>46</sup> Fredman and Goldblatt (n 43 above).

<sup>47</sup> Fredman and Goldblatt (n 43 above) 8.

right to equality and non-discrimination by the bodies tasked with monitoring these treaties and the jurisprudence of these treaty bodies by looking at the decisions they have made.

While the rights to equality and non-discrimination have been expressed in general terms in the various human rights instruments, there has been growing recognition at various levels that equality should be viewed and interpreted substantively. This can be seen from a thorough comparative analysis of earlier instruments such as the Universal Declaration, the ICCPR and the ICESCR, which couched the equality guarantees in the manner mentioned above. Later treaties such as the CEDAW have evolved towards the substantive approach through provisions that go beyond requiring equal treatment between men and women. A close look at the text of the Convention reveals its adoption of different forms of equality including substantive equality. The treaty's provisions such as those on temporary special measures and those requiring states to modify social and cultural patterns are such examples of giving value to substantive equality. A further way in which international law has moved towards the substantive equality approach is through provisions that impose on states of positive obligations to respect, protect and fulfil the right.<sup>48</sup>

Apart from the treaty provisions, the interpretation and application of the equality and non-discrimination provisions by the various treaty bodies are particularly insightful in establishing development of the substantive approach in international law. These bodies which are mandated with interpreting the provision of the treaties they monitor have done so through General Comments or General Recommendations, communications they receive and Concluding Observations to different countries. The UN Committee on the Elimination of all forms of Discrimination against Women (CEDAW Committee) has underlined the importance of an interpretation of equality that goes beyond formal equality as a means of deconstructing underlying factors that impede on the realisation of women's rights in several of its General Recommendations. The committee has stated that equality requires that states should give attention to differences between men and women which warrant non-identical treatment in order to achieve equality that is transformative, equality of outcomes and equality of opportunities.<sup>49</sup> In addition to affirming substantive equality as a component of the equality guarantees, this interpretation has also informed how the Committee has interpreted the substance of various other rights and the state obligations pursuant to these rights. In addition to calling on states to guarantee formal equality in the enjoyment of several rights, General Recommendations compel states to take into account factors that impede different groups from enjoying rights on an equal footing.<sup>50</sup> Even though as mentioned above the equality guarantee in the ICESCR is phrased in a general manner, the UN Committee on Economic, Social and Cultural Rights (Committee on

<sup>48</sup> Fredman and Goldblatt (n 43 above).

<sup>49</sup> General Recommendation 25.

<sup>50</sup> General Recommendation 24.

CESCR) has also used its General Comments to elaborate that equality as provided for in its treaty also includes substantive equality.<sup>51</sup> Further, the Committee has stated that in ensuring equality it is permissible for states to give different treatment where it is a measure designed to suppress factors that perpetuate discrimination.<sup>52</sup>

The three committees have addressed the need to take into account various factors in all spheres of life that infringe on women's rights in several concluding observations to states. In particular, the CEDAW Committee has in a number of concluding observations criticised states on placing emphasis only on formal equality.<sup>53</sup> In relation to redressing disadvantage it has consistently directed states to factors within the family that impede on equality.<sup>54</sup> The Committees have focused on the differences in power within the marriage and inheritance practices. They have in addition directed states to target measures on achieving equality to groups of vulnerable women such as women with disabilities,<sup>55</sup> rural women and indigenous women,<sup>56</sup> to deal with institutional barriers that stand in the way of equality.

The CEDAW Committee has in its decisions been to a large extent applying an interpretation of substantive equality that is in keeping with its expression of substantive equality in the various General Recommendations. Cusack argues however that the consistency of the generous substantive interpretation has varied between different categories of rights.<sup>57</sup> In keeping with the substantive equality interpretation requiring an acknowledgment of women's context, the CEDAW Committee has stressed the importance of taking into account women's specific needs, intersecting factors that make women vulnerable to inequality.<sup>58</sup> It has emphasised the importance of eliminating gender stereotypes as a means of realising de facto equality.<sup>59</sup> In *Kell v Canada*, the state was obliged to have taken into account the fact that the author was aboriginal and vulnerable. Similarly, in *Alyne da Silva Pimentel Teixeira v Brazil*, the Committee

<sup>51</sup> General Comment 16.

