Women's Right to Inheritance Before the Succession Law in Rwanda

By Yves Sezirahiga*

ABSTRACT

In this article, the author demonstrates that contrary to the general belief, the law n° 22/99 of 12/11/1999 on inheritance (the first law on inheritance in Rwanda)[1] did not create a new inheritance right for women. It rather explicitly formalized a pre-existing right that since the 1956 decision of King Mutara Rudahigwa in the Rwubusisi case, guarantees children and widows to inherit irrespective of their gender. Women's right to inheritance draws its genesis from the constitutional principle of equality and equal protection of the law and the constitutional recognition of the only custom practices that are not repugnant to written law, morality, and justice. It also originates from a number of international legal instruments such as the International Covenant on Economic, Social and Cultural Rights (ICCPR)[2], Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[3], African Charter on Human and Peoples' Rights (ACHPRs)[4] , etc. These international instruments ratified by Rwanda are other important genuine sources of the women's right to inheritance since, upon ratification, Rwanda had an international obligation to eradicate custom practices that discriminated against women.

Even though the emphasis is put on the existence of women inheritance right long ago before the first law on succession in Rwanda, it is argued that the right to inheritance of the women whose succession opened before the first law on succession in Rwanda should be enforced within the respect of the droits acquis in order to safeguard the social stability.

Keywords: Women's rights, discrimination, inheritance, customary practices, international treaties, constitutional principles of equality and equal protection

1. INTRODUCTION

Before adopting the first law governing succession as part of the family law

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[1] Law n° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, O.G. n° 22 of 13/11/1999.

[2] Rwanda acceded to the International Covenant on Civil and Political Rights (ICCPR) on April 16, 1975 pursuant to the Decree Law No. 08/75, *Journal officiel* of 12 February 1975.

[3] Rwanda ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Presidential decree no 436/12 of 10 November 1980, *Journal officiel* N° 4 of 15/12/1981.

[4] Rwanda ratified the African Charter on Human and Peoples' Rights (ACHPRs) of 27 June 1981, by Presidential Decree n° 10/1983 of 1st July, 1983, *Journal officiel*, N ° 13 of 01/07/1983.

in Rwanda, the family law was fundamentally dualistic. It resulted from both legislative and customary sources. Whereas the civil code adopted in 1988 governed the law of persons, the custom continued to regulate the matrimonial property and succession.[5]

Customary law did not allow women to inherit parents' or husband's property. Inheritance followed the principle of patrilineal succession. Only the male(s) of a family succeeded the entire estate after the death of a parent at the expense of their female sibling(s).

Although a woman had no automatic right to succession like a man, women could inherit land as a gift from their parents or in the absence of male descendants. Equally, custom recognized usufruct rights to surviving widow on her deceased husband's property under the condition of staying in the matrimonial home.[6]

The 1999 Succession law[7] broke from this customary practice. Iformalized inheritance within the Rwandan legal system and granted to descendant female(s) the right to equally inherit the property from their parents just like their male(s) sibling(s). According to Article 50 of this law, "[a]ll legitimate children of the de cujus, in accordance with civil laws, inherit in equal parts without any discrimination between male and female children."

In its article 49 para. 1, the 1999 Succession law defined 'Succession' as "an act by which the rights and obligations on the patrimony of the de cujus are transferred to the heir." Its paragraph 2 provides that "[t]he succession goes through probate at the death of the de cujus, at his/her domicile or residence."

The 1999 Succession law was repealed and replaced by the Law N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions (Hereinafter The 2016 Succession law)[8] , which, in slightly different words, reiterates the 1999 Succession Law definition and commencement of succession in its article 51 and 52 paragraph 1 respectively. Thus, while article 51 of the 2016

[5] Charles Ntampaka, "Family Law in Rwanda", in A. Bainham (ed.), *The International Survey of Family Law* 1995, p. 415

[6] United Nations Development Fund for Women (UNIFEM), "Women's Property Rights and the Land Ques- tion in Rwanda", in *Women's Land and Property Rights in Situations of Conflict and Reconstruction*, February 1998, p. 41. [7] Law n° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, *O.G.* n° 22 of 13/11/1999.

[8] Law N°27/2016 OF 08/07/2016 governing matrimonial regimes, donations and successions, O.G., n°31 of 01/08/2016.

Succession Law defines succession as "the transfer of rights and obligations on the assets and liabilities of the de cujus," article 52 paragraph 1 states that "succession opens upon the death of a person, at his/her domicile or residence."

In light of the above provisions and the custom, female(s) whose parents, husbands, and/or siblings died before November 15th, 1999,[9] have been constantly denied inheritance by the courts[10] on the grounds of custom practices that excluded women from inheritance.

Nevertheless, in a few other cases[11], courts granted women in a similar situation inheritance rights under the principle of equality before the law, and equal protection of the law, guaranteed by the Rwandan Constitution since 1962[12] and by different international conventions ratified by Rwanda.[13]

This article first contextualizes the custom practices related to inheritance in Rwanda and the origin of the 1999 Succession law. It then analyses how different courts across the country have addressed women's inheritance in cases initiated before its entry into force. Finally, it demonstrates that several legal instruments recognizing to women the right to inheritance existed long before the adoption of a specific law on succession. It should be stressed here that women's right to inheritance introduced by the 1999 Succession law was reiterated in the 2016 Succession law.

