Engendering social and economic rights: Land and water – African perspectives

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Gender, equality and socio-economic rights (SER)

S Fredman’s concept of «engendering SER»

• Recognise the distinctive nature of women’s experiences of poverty and disadvantage

• More than equality as add-on!

• Substantive gender equality – beyond mere formal equality, towards transformative measures.
  – Correct material/social disadvantages (incl. power). Dignity. Respect and accommodate difference. Agency and voice.

• Reconceptualising SER
  – Beyond entitlement to goods – to include agency, participation. (Young)
  – Capabilities (Sen, Nussbaum) – but not only individual choice, also recognise the values/costs of relationships, care and interdependence (Fredman)
It is necessary to recognise the distinctive nature of women’s experience of poverty and disadvantage. This suggests that it is not sufficient simply to extend socio-economic rights to women. Instead, socio-economic rights need to be recast in the light of the demands of substantive gender equality. Substantive equality goes beyond treating women in the same way as men and requires transformative measures. This in turn entails reconceptualising the rights themselves.”

— Sandra Fredman 2013
HRBA to development and women’s rights to land and water

Ikdahl et al 2005, a three-partite framework:

• Non-discriminatory access to and protection of land/water rights
  – Direct discrimination – formal equality
  – Indirect discrimination – substantive equality

• Equal participation and empowerment

• Due process and the rule of law
• Reinterpreting a socio-economic right:

Women’s homes and the right to housing in CESCR
Legal bases for the right to housing

- UDHR (1948) Art. 25.1: “Everyone has the right to a standard of living adequate for the health and well-being of **himself and his family**, including food, clothing, housing (…)

- CESC (1966) Art. 11.1: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for **himself and his family**, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”
From "himself and his family" to neutrality

CESCR GC 4 (1991), The right to adequate housing:

• 6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense.

Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.
"Adequate housing": Protection against forced evictions

CESCR GC 4 (1991), para 8.a
• “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”

CESCR GC 7 (1997), para. 3:
• The term "forced evictions" as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”
The CESCR Committee: FE as external threats to households

CESCR GC 7 (1997)

5. Although the practice of forced evictions might appear to occur primarily in heavily populated urban areas, it also takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements. (...)

6. Many instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence.

7. Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games.
46. The issue of land security is of primary importance. It is clear that in most countries of the world women have neither a right to the home in which they were born nor to the home they live in after marriage. This essential homelessness of women is a major factor in limiting the valuable contribution women can make in gaining and retaining a home and, in turn, in building society. Even in countries where inheritance laws and laws governing rights to home ownership and security of tenure have changed, women are seldom able to exercise these rights.
Intra-household relations and women’s lack of security (2004)

- CHR Spec.Rapp. on housing, Kothari (2004):

- 41. Women are also vulnerable to forced eviction specifically because of the gender discrimination they face as women. Domestic women workers, prostitutes and women migrant workers are vulnerable to being evicted from accommodation provided with their work; women who are married are vulnerable to eviction due to dowry-related issues; women who are living with HIV/AIDS are vulnerable to eviction; women living with their husband’s family are vulnerable to being evicted as widows or due to domestic violence or divorce.
Can the CESCR definitions cover women’s experiences/ vulnerabilities?

• Legal security of tenure:
  – “Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”

• Forced evictions:
  – “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”
Housing: Paradigm shifts

• From «man and his household»...
• ...to gender-neutral household facing external threats
• ...to individuals within household facing internal, gendered threats

• How?
  – dynamics of international human rights law: contextual knowledge, treaty-bodies and special mechanisms such as the Special Rapporteurs
• Equality rights and poverty:

Rights to land and water in the CEDAW
CEDAW on equality, property and family

Art 15
1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women (...) a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property (...)

Art 16
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(c) The same rights and responsibilities during marriage and at its dissolution;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property(...)
Art 14

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(...)  

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
Direct discrimination

• Inheritance is an important, contested field
  – Legal pluralism (Griffiths):
    • «weak, classic, juristic»
    • «strong, deep, new»
  – Private law vs public law
  – Religious law + customary law + tradition

• Case law:
  – Bhe case, South Africa 2004
  – Ephrahim vs Pastory, Tanzania 1990
Substantive equality and engendering: «Legal tools» of CEDAW

The chapeau (arts. 1-5)
- Indirect discrimination (art. 1)
- Discrimination by non-state actors (art. 2.e)
- Discriminatory non-state norms (art. 2.f)
- Substantive equality (art. 3)
- Negative stereotypes (art. 5.a)
- «Positive stereotypes» (art. 5.b)

Other articles:
- Participation (art 14 and other)
- Recognize non-monetized work (art. 14.1)
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Inheritance

• 35. 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.
  • CEDAW GR 21 (1994): Equality in marriage and family relations
17. An examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention.

These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage.

Such limitations often result in the husband being accorded the status of head of household and primary decision-maker and therefore contravene the provisions of the Convention.

- CEDAW GR 21 (1994): Equality in marriage and family relations
Presumption of male head of household upon divorce

- 28. In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic.

Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.

- CEDAW GR 21 (1994): Equality in marriage and family relations
Financial and non-financial contributions

• 32. In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished.

• Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets.

• Financial and non-financial contributions should be accorded the same weight.
  
  – CEDAW GR 21 (1994): Equality in marriage and family relations
Domestic work and participation

11. Relieving women of some of the burdens of domestic work would allow them to engage more fully in the life of their communities.

Women's economic dependence on men often prevents them from making important political decisions and from participating actively in public life.

Their double burden of work and their economic dependence, coupled with the long or inflexible hours of both public and political work, prevent women from being more active.

CEDAW GR 23 (1997): Political and public life
Older women

26. Under some statutory and customary laws, women do not have the right to inherit and administer marital property on the death of their spouse. Some legal systems justify this by providing widows with other means of economic security, such as through support payments from the deceased’s estate. However, in reality these obligations are seldom enforced, and widows are left destitute.

Some of those laws particularly discriminate against older widows. Older widows are particularly vulnerable to “property grabbing”.

52. States parties must repeal all legislation that discriminates against older widows in respect of property and inheritance and protect them from land grabbing.

They must adopt laws of intestate succession that comply with their obligations under the Convention.

CEDAW GR 27 (2010): Older women
International, national and local norms

• Local norms as *obstacle* to women’s access to and rights to land and water
  – With or without state recognition and support: the different types of legal pluralism

• Local norms as *facilitating* women’s access to and rights to land and water
  – Land rights and care/family obligations
  – Right to drinking water

• Cf the larger debates on culture and human rights!