<sup>52</sup> General Comment 20.

<sup>53</sup> C Buckley, A Donald *et al* (eds) *Towards convergence in international human rights law: approaches of regional and international systems* (2016) 202.

<sup>54</sup> Concluding Observations on the initial, second and third Report of Djibouti, CEDAW Committee 28 July 2011 UNDoc CEDAW/C/DJI/CO1-3/2011, Concluding Observations on the Seventh Periodic Report of New Zealand, CEDAW Committee 27 July 2012 UNDoc CEDAW/C/NZI/CO/7(2012).

<sup>55</sup> As above.

<sup>56</sup> UN Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Honduras*, 10 August 2007, CEDAW/C/HON/CO/6, <http://www.refworld.org/docid/46d2810d.html> (accessed 14 July 2017).

<sup>57</sup> S Cusack & L Pusey 'CEDAW and the rights to non discrimination and equality' (2013) 14 *Melbourne Journal of International Law* 16.

<sup>58</sup> *Kell v Canada* (26 April 2012), Communication 18/2008, UNDoc CEDAW/C/51/D/19/2008 (2012).

<sup>59</sup> *RB v Turkey*, Communication 28/201, CEDAW Committee (12 April 2012) UNDoc CEDAW/C/51/D/28/2010 (2012).

adopted the intersectional approach which considered all factors about the author that had impeded the realisation of her right.

That the international human rights system has interpreted and applied equality and non-discrimination using a substantive lens shows what is possible in giving meaning to equality and for this reason provides a useful yardstick with which to look at this right within the African context.

## **6 THE APPLICATION OF EQUALITY AND NON-DISCRIMINATION IN THE AFRICAN UNION'S HUMAN RIGHTS SYSTEM**

In light of the various ways outlined above that show how substantive equality has been incorporated and interpreted in international human rights systems, this section turns to the African Union's human rights system in order to establish whether there has been a recognition and acceptance of substantive equality and if so how it has been assimilated and applied. The section looks at the various instruments, processes and mechanisms that set or develop norms within the African Union's human rights system.

In the African context, the equality guarantees are expressed within the two main treaties, namely, the African Charter on Human and People's Rights (African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol). In the African Charter, the provisions relevant to equality are found in articles 2 and 3 and 18(3). As with the earlier treaties under international law, the formulation of the guarantee to equality in article 3 is also in a general open textured manner without any expansion. Goldblatt and Fredman's have posited that the inclusion of positive duties on states to ensure equality is in accordance with substantive equality. Flowing from this argument, it could be that by virtue of the obligation in article 1 which requires states parties to the African Charter to 'undertake to adopt legislative or other measures to give effect' to rights accords with a substantive equality approach. Article 18(3) is a provision aimed at addressing discrimination against women. That the provision calls on states to 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions' can be viewed as a call to not only pay attention to inequalities that are overt but to take a holistic approach. As Ngwena points out,

an intention by the drafters to give a generous interpretation to equality and non-discrimination under the African Charter can also be inferred from the fact that article 18(3) implicitly appeals to other international treaties as one of the yardsticks for determining whether the state has complied with its non-discrimination obligations.<sup>60</sup>

<sup>60</sup> C Ngwena 'Sexual health and human rights in Africa' [http://www.ichrp.org/files/papers/185/140\\_Ngwena\\_Africa\\_2011.pdf](http://www.ichrp.org/files/papers/185/140_Ngwena_Africa_2011.pdf) (accessed 1 July 2017).

On the basis of this assertion he argues that the wording of article 18(3) makes it possible to allow interpretation of equality as substantive as has been done by other treaty bodies.