2. WOMEN AND INHERITANCE CUSTOM PRACTICES IN RWANDA

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[9] The date of its publication. i.e. entering into force.

[10] Nº RCA 0128/014/TGI/HYE, Mukambuguje v. Havugiyaremye and Semahe, judgement of 30/01/2015, RC 0299/07/TGI/NYGE, Kasine v. Twagirimana, judgement of 15/07/2011, RCAA 0069/12/CS, Murengeramanzi v. Mukarurangwa *et al*., judgement of 04/04/2014, RCA 0322/011/TGI/MHG, Dushimimana v. Usabumubyeyi *et. al*., judgement of 30/09/2011.

[11] Nº R.C.A 0196/15/TGI/NYBE, Nyirahabineza *et al.* v. Habimana, judgement of 18/02/2016, Nº RCA0005/15/TGI/HYE, Uwambajimana v. Ngoga et. al., judgement of 11/6/2015, Nº RCAA 0006/15/CS, Nsanzabera v. Barig- anza, judgement of 10/02/2017.

[12] Article 16 of Constitution of 1978: "All citizens are equal before the law, without discrimination of any kind, especially in respect to race, color, origin, ethnicity, clan, sex, opinion, religion or social position". Article 16 of the Constitution of 1991 " All citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status"., Article 16 of the constitution of 2003: "All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law". Article 15 of the Constitution of 2003 revised in 2015: "All persons are equal before the law. They are entitled to equal protection of the law".

[13] Rwanda acceded to the International Covenant on Civil and Political Rights (ICCPR) on April 16, 1975, ratified the African Charter of Human and people's Rights on 17 May 1983 and ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Presidential decree no 436/12 of 10 November 1980, Official Gazette no 4 of 15/12/1981.

The traditional Rwandan family was exclusively patrilineal. The lineage was exclusively traced through the male. The lineage consisted of all persons, male and female, who descended in a direct line from a common male ancestor. A man's sisters were also members of his lineage, but their children were not; they were considered part of their father's lineage. Likewise, a man's son's children were part of his lineage, but his daughter's children were not. In other words, the lineage did not include wives of the male or descendants of female ones.[14]

Based on the patriarchal tradition, men occupied the positions of authority and were considered superior to women and viewed as the head of the family with the full power of decision and control over all assets and property of the family or household. As the marriage did not affect the family membership of the spouses, only the lineage defined one's right to use and inherit the lineage or family assets.

Therefore, as the inheritance was primarily driven by lineage membership and connected with the death of one of its members, at the death of a male head of the household, property over his assets was passed to male heirs or the man's brothers. Women were not permitted to inherit.

It should be mentioned here that even though women had no automatic right to inheritance like men, daughters could inherit the land as a gift. Moreover, where there was no son, a surviving widow had usufruct rights on her deceased husband's property.[15]

For instance, a woman could receive a gift of land from her father upon her marriage or presentation of a newborn baby to her father's family or after a funeral if she was responsible for burying the deceased.[16] Similarly, a 'repudiated daughter' (indushyi) could also ask or receive from her brothers or father, a portion of the land from the lineage's land. This was also the case for a woman who never married and did not bear children. However, contrary to the gifts that remained the outright property of the woman, a 'repudiated daughter' and a woman who never married could have access to the lineage land for as long as

[14] As of today, even though the law does not include wives in the lineage of their husbands; wives were guaranteed inheritance rights over their husbands' property and the descendants of female and of male were also guaranteed equal inheritance rights. See for instance, articles 54, 75, 76 and 78 of the law N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, O.G., n°31 of 01/08/2016.

[15] Republic of Rwanda, Ministry of Lands, Environment, Forests, Water and Mines, National Land Policy 20 (2004), p. 20.

[16] Katrijn Vanhees, "Property Rights for Women in Rwanda: Access to Land for Women Living in *de facto* Unions", Master in *de Rechten, Faculteit Rechtsgeleerdheid Universiteit Gent*, 2013-2014, p. 33.

she was deemed in need, if necessary, for life.[17]

In addition to land gifts, women could also have access to land through inheritance either by the father's will or in the absence of male heirs.

A woman possessed a usufruct right over her deceased husband's assets. However, the usufruct rights of the widow over her deceased husband depended on her good conduct and lasted until her sons (if any) were mature enough to manage the family property or as long as she remained faithful to her husband's lineage through sexual abstinence or levirate marriage, i.e., marrying the brother of her deceased husband. Depending on the situation, the ownership right over the deceased husband's assets was exercised either by her son(s) or by her brother-in-law, to whom she remarried.[18]

As the code on family law adopted in 1988[19] did not address the issues of matrimonial property and succession (it only regulated the law of persons and the family), people continued to follow the custom in all matters not regulated by written law. This practice arose from article 3 of the 1988 family code, which provided as follows:

> The law shall govern all matters dealt with by the letter or spirit of any of its provisions. Where legislation is silent, the judge shall base his judgment on customary law, and in the absence ofa custom, the same shall be based on the rules he would set out ifhe were the legislator. However, he shall be guided by solutions established by legal scholars and case law.[20]

In the light of the above-mentioned article 3 of the Civil Code Book I, the customary law continued to govern inheritance and matrimonial property until the publication of the Law nº 22/99 of 12/11/1999, which supplemented bookone of the civil code and instituted part five regarding matrimonial regimes, liberalities and successions (hereinafter the 1999 Succession law).[21]

[17] Burnet, Jennie E. and Rwanda Initiative for Sustainable Development, "Culture, Practice, and Law: Women's Access to Land in Rwanda" (2003). Anthropology Faculty Publications. Paper 1., p. 188.