The African Women's Rights Protocol 'completes, develops and specifies the gender equality and non-discrimination contained in the African Charter.'<sup>61</sup> It contains several provisions guaranteeing the formal equality by requiring laws and practices that guarantee equal treatment between women and men. Article 8 of the African Women's Rights Protocol guarantees women and men equality before the law and equal protection of the law. The African Women's Rights Protocol, like its counterpart CEDAW, is also more expansive in the adoption of substantive equality in its provisions. The provision on elimination of discrimination in article 2 by requiring from states the effective application of the principle of equality, obliging states to 'take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist', and requiring modification of social and cultural patterns of conduct of women and men accord with the conception of substantive equality. In this way the African Women's Rights Protocol acknowledges that women and men are not starting at the same point and the effect of other factors in the realisation of women's equality.

Further, the text in the provisions of the African Women's Rights Protocol have been very specific in calling on states to address imbalances fostering inequality that exist within the home and family setting. In particular article 16 addresses a number of factors that are causes of power imbalances within the family. The provisions such as article 5 calling for the elimination of cultural practises and stereotypes based on the superiority or inferiority of the different sexes, article 5(1) calling for the family education on maternity as a social function, attest to the recognition of factors that infringe on equality. In addition, other provisions such as article 9 providing for participative governance and women's governance in national politics, article 12 and article 13 obliging states to guarantee equal opportunities in education and employment resonate with the objectives of substantive equality.

Similarly, there are two bodies that have the mandate to interpret provisions of African Charter and the African Women's Rights Protocol. The African Charter makes provision for the establishment of the African Commission as a quasi-judicial body tasked with monitoring implementation of the African Charter's provisions and in article 45(3), and mandates the body with the interpretation of the Charter's provisions. On the other hand, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) establishes the African Court on Human and Peoples' Rights (African Court) to strengthen the protective mandate of the African Commission. The jurisdiction of this court includes the interpretation and application of

<sup>61</sup> Buckley *et al* (n 53 above) 203.

the Charter, the Protocol and any other human rights instruments ratified by states.<sup>62</sup> There are various processes at the disposal of these bodies through which they can elaborate on norms. Each of these processes produces standards of varying legal weight and include concluding observations and recommendations, general comments, advisory opinions, resolutions and decisions on communications. On the basis of the mandates of these bodies regarding interpretation and application of the provisions of the Charter and the African Women's Rights Protocol, the part that follows focuses on how these bodies have proceeded to interpret and apply the right to equality.

Unlike the deepened use of various means by treaty bodies in the international human rights systems, the elaboration of norms and content of rights in the African human rights system is still at a nascent stage. The African Commission has adopted only a handful of general comments and does not have a general comment that speaks exclusively to the right to equality. The approach in General Comment 2 interpreting provisions of article 4 allude to recognition on the part of the African Commission of substantive equality. The General Comment references the importance of removing impediments to health services reserved for women by addressing factors such as policies, socio-cultural attitudes and gender disparities in the attainment of equality in health care.

The African Commission is empowered by the Charter to pass resolutions.<sup>63</sup> Resolutions formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and are generally categorised into three.<sup>64</sup> These are thematic resolutions, administrative resolutions and country specific resolutions. In particular, the Commission has stated that its thematic resolutions 'elaborate in greater detail specific human right themes or a particular substantive right covered in the Charter.'<sup>65</sup> The Commission has adopted a number of comprehensive resolutions in which it elaborates on several substantive rights.<sup>66</sup> However, it is yet to do the same with the right to equality.

The African Commission has also adopted a handful of guidelines but similar to the absence of a resolution on equality it does not have any guidelines that deal directly with the equality provisions in the treaties of the African Union. In its Guidelines on the Implementation of socio economic rights the Commission has however stated that

<sup>62</sup> Articles 4 of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of the African Court on Human and Peoples' Rights.

<sup>63</sup> Article 45 of the Charter.

<sup>64</sup> <http://www.achpr.org/resolutions/about/>

<sup>65</sup> As above.

<sup>66</sup> 231: Resolution on the right to adequate housing and protection from forced evictions, Adopted at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights held in Yamoussoukro, Côte d'Ivoire, from 9 to 22 October 2012; 234: Resolution on the Right to Nationality e African Commission on Human and Peoples' Rights, meeting at its 53rd Ordinary Session held from 9 to 23 April 2013 in Banjul, The Gambia; 375: Resolution on the Right to Life in Africa - ACHPR/Res. 375 (LX) 2017 he African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held in Niamey, Republic of Niger, from 8 to 22 May 2017.

'[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible.'<sup>67</sup> In formulating effective equality in the enjoyment of socio economic rights, the Commission has included the hallmarks of substantive equality by obliging states to pay attention to vulnerable groups and the factors that impede their enjoyment of rights on an equal basis. Further, the Commission clearly states that the right to equality encompasses the adoption of special measures 'in order to reduce or suppress conditions that perpetuate discrimination and to realise substantive equality.'<sup>68</sup> States are also required to take into account all patterns of inequality such as those based on sex, religion and ethnicity in measures aimed at ensuring equality.

The African Commission's concluding observations and recommendations to different states allow a glimpse of the body's interpretation of equality. The utility of concluding observations lie in the recommendations that the Commission gives to states on how to implement the provisions of the Charter or the obligations of states in relation to the rights in the African Union's treaties. The concluding observations to many African states have consistently included key components of a substantive equality approach. For instance, the Commission's observations and recommendations have highlighted that even in the presence of measures protecting the rights of women there are structural factors such as patriarchical cultures resulting in inequality which require attention in order to ensure women's actual enjoyment of the right to equality.<sup>69</sup>

Not only do these observations and recommendations recognise the need to consider the several factors that hamper the enjoyment of equality between different groups, the Commission has consistently, in keeping with substantive equality, commended or called upon states to implement measures that level the playing field between men and women and are aimed at ensuring equality. The Commission has on several occasions commended states on the implementation of provisional measures such as affirmative action in various spheres or called upon states to implement such measures.<sup>70</sup> The concluding observations of the Commission have also addressed themselves to

<sup>67</sup> Principles and Guidelines on the Implementation of ESCR (n 18 above) para 31.

<sup>68</sup> Principles and Guidelines on the Implementation of ESCR (n 18 above) paras 31 & 34.

<sup>69</sup> Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights. 55th Ordinary Session, held from 28 April to 12 May 2014, in Luanda, Angola, and adopted at its 17th Extra-Ordinary Session, held from 19 to 28 February 2015, in Banjul, The Gambia.

<sup>70</sup> Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 – 2013) considered during its 56th Ordinary Session, held from 21 April – 7 May 2015 in Banjul, The Gambia and adopted 57th Ordinary Session held from 04 to 18 November, 2015, in Banjul, Republic of The Gambia; Concluding Observations and Recommendations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania adopted at the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights held from 7 to 22 May 2008, Ezulwini, Kingdom of Swaziland

other aspects of substantive equality such as the dismantling of gender inequalities and power disparities inherent within the family.<sup>71</sup>

To date, there is a dearth on jurisprudence on women's human rights within the African human rights system which makes it nearly impossible to assess the extent to which substantive equality has been interpreted in relation to women. Both the Commission and the Court have hardly dealt with communications on women's human rights. However, the bodies have been occasioned with the opportunity to deal with the right to equality. Predominantly the jurisprudence of the African Commission has favoured the formal approach to equality. Several communications have consistently referred to equality as requiring sameness in treatment. In *Zimbabwe Lawyers for Human Rights v Zimbabwe*, the Commission stated that equality at its most fundamental level 'is a principle under which each individual is subject to the same laws, with no individual or groups having special legal privileges.' In the communication the Commission does not go any further than this in defining equality. Similarly, in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, the Commission reiterates the above definition of equality and further explains that equality in Article 3(1) means that 'the right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement.'<sup>72</sup> In *Purohit and Moore v the Gambia*, the Commission stressed on the importance of article 3 as guaranteeing fair and just treatment of individuals within the legal system of a country.