[18] *Idem*., pp. 187-188.

[19] Law No. 42/1988 instituting the Preliminary Title and First Book of the Civil Code, 27 October 1988, *O.G*., 1989.

[20] Article 3 of the Civil Code, Book I.

[21] Law nº 22/99 of 12/11/1999 to supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, *J.O*. nº 22 of13/11/1999. This law was repealed in 2016 by the Law

3. THE GENESIS OF THE SUCCESSION LAW IN RWANDA AND ITS IMPACT ON THE WOMEN INHERITANCE RIGHT

Change in the inheritance system was deemed necessary to empower women and girls to legally claim their land in the aftermath of the Genocide against the Tutsi, which left many widows and orphans.

The Genocide against the Tutsi of April 1994 resulted in the death of more than 1,000,000 Tutsi and moderate Hutus altered the country's demographic composition so radically that after the Genocide, women and girls represented between 60 and 70 percent of the population and between a third and a half of all women were widows.[22]

Therefore, as under the customary law practices, the property passes through males members of the household, widows and female orphans lacked the legal capacity to claim properties belonging to their parents, siblings and/or husbands who died during the Genocide against the Tutsi. Moreover, those who attempted to recover land belonging to their husbands or their own families faced opposition from their husbands' families or male members of their own families.[23]

To address this conflict and inequality between men and women in the enjoyment of their rights, then the Ministry of Gender, Family and Social Affairs introduced a draft of a law on inheritance and marriage settlements allowing a daughter to inherit property from parents and a widow to manage the marital property and inherit her deceased husband's property.[24] In November 1999, the draft law was passed into the 1999 Succession law, which granted equal rights to male and female children to inherit property from their parents and provided for spouses married under the regime of community of property to have joint rights to property.

Even though the 1999 Succession law paved the way for women's access to land and legally abolished gender discrimination in inheritance practices for all

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N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, *O.G. n°31* of 01/08/2016.

[22] Krishna Kumar, at Al., *Rebuilding Postwar Rwanda: The Role of the International Community*, Center for Development Information and Evaluation, USAID Evaluation Special Study No. 76, p. viii.

[23] Alfred Buregeya *at al*., *Women's Land and Property Rights in Situations of Conflict and Reconstruction*, The United Nations Development Fund for Women (UNIFEM), 2001, p. 41.

[24] *Idem,* p. 42.

legitimate children,[25] some judges did not follow the move. The 1999 Succession law did not serve its' raison d'être', i.e., solving the inheritance related problems of many widows and female orphans of the Genocide against the Tutsi, because some judges denied inheritance to women who lost their siblings, father and/or husband before November 1999 pretending the non-retroactivity nature of the 1999 Succession Law[26] as if before 1999 women could not legally inherit. It is argued here that, contrary to what some judges believed, the 1999 Successionlaw did not, in fact, create the right of women to inherit. It instead reiterated and strengthened the women's inheritance right that legally existed sincethe adoption of the first Constitution in Rwanda in 1962 and through the ratification by Rwanda of the core international treaties that prohibit all forms of discrimination, especially discrimination based on sex.

4. THE LEGAL UNCERTAINTY OF THE CUSTOMARY INHERITANCE SYSTEM IN THE RWANDAN JURISPRUDENCE

The decisions of different courts on the women's right to inheritance demonstrate the difficulties that arose from the application of the 1999 Succession law. Some judges categorically denied inheritance to women based on custom and non-retroactivity nature of the 1999 succession law,

while others recognized such right either on the basis of the equality principle enshrined in the Rwanda Constitution or on the basis of international treaties ratified by Rwanda or on both.

Consequently, those divergent court decisions created a legal uncertainty of the customary system of inheritance.[27]

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[25] See article 50 of the Law N°22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding matrimonial regimes, liberalities and successions

[26] *Idem.,* article 49, paragraph 2, and article 95.

[27] This was for instance the case in Mukambuguje v. Havugiyaremye and Semahe Callixte; Kasine v. Twagirimana, Murengeramanzi v. Mukarurangwa *et al* and of Dushimimana v. Usabumubyeyi, just to name the few.

4.1. THE CUSTOM AND NON-RETROACTIVITY EFFECT OF THE 1999 SUCCESSION LAW

In all cases where the court denied women from inheriting the properties of their siblings, parents and/or husbands deceased before the publication of the 1999 Succession law, judges based their decisions on the exclusion of women from inheritance by custom practices and on the non-retroactive nature of the 1999 Succession Law.

For instance, in Mukambuguje v. Havugiyaremye and Semahe, the Intermediate Court of Huye confirmed the Primary Court's decision and rejected the appeal of Mukambuguje against her two brothers. The Court confirmed what the lower court had decided. It held that:

> [a]rticle 95 of the law N°22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding matrimonial regimes, liberalities, and successions provides that it comes into force from 12/11/1999; which means that it cannot be applied to matters that happened before its publication. Before its publication, the custom was applied and didn't authorize females children to inherit as the previous judge (Primary Instance Court) explained. Therefore, it is obvious that the land was inherited by the male children of Gakoko Jean, i.e., Havugiyaremye and Semahe, thus Mukambuguje should not inherit other than what the custom allowed her at that time.[28]

Equally, in the Kasine v. Twagirimana case, the Intermediate Court of Nyarugenge denied the right to inheritance to Kasine and Kantarama on the ground that their father died before the 1999 Succession law came into force when the inheritance was governed by the custom. The court held that:

> [a]s Kasine requests a share in the assets left by her father Hitimana, and Kantarama requests a share on the house situated

[28] N° RCA 0128/014/TGI/HYE, *Mukambuguje* v. *Havugiyaremye* and *Semahe*, judgement of 30/01/2015, para. 9, p.2. A rough translation of the original text that reads: "*Ingingo ya 95 y'itegeko n° 22/99 ryo kuwa 12/11/1999 ryuzuza igi- tabo cyambere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashakanye , impano n'izungura iteganya ko iri tegeko ritangira gukurikizwa kuva tariki ya12/11/1999; bivuga ko ridashobora gukurikizwa ku byabaye mbere y'uko ritangajwe. Mbere y'uko rijyaho hakurikizwaga umuco kandi umuco ntiwemereraga abana b'abakobwa kuzungura nk'uko umucamanza wambere (w'Urukiko rw'Ibanze) yabisobanuye. Aha rero birumvikana ko isambu yazunguwe n'abana ba Gakoko Jean b'abahungu aribo Havugiyaremye Deswaldi na Semahe Callixte , bityo Mukambuguje Valentine akaba atagomba kuyizungura, uretse ibyo umuco wamwemereraga icyogihe*".

> in Kiyovu as well, the court finds that they have no right to inherit their father who died before the law N°22/99 of 12/11/1999 mentioned above that allows females to inherit their parents is published.[29]

In the same line as the previous cases which denied the right to inheritance on the basis of custom and non-retroactive nature of the law N° 22/99 of 12/11/1999, in Dushimimana v. Usabumubyeyi et al. case, the intermediate Court of Muhanga firmly and expressly declared unlawful the court decision allowing inheritance to a female whose parents died before 12/11/1999. It overturned the decision of the Primary Instance court of Gacurabwenge, arguing that a decision allowing inheritance rights to females is contrary to the law. The court held that:

> [t]he court believes that Dushimimana is the principal heir who should have inherited the estate left by their parents died in 1994 as well as children of his male siblings who were alive after their parents' death, therefore the Primary court argument that inheritance didn't take place while Dushimimana the rightful successor confirms that he already inherited the estate, the decision of the Primary Instance Court recognizing the female right to inheritance violates the law.[30]

The Intermediate Court of Muhanga added that:

> [i]t finds that female children have been recognized the right to inheritance by the law N° 22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding matrimonial regimes, liberalities and successions, article 95 of this law provides that it comes into force on the day of its publication in the official gazette, this law didn't provide that it

[29] N° RC 0299/07/TGI/NYGE, *Kasine* v. *Twagirimana et. al*, judgement of 15/07/2011, para. 6, p. 3. A rough trans- lation of the original text that reads: "*Kuba Kasine Espérance asaba umugabane mu mutungo wasizwe na se Hitimana, Kantarama nawe ashaka ko bagabana amazu yo mu Kiyovu, urukiko rurasanga nta burenganzira bari bafite bwo kuzungura se wapfuye mbere y'uko itegeko n°22/99 ryo kuwa 12/11/1999 ryavuzwe haruguru riha uburenganzira umwana w'umukobwa kuzun- gura ababyeyi be risohoka*".

[30] N° RCA 0322/011/TGI/MHG, Dushimimana v. Usabumubyeyi et. al., judgement of 30/09/2011, para. 7, p. 3. A rough translation of the original text that reads: "[7] *Urukiko rurasanga Dushimimana Phillippe ariwe muzungura w'ibanze wagombaga kuzungura umutungo wasizwe n'ababyeyi babo bapfuye mu 1994 ndetse n'abana bakomoka ku bavandimwe b'ababuhungu bariho nyuma y'uko ababyeyi babo bapfa, rusanga rero kuba urukiko ku rwego rw' ibanze ruvuga ko nta zungura ryabayeho kandi Dusabimana Phillipe wagombaga kuzungura yemeza ko yazunguye icyemezo cyafashwe n'urukiko rwemeza ko n'abakobwa bagomba kuzungura kinyuranyije n'amategeko*".