In *Egyptian Initiative for Personal Rights and Interights v Egypt*, a case in which the complainants were all women and alleged an infringement of their equality right, the Commission similarly based its decision on violation of equality by largely using the formal equality lens. Once again the Commission relied on its interpretation of equality espoused in the *Zimbabwe Lawyers for Human Rights* decision which calls for sameness in the application of the law. While the Commission acknowledged that the state has an affirmative duty to prohibit discrimination,<sup>73</sup> the decision does not go further to elaborate what the positive duty entails an exercise which perhaps might have resulted in the development of the Commission's substantive equality.

In *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, the Commission persisted on a formal approach and pronounced that the guarantee in article 3 is

<sup>71</sup> Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights considered at its 55th Ordinary Session, held from 28 April to 12 May 2014, in Luanda, Angola, and adopted at its 17<sup>th</sup> Extra-Ordinary Session, held from 19 to 28 February 2015, in Banjul, The Gambia.

<sup>72</sup> *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development (on behalf of Andrew Meldrum) v Zimbabwe*, Communication 294/2004, 26th Annual Activity Report.

<sup>73</sup> *Egyptian Initiative for Personal Rights and Interights v Egypt* (2006) AHRLR 94 (ACHPR 2006 para 175)

'accorded to all persons in analogous situations in an equal manner and measure.'<sup>74</sup> Grounding its enquiry in the prohibition on discrimination, the Commission focused itself to an enquiry on direct discrimination which like formal equality relies on the use of a comparator as opposed to indirect discrimination. An indirect discrimination enquiry would have enquired into whether a law, policy or action that is seemingly neutral results in disproportionate impact on a particular group.

The *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* did not deal with violations of the equality provisions of the Charter. However, it is one of the cases that displays aspects of a substantive approach to equality through the view it took on special measures. In response to state allegations that 'special treatment in favour of the Endorois might be perceived as being discriminatory,' the Commission established that in certain cases 'positive discrimination or affirmative action' is not discriminatory when employed for the purposes of helping to redress imbalance.<sup>75</sup>

The African Court is a relatively recent addition to the bodies of the African human rights system established 'to complement and reinforce the functions of the African Commission.'<sup>76</sup> As a result of having in existence for a short period of time the Court has not had much of an opportunity to deal with cases that develop interpretation of the equality provisions.

While the jurisprudence of the African human rights system that shows a recognition of substantive equality has been limited it is worth mentioning that the Charter in articles 60 and 61 allows the Commission to be guided by international law and there have been communications in which the Commission has made reference to the jurisprudence of other bodies. In *Purohit*, the African Commission based on the similarities between article 13(1) of the African Charter and article 25 of the ICCPR endorsed the interpretation afforded to article 25 by the Human Rights Committee.<sup>77</sup> While General Comment on article 25 does not relate explicitly to substantive equality, the value of the approach leaves room for the Commission to be inspired to develop its own jurisprudence on the basis of some of the progressive norms and standards developed by the other treaty bodies. On this basis it is hoped that in future when the treaty bodies are occasioned to deal with communications relating to women's property rights they will do so taking into account progressive developments that have taken place in other jurisdictions when using interdependence of rights.

<sup>74</sup> *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* para 142.

<sup>75</sup> *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 196.

<sup>76</sup> <http://www.african-court.org/en/>

<sup>77</sup> *Purohit and Moore v the Gambia* (2003) AHRLR 96 (ACHPR 2003).

## 7 CONCLUSION

Systemic and systematic violations of women's land and property rights exist in many African countries in the form of statutory and customary laws, policies and practices and social norms that are widely discriminatory. These patriarchal beliefs and ideologies are deeply entrenched in the various ways through which women acquire rights to land and property. Power imbalances and stereotypes within the family and home particularly around the role of women significantly pose threats to realisation of women's property rights. It is against this backdrop that the African human rights system needs to develop jurisprudence on WLPR based on substantive equality. Given that the jurisprudence of the African human rights system that shows recognition of substantive equality has been limited, there is room for the development of African jurisprudence drawing some of the progressive norms and standards developed by the other treaty bodies.