> will address inheritance issues that existed before its publication. Thus the court finds that female siblings of Dushimimana do not have any right to inheritance on the estates left by their parents in 1994 because the heir recognized by the law at that time is Dusabimana Phillippe.[31]

Even though with time, the position of the Supreme Court of Rwanda on this issue has evolved as discussed below, in the Murengeramanzi v. Mukarurangwa case while determining the law that should govern the inheritance of Semanzi François, who died in 1994 during the Genocide against the Tutsi, the Supreme Court of Rwanda rightly confirmed the non-retroactivity nature of the law N° 22/99 of 12/11/1999 and denied inheritance to a widow. In this regard, the Supreme Court held that:

> [a]s for the law that applies in the inheritance of the de cujus Semanzi François, the court finds that the law N°22/99 of 12/11/1999 comes into force after the death of Semanzi François as he died in the Genocide against the Tutsi in 1994, and legal scholars including Henri de Page and René Dekkers in the book entitled «Droit Civil Belge, T.9, Les successions, 2e éd., Bruxelles, 1974, p.41, said that inheritance goes through probate at the death of the de cujus (la succession s'ouvre par le décès), this is different from what Murengeramanzi Claver says that inheritance starts with the partition of the de cujus's estate, i.e., when there are in the hands of right-owners, therefore the custom should apply because it is the one existing that time. Per customary law, the wife didn't inherit her husband. Still, custom recognized usufruct rights to surviving widow and the administration of the de cujus properties till the majority of the children.[32]

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[31] *Idem*., para. 8, p. 3. A rough translation of the original text that reads: "[8] *Rusanga abana babakobwa bemerewe kuzungura n'itegeko n° 22/99 ryo ku wa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingongo ya 95 y'iri tegeko iteganya ko ritangira gukurikizwa kuva risotse mu igazeti ya Leta, iri tegeko ntiryateganyije ko rizacyemura ibibazo byabaye mbeye y'uko risohoka ku bijyanye n'izungura, bityo rusanga nta burenganzira ababa babakobwa bavukana na Dusashimimana Phillippe bafite bwo kuzungura umutungo wasizwe n'ababyeyi babo mu 1994 kuko umuzungura wari wemewe n'amategeko icyo gihe ari Dusabimana Phillippe*.

[32] N° RCAA 0069/12/CS, *Murengeramanzi* v. *Mukarurangwa et. al.,* judgement of 04/04/2014, paras. 35 and 36, p. 12. A rough translation of the original text that reads: " *35. Ku byerekeranye n'Itegeko ryakurikizwa mu kuzungura nyakwigendera Semanzi François, Urukiko rurasanga Itegeko n°22/99 ryo kuwa 12/11/1999 ryaragiyeho nyuma y'urupfu rwa Semanzi François kuko yapfuye muri jenoside yakorewe abatutsi mu mwaka wa 1994, kandi abahanga mu mategeko barimo Henri de Page na René Dekkers mu gitabo cyitwa «Droit Civil Belge, T.9, Les successions, 2e éd., Bruxelles, 1974, p.41, bavuga ko izungura rifungurwa iyo uzungurwa apfuye (la succession s'ouvre par le décès), ibi bikaba bitandukanye n'ibivugwa na Murengeramanzi Claver ko izungura riba iyo ibintu nyakwigendera yasize bizunguwe, ni ukuvuga bigeze mu maboko y'abo bigenewe, bityo hakaba*

As it appears from the above examples, all judges who denied inheritance right to women erroneously considered the date of the publication of the 1999 Succession law as the date of the birth of the women's right to inheritance in Rwanda and overlooked the principle of equality enshrined in the Rwandan Constitution since 1962 and reiterated in all subsequent Constitutions of the Republic of Rwanda.

Surprisingly, it is unfortunate that none of the cases which denied the women's right to inheritance took time to discuss the application or not of the constitutional equality between man and woman enshrined in the Rwandan Constitution since 1962[33] or in international conventions ratified by Rwanda discussed below.

In fact, even though in most of such cases, the plaintiffs did not request their inheritance right based on the Constitution or international treaties ratified by Rwanda, this should not have been a reason for a judge to overlook their inheritance right under other sources of law which had and still have a high binding power than custom.

Regarding inheritance rights, the constitutional principle of equality of all before the law should have been interpreted as guaranteeing equal inheritance rights over the de cujus properties.

4.2. PROACTIVE MOVE TOWARD THE RECOGNITION OF WOMEN'S RIGHT TO INHERITANCE

Certain courts' proactive and progressive approach in dealing with the inheritance of women whose siblings, parents, and/or husbands deceased before the promulgation and publication of the 1999 Succession law should be commendable. With time, the courts' position as to the Rwandan women

hagomba gushingirwa ku mategeko y'umuco kuko ariyo yakoreshwaga icyo gihe.
36. Mu mategeko y'umuco, umugore ntiyazunguraga umugabo ariko yahabwaga ibimutunga iyo umugabo yabaga amaze gupfa, umutungo usigaye akawucungira abana kugeza bakuze".

[33] Article 16 of the 1962: "All citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status". Article 16 of Constitution of 1978: "All citizens are equal before the law, without discrimination of any kind, especially in respect to race, color, origin, ethnicity, clan, sex, opinion, religion or social position". Article 16 of the constitution of 1991 " All citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status"., Article 16 of the constitution of 2003: "All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law". Article 15 of the constitution of 2003 as modified in 2015: "All persons are equal before the law. They are entitled to equal protection of the law".

right to inheritance evolved positively when certain judges started to question the place of the inheritance custom practices (often referred to as a ground to exclude women from inheritance) vis – à- vis the anti-discrimination provisions of the Constitution and international treaties ratified by Rwanda.

In this regard, courts, including the Supreme Court of Rwanda, re-established the Rwandan women right to inheritance based on previous court decisions which granted such right based on the non-discrimination principle provided in the Rwandan Constitution and international legal instruments ratified by Rwanda such as the Universal Declaration of Human Rights (hereinafter UDHR), the International Covenant on Civil and Political Rights(hereinafter ICCPR), and the International Covenant on Economic, Social, and Cultural Rights(hereinafter ICESCR), the African Charter on Human and Peoples' Rights (hereinafter African Charter") and the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW).[34]

For instance, in Uwambajimana v. Ngoga et al. case, the Intermediate Court of Huye ruled that the custom was not the first basis that the court could have based on in the absence of a law. The court ruled so based on the principle of the hierarchy of norms provided in article 6 of Law n°18/2004 of 20/06/2004 related to the civil, commercial, labour, and administrative procedure in force at the time of the trial of the case N° RC 0479/07/TB/BSSMANA at the first level, which stipulated that:

> [j]udges shall decide cases by basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they have to do so, guided by judicial precedents, customs, and usages, general principles of law and written legal opinions.[35]

Following the principle of the hierarchy of norms, the intermediate Court of Huye authorized Uwambajimana to inherit her father's estates based on court decisions (precedents) that recognized inheritance rights to women issued before the promulgation and publication of the 1999 Succession law. It referred

[34] Rwanda acceded to the ICCPR on April 16, 1975, ratified the African Charter of Human and people's Rights on 17 May 1983 and ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Presidential Decree N° 436/12 of 10 November 1980, Official Gazette no 4 of 15/12/1981.

[35] N° RCA 0005/15/TGI/HYE, *Uwambajimana v. Ngoga et. al.,* judgement of 11/6/2015, para. 20, p. 5.

to the case N° RCA 8689/132 rendered by the Appeal Court of Nyabisindu on 29/10/1996 and RA 0967/13.03/84 rendered by the 'Cour de Cassation' of Rwanda on April 10th, 1985 in Mukamusoni v. Buyitare case. Specifically, in the latter case, the court had held that:

> ..., nothing in the law upon which the Court can base to decide that a daughter could not inherit her father's estate, as the Constitution in force in its article 16 prohibits discrimination based on sex.[36]

It is unfortunate, however, that the judge, in this case, chose to base his decision on the precedent rather than on the anti-discrimination provisions of the Constitution of Rwanda and international legal instruments ratified by Rwanda. It seems that without such precedents, the judge in the above-mentioned case would not have allowed Uwambajimana to inherit the de cujus. In reality, the judge expressly excluded the possibility of basing on the Constitution and international treaties alone when recognizing women the right to inheritance in the absence of precedents. The judge argued that:

> [e]ven though such principle existed and was provided in the laws (Rwandan Constitution and International treaties ratified by Rwanda) as explained, alone it does not give women the right to inheritance in case inheritance started when there was no law governing it. Instead, the way courts have interpreted the equality principle led to the evolution of custom practices regarding women's inheritance.[37]

The recognition of women's inheritance right in this case should be appreciated for its progressive effect in re-establishing women's inheritance rights. Still, the judge erred in his reasoning. By arguing that the anti-discrimination provisions of the Constitution and international treaties alone could not give women a right to inheritance, the judge overlooked the legally binding force of the Constitution

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[36] *Idem*, para. 22, p. 6. A rough translation of the original text that reads "..., *nta mpamvu yemewe n'amategeko rwashingiyeho rwemeza ko umukobwa adashobora kuzungura ibya se na cyane igihe Itegeko Nshinga ririho,mu ngingo yaryo ya 16 ridashigikiye ubusumbane bw'abantu bushingiye ku gitsina*"

[37] *Idem*., para. 21, p. 6. A rough translation of the original text that reads " *nubwo iryo hame ryari ririho kandi riteganywa muri ayo amategeko nkuko byasobanuwe,sibyo ubwabyo biha umukobwa uburenganzira bwo kuzungura mu gihe izungura ryatangiye nta tegeko ribigenga ririho ahubwo uburyo iryo hame ryagiye risobanurwa n'inkiko mu manza zinyuranye nibyo byatumye habaho ukwivugurura k'umuco mu birebana n'izungura ku gitsina gore*."

and ratified international treaties provisions vis- à – vis the cases laws. In other words, the judge ignored that provisions of the Constitution and international treaties prevail over the case laws in terms of hierarchy. Surprisingly, the decisions that the judge referred to in this particular case, were based on the same customary practices that discriminated against women.

In the logic of respecting the principle of the hierarchy of norms, which is the cornerstone of his motivation, the judge in the Uwambajimana case should have based his decision on the anti-discrimination laws first and then supported his position with the precedents. This is the approach taken by the High Court of Kigali and the Supreme Court, which in several cases expressly referred to the Constitution of Rwanda and ratified international treaties as the primary legal sources for the right to inheritance to Rwandan women whose siblings, parents and/or husbands died before 1999.

In this regard, in Mukayiranga v Kayingerwa and Mukamusoni v Mukagasana et al., the High Court of Kigali established that Mukamusoni in particular, and women in general, regardless of her marital status or her relationship with her biological family, has the right to inherit the property of her sister who died during the Genocide on the basis of equality principle and prohibition of discrimination based on sex.[38]

Similarly, contrary to its previous decision in the Murengeramanzi v Mukarurangwa case discussed above, the Supreme Court of Rwanda reviewed its earlier position on the right of women to inherit from parents, husbands and/or siblings who died before the entry into force of the first law on succession in Rwanda. In the Nsanzabera v Bariganza case, the court firmly and expressly held that:

> ..., even before there was nothing that prohibited a female child from inheriting her parents because, in 1962, the Constitution of the Republic of Rwanda provided that all human beings are equal before the law regardless of their ethnicity, color, race, gender, language (...), the same was once again provided in the Constitution of the Republic of Rwanda of 20/12/1978 as well as that of 10/06/1991. Therefore, saying that Uwamahoro Béatrice

[38] Nº RCA 0087/12/HC/KIG, *Mukamusoni v. Mukagasana et al* cited by Sam Rugege, Women and Poverty in Rwanda: The Respective Roles of Courts and Policy, Working Paper No. 1, January 2015, p. 31.

> did not have the right to inherit her parent because she is a female is unsubstantiated.[39]

It is worthy to note that a more proactive and progressive approach toward eliminating the custom practices that exclude women from inheritance comes from King Mutara Rudahigwa, who formally recognized the discriminatory nature of the custom practices related to women's inheritance.

As explained by Sam Rugege, the former Chief Justice of the Supreme Court of Rwanda, in 1956, King Mutara Rudahigwa decided to divide equally the estates of the Chief Rwubusisi among his children and widows, irrespective of their gender.[40] In a written testimony in the succession case of the descendants of Rwubusisi addressed by the Intermediate Court of Nyarugenge, the King stated (or 'yaciye iteka') that:

> [b]ased on the common human values that should guide us in the improvement and adjustment of the national culture and custom towards justice and equity: We have decided to put the sons and daughters of Rwubusisi on the same level in sharing the inheritance.[41]

As discussed in the next section, the above contradictory courts' decisions would not have been possible had the first judges who decided on this issue followed the provisions of the Constitution and international treaties ratified by Rwanda prohibiting discrimination based on sex.

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[39] A rough translation of the original text that reads: ..., *na mbere y'aho nta cyabuzaga ko umwana w'umukobwa azun- gura ababyeyi be kuko kuva mu mwaka wa 1962, Itegeko Nshinga rya Repubulika y'u Rwanda ryemeraga ko abantu bose bangana imbere y'amategeko hatitawe ku bwoko, ku ibara ry'umubiri, ku nkomoko, ku gitsina, ku idini (...), ibyo bibaka ari nako byemejwe mu Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 20/12/1978 ndetse no mu Itegeko Nshinga ryo ku wa 10/06/1991, bityo kuvuga ko UWAMAHORO Béatrice nta burenganzira yari afite bwo kuzungura umubyeyi we ngo kuko ari umubobwa, bikaba nta shingiro bifite*.

[40] Sam RUGEGE, *op. cit*,, p. 32.

[41] *Idem*., p. 33. A rough translation of Sam Rugege of the original text in Kinyarwanda from a document entitled "*Ubuhamya bg'izungura ry'umutware Rwubusisi*" done at Kigali on 02/02/1956 submitted to the court as an evidence in the succession of the descendants of Rwubusisi in Nº RC 0215/12/TGI/NYGE. The original text reads: "*Du- shingiye k'uburyo busanzwe bwa kintu bugomba kutuyobora mwigorora n'itunganya ry'umuco w'igihugu twerekera mu nzira y'ubutabera no gushyira mu gaciro: Twemeje gushyira ku rugero rumwe abahungu n'abakobwa ba Rwubusisi muby'iminani*"

5. INHERITANCE CUSTOM PRACTICES AND THE CONSTITUTIONAL RIGHT TO EQUALITY AND EQUAL PROTECTION BY THE LAW

The first Constitution of the Republic of Rwanda adopted in 1962, and subsequent Constitutions, namely that of 1978, 1991, and the 2003 Constitution as amended in 2015, with slightly different terms, established the principles of equality and equal protection under the law. They also provided that:

> customary law remains in force only to the extent that it has not been superseded by legislation and that it contains nothing that is contrary to the Constitution, to legislation, to regulations, to public order or to public decency.[42]

A plain reading of the above constitutional provision shows that the Rwandan legislation firmly limited the application of customary law, where a written legal source existed.

The traditional cultural practices and beliefs which exclude women in succession are incontestably in violation of the constitutional principle of equality and equal protection of the law and thus should not have been served as the legal basis for denying inheritance to women. Wherever the legislator intended that a man and woman be treated differently, they stated so in unambiguous terms. This was, for example, the case in the law on the commerce of 1913[43] that stipulated that women were not allowed to be commercially active without the explicit permission of their husbands, or the civil code of 1988 that fixed the wife's domicile as that of her husband[44].

The court decisions that denied women the right to inheritance on the basis of custom practices violated the Constitution of Rwanda and the Rwandan obligations arising from the ratification of international treaties. It is beyond dispute that international obligations require the equal treatment of men and women in the ownership and disposition of property, including property acquired during the marriage and passed on under the intestate inheritance laws.

Since the ratification by Rwanda of the ICCPR in 1975 and of the CEDAW in

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[42] See article 93 of the 1962 and 1978 Constitutions, article 98 of the 1991 Constitution, article 201 of the 2003 constitution and article 176 of the 2015 constitution.

[43] See Décret du 02/08/1913 sur des commerçants et de la preuve des engagements commerciaux, in *B. O.,* 1913.

[44] Law No. 42/1988 instituting the Preliminary Title and First Book of the Civil Code, 27 October 1988, O.G., 1989, article 83.

1981, Rwanda had an international legal obligation not only to guarantee women's equality under and through the law but to undertake to change cultural practices and beliefs that undermine the realization of equality in women's lives. As a matter of fact, article 2 of CEDAW obliges all States parties to modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women.

Elaborating and interpreting the States obligation under the article 16 (1) (h) of CEDAW, the CEDAW Committee in its General recommendation 21 declared that:

> there are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.[45]

In April 2015, in the case E.S. and S.C. v. the United Republic of Tanzania concerning the issue of two widows in Tanzania (E.S. and S.C.) who, under Tanzania's customary inheritance law, were denied the right of inheriting or administering the estates of their late husbands, CEDAW Committee also found that legal framework to be gender discriminatory.[46] According to the CEDAW Committee

> although the State party's Constitution includes provisions guaranteeing equality and non-discrimination, the State party

[45] Committee on the Elimination of Discrimination against Women, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), U.N. Doc. A/49/38 at 1 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 250 (2003), para. 35.

[46] CEDAW, E.S. and S.Cv. United Republic of Tanzania, Communication No. 48/2013, CEDAW/C/60/D/48/2013, 13 April 2015. See also Helen Dancer, An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania. Social and Legal Studies (2017), 26 (3), p. 295.

> has failed to revise or adopt legislation to eliminate the remaining discriminatory aspects of its codified customary law provisions with regard to widows.[47]

It also pointed out that Tanzania, by condoning legal restraints on inheritance and property rights, has denied the two women equality in respect of inheritance and thus violated several provisions under CEDAW, especially those pertaining to equality before the law.[48]

In the same way, the African Charter requires States to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of women as stipulated in international declarations and conventions."[49]

These international instruments and their interpretations reflect the extent of the Rwandan obligation to guarantee women's equal rights under the law and to eliminate cultural practices and beliefs as well as material conditions that undermine that equality.

As the discrimination nature of the custom practices related to women's inheritance is an issue in most African countries[50], different domestic courts have on several occasions declared such custom practices unconstitutional and contrary to the State's international obligation to prohibit discrimination against women.[51]

In South Africa, for instance, the Constitutional Court found the customary law of male primogeniture (by which only male relatives of the deceased could inherit property) in breach of the Constitution.[52] In the Bhe and Others v Magistrate Khayelitsha and Others case, the majority judgment held that the customary law of primogeniture discriminates unfairly against children born out of wedlock and women. It further ruled that excluding women from inheritance on the grounds

[47] CEDAW, E.S. and S.C v. United Republic of Tanzania, *op. cit.* , para. 7.6.

[48] *Idem.,* para.7.9.

[49] Article 18 para. 3, African Charter.

[50] See for instance Mashalaba Siyabulela Welcome, Discrimination against Women under Customary Law in South Africa with Reference to Inheritance and Succession, Mini-Dissertation Masters' degree, Fort Hare/ University of Fort Hare, 2012, Abby Morrow Richardson, 'Women 's Inheritance Rights in Africa: The Need to Intergrate Cultural Understanding and Legal Reform', (2004) *11 (2) Human Rights Brief*, 19-22 and Ndulo, Muna, "African Customary Law, Customs, and Women's Rights" (2011). Cornell Law Faculty Publications. Paper 187.

[51] *Idem.*

[52] Bhe v Khayelitsha Magistrate (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) South African Constitutional Court.

of gender was a clear violation of section 9(3) of the South African Constitution, which prohibits discrimination on various grounds.[53] Former Chief Justice Pius Langa further stated that this exclusion is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group exacerbated by old notions of patriarchy and male domination was incompatible with the guarantee of equality under the constitutional order.[54]

In light of the above, it should, however, be noted that discriminatory practices remained until the adoption of the 1999 Inheritance law. Unfortunately, the 'droits acquis' created through successions opened before the first succession law in 1999 had to be preserved to maintain social stability. In this regard, what was determinant was whether partition of the estate had taken place and not when the succession opened. This was also the spirit behind Article 101 of the 2016 Succession law, which stipulates that 'a succession having been opened from October 1st, 1990 and whose partition has not yet taken place, is carried out in accordance this law'.

6. CONCLUSION

This article demonstrates that the 1999 Succession law did not create a new inheritance right for women. Instead, this law formalized inheritance rights that legally existed since the adoption of the first Constitution in Rwanda in 1962 and the ratification by Rwanda of different international instruments forbidding discrimination based on sex.

Although discriminatory inheritance practices against women remained until the adoption of the 1999 inheritance law, these practices had no legal or customary foundation. Their survival was more the result of the government's failure to enforce existing laws guaranteeing women's rights to inheritance. Customary practices discriminating against women in inheritance had been reversed since the 1956's King Mutara's ruling in Chief Rwubusisi's case. Furthermore, the Principles of equality and equal protection of the law enshrined the Rwandan Constitution, and several international human rights treaties ratified by Rwanda outlawed discrimination in inheritance matters.

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[53] Bhe and Others v Magistrate Khayelitsha and Others 2004 (1) SA 580 (CC), para 91.

[54] *Idem.*

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